

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

American Electric Power Service Corporation	Docket Nos. EC07-11-000
AEP Energy Partners, LP	EC07-12-000
AEP Texas Central Company	ER07-117-000
AEP Texas North Company	
Appalachian Power Company	
Columbus Southern Power Company	
Indiana Michigan Power Company	
Ohio Power Company	
Public Service Company of Oklahoma	
Southwestern Electric Power Company	

ORDER DISCLAIMING JURISDICTION

(Issued December 29, 2006)

1. In this order, the Commission disclaims jurisdiction over proposed transactions by American Electric Power Service Corporation (AEP Service), the AEP Operating Companies,¹ and AEP Energy Partners, L.P. (AEP Marketer) that Applicants state will permit AEP Service and the AEP Operating Companies to largely exit the wholesale marketing and trading business within the Electric Reliability Council of Texas (ERCOT), consistent with electric industry restructuring in ERCOT.

¹ For purposes of this order, the AEP Operating Companies are AEP Texas Central Company (TCC), AEP Texas North Company (TNC), Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Ohio Power Company, Public Service Company of Oklahoma (PSO) and Southwestern Electric Power Company (SWEPCO).

Background

2. On October 31, 2006, as supplemented on November 9, 2006, the Applicants filed an application seeking a disclaimer of jurisdiction under section 203 of the Federal Power Act (FPA)² over the proposed transfer of long-term requirements contracts, referred to as the Non-Dedicated Contracts. They also request a disclaimer of jurisdiction under FPA section 205³ in connection with two affiliate power purchase agreements (Affiliate PPAs) between AEP Service and AEP Marketer. Applicants seek, in the alternative, approvals under FPA sections 203 and 205 to engage in the proposed transactions. On October 31, 2006, as supplemented on November 9, 2006, Applicants filed a second application seeking a disclaimer of jurisdiction under FPA section 203 in connection with the proposed transfer of a second set of long-term requirements contracts, referred to as the Dedicated Contracts, or in the alternative, approval of the transfer under section 203.

3. AEP Service is a wholly-owned subsidiary of American Electric Power Company, Inc. (AEP), a public utility holding company. AEP Service is a service company that provides management and professional services to AEP, the AEP Operating Companies and other AEP affiliates.

4. The AEP Operating Companies are public utilities that own generation, transmission and/or distribution facilities that are used to serve retail and wholesale customers in Arkansas, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Tennessee, Texas, Virginia and West Virginia.

5. AEP Marketer is a subsidiary of AEP and the successor in interest to CSW Power Marketing Inc. It has received market-based rate authority from the Commission.

6. A primary distinction between the Dedicated Contracts and the Non-Dedicated Contracts is that any realizations from sales under the Dedicated Contracts is dedicated to TCC or TNC (collectively, the ERCOT Operating Companies), whereas revenues under the Non-Dedicated Contracts are not dedicated solely to the ERCOT Operating Companies. Any net positive revenues from sales under these contracts are treated as off-system sales under the AEP West Pool Agreement and are shared by the AEP Operating Companies that are parties to that agreement in accordance with its terms. Applicants note that as a result of revisions to the AEP System Integration Agreement and West Pool Agreement that went into effect earlier this year, TCC and TNC have been

² 16 U.S.C. § 824b (2000), *amended by* the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594 (2005).

³ 16 U.S.C. § 824d (2000).

removed from the West Pool Agreement, and the margins from non-dedicated sales in ERCOT are now shared under that agreement exclusively by SWEPCO and PSO.

7. Under the Dedicated Contracts, one or more of the AEP Operating Companies sells wholesale power entirely within ERCOT to provide load-following service to meet the buyer's retail loads.

8. Under the Non-Dedicated Contracts, AEP Service, on behalf of one or more AEP Operating Companies, sells wholesale power entirely within ERCOT to provide load-following service to meet the buyer's retail loads.

