133 FERC ¶ 61,018
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.

California Pacific Electric Company, LLC Docket No. EL10-75-000

ORDER GRANTING IN PART AND DENYING IN PART PETITION FOR DECLARATORY ORDER

(Issued October 7, 2010)

1. On July 2, 2010, California Pacific Electric Company, LLC (CalPeco), pursuant to Rule 207 of the Rules of Practice and Procedure of the Commission,[1] filed a petition for declaratory order requesting that the Commission find that certain distribution services and facilities are not subject to the Commission's jurisdiction under the Federal Power Act (FPA). Alternatively, CalPeco requests that, if the Commission does not disclaim jurisdiction over the local distribution services and facilities at issue, the Commission grant CalPeco waivers of the Commission regulations applicable to public utilities that own or operate transmission facilities.

I. Background

2. CalPeco is a California limited liability company formed for the purpose of acquiring the assets and operations of Sierra Pacific Power Company's (Sierra) electric distribution system located in California (California Distribution System).[2] According to CalPeco, it does not currently provide any jurisdictional services under the FPA. However, after the acquisition of the Sierra assets, CalPeco will provide certain limited FERC-jurisdictional services in the form of wholesale sales of electricity.

[1] 18 C.F.R. § 385.207 (2010).

[2] CalPeco July 2, 2010 Petition for Declaratory Order at 3 (Petition).

3. The California Distribution System represents a portion of Sierra's utility system,[3] the remainder of which is located in Nevada. The retail operations of the California Distribution System currently are regulated by the California Public Utilities Commission (CPUC).

4. On October 8, 2009, CalPeco and Sierra entered into an Asset Purchase Agreement pursuant to which Sierra agreed to sell the California Distribution System to CalPeco. Under the agreement, CalPeco will acquire all of Sierra's electric distribution assets in California, including real property and real property interests. CalPeco also will acquire the 12 MW diesel-fired Kings Beach Generation Facility (Kings Beach). Sierra will retain all transmission and other assets that are currently FERC-jurisdictional.[4]

5. After the transfer of the assets, CalPeco will own and operate, as its only business, the distribution company. Because of the geographic remoteness of some parts of the service territory, as well as historic interconnections, CalPeco will be required to provide "minimal" delivery and reliability support services to Sierra to enable Sierra to reliably supply power to its Nevada customers.[5]

II. <u>Request for Declaratory Order</u>

6. The petition for declaratory order is one of several related filings in connection with the transfer of a part of Sierra's service territory to CalPeco. In its petition for declaratory order, CalPeco requests that the Commission declare: (1) that the electric delivery service to be provided by CalPeco to Sierra under the Distribution Capacity Agreement[6] is not subject to the Commission's jurisdiction; (2) that the reliability support to be provided by CalPeco to Sierra under the Reliability Support Agreement is not subject to the Commission's jurisdiction; and (3) that all distribution facilities that

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[3] *Id.* The California Distribution System serves approximately 46,000 retail electric customers in California, primarily in the Lake Tahoe Basin.

[4] *Id.* at 4. Docket No. EC10-78-000 involves the joint application of Sierra and CalPeco for authorization for disposition of jurisdictional assets under section 203 of the Federal Power Act.

[5] *Id.*

[6] The Distribution Capacity Agreement is included with the Petition as Appendix A.

will be transferred to CalPeco are properly considered to be "local distribution" facilities.[7]

A. The Distribution Capacity Agreement

7. Currently, Sierra uses its California distribution facilities to serve retail customers in both California and Nevada. Customers located in three border communities[8] in Nevada are supplied with power from Sierra's system resources which must flow through a portion of the California Distribution System. Under the Distribution Capacity Agreement, after the transfer of the facilities to CalPeco, Sierra will be entitled to continue using designated portions of the California Distribution System facilities to serve at retail the three border communities in Nevada, thus avoiding the immediate need to construct additional distribution facilities in Nevada to serve those customers.[9]

