

144 FERC ¶ 61,131  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Southwestern Public Service Company

Docket No. EC13-100-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued August 14, 2013)

1. On April 29, 2013, Southwestern Public Service Company (Southwestern) submitted an application under section 203(a)(1) of the Federal Power Act (FPA)<sup>1</sup> requesting authorization for the disposition of jurisdictional transmission facilities to Sharyland Distribution and Transmission Services, L.L.C (Sharyland DTS) (Proposed Transaction).<sup>2</sup> The Commission has reviewed the Proposed Transaction under the Commission's Merger Policy Statement.<sup>3</sup> As discussed below, we will authorize the Proposed Transaction as consistent with the public interest.

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<sup>1</sup> 16 U.S.C. § 824b (2006).

<sup>2</sup> Application of Southwestern Public Service Company for Authorization under Section 203 of the Federal Power Act for Disposition of Jurisdictional Facilities (Application).

<sup>3</sup> *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 (2007) (Supplemental Policy Statement). *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 the Parties**

2. Southwestern, a New Mexico corporation and wholly-owned public utility subsidiary of Xcel Energy, Inc. (Xcel), a public utility holding company, is a vertically-integrated electric utility that provides generation, transmission, and distribution services in the Texas Panhandle and Eastern New Mexico. Southwestern states that wholesale service accounts for approximately one-third of Southwestern's total load. Southwestern is a transmission-owning member of the Southwest Power Pool, Inc. (SPP) and provides transmission services over its transmission facilities under the SPP Open Access Transmission Tariff (OATT). Southwestern states that its transmission facilities, which consist of 6,635 miles of transmission lines and 330 substations, are located in Texas, New Mexico, Oklahoma, and Kansas.

3. Sharyland DTS is a Texas limited liability company that was formed by the owners of Sharyland Utilities, L.P. (Sharyland Utilities), an investor-owned, Texas-based electric utility regulated by the Public Utility Commission of Texas (Texas Commission). According to Southwestern, Sharyland DTS was formed to facilitate Sharyland Utilities' access to the capital markets. Southwestern states that Sharyland DTS owns transmission and distribution facilities located within the Electric Reliability Council of Texas (ERCOT) and leases those assets to Sharyland Utilities, which operates the assets. Southwestern states that Sharyland DTS and Sharyland Utilities operate solely within ERCOT and neither is a public utility as defined by the FPA.<sup>4</sup>

### **B. Description of the Proposed Transaction**

4. Pursuant to the terms of an Asset Purchase Agreement, dated as of March 29, 2013, between Southwestern and Sharyland DTS, Southwestern has agreed to sell to Sharyland DTS: (1) all poles, lines, conductors, arms, braces, insulators, structures, facilities or improvements, fixtures, equipment, and other tangible personal property comprising the "Hobbs-Midland Line," except for a small segment, and the "Grassland-Borden Line," except for a small segment (collectively, the Transmission Lines); (2) all transformers, switches, structures, facilities or improvements, fixtures, equipment and other items of tangible personal property comprising the Borden and Midland Substations (the Substations); (3) the real property upon which the Substations are located;

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<sup>4</sup> Southwestern states that prior to Sharyland Utilities' 2010 acquisition of Cap Rock Energy Corporation (Cap Rock), Sharyland Utilities operated transmission and distribution facilities only within ERCOT. As a result of the Cap Rock acquisition, two divisions of Sharyland Utilities are currently interconnected with SPP. Southwestern notes, however, that those divisions will be disconnected from SPP and interconnected to ERCOT by December 31, 2013. Application n.6.

(4) applicable easements; (5) any and all rights under express or implied warranties provided by third parties to the Transmission Lines and Substations; (6) property licenses and other real property entitlements benefiting the real property, Transmission Lines, Substations, or land contracts, together with the real property and land contracts; and (7) all permits held by Southwestern that relate to the Transmission Lines or Substations.<sup>5</sup>

5. Southwestern states that, effective on the closing date, Southwestern will de-energize the Transmission Lines, Substations, and other related facilities, and thereafter remove certain conductors and insulators in order to physically disconnect the facilities being sold from the Southwestern transmission system. In particular, for the Grassland-Borden Line, Southwestern states that it will remove the conductors and insulators between Structure Numbers 62 and 64. As a result, an approximate 1200-foot gap will exist between the two structures. Similarly, for the Hobbs-Midland Line, Southwestern will remove the conductors and insulators between Structures 197 and 350. As a result, an approximate 24-mile gap will exist between the two structures.<sup>6</sup> Additionally, Southwestern states that, pursuant to a 2011 Texas Commission order, on or after January 1, 2014, Sharyland Utilities will integrate the Transmission Lines and Substations that Southwestern has de-energized and disconnected into the ERCOT transmission grid.<sup>7</sup>

