

131 FERC ¶ 61,029
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Denver City Energy Associates, L.P.

Docket No. EC10-31-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued April 15, 2010)

1. On December 18, 2009, Denver City Energy Associates, L.P. (Denver City Energy) filed an application under section 203(a)(1) of the Federal Power Act (FPA)¹ seeking authorization for the disposition of certain upstream equity interests in Denver City Energy currently held by funds managed and controlled by EIF Management, LLC (EIF) to Great Point Power, LLC (Great Point), a wholly-owned subsidiary of one or more funds managed by ArcLight Capital Partners, LLC (ArcLight Capital). Denver City Energy states that the proposed transaction is part of a larger transaction in which Great Point will acquire from EIF indirect interests in a portfolio of four generating projects (including the facility owned by Denver City Energy) and certain passive interests held by EIF in an independent transmission entity, as described below.

2. The Commission has reviewed the application under the Commission's Merger Policy Statement.² As discussed below, we will authorize the proposed transaction as consistent with the public interest.

¹ 16 U.S.C. § 824b (2006).

² *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 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); *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement), *order on clarification*, 122 FERC ¶ 61,157 (2008); *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A,

(continued)

I. Background

A. Description of the Parties

1. EIF Funds

3. Denver City Energy states that EIF manages and controls several private equity investment funds that invest in power projects in the United States: Project Finance Fund III, L.P.; United States Power Fund, L.P.; United States Power Fund II, L.P., USPF II Institutional Fund, L.P.; and United States Power Fund III, L.P. (collectively, EIF Funds).³

4. Denver City Energy further states that neither EIF nor any of the EIF Funds is a “public utility” as defined under the FPA, although the EIF Funds invest in various energy-related business entities, a number of which are “public utilities” under the FPA.⁴ Denver City Energy also states that the individuals who privately own and control EIF do not directly or indirectly control and are not affiliated with any electric generator or “public utility” other than through the EIF Funds. Moreover, Denver City Energy contends that neither EIF nor any of the EIF Funds is a holding company of any electric utility or any public utility which has a franchised retail service territory, has any captive customers, or which is engaged in the state-regulated sale of electricity at retail, or which owns, operates or controls electric transmission rights or electric transmission facilities (other than limited facilities used solely for the interconnection of generating facilities to the transmission grid). Finally, according to Denver City Energy, neither EIF nor any of

FERC Stats. & Regs. ¶ 31,214, *order on reh’g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

³ EIF also from time to time holds small limited partnership interests, in each case of substantially below five percent, in certain of the EIF Funds.

⁴ Denver City Energy states that the EIF Funds also occasionally invest in energy projects and companies, in the form of development or other loans or limited partnership investments, which convey no voting rights and no ability to control the companies. Thus, Denver City Energy states that such investments do not create affiliate relationships for any relevant purpose and involve no control over the making of relevant decisions.

the EIF Funds owns or controls any electric facilities⁵ or essential inputs to electric generation⁶ located in the United States.

5. The proposed transaction is part of a larger transaction in which Great Point will acquire indirect interests in a portfolio of four generating projects (including the project owned by Denver City Energy) and certain passive interests held by EIF in an independent transmission entity (collectively, the EIF Portfolio). In addition to Denver City Energy, the EIF Portfolio includes Borger Energy Associates, L.P. (Borger) and Crockett Cogeneration,⁷ as well as Hamakua Energy Partners, L.P.⁸ Great Point also will acquire an indirect passive investment interest in Neptune Regional Transmission System, LLC (Neptune RTS), the owner of an independent transmission line linking New Jersey and Long Island, New York that is fully controlled by and a part of the PJM Interconnection LLC regional transmission organization.⁹

6. Denver City Energy notes that Borger owns the 227 MW Blackhawk Power Station, a gas-fired QF located within the footprint of the Southwestern Public Service Company (SPS) balancing authority area (BAA). Borger sells the electric output from its

⁵ Denver City Energy later clarifies that “any electric facilities” relates only to interests in entities other than wholesale generating facilities. Denver City Energy, January 12 Answer at 9.

