

133 FERC ¶ 61,017
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.

Sierra Pacific Power Company
California Pacific Electric Company, LLC

Docket No. EC10-78-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued October 7, 2010)

1. Sierra Pacific Power Company (Sierra Pacific) and California Pacific Electric Company, LLC (CalPeco) (collectively, the Applicants) filed an application under section 203(a)(1) of the Federal Power Act (FPA)¹ requesting Commission authorization for Sierra Pacific to transfer to CalPeco certain assets comprising the Kings Beach Generation Facility (Kings Beach) and, to the extent that the Commission deems them jurisdictional facilities, certain distribution facilities that form part of Sierra Pacific's California electric distribution system in California. In this order, we grant authorization for the transfer of Kings Beach. In an order being issued concurrently with this order, we find that the distribution facilities in question are not jurisdictional, and we thus take no action with regard to them here.²

I. Background

A. Description of the Parties

1. Sierra Pacific

2. Sierra Pacific is a wholly-owned subsidiary of NV Energy, Inc. (NV Energy), an investor-owned public utility holding company. It is a public utility that generates, transmits, and distributes electric energy to customers in Nevada and Northeastern California. It also serves natural gas customers in Reno and Sparks, Nevada. Sierra

¹ 16 U.S.C. § 824b (2006).

² *California Pacific Electric Company, LLC*, 133 FERC ¶ 61,018 (2010).

Pacific is affiliated with Nevada Power Company, a wholly-owned subsidiary of NV Energy. Nevada Power serves electric customers in Las Vegas and surrounding areas in southern Nevada.

2. California Pacific Electric Company, LLC

3. CalPeco is a new entity that is indirectly owned by Algonquin Power & Utilities Corp. (Algonquin) and Emera Incorporated (Emera). Algonquin owns and operates more than 450 MW of renewable and thermal electric generation facilities in the United States and Canada. Emera owns and operates companies involved in the generation, transmission, and distribution of electricity, natural gas transmission, and other energy-related activities. Emera owns two regulated electric utilities in North America, Nova Scotia Power Inc. and Bangor Hydro-Electric Company.

B. Description of the Transaction

4. Sierra Pacific proposes to sell Kings Beach, a 12 MW diesel-fired generation facility and switching substation located in Placer County, California, and associated books and records to CalPeco. This facility is used to provide emergency backup power to customers served through Sierra Pacific's distribution system in California and limited portions of Sierra Pacific's Nevada system.³ Applicants acknowledge the need for prior approval under section 203(a) for the transfer of Kings Beach and the associated facilities mentioned above, and request approval for such transfer. Sierra Pacific will also sell its distribution system in California to CalPeco. This will result in CalPeco becoming the franchise utility provider for the customers that make up Sierra Pacific's retail load in California. Applicants state that they do not believe that transfer of these local distribution assets requires prior Commission approval under FPA section 203. On the same date that Applicants filed their application, CalPeco filed a petition in Docket No. EL10-75-000 for a Commission determination that the distribution facilities it proposes to acquire from Sierra Pacific do not include facilities that are subject to the Commission's jurisdiction. Nevertheless, Applicants state that to facilitate closing of the proposed transaction, they have included Sierra Pacific's California distribution facilities within the scope of their requests for approval under section 203 of the FPA.

II. Notice of Filing and Responsive Pleadings

5. Notice of the application was published in the *Federal Register*, 75 Fed. Reg. 40,808 (2010), with interventions and protests due on or before July 23, 2010. The

³ Sierra Pacific will continue to have access to capacity available from and energy generated by Kings Beach for emergency backup service for an initial period of 20 years.

Truckee Donner Public Utility District (Truckee) filed a timely motion to intervene and comment. Applicants filed an answer to Truckee.

III. Discussion

A. Procedural Issues

6. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁴ the timely, unopposed motion to intervene serves to make the entity that filed it a party to this proceeding.

7. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure⁵ prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Applicants' answer because it has provided information that assisted us in our decision-making process.

B. Standard of Review Under Section 203

8. Section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest. 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.⁶ Section 203 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."⁷ The Commission's 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.⁸

⁴ 18 C.F.R. § 385.214 (2010).

