

132 FERC ¶ 61,215  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur.

Terra-Gen Dixie Valley, LLC, TGP Dixie  
Development Company, LLC, and New York  
Canyon, LLC

Docket No. EL10-29-000

Green Borders Geothermal, LLC

v.

Docket No. EL10-36-000

Terra-Gen Dixie Valley, LLC

ORDER GRANTING IN PART AND DENYING IN PART  
PETITION FOR DECLARATORY ORDER AND COMPLAINT

(Issued September 16, 2010)

1. In this order, the Commission grants in part and denies in part a petition for declaratory order (Petition) and a complaint (Complaint) concerning a transmission line owned by Terra-Gen Dixie Valley, LLC (Terra-Gen). The parties to this dispute claim priority over existing and planned expansion capacity on a 214-mile, 230 kV radial transmission line owned by Terra-Gen, in northern Nevada (the Dixie Valley Line).
2. In the Petition, filed on December 24, 2009, in Docket No. EL10-29-000, Terra-Gen, TGP Dixie Development Company, LLC (TGP Dixie), and New York Canyon, LLC (New York Canyon) (collectively, Petitioners) seek confirmation that Petitioners have priority firm transmission rights to 60 MW of existing transmission capacity and 300 MW of planned transmission capacity expansion on the Dixie Valley Line. Petitioners also seek waiver of certain requirements in

Order Nos. 888, 889, 890, and the Standards of Conduct requirements of Part 358 of the Commission's regulations.<sup>1</sup>

3. In the Complaint, filed on January 25, 2010 in Docket No. EL10-36-000, Green Borders Geothermal, LLC (Green Borders) requests that the Commission issue an order finding that Terra-Gen has violated the Commission's previous *Oxbow Orders*,<sup>2</sup> and the Commission's policy established in Order No. 888, which requires transmission providers to have an Open Access Transmission Tariff (OATT) on file with the Commission and to provide non-discriminatory transmission services to all eligible customers. Specifically, Green Borders

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<sup>1</sup> Petition at 18. See *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); *Open Access Same-Time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,035 (1996), *order on reh'g*, Order No. 889-A, FERC Stats. & Regs. ¶ 31,049, *reh'g denied*, Order No. 889-B, 81 FERC ¶ 61,253 (1997); *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on reh'g*, Order No. 890-D, 129 FERC ¶ 61,126 (2009); 18 C.F.R. Part 358 (2010); *Standards of Conduct for Transmission Providers*, Order No. 717, FERC Stats. & Regs. ¶ 31,280 (2008), *order on reh'g*, Order No. 717-A, FERC Stats. & Regs. ¶ 31,297 (2009). In this order, to the extent we find that certain of Petitioners' requests entail relief that may only properly be granted/denied with respect to Terra-Gen (e.g., Petitioners' request for priority for Terra-Gen's current use of 60 MW of existing transmission capacity or for waivers of the requirements of Order Nos. 888, 889, 890, and the Standards of Conduct), we construe such requests as having been made on behalf of Terra-Gen alone, and discuss them accordingly.

<sup>2</sup> Complaint at 1 (citing *Oxbow Power Marketing, Inc.*, 76 FERC ¶ 61,031 (1996); *Oxbow Power Marketing, Inc.*, 79 FERC ¶ 61,193 (1997) (collectively *Oxbow Orders*)).

requests that the Commission: (1) find that Terra-Gen's failure to file an OATT and a Large Generator Interconnection Agreement (LGIA) is unjust, unreasonable, unduly discriminatory, and in violation of Order No. 888; (2) direct Terra-Gen to file an OATT and a LGIA; and (3) place Green Borders first in a queue for interconnection and transmission service on the Dixie Valley Line.<sup>3</sup>

4. The Commission finds that Terra-Gen may not receive a waiver of the requirements of Order Nos. 888 and 890. Accordingly, the Commission finds that Terra-Gen will be required to file an OATT, and to the extent the Complaint seeks to have Terra-Gen file an OATT and LGIA, we grant the Complaint in this respect. Additionally, the Commission finds that Terra-Gen has established priority for its current use of 60 MW of existing transmission capacity but has not presented sufficient evidence of specific pre-existing plans to establish priority for any planned transmission capacity use beyond its current use of 60 MW.<sup>4</sup> We will therefore deny Terra-Gen's request that we declare it has established priority for its planned capacity expansion without prejudice to Terra-Gen filing additional evidence to establish such priority when it files its OATT. Absent such a showing, we will require Terra-Gen to allocate transmission use priority on its line consistent with the OATT. As such, to the extent the Complaint seeks priority use of the line, we deny the Complaint and reiterate that Terra-Gen must follow its OATT, in a non-discriminatory manner, when allocating capacity and planning expansions. In addition, we will grant Terra-Gen waiver of the requirements of Order No. 889 and the Standards of Conduct until such time as another interconnection on the Dixie Valley Line becomes operational.

#### **I. Petition for Declaratory Order**

5. Petitioners assert that, based on the Commission's precedent established in *Aero Energy* and *Milford Wind Corridor*, and the specific development plans that they and their predecessors have diligently pursued, Petitioners are entitled to firm priority rights to use 360 MW of capacity on the Dixie Valley Line to interconnect

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<sup>3</sup> Complaint at 2.

<sup>4</sup> Petitioners' and Green Borders' filings arise out of factual circumstances that are identical in all material respects. Therefore, for the purposes of our review, we address the Petition and Complaint together. However, we do not consolidate the two dockets. *See infra* note 74..

their existing and planned geothermal projects to the integrated transmission grid.<sup>5</sup> In order to eliminate regulatory uncertainty regarding Petitioners' firm priority transmission rights in the Dixie Valley Line, Petitioners request that the Commission confirm, on an expedited basis, Petitioners' firm priority rights to 360 MW of capacity in the Dixie Valley Line. Additionally, Terra-Gen, the owner of the Dixie Valley Line, requests waiver of Order Nos. 888, 889, and 890, and the Standards of Conduct, unless and until a third party submits a valid request for transmission service.

6. Petitioners state that Terra-Gen is the owner of a 60 MW geothermal plant (Dixie Valley Plant) and the Dixie Valley Line (together, Dixie Valley QF).<sup>6</sup> Petitioners also state that Terra-Gen is controlled by Terra-Gen Power, LLC (Terra-Gen Power), which is indirectly owned 62 percent by affiliates of ArcLight Capital, a Delaware limited liability company, and 38 percent by affiliates of Global Infrastructure Partners. Petitioners further state that the Dixie Valley Line is currently used for the delivery of energy from the Dixie Valley Plant to Southern California Edison (SoCal Edison), and for emergency service from SoCal Edison to the Dixie Valley Plant.