⁶ See 18 C.F.R. §33.4(a) (2009). Denver City Energy notes in addition that, pursuant to section 35.36 of the Commission’s regulations, essential inputs to generation include intrastate natural gas transportation, intrastate natural gas storage or distribution facilities, sites for generation capacity development, physical coal supply sources and ownership of or control over who may access transportation of coal supplies.

⁷ Denver City Energy notes that these projects are qualifying facilities (QFs) under the Public Utility Regulatory Policies Act of 1978, as amended, which are exempt from the requirements of FPA section 203(a)(1). 118 C.F.R. §292.601(c) (2009).

⁸ Denver City Energy states that, as a seller of wholesale electricity solely within Hawaii, this facility is not a public utility under the FPA and is therefore not subject to section 203(a)(1). See Docket Nos. EG00-181-000, EG01-99-000, *et al.*

⁹ Denver City Energy states that, because the Commission has found that EIF Neptune, LLC's non-voting interests in Neptune RTS are passive, *see Neptune Regional Transmission System, et al.*, 111 FERC ¶ 61,306 (2005), the proposed transaction will not result in a change in control and therefore does not require Commission approval under section 203(a)(1).

facility under a long-term contract to SPS through 2024, pursuant to which the Blackhawk Power Station is fully committed for the life of the agreement.¹⁰

2. Denver City Energy

7. EIF Funds indirectly own 88.8 percent of Denver City Energy, which holds an undivided 50 percent interest as tenant-in-common in the Mustang Station, a 489 MW gas-fired combined cycle electric generating facility located near Denver City, Texas, within the footprint of the SPS BAA.¹¹ Denver City Energy states that the other 50 percent undivided interest in the Mustang Station is directly or indirectly held by the Golden Spread Electric Cooperative, Inc. (Golden Spread Cooperative), a membership-owned generation and transmission cooperative.

8. Denver City Energy is an exempt wholesale generator (EWG) under the Public Utility Holding Company Act of 2005¹² and is authorized by the Commission to sell power at market-based rates.¹³ The application states that all of Denver City Energy's electric output from, and electricity rights related to, the Mustang Station are sold to Golden Spread Cooperative under the terms of a Power Purchase Agreement that terminates in 2020 (Power Purchase Agreement).

3. Great Point and Its Affiliates

9. The application states that Great Point was formed for the purpose of acquiring EIF's interests in the EIF Portfolio and is a wholly-owned indirect subsidiary of ArcLight Energy Partners Fund IV, L.P. (ArcLight Fund IV), or one or more other funds managed by ArcLight Capital. ArcLight Capital also manages ArcLight Energy Partners Fund I, L.P., ArcLight Energy Partners Fund II, L.P., ArcLight Energy Partners Fund III, L.P.,

¹⁰ Denver City Energy states that, pursuant to section 292.601(c) of the Commission's regulations, Borger is exempt from rate regulation under section 205 of the FPA, because it sells the output from its facility pursuant to a contract that was in existence as of March 17, 2006.

¹¹ UnionBanCal Equities, Inc. (UnionBanCal) indirectly holds 11.2 percent of the interests in Denver City Energy as passive limited partner interests. Denver City Energy states that, as part of the proposed transaction, the interest held by UnionBanCal will ultimately be transferred to Great Point together with the EIF Funds' existing interests in Denver City Energy, resulting in Great Point holding a 100 percent interest in Denver City Energy and thus a 50 percent undivided interest as tenant-in-common in the Mustang Station.

¹² *Denver City Energy Associates, L.P.*, 80 FERC ¶ 62,265 (1997).

¹³ *GS Electric Generating Cooperative, Inc., et al.*, 81 FERC ¶ 61,042 (1997).

and ArcLight Liquid Energy Opportunities Fund, L.P. (collectively, with ArcLight Fund IV, the ArcLight Funds), each of which is a private equity fund with a focus on the independent power sector.

