

156 FERC ¶ 61,206
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

AEP Texas Central Company
AEP Texas North Company
AEP Utilities, Inc.

Docket No. EC16-135-000

ORDER AUTHORIZING MERGER

(Issued September 22, 2016)

1. On June 27, 2016, pursuant to section 203(a)(1)(B) of the Federal Power Act (FPA)¹ and part 33 of the Commission's regulations,² American Electric Power Service Corporation, on behalf of its affiliates AEP Texas Central Company (Texas Central), AEP Texas North Company (Texas North), and AEP Utilities, Inc. (AEP Utilities) (collectively, Applicants), submitted an application seeking authorization for an internal corporate reorganization under which Texas North and Texas Central will merge into a single entity (Proposed Transaction). We have reviewed the Proposed Transaction under the Commission's Merger Policy Statement.³ As discussed below, we authorize the Proposed Transaction as consistent with the public interest.

¹ 16 U.S.C. § 824b (2012).

² 18 C.F.R. pt. 33 (2016).

³ See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996) (Merger Policy Statement), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997); 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

(continued ...)

I. Background

A. Description of Applicants

2. Applicants state that Texas Central and Texas North are wholly owned subsidiaries of American Electric Power Company, Inc. (AEP), an electric utility holding company, and that Texas North and Texas Central provide wholesale and retail electric service entirely within the borders of the Electric Reliability Council of Texas.⁴ Applicants explain that, although Texas North has divested its electric generation facilities, it has retained an undivided ownership interest of 54.69 percent in the 690 megawatt Oklaunion generation facility and certain other mothballed power plants.

3. Applicants state that Texas Central and Texas North together operate under the name AEP Texas,⁵ and that they provide wholesale transmission service at rates on file with the Commission. Applicants further state that AEP Utilities, a first tier subsidiary of AEP, is the direct parent of Texas Central and Texas North.⁶

B. Description of the Proposed Transaction

4. Applicants explain that the Proposed Transaction, which they expect will occur in the fourth quarter of 2016, involves the merger of Texas Central and Texas North into AEP Utilities, which will then change its name to AEP Texas. Applicants state that the purpose of the transaction is to align the legal structure of Texas Central and Texas North with the current organizational and operational structure.⁷ Applicants further represent that the Proposed Transaction should lead to improved access to financing for the newly-

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).

⁴ Application at 1-2.

⁵ Applicants explain that, although Texas North and Texas Central already operate and are managed under the brand name AEP Texas, they made a filing on June 15, 2016 with the Public Utility Commission of Texas (Texas Commission) seeking approval to merge into a legal entity of that same name so that the legal structure of AEP Texas would align with its operational and organizational form. *Id.* at 4.

⁶ *Id.* at 3.

⁷ *Id.* at 4.

formed legal entity, AEP Texas, because it will be able to issue one set of financial instruments and access financial markets with a larger and stronger financial base. Additionally, Applicants state that the Proposed Transaction will allow AEP Texas to streamline its financial and regulatory filings.⁸

II. Notice of Filing and Responsive Pleadings

5. Notice of the Application was published in the *Federal Register*, 81 Fed. Reg. 44,014 (2016), with interventions and protests due on or before July 18, 2016. Oklahoma Municipal Power Authority (Oklahoma Authority) filed a motion to intervene and comments on July 15, 2016. Golden Spread Electric Cooperative, Inc. (Golden Spread) filed a motion to intervene on July 18, 2016.

II. Discussion

A. Procedural Matters

6. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2016), Golden Spread's and Oklahoma Authority's timely, unopposed motions to intervene serve to make them parties to this proceeding.

B. Substantive Matters

1. FPA Section 203 Standard of Review

7. FPA section 203(a)(4) requires the Commission to approve proposed dispositions, consolidations, acquisitions, or changes in control if the Commission determines that the proposed transaction will be consistent with the public interest.⁹ The Commission's analysis of whether a proposed transaction is 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.¹⁰ FPA section 203(a)(4) also requires the Commission to find that the proposed 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-

⁸ *Id.*

⁹ 16 U.S.C. § 824b(a)(4).

¹⁰ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

subsidization, pledge, or encumbrance will be consistent with the public interest.”¹¹ The Commission’s regulations establish verification and informational requirements for entities that seek a determination that a proposed transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.¹²

2. Analysis of the Proposed Transaction

a. Effect on Competition

i. Applicants’ Analysis

8. Applicants state that the Proposed Transaction will not have an adverse effect on competition and does not raise any horizontal or vertical market power concerns.

