

152 FERC ¶ 61,036  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Philip D. Moeller, Cheryl A. LaFleur,  
Tony Clark, and Colette D. Honorable.

DTE Electric Company and  
DTE East China, LLC

Docket No. EC15-138-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES AND  
ACQUISITION OF EXISTING GENERATION FACILITY

(Issued July 16, 2015)

1. On May 11, 2015, pursuant to section 203(a)(1) of the Federal Power Act (FPA)<sup>1</sup> and Part 33 of the Commission's regulations,<sup>2</sup> DTE Electric Company (DTE Electric) and DTE East China, LLC (DTE East China) (together, Applicants) submitted an application for authorization to permit DTE Electric to acquire an approximately 320 megawatt (MW) natural gas-fired peaking facility (Facility) from DTE East China (Proposed Transaction).<sup>3</sup> As discussed below, we have reviewed the Proposed

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<sup>1</sup> 16 U.S.C. § 824b(a)(1) (2012).

<sup>2</sup> 18 C.F.R. pt. 33 (2014).

<sup>3</sup> Application for Authorization for Disposition of Jurisdictional Facilities, Request for Confidential Treatment, and Request for Expedited Consideration, Docket No. EC15-138-000 (May 11, 2015) (Application). Specifically, Applicants request approval under FPA sections 203(a)(1)(A) and 203(a)(1)(B) for the change in control over interconnection and any other facilities deemed to be Commission-jurisdictional, and under FPA section 203(a)(1)(D) for DTE Electric's acquisition of an existing generating facility with a value in excess of \$10 million that is used to make Commission-jurisdictional wholesale sales. Application at n.3.

Transaction under the Commission's Merger Policy Statement<sup>4</sup> and authorize the Proposed Transaction under FPA section 203 as consistent with the public interest.

**I. Background**

**A. Description of Applicants**

**1. DTE Electric**

2. Applicants state that DTE Electric is a direct, wholly owned subsidiary of DTE Energy Company (DTE Energy), and a public utility operating company engaged in the generation and distribution of electric energy in Michigan. Applicants state that DTE Electric owns and controls approximately 13,479 MW of generating capacity and approximately 44,000 miles of distribution lines located in the footprint of the Midcontinent Independent System Operator, Inc. (MISO) and has Commission authorization to engage in wholesale sales of energy and capacity at market-based rates.<sup>5</sup>

**2. DTE East China**

3. Applicants state that DTE East China is an indirect, wholly owned subsidiary of DTE Energy. Applicants note that DTE East China owns and operates the Facility and has Commission authorization to engage in wholesale sales of energy and capacity at market-based rates.<sup>6</sup>

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<sup>4</sup> 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 *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008) (Supplemental Policy Statement). 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).

<sup>5</sup> Application at 4 (citing *Detroit Edison Co.*, 77 FERC ¶ 61,279 (1996)).

<sup>6</sup> *Id.* (citing *DTE East China, LLC*, Docket No. ER05-1469-000 (Oct. 25, 2005) (delegated letter order)).

## **B. Proposed Transaction**

4. Applicants state that DTE Electric issued a Request for Proposals for Natural Gas Simple Cycle Generating Facilities (RFP) on January 30, 2015, seeking up to 350 MW of Unforced Capacity (as defined by MISO) to meet its MISO Zone 7 resource adequacy requirements. Applicants explain that DTE Electric is the provider of last resort for all customer load within its service territory and must provide adequate generation resources to serve the load of its customers in the short- and long-term. Applicants state that DTE Electric solicited proposals for an asset purchase in order to meet its short-term and long-term reliability requirements. According to Applicants, one entity submitted a bid that met DTE Electric's selection criteria, DTE East China, and that DTE Electric and DTE East China anticipate executing an asset purchase agreement in the near future to effectuate the sale of the Facility and associated interconnection facilities, real property, agreements and documents.<sup>7</sup>

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

5. Notice of the Application was published in the *Federal Register*, 80 Fed. Reg. 28,262 (2015), with interventions and protests due on or before June 1, 2015. None was filed.

## **III. Discussion**

### **A. Standard of Review Under FPA Section 203**

6. FPA section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest.<sup>8</sup> The Commission's analysis of whether a transaction will be 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.<sup>9</sup> FPA section 203(a)(4) also requires the Commission to find that the transaction "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."<sup>10</sup> The

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<sup>7</sup> *Id.* at 6-8.

<sup>8</sup> 16 U.S.C. § 824b(a)(4) (2012).

<sup>9</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

<sup>10</sup> 16 U.S.C. § 824b(a)(4) (2012).

