

132 FERC ¶ 61,249
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Denver City Energy Associates, L.P.

Docket No. EC10-31-001

ORDER ON REHEARING
AND CLARIFICATION

(Issued September 21, 2010)

1. On May 17, 2010, Golden Spread Electric Cooperative, Inc. (Golden Spread Cooperative) and GS Electric Generating Cooperative, Inc. (GS Generating) (collectively, Golden Spread) filed a request for rehearing and/or clarification of the Commission's order in this proceeding.¹ For the reasons discussed below, we deny Golden Spread's request for rehearing and clarification.

I. Background

2. Denver City Energy Associates, L.P. (Denver City) filed an application under section 203(a)(1) of the Federal Power Act (FPA)² seeking authorization for the disposition of certain upstream equity interests in Denver City held by EIF Management, LLC (EIF) to Great Point Power, LLC (Great Point). The proposed transaction was part of a larger transaction in which Great Point acquired from EIF indirect interests in a portfolio of four generating projects (including Mustang Station, the facility owned by Denver City) and certain passive interests held by EIF in an independent transmission entity.³ In its application, Denver City requested privileged and confidential treatment of the Purchase and Sale Agreement, designated as Exhibit I, under the Commission's model protective order.⁴ Subsequently, Denver City requested that the Commission

¹ *Denver City Energy Associates*, 131 FERC ¶ 61,029 (2010) (April 15 Order).

² 16 U.S.C. § 824b (2006).

³ On June 8, 2010, the Commission received notice that the proposed transaction had been consummated.

⁴ *Denver City Energy Associates* January 10, 2010 Application at 2 (Application).

adopt its proposed protective order to address “highly confidential” material (Protective Order).⁵

3. In its protests, Golden Spread argued, among other things, that the application was incomplete in that Denver City failed to identify the Joint Operating Agreement⁶ between GS Generating and Denver City as a jurisdictional facility included in the proposed transaction.⁷ Golden Spread requested that the Commission issue a deficiency letter requiring Denver City to identify the Joint Operating Agreement as a jurisdictional facility. In addition, Golden Spread argued that Denver City did not justify the need for its proposed heightened protective order, which, according to Golden Spread, would effectively preclude any Golden Spread representatives from reviewing Exhibit I to verify the jurisdictional facilities subject to the proposed transaction.⁸

4. In the April 15 Order, the Commission authorized the proposed transaction, finding that it would not adversely affect competition, rates, or regulation, nor would it result in inappropriate cross-subsidization or encumbrances. The Commission declined to issue the deficiency letter requested by Golden Spread, stating that, because it had already determined that the proposed transaction would have no effect on rates, “no purpose would be served by issuing a deficiency letter identifying the Joint Operating Agreement as a jurisdictional facility being disposed of in the proposed transaction.”⁹ The Commission also granted Denver City’s motion to adopt the Protective Order and explained that Golden Spread could gain access to Exhibit I if it executed the Protective Order.¹⁰

⁵ Denver City January 12, 2010 Motion at 15-20.

⁶ Denver City and GS Generating each owns a 50 percent undivided interest in the Mustang Station, and each sells its share of the electric output from the Mustang Station to Golden Spread Cooperative pursuant to long-term power purchase agreements. Under the Joint Operating Agreement, Denver City operates the Mustang Station and allocates project costs to the two co-owners.

⁷ Golden Spread January 8, 2010 Protest at 8-9; *see also* 18 C.F.R. § 33.2(d) (2010).

⁸ Golden Spread January 21, 2010 Protest at 6-7.

⁹ April 15 Order, 131 FERC ¶ 61,029 at P 38.

¹⁰ *Id.* P 35.

II. Request for Rehearing

5. Golden Spread seeks rehearing or clarification of the April 15 Order in two respects.¹¹ First, Golden Spread contends that the Commission erred in failing to determine that the Joint Operating Agreement is a jurisdictional facility. More specifically, Golden Spread argues that the Commission erred in relying on Denver City's assertions that the Joint Operating Agreement would remain in force and would not be modified in reaching its conclusion that no purpose would be served by issuing the deficiency letter that Golden Spread had requested.¹² On rehearing, Golden Spread requests that the Commission require Denver City to submit a compliance filing identifying the Joint Operating Agreement as a jurisdictional facility.¹³

6. Second, Golden Spread contends that the Commission erred in granting Denver City's motion to adopt the Protective Order.¹⁴ Golden Spread states that it does not dispute that Exhibit I should be afforded some degree of protection from disclosure but asserts that it needs access to the portion of Exhibit I that pertains to Denver City in order to verify the jurisdictional facilities that are subject to the proposed transaction.¹⁵ Golden Spread argues that, as proposed, the Protective Order precludes its review of Exhibit I, because paragraph 21 of the Protective Order prevents Principals or any Reviewing Representative of a Principal from reviewing materials designated as being highly confidential and it defines a "Principal" to include anyone who advises or performs any management or operational activities for a "Participant" (i.e., a party to the Protective Order).¹⁶ Golden Spread claims that even if one of its legal representatives could obtain access to Exhibit I, he or she could not communicate its contents, lest they become a "Principal."¹⁷ Golden Spread requests the Commission (i) adopt the original protective order filed as part of Denver City's application, which is less restrictive than the Protective Order; or (ii) require modification of the Protective Order such that it

¹¹ Golden Spread May 17, 2010 Request for Rehearing (Request for Rehearing)

¹² *Id.* at 7 (citing April 15 Order, 131 FERC ¶ 61,029 at P 38).

¹³ *Id.* at 5-9.