## **II. Notice of Filing and Responsive Pleadings**

6. Notice of the Application was published in the *Federal Register*, 78 Fed. Reg. 28,208 (2013), with interventions and comments due on or before May 20, 2013. Golden Spread Electric Cooperative, Inc. and American Electric Power Service Corporation filed timely motions to intervene. SPP filed a motion to intervene and comments.<sup>8</sup> On June 4, 2013, Southwestern filed an answer to SPP's comments.

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<sup>5</sup> The Asset Purchase Agreement was filed as Exhibit I to the Application.

<sup>6</sup> Exhibits C and D of the Application provide greater detail on the assets that Sharyland DTS will buy from Southwestern.

<sup>7</sup> Application at 5 (citing Application of Sharyland Utilities, L.P. to Approve Study and Plan Pursuant to the Commission's Order in Docket No. 37990 Concerning the Movement of Sharyland's Stanton and Colorado City Divisions from the Southwest Power Pool to ERCOT, Order, Docket No. 39070 (P.U.C. Tex. Jul. 8, 2011)).

<sup>8</sup> SPP May 20, 2013 Comments (SPP Comments).

### **III. Discussion**

#### **A. Procedural Issues**

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

8. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept Southwestern's answer to SPP's comments because it has provided information that assisted us in our decision-making process.

#### **B. Standard of Review under Section 203**

9. Section 203(a)(4) of the FPA 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.<sup>9</sup> 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."<sup>10</sup> 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.<sup>11</sup>

#### **C. Analysis under Section 203**

##### **1. Effect on Horizontal Competition**

##### **a. Southwestern's Analysis**

10. Southwestern states that as a "wires-only" transaction, the Proposed Transaction does not raise any horizontal market power concerns. It states that the Proposed

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<sup>9</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

<sup>10</sup> 16 U.S.C. § 824b(a)(4) (2006).

<sup>11</sup> 18 C.F.R. § 33.2(j) (2013).

Transaction will have no effect on the ownership or control of generation resources and will not result in a change in horizontal market power in any relevant market.<sup>12</sup>

**b. Commission Determination**

11. In analyzing whether a transaction will adversely affect competition, the Commission first examines its effects on concentration in generation markets or whether the transaction otherwise creates an incentive to engage in behavior harmful to competition, such as the withholding of generation. However, the Commission has recognized that transactions involving only the transfer of transmission facilities should not raise competitive concerns.<sup>13</sup> Because the Proposed Transaction will only involve the transfer of transmission facilities, we find that the Proposed Transaction will not have an adverse effect on horizontal competition.

**2. Effect on Vertical Competition**

**a. Southwestern's Analysis**

12. Southwestern states that the Proposed Transaction does not present any vertical market power concerns. More specifically, Southwestern affirms that the Proposed Transaction does not result in any vertical combination of upstream inputs to electric generation, such as transmission facilities or natural gas pipelines, with downstream generating capacity. Southwestern states that Sharyland DTS does not own or control any generation facilities and the transmission facilities will be transferred from the operational control of SPP to ERCOT.<sup>14</sup>

**b. Commission Determination**

13. In analyzing whether a transaction presents vertical market power concerns, the Commission considers the vertical combination of upstream inputs, such as transmission or natural gas, with downstream generating capacity. Because there is no transfer of generation facilities or inputs to electric power generation, we find that the Proposed Transaction will not have an adverse effect on vertical competition.

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<sup>12</sup> Application at 6.

<sup>13</sup> See Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,903 (recognizing that there is no need for a Competitive Analysis Screen when a transaction only involves a disposition of transmission facilities); *DTE Energy Co.*, 97 FERC ¶ 61,330, at 62,572 (2001) (“anticompetitive effects are unlikely to arise in a transaction that only involves a disposition of transmission facilities”).

<sup>14</sup> Application at 7.