8. In exchange for the continued use of the California Distribution System, Sierra will compensate CalPeco on a cost-of-service basis for access to and use of specific distribution circuits over which CalPeco will make capacity available to enable Sierra to serve its retail customers in the border communities. According to CalPeco, Sierra expects to construct additional distribution facilities that will connect the border communities directly with Sierra's Nevada system and thus reduce and perhaps ultimately eliminate the need for the Distribution Capacity Agreement. The term of the Distribution Capacity Agreement will be as long as Sierra needs to use capacity on the California Distribution System to serve the border communities.[10]

9. CalPeco argues that the Commission has determined that it will not assert jurisdiction over the transmission of power to retail customers unless the transmission product is unbundled from the sales product. According to CalPeco, the Distribution Capacity Agreement provides only local distribution service to allow Sierra to make a bundled retail sale, which CalPeco contends places the Distribution Capacity Agreement outside of the Commission's jurisdiction.[11]

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[7] *Id.* at 4-5.

[8] The border communities are Incline Village, Stateline, and Verdi in Nevada.

[9] *Id.* at 5.

[10] *Id.*

[11] *Id.* at 6.

10. Under the Distribution Capacity Agreement, Sierra will pay CalPeco to use a portion of the California Distribution System to provide the same bundled retail service to the border communities that Sierra provided prior to the transfer of the assets. According to CalPeco, this arrangement will enable Sierra to provide service to the border communities in the most cost-effective manner. Furthermore, CalPeco asserts that Sierra will serve only retail customers and that no service under the Distribution Capacity Agreement will be used to supply power to wholesale customers.[12]

11. Sierra will retain title to the power and the border communities will continue to receive a bundled retail service from Sierra under a retail tariff approved by the Nevada Public Utility Commission. The maximum contracted delivery capacity under the Distribution Capacity Agreement is limited to the amount of energy Sierra requires to serve the retail load of the border communities. Furthermore, the Distribution Capacity Agreement provides that the distribution charge to Sierra is based exclusively on the circuits necessary to serve the border communities.[13]

12. As part of their application to the CPUC seeking approval of the transfer, CalPeco and Sierra have asked the CPUC to assert jurisdiction over the Distribution Capacity Agreement, and to authorize CalPeco to provide distribution service to Sierra in accordance with the terms and conditions set forth in the Distribution Capacity Agreement.[14]

B. The Reliability Support Agreement

13. As part of the transfer of assets, CalPeco will acquire a 60 kV facility known as the "608 Line" connected to Sierra's Truckee Substation. The 608 Line is currently used by Sierra to serve Sierra's California retail customers located in the vicinity of the Glenshire Substation, which CalPeco also will acquire. These customers will become CalPeco retail customers as part of the transaction and CalPeco will provide retail distribution service to these customers with power that CalPeco will purchase from Sierra under the Power Purchase Agreement at the Truckee Substation.[15]

14. Sierra currently uses the 608 Line to deliver power to the Truckee Donner Public Utility District (Truckee) at Truckee's Glenshire Meter. Sierra intends to construct a new

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[12] *Id.* at 6-7.

[13] *Id.* at 7.

[14] *Id.* at 7-8.

[15] *Id.* at 8.

segment of 14.4 kV line to directly connect its Truckee substation to the Glenshire Meter in order to continue to transmit power to Truckee after the transfer of the 608 Line to CalPeco.[16]

15. According to CalPeco, to enhance reliability and provide an alternative path for service in the event of an interruption on either the 608 Line or the new 14.4 kV segment Sierra is constructing, Sierra and CalPeco have executed a Reliability Support Agreement.[17] In the event of an interruption on the Sierra 14.4 kV line, the Reliability Support Agreement will allow Sierra to make use of CalPeco's 608 Line to deliver power to Truckee's Glenshire Meter. Conversely, in the event of an interruption on CalPeco's 608 Line, Sierra will use the 14.4 kV line to deliver power under the Purchase Power Agreement directly to CalPeco's Glenshire substation.[18]