¹⁴ Request for Rehearing at 10-13; *see also* 18 C.F.R. § 33.9 (2010) (applicants seeking a protective order must include in their application "a proposed protective order under which the parties to the proceeding will be able to review any of the data.").

¹⁵ Request for Rehearing at 12.

¹⁶ *Id.* at 9-10.

¹⁷ *Id.* at 10.

conforms to Commission precedent and would permit Golden Spread's access to Exhibit I.¹⁸

7. On June 1, 2010, Denver City filed an answer to the request for rehearing.¹⁹ On June 11, 2010, Golden Spread filed an answer to Denver City's filing.

III. Commission Determination

A. Procedural Matters

8. Rule 713(d) of the Commission's Rules of Practice and Procedure bars answers to rehearing requests.²⁰ Thus, we will reject Denver City's June 1, 2010 filing and Golden Spread's June 11, 2010 filing.

B. Substantive Matters

1. Joint Operating Agreement

9. In the April 15 Order, the Commission noted that Golden Spread's principal concern was how Denver City will administer the Joint Operating Agreement and what impact that would have on rates charged to Golden Spread.²¹ In that context, the Commission accepted Denver City's assurance that the Joint Operating Agreement will remain in force, without modification, and that Denver City would hold Golden Spread harmless from the costs of the transaction.²² The Commission found that the proposed transaction would not have an adverse effect on rates or on any other matter related to the Commission's analysis, and thus declined to issue a deficiency letter, concluding that it would serve no purpose.²³

¹⁸ *Id.* at 13. Golden Spread suggests that, under such a revised protective order, access to Exhibit I should be denied only to Golden Spread employees and representatives who are engaged in marketing activities.

¹⁹ Denver City characterized its filing as a motion and brief, but the Commission is not bound by a party's characterization of its arguments. *Black Hills Power, Inc.*, 126 FERC ¶ 61,104, at P 6 n.4 (2009) (citing *Stowers Oil and Gas Co.*, 27 FERC ¶ 61,001, at 61,002 and n.3 (1984)).

²⁰ 18 C.F.R. § 385.713(d) (2010).

²¹ April 15 Order, 131 FERC ¶ 61,029 at P 24.

²² *Id.* P 26.

²³ *Id.* P 38. We disagree with Golden Spread's contention that our holding was an implicit determination that the Joint Operating Agreement is not a jurisdictional facility.

10. Golden Spread still does not explain how requiring Denver City to submit a compliance filing identifying the Joint Operating Agreement as a jurisdictional facility would affect the Commission's finding that in light of Denver City's commitments regarding the Joint Operating Agreement, the proposed transaction is consistent with the public interest. As noted above, GS Generating is a party to the Joint Operating Agreement and thus has access to the agreement in any case.²⁴ Additionally, the Commission will not consider pending litigation between the parties to the Joint Operating Agreement, which is outside the scope of this proceeding. For these reasons, we will deny rehearing as to the Joint Operating Agreement.

2. Protective Order

11. We also reject Golden Spread's contention that the Commission erred in granting Denver City's motion to adopt the Protective Order. Golden Spread states that the Commission properly acknowledged the three-step process by which the Commission analyzes a protective order, including whether the information qualifies as confidential, requesters need access to some or all of the information, and what protection is needed for confidential information that will be disclosed under the protective order. The Commission adheres to that process and continues to find that the motion to adopt the Protective Order was properly granted.

12. The Protective Order provides for some material to be designated as confidential, under paragraph 3(b)(1)(D), and other material to be designated as highly confidential, under paragraph 20. The provisions regarding confidential information were also in the model protective order; the definition of "Principal" and paragraphs 20 and 21 were added to address highly confidential material. Neither party makes it clear precisely which language in Exhibit I was designated as confidential and which was designated as highly confidential.

13. Golden Spread's arguments seem to assume that the entire Exhibit I will be designated highly confidential and access will be limited to "Principals." However, Denver City stated that it intended, even under the Protective Order, to permit Golden Spread access to all information concerning Denver City and the effect of the proposed transaction on Golden Spread, but limit access to materials that are irrelevant or highly commercially sensitive and unrelated to Golden Spread's interests.²⁵ Denver City also stated that the Protective Order provided for a redacted Exhibit I, restricting access to materials not related to Denver City or Golden Spread's contractual and other relationships with Denver City.²⁶ Golden Spread acknowledges that Exhibit I should be

²⁴ *Id.* P 24.

²⁵ Denver City January 12, 2010 Motion at 17.

²⁶ *Id.* at 20.

afforded protection, arguing that Golden Spread should be able to access the portion of Exhibit I that pertain to Denver City.²⁷

14. As the Commission stated in the April 15 Order, to gain access to Exhibit I, or the relevant portions thereof, Golden Spread must first execute the Protective Order, which it has failed to do thus far.²⁸ We clarify that Denver City is directed to provide Golden Spread, upon Golden Spread's execution of the protective order, with access to all information concerning Denver City and the effect of the proposed transaction on Golden Spread. If Golden Spread and Denver City are unable to resolve disputes over who may see confidential materials or what materials are designated "highly confidential," Golden Spread may pursue challenges in accordance with the procedures set forth in the Protective Order.²⁹ For these reasons, we will deny Golden Spread's request for rehearing as to the Protective Order.

The Commission orders:

Golden Spread's request for rehearing and/or clarification of the April 15 Order is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁷ Request for Rehearing at 11-12.

²⁸ April 15 Order, 131 FERC ¶ 61,029 at P 35.

²⁹ Paragraph 9 of the Protective Order sets forth a procedure by which Golden Spread may challenge Denver City's designation of Exhibit I or any portion thereof as "highly confidential."