

153 FERC ¶ 61,006
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.

American Transmission Company LLC

Docket No. EC15-115-000

ORDER AUTHORIZING ACQUISITION
OF JURISDICTIONAL FACILITIES

(Issued October 2, 2015)

1. On April 7, 2015, American Transmission Company LLC (ATC or Applicant) filed an application pursuant to section 203(a)(1)(B) of the Federal Power Act (FPA)¹ requesting Commission authorization, on a prospective basis, for ATC's prior acquisition from Madison Gas & Electric Company (Madison Gas) of certain transmission facilities on February 15, 2007 (Closed Transaction). The Commission has reviewed the application under the Commission's Merger Policy Statement.² As discussed below, we authorize the Closed Transaction on a prospective basis from the date of this order, as consistent with the public interest.

¹16 U.S.C. § 824b (2012).

² 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, 120 FERC ¶ 61,060 (2007) (Supplemental Policy Statement), *order on clarification*, 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).

I. Background**A. Description of ATC**

2. ATC, a Wisconsin limited liability company and single-purpose, for-profit transmission company, owns and operates, approximately 9,500 miles of transmission facilities in Wisconsin, Illinois, Minnesota, and Michigan. ATC states that on February 1, 2002, it transferred operational control of its facilities to the Midcontinent Independent System Operator, Inc. (MISO). ATC states that since that time, MISO has provided transmission service over ATC's transmission facilities pursuant to the terms of the MISO Open Access Transmission Tariff (MISO Tariff).³

B. Description of Madison Gas

3. Madison Gas is a Wisconsin public utility and is a part of MGE Energy, Inc., an investor-owned public utility holding company. Madison Gas is engaged in the generation, purchase, and distribution of electric energy, and the distribution of natural gas, in an area of southern Wisconsin. Madison Gas provides electric service to residential, commercial, and industrial customers in an area covering approximately 250 square miles, with a 2011 peak load of 778 megawatts, and annual sales of approximately 3 million MWh. Madison Gas also distributes natural gas throughout a 1,325 square mile area. Madison Gas owns 3.55 percent of ATC.⁴

C. Description of the Closed Transaction

4. ATC states that on November 24, 2000, in Docket No. EC00-136-000, the Commission authorized the initial transfer of Madison Gas' transmission system to ATC.⁵ ATC further states that in 2007, additional facilities owned by Madison Gas (not covered by the 2000 acquisition) were transferred to ATC. ATC states that the terms and conditions of the "Closed Transaction" are contained in the Asset Purchase Agreement and LLC Agreement (collectively, Agreements), attached as Exhibit I to the Application. ATC states that it acquired ownership and operation of certain facilities from Madison Gas that were reclassified from distribution to transmission by the Public

³ Application at 2-3.

⁴ *Id.* at 4.

⁵ *Madison Gas & Elec.*, 93 FERC ¶ 61,215 (2000).

Service Commission of Wisconsin.⁶ It states that the purchase price was \$1,482,640.21 as of February 15, 2007, the closing date of the Closed Transaction. ATC states that the purchase price was equal to the combined net book value of the transmission facilities determined as of the month-end prior to closing, including sales tax. ATC states that it compensated Madison Gas by paying 50 percent of the \$1,482,640.21 in cash and by giving Madison Gas an equity interest in ATC equal to the remaining 50 percent. ATC explains that the transmission facilities became part of ATC's transmission system and were placed under the operational control of MISO with open access transmission services then provided over such facilities under the MISO Tariff.⁷

II. Notice of Filing

5. Notice of the Application was published in the *Federal Register*, 80 Fed. Reg. 19,979 (2015), with interventions and protests due on or before April 28, 2015. None was filed.

III. Discussion

A. Standard of Review Under FPA Section 203

6. Section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest.⁸ 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.⁹ 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."¹⁰ The Commission's

⁶ Application at 4-5 (citing Joint Application of Madison Gas and Electric Company, MGE Transco Investment LLC and American Transmission Company, LLC to Reclassify Certain Radial Lines as Transmission Facilities, and for Approval of Affiliated Interest Agreements and the Acquisition of an Ownership Interest in a Public Utility Related to the Transfer of Certain Facilities, Docket No. 05-AE-144 (Public Service Commission of Wisconsin Jan. 19, 2007)).

⁷ Application at 4-5.

⁸ 16 U.S.C. § 824b(a)(4) (2012).

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

regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.¹¹

7. Under section 203(a)(1)(B), a public utility must obtain authorization from the Commission prior to acquiring, merging, or consolidating facilities subject to the Commission's jurisdiction. ATC should have, but did not, request authorization under FPA section 203 from the Commission prior to the Closed Transaction. Accordingly, contrary to the requirements of FPA section 203, ATC failed to obtain Commission authorization in a timely manner.¹²

B. Analysis Under FPA Section 203

1. Effect on Competition

8. ATC states that the Closed Transaction does not involve disposition of any generation assets or the combination of upstream and downstream assets. It states that the Closed Transaction does not affect concentration in generation markets, create an opportunity to engage in anticompetitive behavior in those markets, or implicate vertical market power concerns. Therefore, ATC argues that there are no horizontal market power concerns raised as a result of the Closed Transaction.¹³

9. ATC further states that the Closed Transaction was in furtherance of the policy goals of Wisconsin law, which led to the creation of ATC. It explains that those goals are: (1) to create a single eastern Wisconsin transmission system; (2) to facilitate operation and access to the transmission system; and (3) to facilitate needed expansion of

¹⁰ 16 U.S.C. § 824b(a)(4).