⁵ *Id.* § 385.213(a)(2).

⁶ *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 at 30,111 (1996) (Merger Policy Statement), *order on reconsideration*, Order No. 592-A, 79 FERC ¶ 61,321 (1997).

⁷ 16 U.S.C. § 824b(a)(4) (2006).

⁸ 18 C.F.R. § 33.2(j) (2010).

C. Analysis under Section 203

1. Effect on Competition – Horizontal Market Power

a. Applicants’ Analysis

9. Applicants argue that the transaction raises no adverse horizontal market power issues. They maintain that Kings Beach and its related jurisdictional facilities involve a *de minimis* amount of generation in the California Independent System Operator Corporation (CAISO) market—12 megawatts—and thus have no competitive effect in the market.⁹

b. Commission Determination

10. We find that the proposed transaction does not raise horizontal market power concerns. Applicants have demonstrated that the transaction involves a *de minimis* amount of generation in the relevant market. Therefore, the transaction will not materially increase market concentration in the CAISO market. We note that no protestor has argued otherwise.

2. Effect on Competition – Vertical Market Power

a. Applicants’ Analysis

11. Applicants assert that the transaction does not raise any vertical market power concerns. They state that the transaction does not involve the transfer of any transmission facilities that are used to provide transmission services, and that Sierra Pacific will continue to offer service over all of its transmission facilities under the terms of its Open Access Transmission Tariff (OATT). Applicants add that CalPeco and its affiliates do not own or control any transmission facilities in the western United States, and therefore the transaction will have no effect on transmission market power. Applicants state that the transaction does not involve the sale of any fuel supplies or fuel delivery systems that could be used to impose barriers to entry by competing suppliers. Applicants conclude that the transaction does not raise any vertical market power issues.¹⁰

⁹ Application at 17.

¹⁰ *Id.* at 18-19.

b. Commission Determination

12. Based on the facts presented, we find that the transaction does not raise any vertical market power concerns. The transaction does not involve the transfer of any transmission facilities that are used to provide transmission services. Further, the transaction does not involve the sale of any fuel supplies or fuel delivery systems that could be used to impose barriers to entry to competing suppliers. We note that no protester raised vertical market power issues in this proceeding.

3. Effect on Rates

a. Applicants' Analysis

13. Applicants state that the transaction will have no adverse effect on rates. They state that after the transaction closes, all wholesale sales of energy and capacity by Sierra Pacific to third parties within the Sierra Pacific balancing authority area will continue to be made at cost-based rates subject to Commission approval. They add that under terms of its existing wholesale requirements contracts, Sierra Pacific would have no ability to pass through any increased costs resulting from the transaction to its wholesale requirements customers.¹¹ Applicants argue that the transaction will not have any impact on transmission rates. They state that Sierra Pacific owns and operates the transmission network in its balancing authority area and that the sale of the assets in question will have no effect on its FERC-jurisdictional rates or the provision of services because no transmission facilities used to provide transmission services are being transferred to CalPeco as part of the transaction. Sierra Pacific commits that it will not include any transaction-related costs in transmission rates charged to customers under its Commission-approved OATT.¹²

¹¹ *Id.* at 19-20. Applicants note Sierra Pacific has a partial wholesale requirements contract for sales to Pacific Gas and Electric Company (PG&E). This contract will terminate when the proposed transaction closes. They state that CalPeco will assume responsibility for this service to PG&E under a replacement wholesale power supply agreement. CalPeco intends to negotiate a replacement agreement with PG&E that has pricing terms designed to replicate the price structure of Sierra Pacific's current contract with PG&E. CalPeco's remaining rates will be retail rates that are subject to oversight by the California Public Utility Commission.