10. The ArcLight Funds are affiliated with ArcLight Energy Marketing, LLC (ArcLight Energy), a marketer of electric power and natural gas. The Commission has authorized ArcLight Energy to sell energy, capacity, and ancillary services at market-based rates.¹⁴ The application states that ArcLight Energy does not own or control any electric facilities in the United States. In addition, the ArcLight Funds are affiliated with certain existing generation facilities in the United States.¹⁵ Specifically, in the SPS BAA, the ArcLight Funds currently are affiliated with Lea Power Partners, LLC (Lea Power), an EWG¹⁶ that owns and operates the 604 MW Hobbs Generating Station. The Commission has authorized Lea Power to sell energy, capacity, and ancillary services at market-based rates.¹⁷ The application states that all of the output from the Hobbs Generating Station is committed to SPS pursuant to a long-term power purchase agreement that is in effect until 2033.

11. The application states that none of the ArcLight Funds or any of their affiliates owns or controls any transmission facilities in the United States, other than the limited interconnection facilities required to connect individual generating facilities to the transmission grid. In addition, according to the application, none of the ArcLight Funds or any of their affiliates owns or controls inputs to electric power production, which could be used to prevent competitors from entering the relevant market. The ArcLight Funds are not affiliated with any public utility with a franchised electric service territory.

B. Description of the Transaction

12. Pursuant to the proposed transaction, EIF will transfer its indirect ownership interests in Denver City Energy (including the UnionBanCal interest) and the other EIF Portfolio entities to Great Point. EIF will not retain any ownership interests in Denver

¹⁴ ArcLight Energy Marketing, LLC, Docket No. ER07-11 06-000 (July 25, 2007) (unpublished letter order).

¹⁵ Exhibit B to the application lists and describes the generation facilities owned or controlled by affiliates of the ArcLight Funds. Additionally, the application states that ArcLight Funds affiliates may own passive interests in electric generation facilities as a result of sale leaseback transactions or other forms of passive ownership.

¹⁶ See Notice of Effectiveness of Exempt Wholesale Generator Status or Foreign Utility Company Status issued in Docket No. EG07-28-000 on April 4, 2007.

¹⁷ *Lea Power Partners, LLC*, Docket No. ER07-751-000 (June 5, 2007) (unpublished letter order).

City Energy or its related assets following the proposed transaction. Accordingly, as a result of the proposed transaction, Great Point will directly or indirectly own 100 percent of Denver City Energy and will indirectly own a 50 percent undivided interest as tenant-in-common in the Mustang Station.

13. Denver City Energy states that the jurisdictional facilities affected by the proposed transaction are: (1) Denver City Energy's market-based rate schedule on file with the Commission, (2) Denver City Energy's interconnection agreement, (3) Denver City Energy's power sales contracts, and (4) Denver City Energy's limited generation-side interconnection facilities necessary to connect the Mustang Station to the transmission system.

II. Notice of Filing and Responsive Pleadings

14. Notice of the application was published in the *Federal Register*, 75 FR 355 (2009), with interventions and protests due on or before January 8, 2010. Golden Spread Cooperative and GS Electric Generating Cooperative, Inc. (GS Generating, and together with Golden Spread Cooperative, Golden Spread) filed a timely motion to intervene, protest, and request for issuance of a deficiency notice. Denver City Energy filed an answer to the protest.

15. On January 11, 2010, Denver City Energy submitted a supplemental filing. Notice of the supplemental filing was published in the *Federal Register*, 75 FR 3461 (2010), with interventions and protests due on or before January 21, 2010. Golden Spread filed a protest of Denver City Energy's supplemental filing, reply to Denver City Energy's motion for adoption of a protective order, and motion for leave to answer and an answer to Denver City Energy's answer. On January 25, 2010, Denver City Energy filed a request for permission to file an answer and an answer to the protest.

III. Discussion

A. Procedural Issues

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹⁸ the timely, unopposed motion to intervene of Golden Spread serves to make it a party to this proceeding.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure¹⁹ prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority.

¹⁸ 18 C.F.R. § 385.214 (2009).

¹⁹ 18 C.F.R. § 385.213(a)(2) (2009).

We will accept the answers because they have provided information that assisted us in our decision-making process.