### 3. Effect on Rates

#### a. Southwestern's Analysis

14. Southwestern asserts that the Proposed Transaction will have no adverse effect on jurisdictional rates. With regard to transmission rates, Southwestern states that transmission service on Southwestern's facilities is provided by SPP under a Commission-approved cost-based formula rate. When Southwestern transfers the transmission facilities to Sharyland DTS in accordance with the Asset Purchase Agreement, it will remove the cost of the transmission facilities from rate base, and all other costs associated with the transmission facilities will no longer be included in the transmission formula rate. Southwestern also states that it will not include any costs of the Proposed Transaction ("legal fees expenses, etc.") in the transmission formula rate.<sup>15</sup> Accordingly, Southwestern states that the rates charged to transmission service customers will not include any of the costs associated with the facilities sold to Sharyland DTS.<sup>16</sup>

15. With regard to wholesale power sales agreements, Southwestern states that it currently provides wholesale power sales service to multiple customers pursuant to Commission-approved cost-based formula rates and to one customer at stated rates. Southwestern states that the Proposed Transaction will not adversely affect these customers' rates, as the transmission facilities covered by the Proposed Transaction are not included in the formula rate calculations. In addition, Southwestern states that the costs of the Proposed Transaction will not be included in the calculations of the formula rates, and will not be included in the revenue requirement for the stated rates.<sup>17</sup> Southwestern notes that following the Proposed Transaction, Sharyland DTS's facilities and services will be located wholly within ERCOT and therefore, the rates, terms, and conditions of service for Sharyland DTS's facilities acquired under the Proposed Transaction will be regulated by the Texas Commission.<sup>18</sup>

#### b. Commission Determination

16. We note that our analysis of rate effects under section 203 of the FPA differs from the analysis of whether rates are just and reasonable under section 205. Our focus here is on the effect that the Proposed Transaction will have on rates, whether that effect is

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<sup>15</sup> *Id.* at 8.

<sup>16</sup> *Id.* at 8.

<sup>17</sup> *Id.* at 8-9.

<sup>18</sup> *Id.* at 9.

adverse, and whether any adverse effect will be offset or mitigated by benefits that are likely to result from the Proposed Transaction.<sup>19</sup>

17. We find that the Proposed Transaction will have no adverse effect on transmission rates. We note that Southwestern will remove the costs of the transferred transmission facilities and all other costs associated with such facilities from rate base. Southwestern represents that the rates charged to transmission service customers will not include any of the costs associated with the facilities sold to Sharyland DTS. Consequently, we find that the Proposed Transaction will not result in an adverse impact on wholesale transmission rates.

18. We also find that the Proposed Transaction will have no adverse effect on wholesale power sales rates based on Southwestern's representation that the costs of the transmission facilities that are the subject of the Proposed Transaction are not included in Southwestern's wholesale customers' formula rate calculations and its representation that the costs of the Proposed Transaction will not be included in the calculations of the formula rates, and will not be included in the revenue requirement for the stated rates.

19. We note that Sharyland DTS's rates will be regulated by the Texas Commission following the Proposed Transaction.

#### **4. Effect on Regulation**

##### **a. Southwestern's Analysis**

20. Southwestern states that the Proposed Transaction will not result in a regulatory gap and will have no adverse effect on federal or state regulation. Following the closing of the Proposed Transaction, Southwestern states that it will continue to be regulated by the Commission in the same manner as it is today, and Sharyland DTS will continue to operate within ERCOT subject to the regulation of the Texas Commission. For these reasons, Southwestern argues that the Proposed Transaction does not create a regulatory gap or other adverse effect on regulation even though it provides for certain transmission facilities to be sold to an entity that is not a "public utility" as defined by the FPA. Additionally, Southwestern states that the Proposed Transaction is subject to prior review and approval by the Texas Commission and the New Mexico Public Regulation Commission. Southwestern states that such review ensures that any potential effect of the Proposed Transaction on state regulation will be fully evaluated.<sup>20</sup>

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<sup>19</sup> See *ITC Midwest LLC*, 133 FERC ¶ 61,169, at P 23 (2010); *ALLETE, Inc.*, 129 FERC ¶ 61,174, at P 19 (2009); *Startrans IO, L.L.C.*, 122 FERC ¶ 61,307, at P 25 (2008); *ITC Holdings Corp.*, 121 FERC ¶ 61,229, at P 120 (2007).

<sup>20</sup> Application at 9-10.

**b. Commission Determination**

21. 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.<sup>21</sup> We find that the Proposed Transaction will not create a regulatory gap at the federal level, because the Commission will retain its regulatory authority over Southwestern after the Proposed Transaction is consummated. The Texas Commission will retain authority over Sharyland DTS after consummation of the Proposed Transaction. Thus, we do not view Southwestern's disposition of the jurisdictional facilities in question as undermining effective regulation.<sup>22</sup> We also note that no party alleges that regulation would be impaired by the Proposed Transaction, and no state commission has contested Southwestern's assertion that there are "no affected state commissions" and no state commission has requested that the Commission address the issue of the effect on state regulation.