¹² *Id.* at 21-22.

b. Commission Determination

14. Based on the facts presented, we find that the transaction does not raise any concerns regarding rates. Sierra Pacific states that all wholesale sales within its balancing authority area are made at cost-based rates. Sierra Pacific also states that following completion of the proposed transaction, all wholesale sales it makes to third parties within its balancing authority area will continue to be made at cost-based rates and that under the terms of its existing wholesale requirements contracts, it will have no ability to pass through any increased costs resulting from the transaction to its wholesale requirements customers. Further, we accept Sierra Pacific's commitment that it will not include any transaction-related costs in transmission rates charged to customers under its Commission-approved OATT. We note that no customer argues that the transaction will have an adverse impact on rates. The Commission's authority under section 301(c) of the FPA, as well as the books and records provision of Public Utility Holding Company Act 2005, will enable it to confirm, if necessary, that Sierra Pacific's wholesale requirements customers are not charged any costs that Sierra Pacific incurs in completing the transaction and that Sierra Pacific is abiding by its commitment not to include these costs in its transmission rates.

4. Effect on Regulation

a. Applicants' Analysis

15. Applicants assert that the transaction will have no adverse effect on regulation. They state that the sale to CalPeco of the assets subject to our review here is also subject to prior approval by the Public Utility Commission of Nevada and the California Public Utilities Commission (California Commission), the latter of which will have full oversight of CalPeco's retail service after closing of the transaction. Applicants add that Sierra Pacific will continue to be subject to the Commission's jurisdiction after the transaction closes, and that, upon consummation of the transaction: (i) to the extent that Sierra Pacific makes wholesale sales to CalPeco; (ii) CalPeco makes emergency wholesale capacity and energy available to Sierra Pacific; or (iii) the parties make wholesale sales to one another, such sales will continue to be subject to the Commission's jurisdiction.¹³

¹³ *Id.* at 22. These sales would be made under: (i) a service agreement covering wholesale sales by Sierra Pacific to CalPeco; (ii) an emergency backup service agreement covering emergency wholesale capacity and energy supplied by CalPeco; and (iii) a borderline customer agreement, under which Sierra Pacific and CalPeco make sales to one another at points of interconnection between their systems at the California-Nevada state boundary. Applicants have submitted these documents for filing under section 205 of the FPA. *See* Docket Nos. ER10-1703-000, ER10-1709-000, and ER10-1719-000.

b. Commission Determination

16. 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.¹⁴ We find that the transaction will not create a regulatory gap at the federal level, because the Commission will retain its regulatory authority over Sierra Pacific and CalPeco after the transaction. In the Merger Policy Statement, the Commission stated 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.¹⁵ We note that no party alleges that regulation would be impaired by the proposed transaction, and no state commission has requested that the Commission address the issue of the effect on state regulation.

5. Cross-Subsidization

a. Applicants' Analysis

17. Applicants assert that the proposed transaction will not result in, at the time of the proposed transaction or in the future, cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company. Applicants verify that the transaction will not result in: (1) any transfer of facilities between a traditional utility associate company that has captive customers or that owns or provides transmission service over jurisdictional facilities, and an associate company; (2) any new issuances 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; (3) any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) any new affiliate contract between a non-utility 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 FPA. Applicants disclose their existing pledges and encumbrances of utility assets, as required under Order No. 669-A and 18 C.F.R. § 33.2(j)(1).

¹⁴ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

¹⁵ *Id.* at 30,125.

b. Commission Determination

18. Based on the facts as presented in the application, we find that the 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.

D. Other Considerations

1. Truckee Request for Conditional Approval

19. Truckee states that it does not object to the proposed transaction, but it requests that the Commission require that a new facility linking the Sierra Pacific transmission system with Truckee's facilities be completed prior to closing the proposed transaction.

20. Truckee states that it protested the proposed transaction before the California Commission. Truckee argued that its retail load located in the Glenshire, California area would no longer be connected to the Sierra Pacific transmission system if, as Applicants propose, Sierra Pacific sold a certain 60 kV line to CalPeco. This could require Truckee to take delivery service from both CalPeco and Sierra Pacific, which would result in pancaked rates for service that Truckee now takes exclusively under the Sierra Pacific OATT. Applicants and Truckee subsequently entered into a settlement (California Commission Settlement) in which Sierra Pacific committed to construct a new 14.4 kV line to maintain a direct connection between its transmission system and Truckee's facilities in the Glenshire area. To provide backup service after completion of the new line, Applicants and Truckee also agreed to enter into a Mutual Assistance Agreement under which Sierra Pacific would be able to use (at no charge) the 60 kV line as necessary to serve Truckee's load during any periods in which the new 14.4 kV line was not in service. However, Truckee states that Sierra Pacific did not commit to complete the new line to Truckee's retail load prior to closing the proposed transaction.

