130 FERC ¶ 61,013
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

American Electric Power Service Corporation Docket Nos. EC10-8-000
EC10-10-000

ORDER AUTHORIZING DISPOSITION OF TRANSMISSION FACILITIES

(Issued January 6, 2010)

1. On October 23, 2009, American Electric Power Service Corporation (AEP Services) submitted, on behalf of AEP Texas Central Company (Texas Central) and AEP Texas North Company (Texas North) (collectively, Applicants) a request for a disclaimer of jurisdiction, or, in the alternative, authorization under section 203(a) of the Federal Power Act (FPA),[1] for transactions that result in the transfer of transmission facilities from Texas Central and Texas North to Electric Transmission Texas, LLC (Electric Transmission Texas) (Proposed Transfers). As discussed below, this order approves the disposition of assets under section 203.

2. Although the Applicants do not specify in their applications the subsection(s) under section 203 under which they are seeking authorization, we will authorize the Proposed Transfers under section 203(a)(1).[2] We remind applicants that when they submit applications under section 203, they must specify the subsection or subsections under which they are seeking authorization.

I. Background

A. Description of Parties

3. AEP Services is a wholly owned subsidiary of American Electric Power Company, Inc. (AEP), an electric utility holding company. AEP Services is a service

[1] 16 U.S.C. § 824b (2006).

[2] *See generally Brazos Elec. Power Coop.*, 118 FERC ¶ 61,199, at P 46 (2007); *Duke Power Co. v. Federal Power Comm'n*, 401 F.2d 930, at 941 (D.C. Cir. 1968).

company that provides management and professional services to AEP, Texas Central, Texas North, and Electric Transmission Texas.

4. Texas Central and Texas North are electric transmission and distribution utility companies whose facilities are located entirely within the Electric Reliability Council of Texas (ERCOT) electricity market in the state of Texas and are used to serve retail electric customers and other participants in the ERCOT electricity market. Neither Texas Central nor Texas North owns any generation.

5. Electric Transmission Texas is owned in equal 50 percent shares by non-utility holding company subsidiaries of AEP and MidAmerican Energy Company (MidAmerican), a subsidiary of Berkshire Hathaway, Inc. Electric Transmission Texas' business purpose is to acquire, construct, own and operate transmission facilities that are located and operated solely within ERCOT. Electric Transmission Texas is a transmission utility company regulated by the Public Utility Commission of Texas (Texas Commission). Electric Transmission Texas does not own or control any power supply facility and does not engage in sales of electric energy in ERCOT or elsewhere.

B. Proposed Transfers

6. Texas Central proposes to transfer to Electric Transmission Texas the following facilities: Nueces Bay Generation Interconnection Projects and Barney Davis Generation Interconnection Projects along with the associated Certificate of Convenience and Necessary rights, with a current net book value of $23.6 million (Neuces Bay and Barney Davis Facilities).

7. Additionally, Texas Central proposes to transfer to Electric Transmission Texas the following facilities: Competitive Renewable Energy Zone Default 69 kilovolt (kV) Line and Substation Facilities, Port Aransas Transmission Substation Facilities, Rocksprings Substation, Victoria 69 kV Substation Facilities, West Batesville Substation Facilities, Lytle 138/69 kV Substation and Lines, and Laredo Topaz Generation Interconnection along with associated Certificate of Convenience and Necessary rights, easements, and rights of way, with a current net book value of $9.2 million (collectively with the Neuces Bay and Barney Davis Facilities, Texas Central Transfer Facilities).

8. Texas North proposes to transfer to Electric Transmission Texas the following facilities: Competitive Renewable Energy Zone Default 69 kilovolt (kV) Line and Substation Facilities, Paducah Clare Street Substation Facilities, Abilene – San Angelo Area Transmission Facilities, Childress 60 kV Transmission Line, Rio Pecos/Big Lake Substation Facilities, Langford Power Generation Interconnection, Vernon Area Substation and Line Facilities, Matador to Paducah 69 kV Lines and Associated Transmission Facilities, and Bluff Creek 138 kV Line along with associated Certificate of Convenience and Necessary rights, easements and rights of way, with a current net book value of $57.6 million (collectively, Texas North Transfer Facilities) (together with

Texas Central Transfer Facilities, Transfer Facilities). Existing Transfer Facilities will be transferred to Electric Transmission Texas at Texas North's and Texas Central's respective net book values at the time of transfer.