**5. Cross-Subsidization**

**a. Southwestern's Analysis**

22. Southwestern also states that, based on facts and circumstances that it is aware of or that are reasonably foreseeable, 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 pledge or encumbrance of utility assets of 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. Specifically, Southwestern confirms that the Proposed Transaction does not contemplate or include the transfer of facilities between Southwestern, a traditional utility company, and an associate company, as Southwestern is not affiliated with any other party to the Proposed Transaction. Southwestern further asserts that it will not issue new securities for the benefit of an associate company in connection with the Proposed Transaction, and that it does not contemplate any such issuances associated in the future. Southwestern further asserts that it will not enter into any new pledges or encumbrances of utility property for the benefit of an associate company in connection with the Proposed Transaction, and that there are no future plans to do so. Finally, Southwestern states that the Proposed Transaction does not, and will not, involve new contracts between itself and its affiliates.<sup>23</sup>

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<sup>21</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

<sup>22</sup> See *Aquila, Inc.*, 117 FERC ¶ 61,276, at P 56 (2006).

<sup>23</sup> Application at Exhibit M.

**b. Commission Determination**

23. Based on the representations presented in the Application, we find that the Proposed 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.

**6. Other Issues**

**a. SPP's Comments**

24. SPP contends that before transferring functional control of the transmission facilities from SPP to ERCOT, studies should be completed to determine whether the transfer will have a reliability impact on the SPP transmission system or have any economic impacts to the SPP region.<sup>24</sup>

**b. Southwestern's Answer**

25. Southwestern argues that SPP has not identified any deficiency in Southwestern's Application that would provide a basis for denying or delaying approval of the Proposed Transaction. It further states that SPP has not stated who would perform such studies, how they should be undertaken, or how the matters to be studied fall under the Commission's FPA section 203 scope of review.<sup>25</sup> Moreover, it states that the Commission has rejected "similar vague requests for analyses" where the complaining party has offered no evidence of adverse effects resulting from a proposed 203 transaction.<sup>26</sup>

**c. Commission Determination**

26. SPP's request for studies goes beyond the Commission's requirements under FPA section 203 and Part 33 of the Commission's regulations. While the Commission has previously stated that, "when necessary, the Commission conditions merger authorization in order to address specific, merger-related harm," SPP has not substantiated its reliability

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<sup>24</sup> SPP Comments at 3.

<sup>25</sup> Southwestern June 4, 2013 Answer at 1.

<sup>26</sup> *Id.* at 5-7 (citing *San Diego Gas & Elec. Co.*, 137 FERC ¶ 61,232 (2011); *Great Plains Energy Inc.*, 121 FERC ¶ 61,069 (2007)).

concerns nor shown how the Proposed Transaction would harm reliability.<sup>27</sup> Therefore we will not condition approval of the Proposed Transaction on completion of the studies that SPP has requested.

27. We note, however, that the North American Electric Reliability Corporation's (NERC) requirements are independent of the Proposed Transaction.<sup>28</sup> 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, NERC, 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) Southwestern shall account for the Proposed Transaction in accordance with Electric Plant Instruction No. 5 and Account 102, Electric Plant Purchased or Sold, of the Uniform System of Accounts. Southwestern shall submit its final accounting entries within six months of the date that the Proposed Transaction is consummated, and the accounting submission shall provide all of the accounting entries and amounts related to the Proposed Transaction along with narrative explanations describing the basis for the entries.

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<sup>27</sup> See *Great Plains Energy*, 121 FERC ¶ 61,069, at P 49 (2007) (declining protestors' request to condition authorization on applicants jointing an RTO where the protestors failed to identify any harm resulting from the 203 transaction). See also *Potomac Electric Power Company*, 96 FERC ¶ 61,323, at 62,238 (2001) (finding that intervenors failed to substantiate reliability concerns but requiring applicants to "maintain their transmission facilities in a manner that continues to ensure reliability").

<sup>28</sup> See *AES Corp.*, 137 FERC ¶ 61,122, at P 43 (2011).

(C) Southwestern 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.

(D) 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.

(E) 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.

(F) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(G) Southwestern, to the extent that it has not already done so, shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction.

(H) Southwestern shall notify the Commission within 10 days of the date on which the Proposed Transaction is consummated.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.