B. Standard of Review Under Section 203

18. 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.²⁰ 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."²¹ The Commission's regulations establish verification and informational requirements for Denver City Energy that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.²²

C. Analysis Under Section 203

1. Effect on Competition – Horizontal Market Power

19. Denver City Energy states that the relevant market for the proposed transaction is the SPS BAA and that there is no need for a market power study because there is no change in market concentration. Denver City Energy further states that, as a result of the transaction, the Mustang Station will be affiliated with the Hobbs Generating Station and Borger's Blackhawk Power Station, which are also located in the SPS BAA. However, as noted above, the entire output of each of these facilities is fully committed under long-term contracts. Thus, Denver City Energy argues that the proposed transaction does not raise any horizontal market power concerns.

20. Based on Denver City Energy's representations, we find that the proposed transaction does not raise horizontal market power concerns. Denver City Energy states that the output from all of the facilities located in the SPS BAA is committed under long-term contracts. Capacity that is committed under long-term sales contracts is effectively removed from the owner's control, and thus should not be counted among the owner's portfolio of uncommitted capacity.²³ Therefore, since Denver City Energy has no

²⁰ See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

²¹ 16 U.S.C. § 824b(a)(4) (2006).

²² 18 C.F.R. § 33.2(j) (2009).

²³ See, e.g., *NorthWestern Corporation*, 117 FERC ¶ 61,100, at P 23 (2006).

uncommitted capacity in the SPS BAA, the proposed transaction will not increase market concentration in the relevant market.

2. Effect on Competition – Vertical Market Power

21. Denver City Energy states that the proposed transaction also raises no vertical market power concerns. Denver City Energy contends that none of the EIF Portfolio entities, Great Point, or any of Great Point's affiliates owns non-passive voting interests in or controls transmission facilities in the United States, except the limited interconnection equipment necessary to connect individual generating facilities to the grid.²⁴ In addition, Denver City Energy states that no inputs to electric generation are involved as part of the proposed transaction. Further, Denver City Energy states that neither Great Point nor any of its affiliates owns or controls intrastate natural gas transportation, intrastate natural gas storage or distribution facilities, or sources of coal supplies and the transportation of coal supplies in the relevant geographic market.

22. Based on Denver City Energy's representations, we find that the proposed transaction raises no vertical market power concerns. The proposed transaction also creates no new vertical combinations of assets. Thus, there will be no increased incentive or ability to harm competition. Moreover, we note that no party has raised concerns about competition.

3. Effect on Rates

23. Denver City Energy states that it has market-based rate authority and will continue to sell power pursuant to negotiated rates under its market-based rate tariff and under the Power Purchase Agreement with Golden Spread. Denver City Energy further states that all of its electric output from, and electricity rights related to, the Mustang Station are

²⁴ Denver City Energy states that none of the ArcLight Funds or any of their affiliates owns or controls any transmission facilities in the United States other than the limited interconnection facilities required to connect individual generating facilities to the transmission grid. Application at 11. We note that, in Exhibit B, the Dixie Valley line was not identified as a transmission line. See Application, Exhibit B at 8. However, in a separate proceeding that is pending before the Commission, the owner of the Dixie Valley line filed a request for waiver of the open access transmission tariff (OATT) requirement with regard to the Dixie Valley line. See *Terra-Gen Dixie Valley, LLC*, Petition for a Declaratory Order, Docket No. EL10-29-000 (filed Dec. 24, 2009). Nevertheless, the proposed transaction in the instant proceeding does not trigger concerns regarding vertical market power because the Dixie Valley line is not located in the relevant geographic market. See, e.g., *NorthWestern Corp.*, 117 FERC ¶ 61,100, at P 27 (2006).

sold to Golden Spread Cooperative under the Power Purchase Agreement through 2020.²⁵ Denver City Energy states that the proposed transaction will not affect the rates Denver City Energy is authorized to charge under its market-based rate authority.