7. Petitioners explain that Terra-Gen Power specializes in the development, acquisition, operation, and management of renewable independent power generation. Petitioners further state that, through its subsidiaries, Terra-Gen Power indirectly owns non-passive interests in approximately twenty-one operating geothermal and other renewable generation facilities located in Nevada,

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<sup>5</sup> Petition at 2 (citing *Aero Energy, LLC*, 115 FERC ¶ 61,128 (2006), *order granting modification*, 116 FERC ¶ 61,149 (2006), *final order directing interconnection and transmission service*, 118 FERC ¶ 61,204 (2007), *order denying reh'g*, 120 FERC ¶ 61,188 (2007); *Milford Wind Corridor, LLC*, 129 FERC ¶ 61,149 (2009)).

<sup>6</sup> The Dixie Valley QF was certified initially by the Commission as three separate geothermal qualifying facilities (QF). See *Sun Geothermal Co.*, 28 FERC ¶ 62,006 (1984); *TGS Associates, Spring Creek*, 30 FERC ¶ 62,071 (1985); and *TGS Associates, Dixie Central*, 30 FERC ¶ 62,072 (1985). The Commission subsequently granted Oxbow Geothermal Corporation certification of the three facilities as a single QF, *Oxbow Geothermal Corp.*, 36 FERC ¶ 62,152 (1986), and granted recertification of the Dixie Valley QF, confirming inclusion of the Dixie Valley Line as a component of the QF. *Oxbow Geothermal Corporation*, 43 FERC ¶ 61,286 (1988), *recertification*, 67 FERC ¶ 61,193 (1994).

California, Colorado, Minnesota, Wyoming, and Texas. Petitioners assert that all of these facilities are either QFs under the Public Utilities Regulatory Policies Act of 1978 (PURPA),<sup>7</sup> as amended, or exempt wholesale generators under the Public Utility Holding Company Act of 2005 (PUHCA).<sup>8</sup>

8. According to Petitioners, Terra-Gen Power also controls TGP Dixie, a Delaware limited liability company, which is wholly-owned by TGP Development Company, LLC (TGP DevCo). Petitioners state that TGP DevCo is engaged in the exploration and development of geothermal resources and plans to construct a number of projects in Nevada, including six geothermal projects (50 MW each, totaling 300 MW) in the Dixie Valley area.<sup>9</sup> TGP Dixie similarly specializes in the development of geothermal power generation with a particular focus on the Dixie Valley, Nevada area. Petitioners state that TGP Dixie holds an option to lease up to a 100 MW undivided interest in the Dixie Valley Line. Petitioners also state that New York Canyon, an indirect subsidiary of ArcLight Capital, holds an option to lease up to a 100 MW undivided interest in the Dixie Valley Line. Similarly, Petitioners assert that Terra-Gen, via management resolution, has reserved 100 MW of capacity on the Dixie Valley Line to accommodate planned expansion of the Dixie Valley Plant.<sup>10</sup>

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<sup>7</sup> 16 U.S.C. § 2601 *et seq.* (2006).

<sup>8</sup> 42 U.S.C. § 16451 *et seq.* (2006).

<sup>9</sup> According to Petitioners, Coyote Canyon #1 and #2 (nominal 100 MW capacity) comprise the Coyote Canyon resource, New York Canyon #1 and #2 (nominal 100 MW capacity) comprise the New York Canyon resource, and Dixie Meadows #1 and #2 (nominal 100 MW capacity) comprise the Dixie Meadows resource.

<sup>10</sup> Petitioners assert that, in July 2006, the manager of Caithness Dixie Valley (predecessor-in-interest to Terra-Gen) authorized proceeding with the exploration and geothermal development necessary to expand the Dixie Valley Plant, and also reserved 100 MW of capacity in the Dixie Valley Line to accommodate the planned expansion. Thus, Petitioners impliedly assert that Terra-Gen's expansion efforts are merely a continuation of those undertaken by their predecessor-in-interest, and that they are therefore entitled to the same 100 MW of reserved capacity. *See* Petition at 11, 16.

9. Petitioners assert that they, by virtue of having been engaged in a long-term plan to develop these projects, which are to be connected to the Dixie Valley Line, are entitled to firm priority rights to 360 MW of capacity in the Dixie Valley Line. In support of their argument, Petitioners assert that the time frame for development of a geothermal project, from identification of a viable site for exploration, acquisition of property (lease or purchase), to final plant construction can take 10 years or more.<sup>11</sup> Petitioners assert that they “have acquired pre-existing priority rights in the [Dixie Valley] Line, paid a premium for geothermal development rights because of the [Dixie Valley] Line, and have diligently pursued the development of their projects since acquiring these rights, including, since 2008, expending in excess of \$25 million in development costs in the process.”<sup>12</sup> Additionally, Petitioners state that they have acquired leases through the U.S. Department of Interior, Bureau of Land Management (BLM) that “require Petitioners to pursue development of the resources during the lease term, which effectively establishes development milestones that must be achieved.”<sup>13</sup> Petitioners state that, as a result of these efforts, they require Commission confirmation of their priority rights to the Dixie Valley Line in order to continue with the development of the proposed projects.<sup>14</sup>

10. Petitioners further state that they have pending interconnection requests with the California Independent System Operator Corporation (CAISO) to interconnect up to 210 MW (nominal) of new generation with the integrated grid, and have conducted feasibility studies regarding the interconnection of new generation to the Dixie Valley Line.<sup>15</sup> Petitioners state that they are also currently negotiating purchase power agreements for the output of their planned generation

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<sup>11</sup> Petition at 14.

<sup>12</sup> *Id.* at 20.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 21.