Commission's regulations establish verification and information requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or a pledge or encumbrance of utility assets.<sup>11</sup>

**B. Analysis of the Proposed Transaction**

**1. Effect on Competition**

**a. Applicants' Analysis**

7. Applicants state that the Proposed Transaction will not have an adverse effect on competition. Applicants explain that the Proposed Transaction does not involve a merger of previously unaffiliated entities, but rather a transfer of a generating asset between affiliated entities, and therefore there is no change in market concentration.<sup>12</sup>

8. Applicants further explain that there are no vertical market power concerns associated with the Proposed Transaction because it is internal to the DTE Energy corporate family. Therefore, Applicants state that the Proposed Transaction will not result in a change of control over any entities that provide inputs to electric power production or electric transmission assets. Additionally, Applicants state that neither DTE Electric nor its affiliates own or control any electric transmission facilities (other than limited and discrete facilities) and no transmission facilities are to be sold to DTE Electric under the Proposed Transaction except generator interconnection facilities.<sup>13</sup>

**b. Commission Determination**

9. We find that the Proposed Transaction raises no horizontal or vertical market power concerns. The Proposed Transaction creates no new horizontal or vertical combinations of previously unaffiliated assets and does not change market concentration levels in any market. Therefore, we find that the Proposed Transaction will have no adverse effect on competition.

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<sup>11</sup> 18 C.F.R. § 33.2(j) (2014).

<sup>12</sup> Application at 10.

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

## 2. Effect on Rates

### a. Applicants' Analysis

10. Applicants explain that the Proposed Transaction will not have an adverse effect on the rates charged to either captive wholesale power sales customers or transmission service customers. Applicants state that neither DTE Electric nor DTE East China make any wholesale sales of electric energy at cost-based rates or have any transmission customers. Applicants note that while DTE Electric has a cost-based rate tariff on file with the Commission, no customer has taken service under that tariff since 2010. Moreover, Applicants state that both DTE Electric and DTE East China have cost-based reactive power tariffs, and that the annual revenue requirements under those tariffs cannot be changed absent separate approval under FPA section 205. Applicants further state that both DTE Electric and DTE East China are authorized to sell energy, capacity, and ancillary services at market-based rates, and that the Proposed Transaction will have no effect on the rates under their market based-rate tariffs.<sup>14</sup>

### b. Commission Determination

11. We find that the Proposed Transaction will not have an adverse effect on rates. The Proposed Transaction will not have an adverse effect on wholesale power rates because Applicants do not make wholesale power sales at cost-based rates, and they will continue to make sales of electric energy pursuant to their market-based rate authorizations.<sup>15</sup> Based on Applicants' representations that no customer takes service under DTE Electric's cost-based rate tariff, and that the annual revenue requirements under the reactive power tariffs cannot be changed absent a separate FPA section 205 filing, we conclude that the Proposed Transaction will have no adverse effect on rates. Furthermore, Applicants do not have transmission customers that may be affected by the Proposed Transaction.

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<sup>14</sup> *Id.* at 11.

<sup>15</sup> See *Union Electric Co.*, 114 FERC ¶ 61,255, at P 45 (2006) (finding wholesale customers will not be adversely affected where applicant provides wholesale service at market-based rates); *NorAm Energy Servs., Inc.*, 80 FERC ¶ 61,120, at 61,382-83 (1997) (stating that the Commission's ratepayer protection concerns do not apply to customers charged market-based rates).

### 3. Effect on Regulation

#### a. Applicants' Analysis

12. Applicants state that the Proposed Transaction will have no effect on regulation as the Commission will continue to have the same jurisdiction after the Proposed Transaction is consummated as it had before with respect to Applicants and the sale of energy, capacity and ancillary services from the Facility. Additionally, Applicants state that the Proposed Transaction will have no effect on state regulation.<sup>16</sup>

#### b. Commission Determination

13. We find that neither state nor federal regulation will be impaired by the Proposed Transaction. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap at the federal or state level.<sup>17</sup> We find that the Proposed Transaction will not create a regulatory gap at the federal level because the Commission will retain its regulatory authority over the companies after the transaction. We note also that no party alleges that regulation would be impaired by the Proposed Transaction, and that no state commission has requested that the Commission address the issue of the effect of the Proposed Transaction on state regulation.

### 4. Cross-Subsidization

#### a. Applicants' Analysis

14. Applicants state that the Commission has found that "in the context of affiliated generation, a competitive solicitation is the most direct and reliable way to ensure no affiliate preference."<sup>18</sup> Applicants note that in *Ameren* the Commission identified four principles it will use to evaluate whether a competitive solicitation process is transparent, fair and nondiscriminatory: (1) transparency (the competitive solicitation process should be open and fair); (2) definition (the product or products sought through the competitive solicitation should be precisely defined); (3) evaluation (evaluation criteria should be standardized and applied equally to all bids and bidders); and (4) oversight (an independent third party should design the solicitation, administer bidding, and evaluate bids prior to the company's selection). Applicants assert that DTE Electric conducted the

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<sup>16</sup> Application at 11.

<sup>17</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

<sup>18</sup> Application at 12 (citing *Ameren Energy Generating Co.*, Opinion No. 473, 108 FERC ¶ 61,081, at P 64 (2004) (*Ameren*)).