24. Golden Spread states that the relationship between GS Generating and Denver City Energy, as co-owners of the Mustang Station, is set forth in a Joint Operating Agreement, pursuant to which Denver City Energy serves as the operating agent for the Mustang Station.²⁶ Golden Spread further states that rates charged to Golden Spread under the Power Purchase Agreement are affected by Denver City Energy's administration of the Joint Operating Agreement, under which Denver City Energy allocates certain costs of operating the Mustang Station to the co-owners. Golden Spread asserts that, in the past, Denver City Energy has improperly allocated these costs and that an arbitrator has found that Denver City Energy had breached the Joint Operating Agreement and Purchase Power Agreement. Golden Spread states that Denver City Energy has not yet complied with the arbitrator's decision and is seeking to have it vacated.²⁷ Golden Spread asserts that the actions of Denver City Energy to improperly increase Golden Spread's cost of power requires Golden Spread to increase its offer prices in the Southwest Power Pool Energy Imbalance Services Market, which may affect market clearing prices, as well as the earnings of other market participants. Golden Spread states that potential beneficiaries of higher market prices could be other projects controlled by EIF or ArcLight Capital. Thus, Golden Spread requests that Commission approval of this transaction should be conditioned upon the acceptance by all transferees of the outcomes of pending litigation regarding the Joint Operating Agreement and Purchase Power Agreement.

25. In its answer, Denver City Energy states that, while it commits to hold Golden Spread harmless from Denver City Energy's and the transacting parties' costs of the proposed transaction, it is not required to provide further protections from rate modifications because it only sells power under a market-based rate tariff.²⁸

26. We accept Denver City Energy's commitment that it will hold Golden Spread harmless from costs of the proposed transaction and rely on that commitment in finding that the proposed transaction will not adversely affect rates. Denver City Energy has committed to sell power to Golden Spread at market-based rates through 2020 through a long-term contract. The Commission has found that, where electricity is sold at market-

²⁵ Application at 10.

²⁶ Golden Spread, January 8 Filing at 5.

²⁷ Golden Spread, January 8 Filing at 8-9 and 13-14.

²⁸ Denver City Energy, January 12 Answer at 12.

based rates, the transaction is unlikely to have an adverse impact on rates.²⁹ Moreover, the pending litigation and Denver City Energy's compliance with the arbitrator's decision are outside the scope of this proceeding. Therefore, we find that the proposed transaction will not adversely affect rates.

4. Effect on Regulation

27. Denver City Energy states that the proposed transaction will not affect the manner or extent to which the Commission, any state, or any other federal agency may regulate it. Denver City Energy further states that its status as an EWG with market-based rate authority and the extent to which it is subject to the jurisdiction of the Commission will not change as a result of the proposed transaction.

28. 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.³⁰ 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 the companies after the transaction. 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

29. Denver City Energy contends that because neither it nor Great Point is, or will by virtue of the proposed transaction become, affiliated with a traditional public utility associate company that has captive ratepayers in the United States or that owns or provides transmission service over jurisdictional transmission facilities in the United States, the proposed transaction is within the scope of the "safe harbor" for transactions in which the Commission has found that there is no potential for harm to customers. In addition, Denver City Energy asserts that because they fall under this "safe harbor" none

²⁹ *SUEZ Energy North America*, 125 FERC ¶ 61,188, at P 37 (2008). Order No. 652 requires that sellers with market-based rate authorization timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. This requirement is codified in section 35.42 of the Commission's regulations. The foregoing authorization may result in a change in status. Accordingly, Denver City Energy is advised that it must comply with the requirements of Order No. 652. In addition, Denver City Energy shall make appropriate filings under section 205 of the FPA, to implement the transaction.

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

of Denver City Energy, Great Point, or any of their affiliates has any existing pledges or encumbrances of public utility assets that are of concern to the Commission.³¹

30. In its Exhibit M, Denver City Energy also states that, based on facts and circumstances that are known or reasonably foreseeable as of the date of the application, the proposed transaction will not result in, at the time of the transaction or in the future: (1) any transfers of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission 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 owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) any new affiliate contracts between a non-utility associate company and a traditional public utility associate company that has captive customers or that own or provide 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.