16. According to CalPeco, these arrangements are in the nature of uncompensated mutual assistance arrangements among adjacent utilities. No charges will be imposed or collected under the Reliability Support Agreement for any mutual assistance use of the facilities to be provided. CalPeco and Sierra have requested that the CPUC assert jurisdiction over the Reliability Support Agreement.[19]

17. CalPeco asks the Commission to declare that CalPeco's agreement to allow Sierra to use a portion of CalPeco's distribution assets in the event of an outage to deliver power to Truckee without compensation is not the provision of a transmission service under section 201 of the FPA. CalPeco further requests that the Commission disclaim jurisdiction over the Reliability Support Agreement.[20]

C. Acquired Distribution Facilities

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[16] *Id.*

[17] The Reliability Support Agreement is included with the Petition as Appendix B.

[18] *Id.* at 8-9. According to CalPeco, the geographic area encompassed by the Reliability Support Agreement is only about eight miles of CalPeco's distribution lines. The maximum amount of capacity that CalPeco will be required to make available to Sierra in the event of an outage is approximately 1.5 MW. *Id.* at 9-10.

[19] *Id.* at 9-10.

[20] *Id.* at 10.

18. According to CalPeco, the electric facilities associated with the California Distribution System have almost exclusively been used to provide local distribution service to retail customers, and will continue to be so used after the transfer to CalPeco.

Currently, the CPUC regulates the California Distribution System as part of Sierra's retail service to California customers.[21]

19. The one exception to Sierra's use of the California Distribution System to exclusively serve retail customers is the wholesale sale of approximately 2 MW of power to Pacific Gas and Electric Company (PG&E) at the service boundary line between CalPeco and PG&E.[22] The sale of power to PG&E does not include unbundled delivery service. The sale is a system sale at the point where the distribution lines acquired by CalPeco connect to a part of PG&E's system. According to CalPeco, the purpose of this transaction is to allow PG&E to serve a small number of retail customers located in a geographic area isolated from the main portions of the PG&E system. Without this transaction, PG&E would have to expand its system to serve these isolated retail customers.[23] CalPeco intends to enter into a new contract with PG&E to provide this wholesale service.

20. According to CalPeco, after the transfer of the California Distribution System the electric facilities will be used in the same manner as previously used by Sierra and will deliver power through the same distribution facilities to the same retail customers. CalPeco avers that it will undertake no obligation to sell unbundled distribution service to deliver power to any wholesale customers.[24] However, in addition to the wholesale

[21] *Id.* at 10-11. As part of their joint application to the CPUC to approve the transfer, CalPeco and Sierra have asked the CPUC to explicitly find that it is maintaining jurisdiction over the California Distribution System. *Id.* at 11.

[22] *Id.* at 11. The contract originated in 1965 and is for the purpose of enabling PG&E to serve retail load in the area. The most recent amendment to the PG&E rate schedule was accepted by the Commission on February 8, 1994 in Docket No. ER94-552-000. *Id.* at 11 n. 14.

[23] *Id.* at 11.

[24] *Id.* at 11-12.

power sales discussed above, CalPeco will make sales to Sierra on an emergency basis from the Kings Beach emergency backup generator it will acquire from Sierra.[25]

21. Thus, according to CalPeco, the only power sales over CalPeco's distribution system that will not be retail sales will be bundled sales to two adjacent utilities under "special" circumstances to allow those utilities to serve their retail customers. Under these circumstances, and in light of the anticipated CPUC assertion of jurisdiction over the CalPeco's facilities, CalPeco asks the Commission to disclaim jurisdiction over the California Distribution System because, according to CalPeco, regulation of those facilities by the Commission would not further the public interest objectives of the FPA.