II. Notice of Filings and Responsive Pleadings

9. Notices of the Applications were published in the *Federal Register*, 74 Fed. Reg. 58269 (2009), *Federal Register*, 74 Fed. Reg. 57667 (2009) with interventions and protests due on or before November 13, 2009. Golden Spread Electric Cooperative, Inc. (Golden Spread) filed a timely motion to intervene and protest . Subsequently, Golden Spread filed a supplemental protest and request for an evidentiary hearing (Supplemental Protest). On November 30, 2009, AEP Services on behalf of Applicants filed an answer to Golden Spread's protest and opposing the motion to intervene.

III. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), we will grant Golden Spread's timely motion to intervene. Notwithstanding the Applicants' opposition to Golden Spread's motion to intervene, we find that good cause exists to permit Golden Spread to intervene in this proceeding given its interest as an ERCOT transmission customer that relies on the transmission facilities of the Applicants to provide service to its members in ERCOT.

11. Rule 213(a) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a) (2009), prohibits answers to protests, unless otherwise permitted by the decisional authority. We will accept the Applicants' answer because it has provided information that assisted us in our decision-making process.

B. Request for Disclaimer of Jurisdiction

1. Applicants' Request

12. Applicants request that the Commission disclaim jurisdiction under section 203(a) of the FPA over the Proposed Transfers. Applicants state that the Transfer Facilities will be part of the ERCOT transmission network and the installation of the Transfer Facilities will not alter the extent to, or the manner in which, ERCOT utilities engage in interstate commerce. Applicants also state the Commission lacks jurisdiction over service provided by utilities operating in ERCOT. In the alternative, Applicants ask the Commission to approve the transactions under section 203 without ruling on jurisdiction.

2. Golden Spread's Protest

13. Golden Spread argues that the Commission's predecessor, the Federal Power Commission, held that Texas Central's and Texas North's predecessors, Central Power & Light Company (Central Power) and West Texas Utilities Company (West Texas), were public utilities pursuant to section 201 of the FPA[3] and therefore subject to the jurisdiction of the Commission.[4] Golden Spread states that since the original Commission finding that Central Power and West Texas were public utilities, those companies have remained interconnected with other Central Southwest Holdings system subsidiaries and Texas Central and Texas North continue to engage in interstate transmission through High Voltage Direct Current (HVDC) ties. Additionally, Golden Spread states that the Commission exercised limited jurisdiction over otherwise non-jurisdictional utilities affected by an order issued pursuant to FPA sections 210-212.[5]

14. Golden Spread argues that perpetuating the asynchronous operation of ERCOT and Southwest Power Pool, Inc. (SPP), which as more transmission is built will be the result of jurisdictional concerns rather than engineering limitations, will likely limit the potential development of wind resources and will impose costs on consumers. Golden Spread asks the Commission to signal that it does not interpret sections 210-212 of the FPA as permitting it to order synchronous interconnections without affecting the basic jurisdictional status of otherwise non-FERC jurisdictional utilities operating in ERCOT.

3. Applicants' Answer

15. Applicants argue that all of the assets at issue in the transactions that are subject to the applications are wholly within ERCOT and do not change the asynchronous nature of the interconnection between ERCOT and neighboring regions. Applicants further state that section 203(a)(1)(A) requires the Commission's prior approval for the disposition of "facilities subject to the jurisdiction of the Commission" but does not confer jurisdiction over non-jurisdictional facilities owned by a jurisdictional public utility. Applicants also state that the Commission need not address any jurisdictional issues to approve the proposed transaction.[6]

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[3] 18 U.S.C. § 824 (2006).

[4] *Central Power & Light Co.*, 56 FPC 432,436 (1976), *remanded for clarification Cent Power & Light Co. v. FERC*, 575 F.2d 937 (D.C. Cir. 1978).

[5] Supplemental Protest at 5-6.

[6] Applicants' Answer at FN 2.

4. Commission Determination

16. As discussed below, we are approving the proposed transactions under section 203, making it unnecessary to rule on Applicants' request for disclaimer of jurisdiction. Therefore, Golden Spread's protests concerning the Commission's jurisdiction are moot.

C. Request for Approval under FPA § 203

17. The Commission has reviewed the Proposed Transfers under the Commission's Merger Policy Statement.[7] As discussed below, we will authorize the Proposed Transfers as consistent with the public interest.

1. Standard of Review

18. Section 203(a) of the FPA, as amended by the EPAct 2005, provides that the Commission must approve the proposed disposition or acquisition of transmission facilities if it finds that the proposed transaction will be consistent with the public interest, and will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.[8]

19. The Commission's analysis of whether a transaction is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.[9] In addition, the Commission determines whether the transaction will result in cross-subsidization of a non-utility

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[7] *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). *See also* Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 (2007), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008). *See also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). *See also Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

[8] 16 U.S.C. § 824b(a)(4) (2006).