<sup>15</sup> *Id.* at 22. While Petitioners describe six nominal 52.5 MW interconnection requests, they also indicate that at the time the Petition was submitted, two of these requests had already been dropped because output of those projects was expected to be sold outside of the CAISO. *Id.* at 17.

facilities.<sup>16</sup> Petitioners further explain that they are at various stages of obtaining the required federal, state, and local authorizations and permits to develop their planned geothermal projects, which have expected commercial operation dates ranging from 2012 through 2016.<sup>17</sup>

11. With respect to particular projects, Petitioners assert that Terra-Gen holds numerous geothermal leases, fee lands, and mineral rights situated near the Dixie Valley Plant and that, since 2005, Terra-Gen has been involved in efforts to increase generation capability by up to 100 MW, through development of the Coyote Canyon resource.<sup>18</sup> In addition, Petitioners assert that TGP DevCo holds multiple BLM leases, which comprise the New York Canyon and Dixie Meadows resources, located approximately eight and fifteen miles from the Dixie Valley Plant, respectively, and that TGP DevCo has also undertaken a variety of efforts to pursue geothermal generation development of those resources. Overall, Petitioners argue that they have demonstrated the existence of specific plans for completion of six geothermal projects and have taken substantial steps to pursue these plans, as evidenced, *inter alia*, by ongoing project development, continuing efforts to obtain additional financing, execution of lease option agreements for capacity on the Dixie Valley Line, and obtaining grants from the U.S. Department of Energy to demonstrate the commercial application of certain specialized geothermal technology at certain of the planned development sites.<sup>19</sup> Accordingly, Petitioners assert that they satisfy the Commission's project milestone requirements under *Aero Energy* and *Milford Wind Corridor* and that they are thus entitled to obtain priority rights to the planned transmission expansion.<sup>20</sup>

12. In support of their request for waiver of certain requirements of Order Nos. 888, 889, 890, and the Commission's Standards of Conduct, Petitioners state that the Dixie Valley Line, a radial generator tie-line, is a limited and discrete transmission facility developed for the purpose of moving location-constrained

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<sup>16</sup> *Id.* at 22.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 16.

<sup>19</sup> *Id.* at 13, 22.

<sup>20</sup> *Id.* at 9-10.

resources to the CAISO grid.<sup>21</sup> Petitioners maintain that the only transmission service provided over the Dixie Valley Line will be provided to Terra-Gen and its affiliates, but that, should Terra-Gen receive a bona fide request for transmission service from a non-affiliated third party, it will file a *pro forma* OATT with the Commission within 60 days after any such request. Petitioners also state that Terra-Gen recognizes that, upon filing of an OATT with the Commission, Terra-Gen will be subject to the OATT obligation to expand the Dixie Valley Line if a third party requests transmission and insufficient capacity is available to provide the requested service.<sup>22</sup>

13. Finally, Petitioners assert that, because the Dixie Valley Line is a limited and discrete facility, Petitioners also qualify for waiver of Terra-Gen's OASIS obligations under Order No. 889 and the Commission's Standards of Conduct.<sup>23</sup>

## **II. Notice of Petition and Responsive Pleadings**

14. Notice of the Petition was published in the *Federal Register*, 75 Fed. Reg. 1052 (2010), with comments, interventions, and protests due on or before January 25, 2010.

15. On December 31, 2009, Green Borders filed a motion to intervene and answer to the Petition. On January 25, 2010, Green Borders supplemented its answer.<sup>24</sup> Green Borders states that it is developing a renewable geothermal generation facility in Mineral County, Nevada and has sought open access transmission service from Petitioners over the Dixie Valley Line for over three years preceding Petitioners' filing of the Petition.<sup>25</sup> Green Borders asserts that the Petition fails to disclose the approximately three years of negotiations that took place between the parties and that Green Borders was not served with a copy of the Petition.

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<sup>21</sup> *Id.* at 23.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> On February 12, 2010, Petitioners filed a motion for leave to respond and response to Green Borders' answer to the Petition.

<sup>25</sup> Green Borders Answer to Petition at 1.

16. Green Borders states that it executed a power purchase agreement with SoCal Edison in March 2005, pursuant to which SoCal Edison agreed to purchase the entire output of Green Borders' planned geothermal plant. Green Borders also states that, in October 2006, it requested transmission service on the Dixie Valley Line from Terra-Gen's predecessor-in-interest, Caithness Dixie Valley, LLC (Caithness),<sup>26</sup> and in November 2006 followed its initial request for transmission service with a written request.<sup>27</sup>

17. Green Borders states that Petitioners refused to grant Green Borders' request for interconnection and transmission service for three years and failed to file an OATT, notwithstanding, according to Green Borders, that the *Oxbow Orders* required Petitioners to file an OATT.<sup>28</sup> Green Borders alleges that Petitioner's refusals have caused Green Borders to be treated in an unduly discriminatory manner, have enabled Petitioners to provide their affiliates with preferential treatment for transmission service, and have thwarted the competition for renewable generation resources that Green Borders' geothermal generator could bring to the market.<sup>29</sup>

18. Additionally, Green Borders asserts that Petitioners fail to meet the criteria for priority transmission rights enunciated in *Aero Energy* and *Milford Wind Corridor*.<sup>30</sup> Green Borders argues that, under *Aero Energy*, Petitioners must show that they had specific, pre-existing generation expansion plans that would require additional firm transmission use of the Dixie Valley Line.<sup>31</sup> However, Green

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<sup>26</sup> *Id.* at 4.

<sup>27</sup> Green Borders states that this written request contained the following information: the name of the transmission service purchaser, the location of the proposed generation facility, the maximum output of such generation facility, the point of delivery for the generation facility's output, contact information for Green Borders, a request for an interconnection study, a requested date for completion of such interconnection study, and a check for \$10,000. *Id.* at 5.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 2.

<sup>30</sup> *Id.* at 6.

<sup>31</sup> *Id.* at 6-7 (citing *Aero Energy*, 118 FERC ¶ 61,204 at P 7, *order denying reh'g*, 120 FERC ¶ 61,188 at P 25).

Borders argues that Petitioners did not acquire the Dixie Valley QF until December 2007, more than a year after Green Borders filed its written request for interconnection and transmission service on the Dixie Valley Line, and therefore that Petitioners' plans could not have preceded Green Borders' request.<sup>32</sup> Moreover, Green Borders states that three pieces of evidence proffered by Petitioners in support of their assertion that their development plans preceded Green Borders' request actually illustrate hedging of interests and lack of commitment.<sup>33</sup> Green Borders states that, even if Petitioners' evidence were sufficient to support the intended propositions, their attempt to reserve the entire capacity on the Dixie Valley Line is contrary to long-standing Commission policy against hoarding and other anti-competitive practices.<sup>34</sup>

19. Green Borders further argues that unlike in *Milford Wind Corridor*, Petitioners have not entered into long term power purchase agreements for any of their six proposed projects nor have they provided evidence that they have contractual obligations to sell more than their 60 MW of current generation capacity.<sup>35</sup> Green Borders also asserts that Petitioners have not demonstrated that any expansion plans are being accelerated in light of their request for transmission and interconnection on the Dixie Valley Line. Green Borders argues that "Petitioners' accomplishment of 'various' stages of development toward a mere 'goal' of generation expansion does not provide a clear enough indication for the time frame of development to be comparable to the accelerated development set forth by *Milford Wind Corridor*."<sup>36</sup> Additionally, Green Borders asserts that

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<sup>32</sup> *Id.* at 7.