D. Application of the Seven Factor Test

22. CalPeco argues that, in Order No. 888,[26] the Commission identified seven factors that it would consider in determining whether the delivery component of an unbundled retail power sale was retail "transmission" or retail "distribution." While acknowledging that the situation at issue in this proceeding does not involve unbundled retail sales, CalPeco claims that application of the seven factor test establishes that the California Distribution System is appropriately classified as a local distribution system.[27]

23. CalPeco states that the Commission first considers the fact that local distribution facilities are normally in close proximity to retail customers. According to CalPeco, the retail customers to be served by the California Distribution System are concentrated in the South Lake Tahoe and North Lake Tahoe areas, with smaller clusters of customers in

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[25] *Id.* at 12. Agreements relating to the Sierra sales were concurrently filed with the Commission

[26] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 FR 21590 (May 10, 1996), FERC Stats. & Regs. ¶31,036 (1996), *order on reh'g*, Order No. 888-A, 62 FR 12274 (Mar. 14 1997), FERC Stats. & Regs. ¶31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York* v. *FERC*, 535 U.S. 1 (2002).

[27] *Id.* at 13. CalPeco also notes that the Commission has adopted a policy of according deference to a state's determination that particular facilities are subject to the state's regulatory jurisdiction. However, in this instance CalPeco has not requested that we delay our decision until the CPUC issues a ruling regarding its jurisdiction.

5 other towns. CalPeco contends that virtually all of these customers are served by distribution facilities that are within 15 miles of these communities. CalPeco also avers that distribution facilities in other areas are located even closer to the customers.[28]

24. Next, CalPeco avers that the second factor is whether the local distribution facilities are primarily radial in character. CalPeco contends that, absent an emergency situation in the Incline Village area, the California Distribution System facilities are exclusively radial in nature. Power over the lines flows only in one direction. The only generation on the system is Kings Beach, which is limited to operating a maximum of 1440 MWh/year and is used almost exclusively for emergency backup purposes in instances in which outages prevent power from being imported from Sierra's east-of-California resources.[29]

25. CalPeco states that the third factor to be considered is the fact that power flows into local distribution systems and rarely, if ever, flows out. According to CalPeco, almost all of the power that will flow into the California Distribution System will be consumed by customers residing within the CalPeco service territory. The exceptions are discussed in detail above and include: (1) the Distribution Capacity Agreement; (2) the sales to PG&E; (3) power will flow from the CalPeco system to the Sierra system to serve three Nevada retail borderline customers; (4) the Kings Beach reliability backup service; and (5) the Reliability Support Agreement.[30]

26. According to CalPeco, the next factor to be considered is that when power enters a local distribution system, it is not reconsigned or transported on to some other market. CalPeco avers that no power entering CalPeco's system will be transported to electric markets. Furthermore, the power leaving CalPeco's system will be used by retail customers of other utilities located in close proximity to the California Distribution System. CalPeco will not market power or export power for resale into markets.[31]

27. CalPeco states that the fifth factor to be considered is that power entering a local distribution center is consumed in a comparatively restricted geographical area. As CalPeco stated in response to the first factor, CalPeco again argues that the retail customers to be served by the California Distribution System are concentrated in the

[28] *Id.* at 14.

[29] *Id.* at 14-15.

[30] *Id.* at 15.

[31] *Id.* at 15-16.

South Lake Tahoe and North Lake Tahoe areas, with smaller clusters of customers in 5 other towns. CalPeco contends that virtually all of these customers are served by distribution facilities that are within 15 miles of these communities. CalPeco also avers that distribution facilities in other areas are located even closer to the customers.[32]

28. CalPeco avers that the sixth factor examines whether the meters are based at the transmission/local distribution interface to measure flows in to the local distribution system. According to CalPeco, perimeter metering will be installed and maintained to measure all flows into and out of CalPeco's distribution system.[33]

29. Finally, CalPeco states that the last factor to be examined is whether the local distribution system will be of reduced voltage. According to CalPeco, the California Distribution System is comprised of 1400 miles of 12.5kV, 14.4 kV, and 25.9 kV distribution circuits, 75 miles of 60 kV distribution lines, and 19 miles of 120 kV distribution lines.[34] CalPeco argues that the Commission has not established a definition of what constitutes a reduced voltage distribution line. CalPeco contends that the limited nature of the three 120kV lines and the retail nature of their use, combined with the fact that the remaining lines are 60kV or below, satisfies the seventh Commission factor.[35]

E. Request for Waivers

30. If the Commission does not grant CalPeco's request for disclaimer of jurisdiction over all of its local distribution facilities and services, CalPeco requests waiver of the Commission's transmission-related regulatory requirements otherwise applicable to any facilities or services found to be jurisdictional.[36]

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[32] *Id.* at 16.

