

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.

Tri-County Electric Cooperative, Inc.
Xcel Energy Services, Inc.
Southwestern Public Service Company

Docket No. EL06-92-000

ORDER DISCLAIMING JURISDICTION

(Issued December 8, 2006)

1. On July 28, 2006, as amended on August 15, 2006, Tri-County Electric Cooperative, Inc. (Tri-County), and Xcel Energy Services Inc., on behalf of its operating company affiliate Southwestern Public Service Company (SPS), (collectively, Petitioners) jointly filed a petition for declaratory order. Petitioners request that the Commission disclaim jurisdiction over Tri-County in connection with its newly-acquired ownership and control of certain SPS distribution facilities. Specifically, Petitioners request that the Commission confirm that, following completion of the transaction, Tri-County will not be considered a “public utility” under section 201(e) of the Federal Power Act (FPA).¹ Alternatively, Petitioners request that, if the Commission does not disclaim jurisdiction over Tri-County concerning the purchased distribution facilities and related delivery services, the Commission grant Tri-County waivers of certain requirements of the FPA because of the limited and discrete nature of the facilities and services at issue.

Background

2. Petitioners state that Tri-County is a not-for-profit electric cooperative that provides electric service to the rural Oklahoma Panhandle. As of December 2005, Tri-County served 11,500 customers in Beaver, Cimarron, and Texas counties in Oklahoma. Tri-County has more than 4,100 miles of distribution lines, over 200 miles of transmission lines, and operates 20 substations. Tri-County, Petitioners explain, has never been a considered a public utility under the FPA.

¹ 16 U.S.C. § 824(e) (2000).

3. By an asset purchase agreement dated October 6, 2005 (Agreement), Tri-County agreed to purchase SPS's retail service territory in several towns located in Oklahoma, Kansas and Texas. SPS will also sell, and Tri-County will then own and control, assets that SPS used to serve the retail load.² Specifically, the Agreement calls for SPS to sell to Tri-County about 28 miles of 115 kV facilities, 98 miles of 69 kV facilities and eight substations located in Oklahoma, Kansas and Texas. SPS will retain certain higher-voltage network transmission facilities in Oklahoma and Kansas. In addition, the Agreement provides for the sale of all of SPS's electric distribution assets located in Oklahoma and Kansas as well as specific SPS distribution assets located in Texhoma and Hansford County, Texas.³

4. The sale of assets to Tri-County includes, in particular, a 34 kV distribution line and related distribution facilities (Distribution Line) to which two 10 MW wind farms located in Hansford County, Texas (Wind Farms) are interconnected. The Distribution Line terminates at the Texas County Interchange in Texas County, Oklahoma, where energy then enters SPS's bulk transmission system.

5. Petitioners state that, following the asset sale, SPS will retain an undivided interest in the Distribution Line solely to: (1) transmit energy from the Wind Farms to the Texas County Interchange; (2) if necessary, deliver SPS energy to Tri-County to the extent SPS sources such energy from the Wind Farms; and (3) deliver energy to Texas retail customers. The Distribution Line serves approximately 4.2 MW of SPS's Texas retail load.⁴ Other than SPS's retained interest, Petitioners indicate that Tri-County will have all other rights to the Distribution Line, but will use that line only for local distribution service to retail customers and not for wholesale sales or interstate transmission of energy from the Wind Farms. Petitioners request that the Commission find that it has jurisdiction only over SPS's retained interest in the Distribution Line, and disclaim jurisdiction over Tri-County with respect to its interest in, and use of, that line.

² SPS filed an application under section 203 of the FPA for approval for the transfer of jurisdictional assets to Tri-County. However, the Commission subsequently accepted the withdrawal of that filing because the aggregate value of the jurisdictional assets in the transaction was below the jurisdictional threshold of \$10,000,000. *See Xcel Energy Services, Inc.*, Docket No. EC06-40-000 (Apr. 19, 2006) (unpublished letter order).

³ The Agreement was amended to exclude assets in Texas from those being transferred to Tri-County at the closing. The assets in Texas will be transferred once all state regulatory approvals are obtained.

⁴ Although the retail load served by the Distribution Line and the interconnected Wind Farms are in Texas, the Distribution Line is in Oklahoma near the Texas border.

6. In their August 15 amendment, Petitioners further argue that, as an electric cooperative that sells less than 4,000,000 MWh of electricity per year,⁵ Tri-County is not a “public utility” under section 201(f) of the FPA, as amended by the Energy Policy Act of 2005.⁶ Petitioners state that, for this reason alone, the Commission should disclaim jurisdiction over Tri-County respecting the delivery and transmission services at issue.

Notice and Responsive Pleadings

7. Notice of Petitioners’ filing was published in the *Federal Register*, 71 Fed. Reg. 47,799 (2006), with interventions and protests due on or before on August 28, 2006.

8. Golden Spread Electric Cooperative, Inc. (Golden Spread) filed a motion to intervene and to dismiss the petition as moot. Golden Spread argues that there is no dispute or questionable point of law that the Commission needs to address given that Tri-County annual sales after the purchase will be about 600,000 MWh and that FPA section 201(f) is clear that electric cooperatives with annual sales of 4,000,000 MWh or less are not public utilities. The National Rural Electric Cooperative Association (NRECA) filed an intervention and similar comments.

9. Golden Spread also believes that any filing fee paid by Tri-County should be returned, given that the application was unnecessary. Golden Spread argues that, even if the petition was needed, Tri-County’s request to exert control of limited and discrete transmission facilities is akin to requesting a waiver of Order No. 888. Golden Spread points out that such requests by jurisdictional entities, including cooperatives, typically do not require a filing fee, nor do requests by non-jurisdictional entities seeking clarification whether an open access transmission tariff meets the safe harbor provisions under Order No. 888.

Discussion

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

⁵ Petitioners state that in 2005, Tri-County’s total sales of energy were less than 300,000 MWh. After its purchase of facilities from SPS, Tri-County projects that its total annual energy sales will be less than 600,000 MWh.

⁶ 16 U.S.C. § 824 (2000), *amended by* Energy Policy Act of 2005 § 1291, Pub. L. No. 109-58, 119 Stat. 594, 984-85 (2005).

11. The Energy Policy Act of 2005 amended section 201(f) of the FPA to exclude from the otherwise-applicable definition of “public utility”, and thus effectively exempt from Parts II and III of the FPA “an electric cooperative that... sells less than 4,000,000 megawatt hours of electricity per year.”⁷

12. Based on Petitioners’ representation that Tri-County’s annual sales of energy fall, and will continue to fall, below the jurisdictional threshold of 4,000,000 MWh per year, we find that Tri-County should not be considered a public utility under Parts II and III of the FPA, even after its purchase of certain SPS assets.⁸

13. We deny Golden Spread’s request that Petitioners’ filing fee be returned. Petitioners did not withdraw their petition for declaratory order, but rather amended their petition to note the amendments to the FPA and continued to ask the Commission for a determination. It is therefore not appropriate to refund the filing fee.

The Commission orders:

Petitioners’ petition for declaratory order finding that Tri-County should not be considered a public utility under Parts II and III of the FPA is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁷ Energy Policy Act of 2005, Pub. L. No. 109-58 § 1291(c), 119 Stat. 594, 984-85 (2005).

⁸ 16 U.S.C.A. § 824 (West Supp. 2006).