¹¹ 18 C.F.R. § 33.2(j) (2015).

¹² ATC has submitted 22 filings under FPA section 203 that are between sixteen months and eight years and five months late. *See* Docket Nos. EC14-134, EC15-5, EC15-6, EC15-7, EC15-8, EC15-14, EC15-50, EC15-51, EC15-55, EC15-95, EC15-156, EC15-92, EC15-93, EC15-94, EC15-97, EC15-101, EC15-111, EC15-112, EC15-115, EC15-128, EC15-149, and EC15-152. With respect to the lateness and the volume of late filings by ATC, we have referred this matter to the Commission's Office of Enforcement for further examination and inquiry as may be appropriate. Applicants for approval under FPA Section 203 are reminded that they must submit required filings on a timely basis or face possible sanctions by the Commission.

¹³ Application at 6-7.

the transmission system.¹⁴

10. ATC states that for these reasons, the Commission has previously found that the transfer of facilities to ATC by others, including the original contributing companies (Wisconsin Electric Power Company, Wisconsin Power and Light Company, Madison Gas, Wisconsin Public Service Corporation, Edison Sault Electric Company, and South Beloit Water Gas and Electric Company) together with other municipal entities “will facilitate greater competition in wholesale markets.”¹⁵ ATC asserts that its Application provides similar benefits.¹⁶

11. We find that the Closed Transaction does not raise horizontal market power concerns. Applicants have demonstrated that, because the Closed Transaction does not involve the disposition of generating assets, the Closed Transaction does not affect the relevant geographic markets.

12. ATC has turned operational control of its transmission facilities over to MISO. Turning over operational control of transmission facilities to an independent entity mitigates any concerns about transmission-related vertical market power because it eliminates a company’s ability to use its transmission system to harm competition.¹⁷ We also find that the Closed Transaction does not raise any vertical market power concerns.

2. Effect on Rates

13. ATC states that the Commission’s analysis of rate effects under FPA section 203 focuses on the cause of any rate increases, for example, whether the cause of any rate increases, for example, to determine whether an increase relates to the acquisition adjustments which are typically not permitted under Commission policy. The Commission also considers whether any ratepayer protection mechanisms are required.

¹⁴ *Id.* at 7.

¹⁵ *Id.* (citing *Wis. Elec. Power Co.*, 90 FERC ¶ 61,346 at 62,144 (2000); *Wis. Power & Light Co.*, 90 FERC ¶ 61,347 (2000); *S. Beloit Water, Gas and Elec. Co.*, 92 FERC ¶ 62,266 (2000); *Edison Sault Elec. Co.*, 93 FERC ¶ 61,146 (2000); *Madison Gas & Elec. Co. and Wis. Public Serv. Corp.*, 93 FERC ¶ 61,215 (2000), *order on clarification*, 93 FERC ¶ 62,201 (2000); *Amer. Trans. Co. LLC*, 95 FERC ¶ 62,096 (2001)).

¹⁶ *Id.*

¹⁷ *See, e.g., Nat’l Grid plc and KeySpan Corp.*, 117 FERC ¶ 61,080, at P 45 (2006) (*National Grid*).

ATC states that it paid current net book value for the facilities it acquired from Madison Gas with no acquisition adjustment. It argues that the Commission has found that there is no adverse impact on rates when a transaction results in different customers paying rates that include only the net book value of a jurisdictional facility, as is the case with the Closed Transaction.¹⁸ ATC further asserts that the Closed Transaction has virtually no effect on transmission rates because the net book value of the facilities acquired under the agreement, \$1,482,640.21, is only .0004 percent of ATC's total net utility plant of \$3,410,406,031 as of May 30, 2014.¹⁹

14. ATC states that the acquired transmission facilities were placed under the full operational control of MISO, with open access transmission service then provided under the MISO Tariff. It states that its transmission customers realize greater operational efficiency and reliability benefits from the expansion of ATC's transmission system. ATC states that for these reasons, the Closed Transaction does not adversely affect rates and does not require the use of any ratepayer protection mechanisms. Additionally, ATC points out that the Commission has found that there is no adverse effect on rates for comparable transactions where the acquisition of the transmission assets was made at their respective net book value.²⁰

15. As the Commission has explained on prior occasions, our analysis of the effects of a proposed transaction on rates under FPA section 203 differs from the analysis of whether rates are just and reasonable under FPA section 205.²¹ Our focus here, in this order, is on the effect that the Closed Transaction will have on rates, whether that effect is adverse, and whether any adverse effect will be offset or mitigated by benefits that are likely to result from the Closed Transaction. We find the Closed Transaction will not

¹⁸ Application at 8 (citing *ITC Midwest LLC*, 133 FERC ¶ 61,169 (2010) (approving an FPA section 203 application where the cost of a transmission line is transferred from one pricing zone to another pricing zone)).