[33] *Id.*

[34] The 120 kV and 60 kV lines connect CalPeco's distribution substations to Sierra's transmission and distribution systems. Two of the 120 kV lines connect CalPeco with the Sierra system at the Nevada/California state boundary, and the other 120kV line connects the CalPeco system to the Sierra transmission system at Truckee, California. There are 60kV lines in both the North and South Lake Tahoe systems and 14.4kV distribution circuits serve as interconnection points between the CalPeco and the Sierra systems at the border communities.

[35] *Id.* at 16-17.

[36] *Id.* at 17. Specifically, CalPeco requests waiver of Order Nos. 717, 888, 889, 890, 2003, and 2004, and any other regulatory requirements that the Commission

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31. CalPeco contends that application of the Commission's "limited and discrete facilities" test[37] and the application of the "small utilities" standard[38] justifies its request for the waivers. CalPeco contends that the seven factors discussed above demonstrate that the transferred facilities are limited and discrete facilities that do not form a part of an integrated grid. According to CalPeco, the California Distribution System is confined to a relatively small geographic area, is designed to serve the needs of retail customers located within the service territory, and has limited interconnections with other systems.

32. CalPeco also avers that the facilities are exclusively radial; power flows in one direction from its receipt by CalPeco at the system boundary with Sierra to CalPeco's customers. According to CalPeco, there is no bi-directional use of the system, except under emergency conditions. The CalPeco system will not be its own balancing authority area, but will continue to be a part of the Sierra Balancing Authority Area.[39] Finally, the only wholesales that will be made from CalPeco's system are the sales to PG&E, the Distribution Capacity Agreement, and the Kings Beach emergency sales.[40]

33. CalPeco avers that it will not provide wholesale transmission service. CalPeco further contends that because of the limited nature of its low voltage lines, the geographic remoteness of the service territory and the small number of interconnections, it is unlikely that anyone will ever request transmission service from CalPeco. CalPeco has no intention of developing separate transmission rates since its three wholesale sales will be bundled sales at its system boundary. Therefore, according to CalPeco, it would be unduly burdensome for CalPeco to maintain an open access transmission tariff and comply with other regulations applicable to transmission service providers when CalPeco

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imposes on owners and operators of transmission facilities and on transmission providers.

[37] *Id.* at 17 – 18 (citing *Black Creek Hydro, Inc.*, 77 FERC ¶ 61,232 (1996)).

[38] *Id.* at 18 (citing *Black Creek Hydro*, 77 FERC at 61,941; Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 830 (2003); *FPL Oliver Wind, LLC*, 123 FERC ¶ 61,246, at P 10-11 (2008)).

[39] *Id.* at 18.

[40] *Id.* at 18-19.

does not intend to provide and in all likelihood will not be asked to provide transmission service to wholesale power purchasers.[41]

34. Finally, CalPeco contends that it will be a small utility as defined in *Black Creek Hydro*. CalPeco estimates that its sales will be under 600,000 MWh.[42]

III. Notice of Filings and Interventions

35. Notice of the CalPeco filing was published in the *Federal Register*,[43] with motions to intervene and protests due on or before August 2, 2010. The Truckee Donner Public Utility District (Truckee) filed identical motions to intervene and identical comments in both this proceeding and in Docket No. EC10-78-000.

