

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

American Electric Power Service Corporation
Oklaunion Electric Generating Cooperative Inc.
Golden Spread Electric Cooperative, Inc.

Docket No. EC04-88-000

ORDER AUTHORIZING DISPOSITION
OF JURISDICTIONAL FACILITIES

(Issued May 28, 2004)

1. On April 1, 2004, American Electric Power Service Corporation (AEP) on behalf of AEP Texas Central Company (TCC), Oklaunion Electric Generating Cooperative, Inc. (OEGC), and Golden Spread Electric Cooperative, Inc. (Golden Spread) (collectively Applicants) filed an application pursuant to section 203 of the Federal Power Act (FPA)¹ requesting Commission authorization for a proposed disposition of jurisdictional facilities associated with the sale of TCC's 7.81 percent undivided ownership interest in the 690 megawatt (MW) Oklaunion Unit 1 (Facility), to OEGC. The Commission has reviewed the transaction under the Commission's Merger Policy Statement² and will authorize the disposition as consistent with the public interest.

¹ 16 U.S.C. § 824b (2000).

² Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, Order No. 592, 61 Fed. Reg. 68,595 (1996), FERC Stats. and Regs., Regulations Preambles July 1996-December 2000 ¶ 31,044 (1996), reconsideration denied, Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); see also Revised Filing Requirements Under Part 33 of the Commission's Regulations, Order No. 642, 65 Fed. Reg. 70,983 (2000), FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000 ¶ 31,111 (2000), order on reh'g, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001).

I. Background

2. TCC is an indirect wholly-owned subsidiary of AEP and a public utility that is engaged in generating, transmitting and distributing electric retail and wholesale energy in south Texas. The Facility is a low sulfur coal-fired steam generating unit with a maximum net capacity of 690 MW located in Wilbarger County, Texas. In an effort to comply with the state statutes and regulations³ requiring the unbundling of electric transmission and generation activities TCC proposes to sell its 7.81 percent interest in this Facility to OEGC.

3. OEGC is an electric cooperative that currently has no assets. OEGC will be in the business of rural electrification by generating and selling electric power and energy. Its sole member is Golden Spread, a public utility that currently does not own generating capacity.

4. Golden Spread transmits electric energy to its rural electric distribution cooperative members in Texas and Oklahoma and sells power at wholesale in the Southwest Power Pool (SPP). Under long-term contracts, Golden Spread purchases power from the Mustang Generating Station, which is partially owned by Golden Spread's affiliate, GS Electric Generating Cooperative, Inc.

II. Notice and Further Filings

6. Notice of the application was published in the Federal Register, 69 Fed. Reg. 18,893 (2004), with interventions or comments due on or before April 22, 2004. Oklahoma Municipal Power Authority (OMPA) and Brownsville Public Utilities Board (Brownsville) both filed motions to intervene, with protests, and AEP and Golden Spread filed answers.

7. OMPA, an Oklahoma governmental agency, is a wholesale power supplier to 35 municipalities in Oklahoma and supplies contract capacity and supplemental energy to three cities in Kansas. OMPA is a member of SPP and relies in part on AEP's transmission system. OMPA currently has an 11.72 percent interest in the Facility.

³ See Texas Public Utility Regulatory Act, Texas Utilities Code § 39.051 (2004); 16 TAC § 25.342(d)(2) (2004).

8. OMPA states that it has a contractual right of first refusal (ROFR) to purchase the 7.81 percent interest in the Facility that TCC proposes to sell to OEGC and that Brownsville has a similar ROFR.⁴ OMPA asserts that it notified TCC that it was exercising its ROFR on April 16, 2004. Therefore, OMPA argues that TCC's filing is premature and requests that the Commission reject it.