9. Applicants are proposing transfers of both the Dedicated Contracts and the Non-Dedicated Contracts in a series of transactions. The ERCOT Operating Companies will end their involvement in the sale of electric power at wholesale, and AEP Marketer will become AEP's wholesale marketing arm within ERCOT. The Dedicated Contracts will each be assigned to AEP Marketer by the AEP Operating Companies that are sellers under individual separate assignment agreements. AEP Service also is assigning a hedging contract to AEP Marketer, where AEP Service is the buyer, to support sales under the Dedicated Contracts.

10. AEP Service proposes to assign the Non-Dedicated Contracts on behalf of SWEPCO and PSO to AEP Marketer. They also propose that AEP Service, acting as an intermediary for SWEPCO and PSO (as one unit), will enter into the two Affiliate PPAs with AEP Marketer. The first Affiliate PPA will pay to AEP Service the proceeds received by AEP Marketer from supplying baseload quantities under the Non-Dedicated Contracts. Applicants state that the baseload energy supply is bought using forward contracts, which have a low risk profile. Under the second Affiliate PPA, AEP Marketer will purchase from AEP Service a portfolio of hedges held to meet the demand from existing contracts in excess of the baseload quantity. Applicants state that the second Affiliate PPA carries additional risk because the portfolio contains options. Applicants state that all this is intended: (i) to maintain for SWEPCO and PSO the portion of the profits generated from supplying the baseload, which is low in risk and which they would have received from the Non-Dedicated Contracts, and (ii) to shift to AEP Marketer all the risk and profit or loss associated with taking on that risk.

11. Applicants argue that the Dedicated Contracts and the Non-Dedicated Contracts involve wholesale power transactions that occur solely within ERCOT and therefore are not jurisdictional to the Commission. They state that all delivery points served under all these contracts are within ERCOT and that the power used to satisfy the contractual obligations is sourced within ERCOT. Applicants argue that under Commission precedent, transactions occurring solely within ERCOT are not subject to Commission jurisdiction, even if the seller is otherwise a jurisdictional public utility. While in the past

AEP has consented to Commission jurisdiction over wholesale power transactions by its operating affiliates within ERCOT, Applicants argue that the Commission cannot acquire jurisdiction through consent. Finally, because both sets of contracts involve only power sales within ERCOT and are therefore not jurisdictional facilities under the FPA, Applicants argue that they do not need section 203 approval to assign them to AEP Marketer and that the Commission should disclaim jurisdiction.

12. Applicants state that the Commission should disclaim jurisdiction over the Affiliate PPAs under FPA section 205 for essentially the same reasons. The Affiliate PPAs involve transactions solely within ERCOT. Under the first Affiliate PPA, AEP Service will sell power to AEP Marketer so that AEP Marketer can meet its obligations under the Non-Dedicated Contracts to supply load in ERCOT. The power sold to AEP Marketer under the first Affiliate PPA is sourced from hedges that all represent power supplies and options acquired within ERCOT, and deliveries to AEP Marketer will take place in ERCOT. The second Affiliate PPA provides for the sale of a residual amount under the hedges from AEP Service to AEP Marketer. Applicants state that the power being sold is sourced entirely within ERCOT and will be delivered to AEP Marketer within ERCOT.

Notices of Filing and Responsive Pleadings

13. Notice of Applicants' request in Docket No. EC07-11-000 regarding the Dedicated Contracts was published in the *Federal Register*, 71 Fed. Reg. 66,764 (2006), with interventions and protests due on or before November 21, 2006. Notice of Applicants' requests in Docket Nos. EC07-12-000 and ER07-117-000 regarding the Non-Dedicated Contracts and over the Affiliate PPAs was published in the *Federal Register*, 71 Fed. Reg. 66,324 (2006), with interventions and protests due on or before November 21, 2006. The Louisiana Public Service Commission filed timely notices of intervention in these proceedings. On November 28, 2007, the Arkansas Public Service Commission filed a motion for late intervention in these proceedings. No comments were filed.

Discussion

Procedural matter

14. Pursuant to Rule 214(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(a)(2) (2006), any State Commission is a party to any proceeding upon filing a timely notice of intervention. We will grant the motions for late intervention of the Arkansas Public Service Commission given its interests in this proceeding, the early stage of this proceeding, and the absence of any undue prejudice or delay.