IV. Discussion

A. Procedural Matters

36. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[44] a timely unopposed motion to intervene serves to make the entity that filed the motion a party to the proceeding. However, while Truckee is a party to this proceeding, we have determined that Truckee's comments, which were filed in this proceeding and in Docket No. EC10-78-000, should be addressed in Docket No. EC10-78-000 because the issues raised by Truckee are not relevant to the issues in this docket.

B. Substantive Matters

1. The Distribution Capacity Agreement

37. With regard to the Distribution Capacity Agreement, we find that the Commission has jurisdiction over the service provided under the agreement. Section 201(b)(1) provides that "the [FPA] shall apply to the transmission of electric energy in interstate commerce."[45] This section empowers the Commission to regulate both wholesale sales of electricity and electric energy transmissions by vesting us with "jurisdiction over all

[41] *Id.* at 19.

[42] *Id.* at 20.

[43] 75 Fed. Reg. 40,818 (2010).

[44] 18 C.F.R. § 385.214 (2010).

[45] 16 U.S.C. § 824(b) (1) (2006).

facilities for such transmission and sale of electric energy."[46] Under section 201 we have authority to regulate all aspects of wholesale transactions. Thus, when a public utility delivers electricity at wholesale to a supplier for the purpose of resale, section 201 gives us unqualified authority to assert jurisdiction over that transaction. The movement of energy from CalPeco's California Distribution System to Sierra is a "transmission of electric energy in interstate commerce." Thus, the service provided under the Distribution Capacity Agreement is squarely within the terms of the FPA.

38. Furthermore, we note that the term "distribution" is often confused with "local distribution." As we explained in Order No. 2003:

> "Local distribution" is a legal term; under [Federal Power Act] section 201(b)(1)[*16 U.S.C. § 824*(b)(1) (2000)], the Commission lacks jurisdiction over local distribution facilities. "Distribution" is an unfortunately vague term, but it is usually used to refer to lower-voltage lines that are not networked and that carry power in one direction. Some lower-voltage facilities are "local distribution" facilities not under our jurisdiction, but some are used for jurisdictional service such as carrying power to a wholesale power customer for resale.[47]

39. In Order No. 888, we determined that to the extent any facilities, regardless of their original classification, are used to provide transmission service in interstate commerce in order to deliver energy to wholesale customers, such facilities become subject to our jurisdiction. Specifically, we explained that "a public utility's facilities used to deliver energy to a wholesale purchaser, whether labeled 'transmission', 'distribution' or 'local distribution', are subject to the Commission's exclusive jurisdiction under sections 205 and 206 of the FPA."[48]

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[46] *Id.*

[47] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 803-804 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 (2004), *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 374 U.S. App. D.C. 406 (D.C. Cir. 2007).

[48] Order No. 888, FERC Stats. & Regs. at 31,969.

40. Moreover, in Order No. 2003 we stated that when any facility, including a "distribution" facility, is used to facilitate a jurisdictional wholesale sale, only the use of the facility for Commission-jurisdictional service is subject to Commission jurisdiction. Thus, when a local distribution facility is used in a wholesale transaction, we have jurisdiction over that transaction.[49] Accordingly, the Commission has jurisdiction under the FPA over sales of energy at wholesale and over interstate transmissions regardless of whether the lines are labeled “transmission” or “distribution.”

41. CalPeco’s contention that the Distribution Capacity Agreement allows Sierra to make a bundled retail sale focuses on the purchaser in the transaction. The identity of the purchaser of wholesale energy or transmission service does not affect the Commission’s jurisdiction under Part II of the FPA. When CalPeco transmits electric energy to Sierra for its customers as provided for in the Distribution Capacity Agreement, that electric energy is transmitted in interstate commerce. Thus, the Distribution Capacity Agreement, which governs CalPeco’s sale of transmission services to Sierra, falls within under the Commission’s jurisdiction. Since the CalPeco lines are to be used for carrying power to a wholesale power customer for resale, this service is jurisdictional regardless of whether the lines themselves are labeled “transmission” lines or “distribution” lines.