<sup>33</sup> The three pieces of evidence cited by Green Borders are as follows: March 2005 correspondence between Caithness and New York Canyon regarding an option to lease an interest in the Dixie Valley Line, March 2005 correspondence between Caithness and Steamboat Financial Company, LLC, also regarding an option to lease an interest in the Dixie Valley Line, and a July 2006 management resolution of Caithness "purporting to reserve 100 MW of capacity of the Dixie Transmission Line for the capacity of the [Caithness] plant expansion." *Id.* at 8.

<sup>34</sup> *Id.* at 10.

<sup>35</sup> *Id.* at 11.

<sup>36</sup> *Id.* at 12.

Petitioners have not provided a firm timetable for when the proposed projects are expected to be completed.

20. Additionally, Green Borders asserts that Petitioners failed to take material steps towards construction milestones for the six projects. According to Green Borders, in *Milford Wind Corridor*, the Commission required the petitioner, Milford Wind Corridor, LLC, to demonstrate material progress toward specific expansion plans and milestones for construction.<sup>37</sup> Green Borders reiterates that, because Petitioners have not entered into power purchase agreements, do not have contractual obligations to sell more than the existing 60 MW, and have not demonstrated milestones toward construction of generation expansion, Petitioners have failed to show that material steps have been taken to warrant priority on the Dixie Valley Line.<sup>38</sup> Green Borders further explains that Petitioners have only acquired an option to lease land upon which they propose to construct the projects and that such leases do not meet the standard requiring that the Petitioners are engaged in actual construction of generation expansion.<sup>39</sup> Green Borders further states that, as articulated in *Milford Wind Corridor*, Petitioners must expand the Dixie Valley Line to accommodate Green Borders' transmission request.<sup>40</sup> Green Borders therefore requests that the Commission confirm that Petitioners are responsible for expanding the Dixie Valley Line if there is no existing capacity to serve Green Borders' transmission needs.<sup>41</sup>

21. Green Borders also alleges that Terra-Gen should have filed an OATT with the Commission when Green Borders first made a good faith request for service in 2006.<sup>42</sup> Green Borders argues that Petitioners are not entitled to a waiver of Order Nos. 888, 889, 890, and the Standards of Conduct because the Commission has already ruled in *Milford Wind Corridor* that it will not grant a "safe harbor" to parties requesting firm rights on a transmission line.<sup>43</sup> Green Borders also states

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<sup>37</sup> *Id.* at 13.

<sup>38</sup> *Id.* at 13-14.

<sup>39</sup> *Id.* at 14-15.

<sup>40</sup> *Id.* at 15.

<sup>41</sup> *Id.* at 16.

<sup>42</sup> *Id.* at 18.

<sup>43</sup> *Id.* at 19 (citing *Milford Wind Corridor*, 129 FERC ¶ 61,149 at P 23).

that the Commission ruled in *Milford Wind Corridor* and other cases that it will not grant waivers of its open access requirements if the owner of a transmission line receives a request for transmission service.<sup>44</sup>

22. Finally, Green Borders states that Petitioners' characterization of the Dixie Valley Line as a tie-line does not change the fact that Petitioners are a transmitting utility within the meaning of section 211 of the Federal Power Act (FPA)<sup>45</sup> and the Commission's QF rules.<sup>46</sup> Green Borders asserts that, as a result of its service requests, Green Borders itself should have first position interconnection and transmission queue priority for its requested 360 MW of capacity on the Dixie Valley Line.

23. On February 12, 2010, Petitioners filed a motion for leave to respond and response to Green Borders' answer to the Petition. Petitioners state that the Commission should deny Green Borders' protest and expeditiously grant the Petition and waivers, as requested.<sup>47</sup> Among other things, Petitioners assert that Green Borders failed to perfect or otherwise act on its requests for service and that Green Borders can nonetheless still properly request transmission and interconnection.<sup>48</sup>

24. Petitioners state that the Terra-Gen affiliates' options to lease and the previous management resolution to reserve 100 MW of transmission capacity for the expansion of the Dixie Valley Plant demonstrate specific contractual obligations and corporate plans which, when coupled with the additional steps they have consistently taken to develop specified geothermal resources, establish their priority rights to firm transmission capacity on the Dixie Valley Line pursuant to standards set forth in *Aero Energy*. Petitioners state that they, and the prior owners of the Dixie Valley Line, took these steps to establish priority in response to *Aero Energy*. Petitioners state that they have provided specific

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<sup>44</sup> *Id.* at 19-20

<sup>45</sup> 16 U.S.C. § 824j (2006).

<sup>46</sup> Green Borders Answer to Petition at 21.

<sup>47</sup> Terra-Gen Motion for Leave to Respond at 4.

<sup>48</sup> *Id.* at 13.

expansion plans with definite dates and milestones for construction that show they will use up to 360 MW of capacity on the Dixie Valley Line.<sup>49</sup>

25. Petitioners also refute Green Borders' claim that they are hoarding transmission capacity and refusing to process Green Borders' service requests. Petitioners state that they offered Green Borders the opportunity to participate in system impact studies, but that Green Borders refused to provide a deposit for such studies.<sup>50</sup> Petitioners also assert that Green Borders can nonetheless still properly request transmission and interconnection service under sections 211, 212, and 213 of the FPA.<sup>51</sup> Finally, Petitioners state that Terra-Gen will file an OATT within 60 days of a receipt of a good faith request for service, consistent with the Commission's policy. Until such time, however, Terra-Gen requests waiver of Order Nos. 888, 889, 890, and the Standards of Conduct, which it asserts is justified based on a proper characterization of the Dixie Valley Line as a limited and discrete transmission facility.<sup>52</sup>

### **III. Complaint**

26. In the Complaint, Green Borders states that Terra-Gen has violated the *Oxbow Orders* and Order No. 888, which require transmission providers to have an OATT on file with the Commission and to provide open access transmission service on a non-discriminatory basis.<sup>53</sup>

27. Green Borders asserts that on November 13, 2006, it sent a letter to Caithness requesting interconnection of a 150 MW geothermal generator to the Dixie Valley Line. Green Borders further asserts that, on May 8, 2007, it sent a second letter to Terra-Gen, requesting interconnection and transmission service for a separate 210 MW geothermal generator. Green Borders attaches correspondence (which it designated as non-public), spanning approximately three years, from

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<sup>49</sup> *Id.* at 6-10.