31. Based on the facts as 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. Protective Order

32. In the application, Denver City Energy requests privileged and confidential treatment of Exhibit I under 18 C.F.R. § 388.112 (2009).³² Exhibit I includes all contracts related to the proposed transaction together with copies of all other written instruments entered into or proposed to be entered into by the parties to the transaction. 18 C.F.R. § 33.2(f). Denver City Energy asserts that Exhibit I contains sensitive commercial and financial information that is privileged or confidential and not publicly available.³³ Denver City Energy subsequently requested that the Commission adopt a

³¹ Application at 18 (citing 18 C.F.R. § 2.26).

³² Denver City Energy also invokes section 33.9 of the Commission's regulations, which applies the protections under section 388.112 to applications under section 203.

³³ Application at 13.

protective order for “certain highly confidential materials” submitted as Exhibit I. Denver City Energy argues that Golden Spread should not have access to any portion of Exhibit I that is “commercially sensitive and wholly irrelevant to Golden Spread’s purported interests in the transfer of the upstream ownership” of Denver City Energy.³⁴

33. Golden Spread responds that Denver City Energy has not justified the heightened protection sought under the protective order requested in Denver City Energy’s January 12 filing, which Golden Spread interprets as a targeted attempt to limit Golden Spread’s access to the protected material.³⁵ Golden Spread argues that Denver City Energy bears the burden of proof as to the designation of materials as protected, and that it has not met that burden.

34. Denver City Energy answers that most of Exhibit I does not relate to Denver City Energy, which is only one of five different EIF Portfolio companies involved in the transaction, and asserts that Golden Spread’s only expressed interest in Exhibit I relates to the Joint Operating Agreement.³⁶ In that regard, however, Denver City Energy argues that the Joint Operating Agreement will not be modified, that it will continue in full force and effect, and that Denver City Energy will continue to operate Mustang Station pursuant to the agreement.³⁷ Denver City Energy also argues that Golden Spread need not have access to Exhibit I to determine the intended disposition of the Joint Operating Agreement, discussed further below.³⁸ Lastly, Denver City Energy argues that receipt of information under section 33.9 of the Commission’s regulations is limited to “parties to the proceeding,” and that at the time of Golden Spread’s initial request for Exhibit I, it was not yet a party.³⁹

35. In analyzing whether to grant Denver City Energy’s request for protective order for Exhibit I,⁴⁰ the Commission considers whether the information qualifies as confidential; whether particular 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.⁴¹ As mentioned above, Denver City Energy states that most of

³⁴ Denver City Energy, January 12 Answer at 1.

³⁵ Golden Spread, January 21 Filing at 5-6.

³⁶ Denver City Energy, January 12 Answer at 15.

³⁷ Denver City Energy, January 12 Answer at 15-16.

³⁸ Denver City Energy, January 12 Answer at 6-8.

³⁹ *Id.* at 16.

⁴⁰ Denver City Energy, January 8 Motion at 15-20.

⁴¹ *Westar Energy, Inc.*, 115 FERC ¶ 61,034, at P 9 (2006).

Exhibit I bears no relationship to Denver City Energy (which is only one of five different EIF Portfolio companies involved in the transaction).⁴² We therefore grant Denver City Energy's motion for the adoption of the protective order addressing highly confidential materials. As a party to this proceeding, if Golden Spread executes the protective order, it may gain access to these materials.⁴³

b. Joint Operating Agreement

36. Golden Spread argues that the Joint Operating Agreement is a jurisdictional facility that is being disposed of in this proposed transaction, but is not identified as such in the application. Golden Spread states that, pursuant to the Joint Operating Agreement, Denver City Energy operates Mustang Station, and its responsibilities include allocating project costs to the two co-owners (i.e., Denver City Energy and GS Generating). Golden Spread further states that it has been involved in litigation with Denver City Energy over the operation and cost allocation of expenses related to Mustang Station. Golden Spread requests that the Commission issue a deficiency notice requiring Denver City Energy to identify the Joint Operating Agreement as a jurisdictional facility being transferred under the proposed transaction, and that the Commission should consider the effect of the proposed transfer of the Joint Operating Agreement on rates in our analysis under section 203.⁴⁴