2. <u>The Reliability Support Agreement</u>

42. Similarly, we find that the Commission has jurisdiction over the Reliability Support Agreement. As discussed above, the Commission has jurisdiction over “the transmission of electric energy in interstate commerce.”[50] Moreover, section 205(c) of the FPA requires public utilities to file all contracts which in any manner affect or relate to services for any transmission subject to the jurisdiction of the Commission.[51] The term electric service is defined “without regard to the form of payment or compensation for the sales or services rendered whether by purchase and sale, interchange, **exchange**, wheeling charge, facilities charge rental or otherwise.”[52] Similarly, rate schedule is

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[49] Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 804.

[50] 16 U.S.C. § 824(b) (1) (2006).

[51] 16 U.S.C. § 824d (c) (2006). We note that the Commission’s regulations governing these filings define electric service to include the utilization of facilities owned or operated by any public utility to affect any interstate transmission service whether by leasing or other arrangements. *See* 18 C.F.R. § 35.2(a) (2010).

[52] *Id* (emphasis added).

defined to mean all contracts which in any manner affect or relate to services, rates and charges regulated by the Commission.[53]

43. We find that the terms of the Reliability Support Agreement govern the provision of interstate transmission service, though only in limited conditions and for no compensation in the monetary sense. However, these limitations to the provision of transmission service do not alter our jurisdiction. As CalPeco points out, under the Reliability Support Agreement either CalPeco or Sierra may provide transmission service to the other company in the event that the other company's transmission line is out of service. We find that backstop transactions to be interstate transmission because in the event of an emergency either CalPeco will be using its California Distribution System to provide transmission service to Sierra for its customers in Nevada or Sierra will be using its system which is located in Nevada to provide transmission service to CalPeco in California. Since the exchange of sources involves transmission of electric energy in interstate commerce, even though for payment in kind, our regulations require public utilities to file these agreements. As noted above, the regulation defines electric service to include transfers without regard to the form of payments or compensation and specifically mentions exchanges.

3. <u>Acquired Distribution Facilities</u>

44. The Commission has jurisdiction over "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce."[54] However, the Commission does not have jurisdiction over facilities used in local distribution.[55] In 1996, the Commission issued Order No. 888, which included open access requirements for a public utility to transmit competitors' electricity over the utility's lines on the same terms that the utility applied to its own electric transmissions. The Supreme Court found that the FPA authorized the Commission to assert jurisdiction over selling in the wholesale market and all interstate transmissions of electric energy.[56]

45. However, in Order No. 888, the Commission did not assert jurisdiction over the service of delivering bundled electric energy to end users.[57] To determine what facilities

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[53] 18 C.F.R. § 35.2(b) (2010).

[54] 16 U.S.C. § 824(b)(1) (2006).

[55] *Id.*

[56] *New York v. FERC,* 535 U.S. 1, 22-23 (2002).

[57] Order No. 888, FERC Stats. & Regs. at 31,782-31, 783. *See also, Wisconsin-*

(continued…)

would be under the Commission's jurisdiction and what facilities would remain under the states' jurisdiction for retail regulatory purposes, the Commission developed a seven-factor test.[58] The seven-factor test enables us to identify the primary function of a facility. This primary function determines whether the facility is under our jurisdiction.[59] Thus, even when a distribution facility is used to facilitate a jurisdictional wholesale sale, as in the Distribution Capacity Agreement and Reliability Support Agreement discussed above, if the primary function of the facility is local distribution, only the use of the facility for the Commission-jurisdictional services will be subject to the Commission's jurisdiction.