<sup>50</sup> *Id.* at 12.

<sup>51</sup> *Id.* at 13-14. *See* 16 U.S.C. §§ 824j, 824k, 824l (2006).

<sup>52</sup> *Id.* at 14.

<sup>53</sup> Complaint at 1-2.

2006 through 2009, between it and Terra-Gen regarding transmission service on the Dixie Valley Line.<sup>54</sup>

28. Green Borders claims that Terra-Gen's rejection of its interconnection and transmission service requests violates the *Oxbow Orders*. Green Borders explains that on February 27, 1996, Oxbow Power Marketing, Inc., an affiliate of Oxbow Geothermal, which was the previous owner of the Dixie Valley QF, applied to the Commission for authorization to sell energy from the Dixie Valley Plant at market-based rates.<sup>55</sup> Green Borders explains that the Commission did not require Oxbow Geothermal to file an OATT at that time because there had not yet been a request for transmission service. Green Borders explains that, on rehearing, however, the Commission found that Oxbow Geothermal would be required to file an OATT, "upon the request of any entity that is eligible for access under the Commission's Open Access Rule and that seeks service over the [Dixie Valley Line]."<sup>56</sup> Green Borders asserts that, despite the applicable precedent established in the *Oxbow Orders* and Green Borders' "repeated requests for access," Terra-Gen has impermissibly failed to file an OATT.<sup>57</sup> Green Borders asserts that the Commission has determined not to grant QFs blanket waiver of the Commission's open access requirements of Order No. 888 and that any such waiver is proper only until a third party requests transmission service on the line.<sup>58</sup> Accordingly, Green Borders argues that Terra-Gen should not be granted a waiver of this obligation.

29. Green Borders further asserts that, upon receiving Green Borders' initial request for service on the Dixie Valley Line, on December 1, 2006, Terra-Gen rejected the request, stating that the Dixie Valley Line was not subject to OATT requirements, because Terra-Gen was not a transmission provider. Green Borders states that Terra-Gen returned Green Borders' \$10,000 deposit and suggested that

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<sup>54</sup> *Id.* at 18.

<sup>55</sup> *Id.* at 10.

<sup>56</sup> *Id.* at 11-12.

<sup>57</sup> *Id.* at 13.

<sup>58</sup> *Id.* at 13 (citing *Milford Wind Corridor*, 129 FERC ¶ 61,149 at P 23).

Green Borders make a request for transmission pursuant to sections 210, 211, and 212 of the FPA.<sup>59</sup>

30. Green Borders states that, on May 8, 2007, it “resubmitted and updated its interconnection request.” On June 21, 2007, Green Borders states that Terra-Gen responded to that request advising Green Borders that it was “in danger of losing its place in the transmission queue due to its failure to return an executed Non-Disclosure Agreement” and its failure to make contributions to transmission line study costs.<sup>60</sup> Green Borders asserts that it and Terra-Gen continued to negotiate the Non-Disclosure Agreement and additional revised transmission applications and deposits. Green Borders states that, in fall 2009, it received a letter from Terra-Gen stating that Green Borders’ request for interconnection and transmission service was denied and it was removed from the Dixie Valley Line queue.<sup>61</sup>

31. Green Borders asserts that Terra-Gen has discriminated against it in favor of Terra-Gen’s own generator and affiliates, exercising monopoly power and preventing Green Borders from competing with Terra-Gen, in violation of Order No. 888 and section 206 of the FPA.<sup>62</sup> Green Borders denies that its requests for interconnection and transmission service were technically deficient, stating that it fastidiously complied with the requirements for interconnection requests under Order No. 2003.<sup>63</sup>

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<sup>59</sup> *Id.* at 16. See 16 U.S.C. §§ 824i, 824j, 824k (2006).

<sup>60</sup> *Id.* at 19.

<sup>61</sup> *Id.* at 20.

<sup>62</sup> *Id.* at 27. 16 U.S.C. § 824e (2006).

<sup>63</sup> *Id.* at 30 (citing *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh’g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh’g*, 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 sub nom. Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007)).

32. Green Borders seeks an order from the Commission that: (1) finds Terra-Gen's failure to file an OATT, including a *pro forma* LGIA, is unjust, unreasonable, unduly discriminatory, and in violation of the Commission's requirements for open access transmission under the *Oxbow Orders* and Order No. 888; (2) directs Terra-Gen to file an OATT that includes the *pro forma* LGIA; and (3) finds that Green Borders should be placed first in a Commission-sanctioned queue for interconnection and transmission service on the Dixie Valley Line.<sup>64</sup>

#### **IV. Notice of Complaint and Responsive Pleadings**

33. Notice of the Complaint was published in the *Federal Register*, 75 Fed. Reg. 5780 (2010), with comments, interventions, and protests due on or before February 16, 2010. By errata notice on January 28, 2010, the Commission extended the comment date on the Complaint to February 24, 2010.

34. On February 24, 2010, Terra-Gen filed an answer to the Complaint. In the answer, Terra-Gen states that, while the parties held informal discussions, Green Borders failed to perfect its request for service and provide appropriate study deposits, ask Terra-Gen to perform interconnection and system impact studies, and clarify the amount of transmission capacity that Green Borders sought and the requested dates of service.<sup>65</sup>

35. Terra-Gen restates its assertion set forth in the Petition, that it has first-position queue priority for 300 MW on the proposed expanded Dixie Valley Line because its internal development plans for the six proposed projects predate Green Borders' requests and fulfill the requirements of *Aero Energy* and *Milford Wind Corridor*. Additionally, Terra-Gen states that Green Borders "fail[ed] to act in a timely fashion to protect its interests."<sup>66</sup>

36. Terra-Gen states that, in the *Oxbow Orders*, the Commission did not affirmatively direct Oxbow Geothermal to file an OATT upon receiving a request for transmission service on the Dixie Valley Line. Rather, Terra-Gen explains that the Commission granted an application for market-based rate authority of a power marketing affiliate on the condition that Oxbow Geothermal agree to provide open

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<sup>64</sup> Complaint at 2.

<sup>65</sup> Terra-Gen Answer to Complaint at 17 (Answer to Complaint).