[9] Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

associate company or the pledge or encumbrance of utility assets for the benefit of an associate company.[10] As discussed below, we will approve the Proposed Transfers because it meets these statutory standards.

2. Effect on Competition

20. Applicants state that the Proposed Transfers will not have an adverse effect on competition because the Transfer Facilities are transmission facilities that are subject to open access use under regulation by the Texas Commission of the rates, terms and conditions for intra-ERCOT transmission service and supervision by ERCOT. Applicants note that Electric Transmission Texas is and will continue to be engaged solely in the transmission service business and will not own or control facilities for the production or sale of electricity.[11]

21. With respect to vertical market power concerns, Applicants assert that the Proposed Transfers do not involve a merger and will not cause any of the entities involved to gain the ability or incentive to affect prices or inputs in the downstream electric markets or to discourage new generators.[12] No party disputes these statements. We agree with Applicants' analysis of the horizontal and vertical market power impacts of the Proposed Transfers. We find that the Proposed Transfers will not adversely affect competition.

3. Effect on Rates

22. Applicants state that the rates Electric Transmission Texas will charge for transmission service over the Transfer Facilities will be regulated by the Texas Commission using the same cost-based ratemaking practices that the Texas Commission uses in setting transmission service rates for other ERCOT transmission utilities, including Texas Central and Texas North. The rates that Texas Central and Texas North charge for transmission service within ERCOT or for transmission service to, from and across the HVDC Interconnection between ERCOT and SPP will not be affected by the Proposed Transfers.[13]

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[10] Order No. 669, FERC Stats. & Regs. ¶ 31,200 at P 1640.

[11] Application at 9.

[12] Application at 10.

[13] Application at 11.

a. Golden Spread's Protest

23. Golden Spread states that it serves members in both ERCOT and the SPP, with a combination of owned or controlled generation resources and purchase power agreements. It is concerned that the jurisdictional determination requested by Applicants could adversely affect its ability to effectively manage its resource needs. Golden Spread states that it currently serves its ERCOT member loads with a full requirements service agreement that terminates in 2013. Golden Spread argues that the applications are silent with regard to the effect of the Proposed Transfers on the full requirements contract under which Golden Spread purchases energy to serve its members' ERCOT loads. Golden Spread asserts that when the contract terminates in 2013, it must either renew the contract or replace it with another resource such as SPP. Golden Spread argues that it must plan to continue to serve its ERCOT load, but will be challenged in deploying SPP based resources for this purpose. Golden Spread contends that unless it can make use of the "to, from and over" tariffs adopted as part of the resolution in Docket No. PL79-8, it would have to construct new interconnections at potentially much higher cost.

24. Golden Spread states that three of its members receive interconnection service from Texas North at multiple points of interconnection pursuant to written interconnection agreements. Golden Spread argues that the applications leave the status of these agreements unclear and that the Applicants make no commitment that the terms and conditions of these interconnections, including but not limited to those related to rates and charges, will be honored by Electric Transmission Texas if the application is approved. Thus, Golden Spread argues that the Commission does not have a sufficient basis for finding the Proposed Transfers to be consistent with the public interest, and should set the matter for hearing.

b. Applicants' Response

25. Applicants state that Golden Spread has not demonstrated that the Proposed Transfers would not satisfy the requirements of section 203. Applicants state that the rates, terms and conditions of Golden Spread's interconnection agreements with AEP are not at issue and any changes to these agreements, which are jurisdictional agreements, would be subject to the Commission's approval under section 205 of the FPA. Applicants also request that the Commission deny Golden Spread's protest because Golden Spread has not shown the relationship between the Transfer Facilities and its future power supply options. Applicants also note that Golden Spread's interconnection agreements with Texas North, which are mentioned in the Supplemental Protest, are not at issue in the application.

c. Commission Determination

26. We agree with Applicants that the Proposed Transfers will not have an adverse effect on rates. We also agree that the issues raised by Golden Spread regarding its

interconnection agreements are not germane to this proceeding. As Applicants point out, the proposed transactions do not alter the interconnection agreements held by Golden Spread, and Golden Spread does not provide any evidence that these agreements would be affected by the proposed transactions. Any changes to the interconnection agreements would be subject to Commission approval in a separate proceeding. Additionally, much of Golden Spread's complaint is mooted by virtue of our jurisdictional ruling above.