46. We have reviewed CalPecos' seven-factor analysis and CalPeco's justifications for why the California Distribution System qualifies for local distribution classification. To reiterate, the seven factors are as follows: (1) local distribution facilities are normally in close proximity to retail customers; (2) local distribution facilities are primarily radial in character; (3) power flows into local distribution systems; it rarely, if ever, flows out; (4) when power enters a local distribution system, it is not reconsigned or transported on to some other market; (5) power entering a local distribution system is consumed in a comparatively restricted geographical area; (6) meters are based at the transmission/local interface to measure flows into the local distribution system; and (7) local distribution systems will be of reduced voltage.[60]

47. Based upon the information provided by CalPeco, we find that the California Distribution System meets factors 1, 2, 5, 6 and 7.[61] However, application of factors 3

Michigan Power Co. v. FPC, 197 F2.d 472, 477 (7th Cir. 1952).

[58] *Id.* As discussed above, CalPeco also noted that the Commission has adopted a policy of according deference to a state's determination that particular facilities are subject to the state's regulatory jurisdiction. However, in this instance CalPeco has not requested that we delay our decision until the CPUC issues a ruling regarding its jurisdiction. Thus, our deference policy is inapplicable.

[59] The Supreme Court has determined that whether facilities are used in local distribution is a question of fact to be decided by the Commission. *See FPC v. Southern California Edison Co.*, 376 U.S. 205, 210 n.6 (1964).

[60] Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,771.

[61] As CalPeco acknowledges, in Order No. 888 the Commission established the seven-factor test to analyze the jurisdictional status of facilities used for unbundled retail service. *See* P 22, *supra*. Nonetheless, based on the facts of this case, we find the criteria

(continued…)

and 4 raise a more difficult question. CalPeco notes four instances where power flows out of the California Distribution System: (1) CalPeco will sell power to PG&E at the system boundary to enable PG&E to serve some isolated retail customers; (2) under the Distribution Capacity Agreement, Sierra will use a portion of the California Distribution System to serve the border communities;[62] (3) CalPeco will provide emergency power to Sierra from the Kings Beach generator to provide reliability backup service in the event of an outage; and (4) CalPeco and Sierra will provide emergency power to each other under the Reliability Support Agreement in the event of a line outage.

48. We find that all of the power flowing out of the California Distribution System will be either for border communities or to lend support in the event of an emergency or outage. Given the totality of the circumstances, we find that the California Distribution System meets the seven factor test. Therefore, we will grant CalPeco's request for a declaratory order and disclaim jurisdiction over the California Distribution System. As noted previously, the Commission can exercise jurisdiction over the use of a facility for a Commission-jurisdictional service without claiming jurisdiction over those facilities for all purposes.[63] Thus, our disclaimer of jurisdiction over the California Distribution System does not affect our jurisdiction over interstate transmission service as provided for in the Distribution Capacity Agreement, Reliability Support Agreement, or any other agreement to be filed with the Commission.

49. As noted above, the CPUC is currently considering its jurisdiction over the California Distribution System. We will direct CalPeco to submit a copy of the CPUC's final decision within 20 days from the date of issuance of the CPUC's decision.[64]

50. In light of our decision to disclaim jurisdiction over the California Distribution System, we deny CalPeco's request for waivers as moot.[65]

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in the seven-factor test to provide helpful guidance in determining the jurisdictional status of the facilities at issue.

[62] CalPeco estimates that a coincident peak load of approximately 23 MW will flow to the border communities. Petition at 15 n. 22.

[63] There is thus no issue of dual regulation in this case. Only the Commission will regulate the interstate transmission transactions conducted over the California Distribution System.

[64] The Commission intends to treat this filing as informational. As such, the Commission does not intend to set the informational filing for notice and comment, nor issue an order on it.

[65] In an order being issued concurrently with this order, we grant authorization for

(continued…)

<u>The Commission orders</u>:

(A) CalPeco's petition for declaratory order is denied in part and granted in part, as set forth above in the body of this order.

(B) CalPeco is directed to submit a copy of the CPUC's decision concerning its jurisdiction over the California Distribution System within 20 days from the date of issuance of the CPUC's decision.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Sierra to transfer to CalPeco certain assets comprising the Kings Beach Generation Facility. *Sierra Pacific Power Co. and California Pacific Elec. Co., LLC*, 133 FERC ¶ 61,017 (2010).