<sup>66</sup> *Id.* at 25.

access; thus, the *Oxbow Orders* provided a “conditional order with no binding effect.” Terra-Gen states that since Oxbow Power Marketing, Inc., withdrew its market-based rates tariff, a third-party request for transmission service did not trigger the obligation to file an OATT under the *Oxbow Orders*.<sup>67</sup>

37. Terra-Gen asserts that, not only was it not hoarding capacity on the Dixie Valley Line, but also that it consistently attempted to negotiate with Green Borders and process Green Borders’ requests in spite of Green Borders’ “ambivalent interest” in obtaining transmission service.<sup>68</sup> Terra-Gen argues that it would be unfair to require it to reserve transmission capacity for Green Borders while Green Borders “sorts out” its development plans—specifically, altering project size and commercial operation dates.<sup>69</sup> Terra-Gen further argues that Green Borders’ delay in bringing the Complaint to the Commission is inexcusable and justifies dismissal on equitable grounds. Finally, Terra-Gen states that Green Borders may still request transmission service and that, should it do so, Terra-Gen will work cooperatively with it and process the request consistently with the Commission’s requirements.

38. On March 9, 2010, Green Borders answered Terra-Gen’s request for summary dismissal, and requested a hearing and consolidation of the Petition and Complaint proceedings. Green Borders states that summary dismissal is not appropriate because of the dispute regarding the factual assertions made by the parties.<sup>70</sup> Green Borders states that both the Petition and Complaint involve common issues of law and fact, and that the resolution of one case will likely control the other.<sup>71</sup>

39. On March 24, 2010, Petitioners filed an answer to Green Borders’ motion to consolidate, stating that Green Borders has not met the legal requirements to support consolidation and hearing because the Complaint raises concerns separate

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<sup>67</sup> *Id.* at 15.

<sup>68</sup> *Id.* at 15.

<sup>69</sup> *Id.* at 18.

<sup>70</sup> *Id.* at 18.

<sup>71</sup> Green Borders Motion for Consolidation at 18-19.

from those presented in the Petition.<sup>72</sup> Petitioners state that, while Green Borders has raised similar factual allegations in both dockets, the manner in which Green Borders has chosen to present its arguments does not control the legal question of consolidation. Petitioners state that Green Borders chose to file a separate complaint raising separate concerns from those presented in the Petition and should not now be relieved of the procedural consequences of that choice.<sup>73</sup>

40. On June 16, 2010, Green Borders filed a motion for an expedited order in the Complaint proceeding, and in the alternative, renewed its request for consolidation and hearing of the Complaint and Petition proceedings. On June 25, 2010, Terra-Gen responded to Green Borders' June 16 filing, urging the Commission to deny the request for consolidation and hearing.

41. On August 2, 2010, Petitioners filed a renewed request for Commission action in the Petition proceeding. Petitioners' request included supplemental information indicating the recent completion of a power purchase agreement between Petitioners and an undisclosed California-based buyer, with deliveries scheduled to begin in 2012. Petitioners also indicate that SoCal Edison has terminated its power purchase agreement with Green Borders, and thus assert that such a "material change in circumstances" undercuts Green Borders' priority claims. On August 10, 2010, Green Borders submitted a response to Petitioners' filing for the purpose of correcting alleged mischaracterizations made in the August 2 filing.

## V. Discussion

### A. Procedural Matters

42. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), Green Borders' timely, unopposed motion to intervene serves to make it a party to the Petition proceeding.

43. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept Petitioners'

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<sup>72</sup> Terra-Gen and Petitioners Answer to Green Borders Motion for Consolidation at 3-4.

<sup>73</sup> *Id.* at 3.

response to Green Borders' answer to the Petition, which is an answer to an answer, because it has provided information that assisted us in our decision-making process.

44. Petitioners' and Green Borders' filings arise out of factual circumstances that are identical in all material respects. Therefore, for purposes of our review, we will address the Petition and Complaint together. However, because we do not find that a formal hearing is appropriate, we do not consolidate the two dockets.<sup>74</sup>

## **B. Commission Determinations**

### **1. QF Open Access Obligations**

45. PURPA, as amended, created a category of generation facilities known as "QFs." In section 210 of PURPA,<sup>75</sup> the Commission was required to prescribe rules as the Commission determined necessary to encourage cogeneration and small power production, including rules requiring electric utilities to offer to purchase electric power from and sell electric power to QFs. Additionally, section 210 of PURPA authorized the Commission to exempt QFs from certain federal and state laws and regulations. Section 201 of PURPA defines the entities that may become QFs, and the entities that are subject to the purchase and sale requirements of PURPA.

46. In Order No. 671<sup>76</sup> the Commission amended its regulations to specifically include QFs within the broad category of public utilities subject to regulation

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<sup>74</sup> See *Startrans IO, LLC*, 122 FERC ¶ 61,253 (2008) (finding formal consolidation inappropriate where a trial-type evidentiary hearing is not required to resolve common issues of law and fact and where consolidation will not ultimately result in greater administrative efficiency); *Cal. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047 (2010) (finding formal consolidation unnecessary where two related petitions were addressed simultaneously via a single Commission order and no hearing was ordered).

<sup>75</sup> 16 U.S.C. § 824a-3 (2006).

<sup>76</sup> See *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, FERC Stats. & Regs. ¶ 31,203 (2006), *clarified*, 114 FERC ¶ 61,128 (2006), *order on reh'g*, Order No. 671-A, FERC Stats. & Regs. ¶ 31,219 (2006). Order No. 671 became effective March 17, 2006.

under sections 205 and 206 of the FPA, with limited exceptions.<sup>77</sup> Subsequently, the Commission has explained that a transmission line owned by a QF/exempt wholesale generator partnership is also subject to section 205 of the FPA.<sup>78</sup> In addition, the Commission has made clear that owners of transmission lines interconnecting generation facilities to the integrated transmission grid, even those characterized as “generator lead lines,” are subject to the requirement to file an OATT and to provide open access transmission service.<sup>79</sup> Thus, whether a transmission line is utilized by a QF to provide service to itself (or co-owners), affiliates, or unaffiliated third parties does not alter the obligation of the QF to file an OATT with the Commission unless it qualifies for a waiver of the OATT filing obligation. Accordingly, any reliance by Petitioners on the status of the Dixie Valley QF to exempt Terra-Gen from an obligation to file an OATT or otherwise provide open access service on the Dixie Valley Line is misplaced.<sup>80</sup>

47. The Commission has granted requests for waiver of the requirements of Order Nos. 888 and 890 to public utilities that can show they own, operate, or control only limited and discrete transmission facilities (i.e., facilities that do not form an integrated transmission grid), unless and until such time as the public

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<sup>77</sup> The Commission regulations governing the exemptions enjoyed by QFs are codified at 18 C.F.R. Part 292, Subpart F (18 C.F.R. §§ 292.601-.602 (2010)). The limited QF exemptions from sections 205 and 206 of the FPA, which apply to QFs making certain sales of energy and capacity, are not applicable to this proceeding, which involves Terra-Gen’s provision of transmission services over the Dixie Valley Line.