37. Denver City Energy answers that, to the extent the Joint Operating Agreement is a jurisdictional facility, Denver City Energy has sufficiently identified and requested authorization for the disposition of its "market-based rate schedule on file with the Commission," which, according to Denver City Energy, includes the Joint Operating Agreement as an agreement made pursuant to Denver City Energy's market-based rate tariff under section 35.1(g) of the Commission's regulations.⁴⁵ Denver City Energy further notes that it has not made and does not propose to make any modification to, or to terminate, the Joint Operating Agreement, and that Denver City Energy will continue to be the party to the agreement. Hence, according to Denver City Energy, the proposed transaction will have no effect on rates, even if the Joint Operating Agreement is a rate schedule or other market-based agreement.⁴⁶

⁴² Denver City Energy, January 12 Answer at 15.

⁴³ We note that, although Golden Spread expressed interest in executing the protective order, it never did so. *See* Golden Spread, January 21 Filing at Attachment B.

⁴⁴ Golden Spread, January 8 Filing at 5-9.

⁴⁵ Denver City Energy, January 12 Answer at 7.

⁴⁶ *Id.* at 8.

38. We have already determined that the proposed transaction will have no effect on rates or on any other matter related to the Commission's analysis. As discussed above, Denver City Energy sells power associated with its undivided interest in the Mustang Station pursuant to its market-based rate tariff. We rely on Denver City Energy's statement that the Joint Operating Agreement will remain in force, without modification, and agree that Golden Spread has provided no legal or factual basis for its concern about the effect of the proposed transaction on the Joint Operating Agreement.⁴⁷ Accordingly, 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. Finally, it would be inappropriate to address issues raised in the ongoing litigation between Golden Spread and Denver City Energy, which are outside the scope of this proceeding.

c. Additional Issues

39. Golden Spread also requests that the Commission set the application for hearing, arguing that the Commission should condition the transaction on remedies, including future compliance with the Power Purchase Agreement and Joint Operating Agreement and appropriate refunds for Denver City Energy's asserted violations of the cost allocation arrangement in the Joint Operating Agreement for Mustang Station.⁴⁸

40. When necessary, the Commission conditions authorizations of proposed transactions in order to address specific harm related to the proposed transactions. However, Golden Spread has not shown that its assertions related to future compliance with the Power Purchase Agreement and Joint Operating Agreement and refunds arising from violations of the Joint Operating Agreement fall into that category. Moreover, as already noted, the ongoing litigation between Golden Spread and Denver City Energy is outside the scope of this proceeding.⁴⁹

41. In addition, Golden Spread notes that Denver City Energy did not provide an Exhibit C (current and post-transaction corporate structure of an applicant) in its initial application and argued that the Exhibit C provided in the supplemental filing was "nebulous."⁵⁰ Denver City Energy responds that additional information is not necessary, and that all of ArcLight Capital's energy affiliates are disclosed in Exhibit B to the application, as required by 18 C.F.R. § 33.2. We find that the application describes the current organizational structure of Denver City Energy sufficiently in the text, and that

⁴⁷ Denver City Energy, January 25 Answer at 2.

⁴⁸ Golden Spread, January 8 Filing at 15.

⁴⁹ See, e.g., *Great Plains Energy Inc.*, 121 FERC ¶ 61,069, at P 49-50 (2007).

⁵⁰ Golden Spread, January 21 Filing at 3.

Denver City Energy has sufficiently explained the post-transaction structure in the text of the application and in its supplemental filing to allow the Commission to review the effect of the proposed transaction on competition within the relevant market.⁵¹ Further, we note that Golden Spread has not raised any concern about the deficiency in Exhibit C that is relevant to our analysis here, as discussed above. Therefore, we deny Golden Spread's request to require Denver City Energy to submit a more specific Exhibit C.

42. 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 disposition of jurisdictional facilities is hereby authorized, as discussed in the body of this order.

(B) Denver City Energy 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.

⁵¹ *PNM Resources, Inc.*, 124 FERC ¶ 61,019, at P 54 (2008).

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

(G) Denver City Energy shall notify the Commission within 10 days of the date that the disposition of jurisdictional facilities has been completed.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.