21. Truckee acknowledges that Sierra Pacific could use the 60 kV under the Mutual Assistance Agreement to serve Truckee even before the new 14.4 kV line is completed, but it maintains that this "is no substitute for getting the new facilities built." Truckee maintains that it would be appropriate for the Commission to make Applicants' settlement commitments binding at the federal level given its exclusive jurisdiction over Truckee's network service. Truckee states that its experience with the implementation of the settlement highlights the need for Commission action. It maintains that the California Commission Settlement requires the Reliability Support Agreement to be a three-party agreement, but Sierra Pacific and CalPeco executed a bilateral agreement and refused to include express recognition of Truckee as a third-party beneficiary over Truckee's express objection. Truckee states that this has shaken its faith that Applicants can be counted on to abide scrupulously to the California Commission Settlement terms. Truckee maintains that to find that the proposed transaction will not adversely affect

transmission service to Sierra Pacific's customers, the Commission must condition its approval on the completion of the 14.4 kV line prior to closing the transaction.

22. Applicants argue in their answer that Truckee is seeking to have the Commission condition its approval of the proposed transaction on terms that go beyond those of the California Commission Settlement, which Truckee agreed were sufficient to address its concerns. They state that the California Commission Settlement does not require the installation of the 14.4 kV line to be completed prior to the closing of the proposed transaction and explicitly provides for an interim arrangement to assure reliable transmission service to Truckee in the event completion of the new 14.4 kV line is unexpectedly delayed until after closing.¹⁶

23. Applicants state that Sierra Pacific is fulfilling its obligations under the California Commission Settlement by making commercially reasonable efforts to complete the 14.4 kV line prior to the closing of the proposed transaction. They state that completion of the new 14.4 kV line is scheduled for October 2010. If they are not completed prior to the closing of the proposed transaction, Sierra Pacific will still have access to transmission service through the Reliability Support Agreement at no incremental cost from which it could provide service to Truckee. Applicants state that Truckee does not assert that granting the application in this proceeding will render Sierra Pacific unable to provide Truckee transmission service in accordance with the Sierra Pacific OATT at any time.

2. Commission Determination

24. Truckee has not provided a sufficient reason to condition approval of the proposed transaction on the completion of the 14.4 kV line. Completion is not a requirement of the California Commission Settlement, and Truckee is thus requesting that we in effect override an aspect of a settlement to which it is a party. Truckee has not explained why its rights and interests are not fully protected by and enforceable under the California Commission Settlement. In addition, Truckee has not identified any harm that it would incur if construction of the 14.4 kV line is not completed prior to the closing of the proposed transaction. Truckee concedes that Sierra Pacific can continue to provide services to it over the 60 kV line until the 14.4 kV line is completed, and it does not explain how receiving service over the 60 kV line instead of the 14.4 kV line for the period in question will lead to harm. It simply asserts that this service is not a substitute for getting the new facilities built. Truckee does not allege that the facilities will not be built, and Applicants state that they are in the process of constructing them. Truckee

¹⁶ This service would be provided under a Reliability Support Agreement between Sierra Pacific and CalPeco which allows Sierra Pacific to use a small segment of CalPeco's distribution facilities as backup delivery path when Sierra Pacific's transmission facilities are not available.

questions whether the Applicants can be relied upon to fulfill their commitments without Commission oversight because they executed a bilateral agreement, rather than a three-party agreement, and because they did not recognize Truckee as a third-party beneficiary of the agreement. However, Truckee does not produce any evidence that this represents a violation of the California Commission Settlement or that it does not have third-party beneficiary status without express recognition. We therefore deny Truckee's request to condition the proposed transaction on the completion of the 14.4 kV line to Sierra Pacific's transmission system.

3. Reliability Matters

25. Finally, 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. 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, and the like, 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 within 30 days of any material change in circumstances that departs from the facts the Commission relied upon in granting the application.

(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 shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the proposed transaction.

(G) Applicants shall notify the Commission within 10 days of the date on which the transaction is consummated.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.