Whether the Commission Has Jurisdiction Under Sections 203 and 205

15. Section 201(e) of the FPA defines a public utility is “any person who owns or operates facilities subject to the jurisdiction of the Commission” under Part II of the FPA.⁴ Section 201(b) of the FPA provides for Commission jurisdiction over all facilities for the transmission of electric energy in interstate commerce and wholesale sales of electric energy in interstate commerce, with certain exceptions not applicable here.⁵ Jurisdictional facilities include contracts for wholesale sales of electric energy in interstate commerce.⁶ FPA section 203(a)(1)(A) specifies that no public utility may sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission or any part thereof with a value in excess of \$10 million without first receiving authorization to do so from the Commission. Section 205(a) requires, among other things, that all rates for sales of electric energy subject to the Commission’s jurisdiction be just and reasonable, and section 205(c) requires all schedules showing rates and charges for such sales be filed with the Commission.

16. Electric energy is deemed to be sold in interstate commerce only if it is transmitted in interstate commerce or is commingled with electric energy that is transmitted in interstate commerce.⁷ The electric utilities in the ERCOT transmission system have no electrical interconnections with transmission facilities outside ERCOT (with the exception of asynchronous direct current interties that do not cause electric utilities or other entities operating exclusively within ERCOT to become subject to Commission jurisdiction other than for limited purposes that are not relevant here).⁸ Thus, the Commission’s section 203, 205 and 206 authorities do not apply to contracts and rates involving transactions that take place solely within ERCOT. In short, wholesale sales of

⁴ 16 U.S.C. §824(e) (2000), *amended by* the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1295(a)(2), 119 Stat. 594 (2005).

⁵ 16 U.S.C. §824(b) (2000), *amended by* the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1295(a)(1), 119 Stat. 594 (2005).

⁶ *See Citizens Energy Corp.*, 35 FERC ¶ 61,198 at 61,452 (1986); *Hartford Electric Light Co. v. F.P.C.*, 131 F.2d 953, 961 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943).

⁷ *See Federal Power Commission v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972).

⁸ 16 U.S.C. § 824(b)(2) (2000), *amended by* the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1295(a)(1), 119 Stat. 594 (2005).

electric energy occurring wholly within ERCOT are not subject to the Commission's jurisdiction but rather to that of the Public Utility Commission of Texas.⁹

Commission Determination

17. We will grant Applicants' request for a disclaimer of jurisdiction over the transfers of the Dedicated Contracts and the Non-Dedicated Contracts under FPA section 203. We also will grant Applicants' request for a disclaimer of jurisdiction over the Affiliate PPAs under FPA section 205. These contracts all involve wholesale power sales that occur entirely within ERCOT and that therefore are not subject to the Commission's jurisdiction under these sections of the FPA.¹⁰

The Commission orders:

Applicants' requests for disclaimers of jurisdiction in this proceeding are hereby granted.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁹ See *TXU Energy Trading Co.*, 91 FERC ¶ 61,242 at 61,874 (2000); *Destec Power Services, Inc.*, 72 FERC ¶ 61,277 at 62,204-205 (1995). Section 201(c) of the FPA, 16 U.S.C. §824(c) (2000), provides that "electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as the transmission takes place within the United States."

¹⁰ We note that the Commission continues to have jurisdiction over the West Pool Agreement and that the distribution of revenues under that agreement remains subject to our review under FPA sections 205 and 206. 16 U.S.C. §§ 825d, 824e (2000), *amended by the Energy Policy Act of 2005*, Pub. L. No. 109-58, § 1295(b), 119 Stat. 594 (2005). Additionally, although we are disclaiming jurisdiction over the Dedicated and Non-Dedicated contracts and the Affiliate PPAs, the Commission reserves the right to require those contracts and agreements to be filed for informational purposes to determine their effects on the West Pool Agreement and jurisdictional services and rates.