¹⁹ *Id.*

²⁰ *Id.* at 8-9.

²¹ See, e.g., *ITC Holdings Corp.*, 143 FERC ¶ 61,256, at P 118 (2013); *Startrans IO, L.L.C.*, 122 FERC ¶ 61,307 at P 25; *ALLETE*, 129 FERC ¶ 61,174 at P 19.

have an adverse effect on rates because the transmission facilities were transferred at net book value and the Closed Transaction will result in offsetting benefits.²²

16. ATC states that the transmission facilities were transferred at net book value, with no acquisition adjustment. In addition, as ATC explains, the Closed Transaction will result in benefits such as operational control of the facilities by MISO, transmission service under the MISO Tariff, and greater efficiency and reliability as a result of the expansion of ATC's transmission expansion.

3. Effect on Regulation

17. ATC states that the Closed Transaction does not result in a regulatory gap at the state or federal level. It explains that the Closed Transaction does not result in a regulatory gap at the federal level because the Commission has jurisdiction over the acquired facilities.

18. We find no evidence that either state or federal regulation will be impaired by the Closed 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.²³ We find that the Closed Transaction will not create a regulatory gap at the federal level because the Commission will retain its regulatory authority over the ATC after the transaction. The Commission stated in the Merger Policy Statement that it ordinarily will not set the issue of the effect of a transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the transaction. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission stated that it may set the issue for hearing, and that it will address such circumstances on a case-by-case basis.²⁴ We note that no party alleges that regulation would be impaired by the Closed Transaction, and no state commission has requested that the Commission address the issue of the effect on state regulation.

4. Cross Subsidization

19. ATC states that, based on facts and circumstances known to Applicant or that are reasonably foreseeable, the Closed Transaction did not result in, at the time of the transaction, and will not result in the future, in cross-subsidization of a non-utility

²² *Idaho Power Co. PacifiCorp*, 151 FERC ¶ 61,233, at P 40 (2015).

²³ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

²⁴ *Id.* at 30,125.

associate company or pledge or encumbrance of utility assets for the benefit of an associate company. ATC states that, while Madison Gas is an equity owner of ATC, owning 3.55 percent of the equity of ATC, cross-subsidy concerns are not present. Specifically, ATC states that:

(a) ATC's utility assets are not pledged or encumbered other than through general bond issuances that are routinely used by utilities to raise capital. ATC will not be issuing additional debt or equity to fund the [Closed Transaction], and the assets [subject to the Closed Transaction] will not be pledged or encumbered any differently than ATC's other utility assets.

(b) The [Closed Transaction] will not result in "[a]ny 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."

(c) The [Closed Transaction] will not result in "[a]ny new issuance 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."

(d) The [Closed Transaction] will not result in "[a]ny 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 sections 205 and 206 of the Federal Power Act."²⁵

20. Based on our review of the representations as presented in the application, we find that the Closed Transaction will not result in cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company. We note that no party has argued otherwise.

21. When a controlling interest in a public utility is acquired by another company, whether a domestic company or a foreign company, the Commission's ability to adequately protect public utility customers against inappropriate cross-subsidization may be impaired unless it has access to the acquirer's books and records. Section 301(c) of the FPA gives the Commission authority to examine the books and records of any person who controls, directly or indirectly, a jurisdictional public utility insofar as the books and

²⁵ Application at 9-10 & Exhibit M.

records relate to transactions with or the business of such public utility. In addition, ATC is subject to the record-keeping and books and records requirements of PUHCA 2005.²⁶ The approval of this transaction is based on such ability to examine books and records.

C. Accounting Analysis

22. Exhibit N of the application includes proposed accounting entries recording the Closed Transaction. ATC's accounting for the Closed Transaction is found to be in compliance with Electric Plant Instruction No. 5 and the instructions for Account 102(A) Electric Plant Purchased or Sold, of the Uniform System of Accounts. However, it is of concern that ATC did not comply with the instructions for Account 102(B) which requires a filing with the Commission of the proposed journal entries within six months from the date of acquisition or sale of property. ATC is directed to examine, and strengthen as necessary, its practices and procedures to ensure that they comply with the Commission's rules regarding the recording and timely reporting of asset purchase and sales transactions under 18 C.F.R. Part 101, Electric Plant Instruction No. 5, and Account 102.

D. Other Considerations

23. 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 215.²⁷ Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information databases, 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.

²⁶ 42 U.S.C. § 15,451 *et seq.* (2012).

²⁷ 16 U.S.C. § 824o (2012).

24. 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.²⁸ 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.

The Commission orders:

(A) The Closed Transaction is hereby authorized on a prospective basis from the date of this order, as discussed in the body of this order.

(B) ATC 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) If the Closed Transaction results in changes in the status or the upstream ownership of ATC's affiliated qualifying facilities, if any, an appropriate filing for recertification pursuant to 18 C.F.R. § 292.207 shall be made.

²⁸ *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).

(G) ATC shall adhere to the accounting requirements discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.