9. In order for OMPA to beneficially exercise its ROFR, it states that it needs transmission from AEP to serve its load in the AEP zone of SPP, since the Facility is located just south of the North DC Tie between ERCOT and SPP. OMPA states that it has sought a commitment from AEP for transmission of this additional power, but that AEP told it that there is no capacity available for OMPA's request. OMPA states that it has agreed to construct and fund or own, with the appropriate credits, an expansion of the North DC tie between ERCOT and SPP to provide the additional capacity OMPA needs. However, OMPA says that AEP has refused its offer and has stated that a study under the Open Access Transmission Tariff (OATT) process is necessary. OMPA states that such a study will take too long, and that the delay will prohibit OMPA from being able to fully exercise its ROFR.

10. OMPA states that within SPP, it competes with the AEP affiliate, Public Service of Oklahoma (PSO), and that AEP is using its vertical market power by making it difficult for OMPA to get transmission to obtain and import additional power into that area. OMPA requests that the Commission instruct AEP to cooperate with OMPA in obtaining the additional transmission capacity OMPA needs to effectively use the additional capacity in the Facility OMPA will obtain through its ROFR.

11. OMPA recognizes there is Commission precedent stating that ongoing contract disputes between the parties are irrelevant to the section 203 analysis.⁵ However, OMPA says that this case is different because this contract dispute involves one party, the transferor, exercising vertical market power, and that the Commission has an obligation to enforce the FPA and protect against such abuses. OMPA states that if the Commission does not reject AEP's application, we should set the matter for hearing to examine the vertical market power issues associated with the proposed transfer; or, if the Commission approves AEP's application, OMPA requests that the Commission state that its order has

⁴ OMPA states Brownsville and OMPA's ROFRs provides for a pro rata ownership in the 7.81 percent based on their existing ownership positions as long as both parties exercise the ROFR. Furthermore, OMPA states that if only one party exercises the right that party is entitled to the full share. OMPA indicates its willingness to purchase the entire 7.81 percent if Brownsville does not continue with its purchase.

⁵ OMPA cites Commonwealth Atlantic Limited Partnership, et al., 97 FERC ¶ 61,375 (2001) (Commonwealth).

no bearing on OMPA's ROFR, including the issue of OMPA's right to transmission access to exercise its ROFR.

12. Brownsville is a municipal electric utility in the Rio Grande Valley that depends on TCC for transmission service. It argues that AEP is attempting to abuse the regulatory process by using the Commission's section 203 approval to extinguish Brownsville's ROFR. Brownsville asserts that under the Construction Ownership and Operating Agreement (COO), TCC is required to give Brownsville and OMPA seven months' notice before selling its interest to another party. Brownsville states that TCC gave notice in February, which would have allowed the sale to Golden Spread to be consummated by September at the earliest. Brownsville states it has notified TCC of its intent to exercise its right. However, Brownsville argues that AEP has changed the deadline to May 12, 2004, three months less than the required seven months notice in the COO. Brownsville requests an evidentiary hearing regarding this conflict over the dates or that the Commission reject AEP's proposal as deficient in order to prevent AEP from exploiting the section 203 process to impair Brownsville's contract rights.

13. In its answer, AEP states that OMPA's offer was not a valid exercise of its ROFR. However, AEP does state that Brownsville has now made a valid ROFR offer. AEP states that it is in the process of preparing a section 203 filing concerning the possible sale of the 7.81 percent of the Facility to Brownsville rather than OEGC. However, AEP requests that the Commission approve this pending section 203 filing in case the Brownsville offer is not finalized.

14. Finally, AEP and Golden Spread protest OMPA's use of this section 203 filing to complain about AEP's handling of OMPA's request for additional transmission service. AEP states that it is studying the request as required by its OATT, and that it is not required to afford OMPA any special treatment to ensure that the study is completed before the ROFR time expires.

III. Discussion

A. Procedural Matters

15. AEP opposes both Brownsville's and OMPA's intervention in these proceedings, arguing that neither party "has clearly identified a cognizable interest in this proceeding."⁶ However, Brownsville and OMPA are co-owners of the Facility, and have a contract issue involving this proposed sale. Therefore, despite AEP's assertions to the

⁶ AEP answer at 5.

contrary, we will grant both Brownsville and OMPA's timely motions to intervene and make them parties to this proceeding.⁷

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept AEP's and Golden Spread's answers because they have provided information that assisted us in our decision-making process.