RFP in a transparent, fair and nondiscriminatory manner consistent with the Commission's competitive solicitation guidelines set forth in *Ameren* and, therefore, no affiliate was given an undue advantage or preference.<sup>19</sup> Applicants state that DTE East China submitted the only bid that met DTE Electric's selection criteria.<sup>20</sup>

15. Applicants assert that the process was transparent because all information regarding the RFP was disseminated through a public website, DTE Electric posted a press release announcing the RFP and bidders were pre-qualified by an independent entity that oversaw the process, Charles River Associates, Inc. (Charles River Associates).<sup>21</sup>

16. With regard to definition, Applicants explain that the RFP defined the product clearly and sought facilities that were: (1) simple cycle natural gas-fueled electric generating assets; (2) in service and commercially operational as of the date of issuance of the RFP; (3) of no less than 50 MW of Unforced Capacity (as defined by MISO); (4) physically located within MISO Local Resource Zone 7 (as defined by MISO); and (5) properly permitted.<sup>22</sup>

17. With regard to evaluation, Applicants state that the RFP process contained specific steps to ensure a standardized evaluation. Applicants explain that interested parties were prequalified using criteria that were made publicly available to all interested parties through a website. Applicants state that these evaluation criteria were established prior to the RFP, that Charles River Associates evaluated all bid proposals according to pre-specified criteria with no deviations, and that the process used a leveled-cost tool which was designed to facilitate an objective evaluation framework to be applied equally across all bids.<sup>23</sup>

18. With regard to oversight, Applicants state that Charles River Associates oversaw the entire process. Applicants state that Charles River Associates is not affiliated with DTE Electric or any of its affiliates, and does not have any interest in any of the potential bidders or the outcome of the RFP. Finally, Applicants assert that Charles River

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<sup>19</sup> *Id.* at 12.

<sup>20</sup> *Id.* at 8.

<sup>21</sup> *Id.* at 13-14.

<sup>22</sup> *Id.* at 14-15.

<sup>23</sup> *Id.* at 15-16.

Associates managed the RFP consistent with the Commission's standards of independence.<sup>24</sup>

**b. Commission Determination**

19. Based on the competitive solicitation process presented in the Application, 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.<sup>25</sup> The RFP described in the Application complies with the Commission's guidance in *Ameren* and, therefore, we find there is no affiliate preference that raises cross-subsidization concerns. We also note that no party has argued otherwise.

**5. Other Considerations**

20. Order No. 652 requires that sellers with market-based rate authority timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.<sup>26</sup> To the extent that the foregoing authorization results in a change in status, Applicants are advised that they must comply with the requirements of Order No. 652. In addition, Applicants shall make appropriate filings under section 205 of the FPA,<sup>27</sup> to implement the Proposed Transaction.

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<sup>24</sup> *Id.* at 16.

<sup>25</sup> In addition to documenting the RFP, Applicants made representations that the Proposed Transaction will not result in cross-subsidization of a non-utility company or pledge or encumbrance of utility assets for the benefit of an associate company in Exhibit M of the Application. Our finding regarding cross-subsidization, however, relies on the RFP because, in the context of an acquisition of affiliated generation, a competitive solicitation is the most direct and reliable way to ensure no affiliate preference and may be presented in lieu of Exhibit M. *See Ameren*, 108 FERC ¶ 61,081 at P 67; *see also Ohio Power Co.*, 143 FERC ¶ 61,075, at P 29 (2013), *order granting clarification and denying reh'g*, 146 FERC ¶ 61,016 (2014) ("If a section 203 applicant chooses not to include a traditional Exhibit M as part of its Application or explain why it qualifies for one of the 'safe harbors' described in the Supplemental Policy Statement, it can instead make an *Ameren* showing.").

<sup>26</sup> *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

<sup>27</sup> 16 U.S.C. § 824d (2012).

21. Information and/or systems connected to the bulk power system involved in this transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to FPA section 215.<sup>28</sup> Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information database, and operating systems. If affiliates, personnel or investors are not authorized for access to such information and/or systems connected to the bulk power system, a public utility is obligated to take the appropriate measures to deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, etc., must comply with all applicable reliability and cyber security standards. The Commission, North American Electric Reliability Corporation or the relevant regional entity may audit compliance with reliability and cyber security standards.

The Commission orders:

(A) The Proposed Transaction is hereby authorized, as discussed in the body of this order.

(B) Applicants must inform the Commission of any material change in circumstances that departs from the facts or representations that the Commission relied upon in authorizing the Proposed Transaction within 30 days from the date of the material change in circumstances.

(C) 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.

(D) 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.

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

(F) Applicants, to the extent that they have not already done so, shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction.

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<sup>28</sup> 16 U.S.C. § 824o (2012).

(G) DTE Electric shall account for the transaction in accordance with Electric Plant Instruction No. 5 and Account 102, Electric Plant Purchased or Sold, of the Uniform System of Accounts. DTE Electric shall submit its final accounting entries within six months of the date that the transaction is consummated, and the accounting submissions shall provide all the accounting entries and amounts related to the transfer along with narrative explanations describing the basis for the entries.

(H) Applicants shall notify the Commission within 10 days of the date on which the Proposed Transaction is consummated.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.