4. Effect on Regulation

27. Applicants state that Electric Transmission Texas is a transmission utility subject to Texas Commission regulation. Electric Transmission Texas offers transmission service under rates, terms and conditions approved by the Texas Commission and it has filed a joint application with Texas Central and Texas North for Texas Commission approval of the transaction. Applicants also state that the Texas Commission will continue to regulate Electric Transmission Texas in the same way and to the same extent that it does today.[14]

28. Based on the facts presented in the applications, the Commission finds that the Proposed Transfers will not adversely affect regulation. We note that no party alleges that regulation would be impaired by the Proposed Transfers, and no state commission has requested that the Commission address the issue of the effect on state regulation.

5. Cross-Subsidization

29. FPA section 203(a)(4) requires that the Commission find that a transaction will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company, unless that cross-subsidization, pledge or encumbrance will be consistent with the public interest. In Order Nos. 669, 669-A, and 669-B, the Commission established specific filing requirements requiring applicants to demonstrate that this requirement is met. This information is to be included in Exhibit M of applications.

30. Applicants assert that based on facts and circumstances known or that are reasonably foreseeable, the Proposed Transfers will not result in, at the time of the Proposed Transfers or in the future, cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company. Applicants state that the Proposed Transfers will not result in, at the time of the transaction or in the future: (1) any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company;

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[14] Application at 11-12.

(2) any new issuances of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; and (4) any new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under section 205 and 206 of the FPA.[15]

31. Applicants also inform the Commission that the Proposed Transfers falls within one of the Commission's safe harbors where the transaction is subject to review by a state commission. The Proposed Transfers of the Transfer Facilities are subject to review by Texas Commission and the Texas Commission will approve the Proposed Transfers only if it finds that it is consistent with the public interest. Applicants explain that because of the Texas Commission's regulatory framework and its review of the Proposed Transfers, the Proposed Transfers will not result in cross-subsidization.

32. Based on the facts as presented in the applications, we find that the proposed transaction will not result in cross-subsidization, or the pledge or encumbrance of utility assets for the benefit of an associate company. We will require Applicants to submit, for informational purposes, the decision of the Texas Commission with respect to the Proposed Transfers.

D. <u>Accounting Issues</u>

33. For the transfer of in-service facilities, Applicants propose to debit Account 146, Accounts Receivable from Associated Companies, and Account 131, Cash, and credit Account 108, Accumulated Provision for Depreciation of Electric Utility Plant. For those facilities still in the process of construction, Applicants propose to debit Account 146 and Account 131, and credit Account 107, Construction Work in Progress – Electric.

34. Applicants' proposed journal entries for the in-service facilities are not consistent with their statement that the entries reflect the transfer of assets from Accounts 101, Electric Plant in Service and 106, Completed Construction not Classified – Electric, nor with the Commission's Uniform System of Accounts. In-service facilities should be recorded in Accounts 101 or 106, respectfully. Therefore, transfer of these in-service assets should involve crediting Accounts 101 and 106 along with a concurrent debit to Account 108 to remove any accumulated depreciation related to the facilities, consistent

[15] Application at Exhibit M.

with the requirements of the Electric Plant Instruction (EPI) No. 5.[16] Further, Applicants did not clear the sale through Account 102, Electric Plant Purchased or Sold, as required by the instructions of EPI No. 5, Electric Plant Purchased or Sold, and the text of Account 102.[17] Account 102 should be used as an interim control account to record all aspects of the transactions. Applicants shall submit their final accounting entries within six months of the date that the transactions are consummated, and the accounting submission shall provide all the accounting entries and amounts related to the transaction along with narrative explanations describing the basis for the entries.

The Commission orders:

(A) We hereby grant authorization under section 203(a)(1) for the Proposed Transfers, as discussed in the body of this order, effective as of the date of this order.

(B) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

(C) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(D) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(E) Applicants shall make the appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transfers.

(F) Applicants must inform the Commission within 30 days of any change in circumstances that would reflect a departure from the facts the Commission relied upon in authorizing the transaction.

(G) Applicants shall make an informational filing within 10 days of the date on which the Texas Commission approves the Proposed Transfers, as discussed in the body of this order.

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[16] 18 C.F.R. Part 101 (2009).

[17] *Id.*

(H) Applicants shall account for the transactions consistent with the body of this order, in accordance with Electric Plant Instruction No. 5 and Account 102, Electric Plant Purchased or Sold, of the Uniform System of Accounts. Applicants shall submit their final accounting entries within six months of the date that the transactions are consummated, and the accounting submission shall provide all the accounting entries and amounts related to the transaction along with narrative explanations describing the basis for the entries.

(I) Applicants shall notify the Commission within 10 days of the date that the disposition of the jurisdictional facilities has been consummated.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.