B. Right of First Refusal

17. OMPA's and Brownsville's contractual ROFR issue is beyond the scope of this proceeding. In this filing, AEP is merely requesting a Commission finding that the transfer of the jurisdictional facilities to OEGC, if it occurs, would be consistent with the public interest under FPA section 203. However, our approval does not affect any other necessary approvals or contractual disputes between the parties.⁸ The disagreement over OMPA's ROFR clause is an issue of contract interpretation best decided through the local courts if the parties continue to disagree.

18. OMPA's allegations of vertical market power being used to restrict transmission service are also not within the scope of this case since those allegations are not being made against the buyer of these jurisdictional assets; the only entity whose market power could conceivably increase as a result of this transaction. OMPA may pursue this pre-existing issue under the relevant OATT, by contacting the Commission Hotline,⁹ by filing a complaint under FPA section 206, or by requesting transmission service under FPA section 211. We take the issue of abuse of transmission market power very seriously, but there are established ways of pursuing such a claim, and OMPA must use those procedures rather than this section 203 proceeding. If AEP believes that sufficient capacity may not exist to meet OMPA's transmission needs, AEP is required to conduct a system impact study in a timely fashion. If the study reveals a lack of capacity, AEP is required to use due diligence in expanding or modifying its system to meet OMPA's needs.¹⁰

⁷ 18 C.F.R. § 385.214 (2003).

⁸ Commonwealth, 97 FERC ¶ 61,375 at P 32.

⁹ The Commission's Enforcement Hotline phone number is (888) 889-8030.

¹⁰ 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., Regulations Preambles ¶ 31,036 (1996), order on reh'g, Order No. 888-A, FERC Stats. & Regs., Regulations Preambles ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997),

C. Section 203 Analysis

19. Section 203(a) of the FPA provides that the Commission must approve a disposition of facilities if it finds that the disposition “will be consistent with the public interest.”¹¹ The Commission’s analysis under the Merger Policy Statement of whether a disposition 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.¹² As discussed below, we will approve the proposed disposition of jurisdictional facilities as consistent with the public interest.

1. Effect on Competition

a. Applicants’ Analysis

20. Applicants argue that the transfer will not adversely affect competition. With regard to horizontal market power, they note that the transfer does not involve a merger of two companies, but a transfer of partial ownership in generation facilities to a company that does not currently own or control any generation in ERCOT, the relevant geographic market. Applicants assert that a horizontal competitive analysis screen is not required because the transfer will reduce TCC’s ownership of generation; moreover, since neither Golden Spread nor OEGC owns any electric generation assets in the relevant market, there is no overlap between existing generation and the generation being acquired by Golden Spread or OEGC. Applicants further argue that because Golden Spread and OEGC do not own any electric generating capacity in ERCOT, the transfer will have a positive effect on competition by de-concentrating the market.

21. Applicants argue that a vertical market screen is not required because neither Golden Spread nor OEGC controls any assets that provide inputs to electricity production or delivery, nor do they control any plant sites in ERCOT. Applicants conclude that the transfer does not raise vertical market power concerns because they have no ability to influence prices in relevant markets.

order on reh’g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff’d in relevant part sub nom. Transmission Access Study Group, et al. v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff’d sub nom. New York v. FERC, 535 U.S. 1 (2002).

¹¹ 16 U.S.C. § 824 (2000).

¹² Merger Policy Statement, supra note 2.

b. Intervenors' Arguments

22. As discussed above, OMPA argues that AEP has exercised vertical market power and is seeking to prevent OMPA from competing with an AEP affiliate (Public Service of Oklahoma) in SPP.¹³

c. Commission Determination

23. As discussed above, OMPA's argument regarding AEP's alleged exercise of vertical market power is irrelevant to our decision under FPA section 203 and may be pursued in other ways.