<sup>78</sup> *Sagebrush*, 130 FERC ¶ 61,093, at P 25 (2010).

<sup>79</sup> *Milford Wind Corridor*, 129 FERC ¶ 61,149 at P 24.

<sup>80</sup> A QF may include transmission lines only if they are used for certain purposes, including to sell the QF's power, to receive supplementary, standby, maintenance, and backup power for the QF itself, or to transmit power to or from other QFs. *See* 18 C.F.R. § 292.101(b)(1) (2010). To the extent that the Dixie Valley Line is used for other purposes, the line may no longer be included in the QF certifications of the Dixie Valley QF. While the transmission line, if used for a purpose other than those specified in 18 C.F.R. § 292.101(b)(1) (2010), will no longer be able to be included in the QF certifications of the Dixie Valley QF, the QF status of the Dixie Valley Plant will not otherwise be affected.

utility receives a request for transmission service.<sup>81</sup> The Commission has further explained that, if a request for transmission service is made merely by an affiliate, the transmission owner/provider may still be able to qualify for a waiver.<sup>82</sup> However, upon receiving a request for transmission service made by an unaffiliated third party, the Commission has stated that the transmission owner/provider is obligated to file a *pro forma* OATT, with the Commission, within 60 days of the date of the request, and to comply with any additional requirements that are effective on the date of the request, pursuant to Order Nos. 888 and 890.<sup>83</sup>

48. In determining whether a request for service is sufficient to trigger the obligation to file an OATT, in *Sagebrush II*, we stated that a request would be sufficient if it satisfies the requirements of *pro forma* OATT section 17.2 for firm point-to-point service, *pro forma* OATT section 18.2 for non-firm service, and *pro forma* OATT section 29.3 for network service.<sup>84</sup> We find that Green Borders'

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<sup>81</sup> *Milford Wind Corridor*, 129 FERC ¶ 61,149 at P 25; *Black Creek Hydro, Inc.*, 77 FERC ¶ 61,232, at 61,941 (1996).

<sup>82</sup> See *Crystal Lake Wind, LLC*, 127 FERC ¶ 61,213 (2009) (*Crystal Lake I*); *Crystal Lake Wind, LLC*, 131 FERC ¶ 61,132 (2010) (*Crystal Lake II*) (collectively, *Crystal Lake Orders*). In the *Crystal Lake Orders*, the Commission granted waiver of the requirements of Order Nos. 888 and 890 where a transmission owner used its own limited and discrete facilities to provide service to itself and two affiliates but where all three entities made showings sufficient to satisfy the criteria for waiver.

<sup>83</sup> *Milford Wind Corridor*, 129 FERC ¶ 61,149 at P 27.

<sup>84</sup> *Sagebrush, a California Partnership*, 132 FERC ¶ 61,234 (2010) (*Sagebrush II*). As we noted in *Sagebrush II*, the absence of a deposit from a third-party request for transmission service, in an amount sufficient to satisfy the applicable deposit requirements of the OATT, has no bearing on the sufficiency of the request for purposes of triggering the obligation of a transmission owner/provider to file an OATT. *Sagebrush II*, 132 FERC ¶ 61,234 at P 44. We further noted that, while a request satisfying the criteria of OATT section 17.2 is sufficient as a transmission request, within 60 days of the OATT being filed, pursuant to the triggering of that obligation of the transmission owner/provider, the requesting party must submit a deposit pursuant to the applicable OATT provision in order to perfect its request for transmission service.

May 8, 2007 request for interconnection and transmission service is a request for firm point-to-point service and is sufficient to satisfy the criteria of section 17.2 of the *pro forma* OATT. Accordingly, we will deny Terra-Gen's request for waiver of Order Nos. 888 and 890 and, as requested in the Complaint, will require Terra-Gen to file an OATT within 30 days of the date of this order.

## 2. Priority Rights to Capacity

49. Petitioners assert that they have priority rights to the existing capacity on the Dixie Valley Line. We agree that Terra-Gen is entitled to continue its present use of 60 MW of existing capacity.<sup>85</sup> Part of the calculation of available transfer capability is the set aside of capacity for existing transmission commitments, defined to include capacity for committed uses of the transmission system.<sup>86</sup> It is therefore reasonable for Terra-Gen to set aside capacity on the Dixie Valley Line as needed to serve its delivery obligations to SoCal Edison.<sup>87</sup>

50. With respect to Petitioners' claims of entitlement to planned capacity on the Dixie Valley Line, Petitioners explicitly recognize, throughout their filings, that the Commission has accepted proposals for transmission line owners to reserve capacity where the owners have specific plans to develop generation resources to be served by their line.<sup>88</sup> Under the standard enunciated by the Commission in *Aero Energy* and applied in *Milford Wind Corridor*,<sup>89</sup> where the transmission

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<sup>85</sup> We note, however, that to the extent any of this reserved 60 MW is unused, Terra-Gen must make this capacity available while Terra-Gen is not using it, in accordance with the provisions of the OATT and Commission's open access policies.

<sup>86</sup> See Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 244.

<sup>87</sup> As required in Order No. 890, Terra-Gen must clearly describe, in Attachment C to its OATT, the methodology it uses to assess available transfer capability, including an explanation of how it calculates the amount of capacity it sets aside for existing transmission commitments. See Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 323.

<sup>88</sup> See, e.g., Petition at 18-22; Answer to Complaint at 18-20.

<sup>89</sup> We note that, in *Milford Wind Corridor*, the pre-existing development plans of the transmission tie-line owner included the future transfer of ownership interests in the line to affiliates developing their own generation projects.

(continued...)

owners have specific pre-existing generation expansion plans, they may have firm priority rights to capacity on their line.<sup>90</sup> As owner of the Dixie Valley Line, in order to reserve future transmission capacity for its use, Terra-Gen must therefore demonstrate specific plans to develop its own generation resources.