24. We find that the transaction, if it occurs, will not harm competition by combining generation assets; neither Golden Spread nor OEGC owns or controls any generation in the relevant market, so the transaction will de-concentrate the market. Moreover, with regard to vertical market power, the issue is whether the transaction would create or enhance OEGC's or Golden Spread's ability or incentive to use control of transmission facilities to raise prices in relevant wholesale electricity markets. Whatever vertical market power AEP may possess before the transaction does not by itself cause this proposed transfer of jurisdictional facilities to be inconsistent with the public interest. We agree with Applicants that because neither Golden Spread nor OEGC controls any transmission facilities or inputs to electricity generation, the transfer will not create or enhance vertical market power for Golden Spread or OEGC.

2. Effect on Rates

a. Applicants' Analysis

25. Applicants argue that the transfer will not adversely affect the rates of any of TCC's, OEGC's or Golden Spread's customers. They state that all of TCC's customers purchase electricity at fixed rates from TCC or its affiliates and that none of those rates will be affected by the transfer. OEGC has no wholesale or retail customers. Finally, the rates of Golden Spread's wholesale customers will not be adversely affected because Golden Spread will use the output of the Oklaunion facility to serve the needs of its member wholesale customers, and any profit from sales made to third party customers will benefit its members.

b. Commission Determination

26. Applicants have shown that the transfer, if it occurs, will not adversely affect wholesale transmission or power rates. We note that as a cooperative, Golden Spread

¹³ OMPA Protest at p. 18.

will use the output of the Oklaunion facility to serve its members and share the benefits of any profits from any opportunity sales with its members. In addition, none of TCC's wholesale customers will be affected by the transfer because their rates are fixed. We note that no intervenor raised any issue regarding the effect of the transfer on the rates of TCC's or Golden Spread's customers.

3. Effect on Regulation

a. Applicants' Analysis

27. Applicants state that the transfer will not impair the ability of the Commission or any state commission to regulate TCC. The transfer does not result in the formation a new holding company that would preempt the Commission's jurisdiction. They note that TCC is already part of a registered holding company system, and in connection with the AEP/CSW merger, committed to this Commission's review of affiliate dealings. Applicants state that OEGC is a new entity, established to acquire the Oklaunion assets, and was not subject to any prior regulation. They state that OEGC and its affiliates (including Golden Spread) are not subject to the Public Utility Holding Company Act of 1935.¹⁴

b. Commission Determination

28. Applicants have shown that the proposed transfer, if it occurs, will not affect federal or state regulation. The transaction does not impair any state's ability to regulate TCC. We note that no state Commission intervened. As noted in the application, the transfer will not result in the creation of a new holding company system that would shift jurisdiction from the Commission to the Securities and Exchange Commission.

c. Accounting

29. TCC submitted its proposed journal entries to account for the transfer of its 7.81 percent ownership interest in the 690 MW Oklaunion Unit No. 1 generating facility to OEGC. Its proposed accounting for the transfer is consistent with the requirements of the Commission's Uniform System of Accounts. However, since this transfer of assets is a sale of and acquisition of an operating unit or system, Applicants must file their proposed journal entries with the Commission to clear Account 102, Electric Plant Purchased or Sold, as required by the instructions to such account, within six months of the date the transfer is consummated.

¹⁴ 15 U.S.C. § 79, et seq. (2000).

The Commission orders:

(A) Applicants' proposed disposition of jurisdictional facilities is hereby authorized, as discussed in the body 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 appropriate filings under section 205 of the FPA, as necessary, to implement the transaction; and

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

(G) Applicants shall account for the transfer of facilities in accordance with the instructions to Account 102, Electric Plant Purchased or Sold, of the Uniform System of Accounts and file, within six months of the date of the transfer, detailed journal entries, with any narrative statements necessary to explain the proposed accounting, including related income tax consequences.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.