51. We find that Terra-Gen has not demonstrated sufficiently specific plans to develop generation resources to be served by the expansion of the Dixie Valley Line. Petitioners state that Terra-Gen, via management resolution, has reserved 100 MW of capacity on the Dixie Valley Line to accommodate planned expansion of the Dixie Valley Plant. While Petitioners generally describe a variety of development activities in which they are engaged, they have not identified clearly the specific activity that is being undertaken in furtherance of Terra-Gen's particular plans to expand the Dixie Valley Plant. On the record before us, we therefore do not find a sufficient basis upon which to grant Terra-Gen the requested priority rights for the planned expansion capacity.

52. With regard to the claim of priority rights by Terra-Gen's affiliates, the Commission has evaluated specific pre-existing development plans of a transmission owner's affiliates where the plans of the transmission owner included the future transfer of ownership interests in the line, to affiliates developing their own generation projects.<sup>91</sup> Here, Petitioners assert that TGP Dixie and New York Canyon each hold an option to lease up to a 100 MW undivided interest in the Dixie Valley Line. However, the options are little more than an agreement to negotiate a potential grant of a lease to TGP Dixie and New York Canyon and, as such, do not provide TGP Dixie or New York Canyon any entitlement to the Dixie Valley Line.<sup>92</sup> Terra-Gen has failed to justify treating its affiliates differently from

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129 FERC ¶ 61,149 at P 5. Affiliates that become transmission owners can obtain firm priority rights to the extent they use the line to serve their own load, or demonstrate specific plans with milestones to use the line in the future, provided they offer open access in the meantime. *SunZia Transmission, LLC*, 131 FERC ¶ 61,162, at P 37 n.38 (2010).

<sup>90</sup> See *SunZia Transmission*, 131 FERC ¶ 61,162 (citing and clarifying *Milford Wind Corridor*, 129 FERC ¶ 61,149 at P 22); *Aero Energy*, 116 FERC ¶ 61,149 at P 28.

<sup>91</sup> See *supra* note 86.

any other party seeking to take service on the Dixie Valley Line. We therefore deny the request for priority for the additional 200 MW of future capacity for Terra-Gen's affiliates.

53. The Commission recognizes that Terra-Gen may have invested in the Dixie Valley Line with the expectation that it would have priority rights to the line's existing and planned capacity for itself and its affiliates, and that Terra-Gen believed that it was taking steps to establish those priority rights. Given that this issue appears to have caused some confusion and Terra-Gen may not have been clear as to the showing it was required to make, when it files its OATT, as required by this order, we will allow Terra-Gen the opportunity to submit further evidence of pre-existing development plans that satisfy the criteria established in *Aero Energy* and *Milford*. In order to meet this evidentiary burden, Terra-Gen must demonstrate the existence of specific pre-existing generation development plans, consistent material progress towards achieving such plans, and that such plans and initial progress pre-date Green Borders' valid request for service.

### **3. Waiver of Order No. 889 and Standards of Conduct**

54. Similar to the criteria for waiver of Order Nos. 888 and 890, the Commission may grant waiver of the requirements of Order No. 889 and the Standards of Conduct if the applicant-public utility owns, operates, or controls only limited and discrete transmission facilities (rather than facilities that are part of an integrated transmission grid). Additionally, the Commission may grant waiver if the applicant is a small public utility<sup>93</sup> that owns, operates, or controls an integrated transmission grid, unless it is a member of a tight power pool, or other

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<sup>92</sup> For example, the option agreement between Caithness (now Terra-Gen) and New York Canyon merely binds those entities, upon the exercise of the option by New York Canyon, to "prepare, negotiate in good faith, and if agreement is reached, execute a definitive lease agreement." Petition at Exhibit A.

<sup>93</sup> To qualify as a small public utility, the applicant must meet the Small Business Administration definition of a small electric utility—an electric utility that disposes of no more than four million MWh annually. See *Wolverine Power Supply Coop., Inc.*, 127 FERC ¶ 61,159, at P 15 (2009)(*Wolverine*).

circumstances are present that indicate that waiver would not be justified.<sup>94</sup> The Commission has held that a waiver of Order No. 889 will remain in effect until the Commission takes action in response to a complaint to the Commission that an entity evaluating its transmission needs could not get the information necessary to complete its evaluation (for an OASIS waiver) or an entity complains that the public utility has unfairly used its access to information about transmission to benefit the utility or its affiliate (for a Standards of Conduct waiver).<sup>95</sup>

55. In the instant case, we find that the Dixie Valley Line is currently only providing transmission service from the Dixie Valley Plant, and thus qualifies as limited and discrete. Accordingly, we will grant Terra-Gen the requested waiver of the requirements of Order No. 889 and applicable requirements of the Standards of Conduct until such time as another interconnection on the Dixie Valley Line becomes operational or the Commission finds revocation appropriate in response to a complaint made to the Commission, as described above. Consistent with our waiver policies, Terra-Gen must notify the Commission if there is a material change in facts that affect its waiver, within 30 days of such a change.<sup>96</sup>

The Commission orders:

(A) The Petition is hereby granted in part, and denied in part, as discussed in the body of this order.

(B) The Complaint is hereby granted in part, and denied in part, as discussed in the body of this order.

(C) Terra-Gen is hereby directed to file an OATT, within 30 days of the date of issuance of this order, as discussed in the body of this order.

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<sup>94</sup> See *Milford Wind Corridor*, 129 FERC ¶ 61,149 at P 25; *Black Creek Hydro, Inc.*, 77 FERC ¶ 61,232, at 61,941; *Peetz Logan Interconnect, LLC*, 122 FERC ¶ 61,086 (2008); *Red Shield Acquisition, LLC*, 128 FERC ¶ 61,090 (2009).

<sup>95</sup> See *Entergy Mississippi, Inc.*, 112 FERC ¶ 61,228, at P 23 (2005) (citing *Central Minnesota Municipal Power Agency*, 79 FERC ¶ 61,260, at 62,127 (1997)); *Easton Utilities Commission*, 83 FERC ¶ 61,334, at 62,343 (1998).

<sup>96</sup> *Material Changes in Facts Underlying Waiver of Order No. 889 and Part 358 of the Commission's Regulations*, 127 FERC ¶ 61,141, at P 5 (2009); see also *Wolverine*, 127 FERC ¶ 61,159 at n.21.

(D) The Secretary is hereby directed to publish a copy of this order in the *Federal Register*.

By the Commission. Chairman Wellinghoff is not participating.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.