9. With respect to horizontal market power issues, Applicants explain that the Proposed Transaction involves only corporate entities already deemed to be affiliates for the purposes of the Commission’s competition policies. Applicants state that no horizontal market power analysis is necessary in this case because no generating assets will be entering or leaving the AEP corporate family as a result of the Proposed Transaction. Applicants therefore submit that the Proposed Transaction presents no horizontal market power concerns.¹³

10. Applicants argue that the Proposed Transaction will have no adverse effect on vertical competition because the Proposed Transaction will not result in AEP owning or controlling any new entities that provide inputs to electricity products and/or new entities that provide electric generation products. Furthermore, AEP Texas will provide wholesale transmission service over the AEP Texas transmission assets pursuant to the rates and terms on file with the Commission. Thus, Applicants argue that the Proposed Transaction presents no vertical market power concerns.¹⁴

ii. Commission Determination

11. In analyzing whether a proposed transaction will adversely affect horizontal competition, the Commission examines the effects on concentration in the generation

¹¹ 16 U.S.C. § 824b(a)(4).

¹² 18 C.F.R. § 33.2(j).

¹³ Application at 6-7.

¹⁴ *Id.* at 7.

markets and whether the proposed transaction otherwise creates the incentive and ability to engage in behavior harmful to competition, such as withholding of generation.¹⁵

12. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on horizontal competition. As Applicants correctly note in their Application, the Commission has generally held that internal corporate reorganizations where there is no addition of assets from outside the corporate family do not have adverse effects on competition.¹⁶ Therefore, because no generating assets will be entering or leaving the AEP corporate family as a result of the Proposed Transaction, we find that the Proposed Transaction will not have an adverse effect on horizontal competition.

13. In analyzing whether a proposed 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. As the Commission has previously found, transactions that combine electric generation assets with inputs to generating power (such as natural gas, transmission, or fuel) can harm competition if the transaction increases an entity's ability or incentive to exercise vertical market power in wholesale electricity markets. For example, by denying rival entities access to inputs or by raising their input costs, an entity created by a transaction could impede entry of new competitors or inhibit existing competitors' ability to undercut an attempted price increase in the downstream wholesale electricity market.¹⁷

14. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on vertical competition. Applicants have demonstrated that the Proposed Transaction will not result in AEP owning or controlling any new entities that provide inputs to electricity products and/or new entities that provide electric generation products. Further, AEP Texas will provide wholesale transmission service over the AEP Texas transmission assets pursuant to the rates and terms of the AEP open access transmission tariff on file with the Commission.

¹⁵ *Nev. Power Corp.*, 149 FERC ¶ 61,079, at P 28 (2014).

¹⁶ Application at 6. *See also Ameren Corp.*, 131 FERC ¶ 61,240, at P 18 (2010); *Cinergy Corp.*, 126 FERC ¶ 61,146, at P 32 (2009).

¹⁷ *Upstate New York Power Producers, Inc.*, 154 FERC ¶ 61,015, at P 15 (2016); *Exelon Corp.*, 138 FERC ¶ 61,167, at P 112 (2012).

b. Effect on Rates**i. Applicants' Analysis**

15. Applicants state that Texas Central and Texas North intend, for rate purposes, to create two separate divisions within the merged AEP Texas entity: the AEP Texas Central Division and the AEP Texas North Division. Applicants state that Texas Central and Texas North are not seeking recovery of the incremental costs associated with approval and implementation of the Proposed Transaction. Applicants state that Texas Central and Texas North will capture these costs in below-the-line accounts and will not flow them through rates.¹⁸

16. Applicants attest that, after the Proposed Transaction, the two divisions will continue to charge customers the same rates as they would have been charged had the divisions remained legally separate entities. Further, Texas Central and Texas North will maintain separate ledgers for each division; therefore, the costs for each division will be captured in the same manner as is done today. In addition, for rate purposes, Texas Central and Texas North will maintain separate ledgers and identifiable costs of capital. This legacy debt will remain on separate ledgers, as it is currently recorded. Applicants state that any new debt issued will be allocated across the two divisions consistent with appropriate cost causation principles. If, in the future, AEP Texas decides to consolidate the separate Texas Central and Texas North rates, it will make the appropriate applications at that time. Also, Applicants state that there is currently no mechanism to recover the transaction-related costs from current Texas Central and Texas North customers.¹⁹ Thus, Applicants submit that there will be no adverse impacts on rates.²⁰

ii. Commission Determination

17. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on rates. Applicants state that, after the Proposed Transaction, the two divisions will continue to charge customers the same rates as they would have been charged had the divisions remained legally separate entities. Applicants state that AEP Texas will maintain separate ledgers for each division; therefore, the costs for each division will be captured in the same manner as is done today. In addition, for rate

¹⁸ Application at 7-8.

¹⁹ *Id.* at 8 (citing *Policy Statement on Hold Harmless Commitments*, 155 FERC ¶ 61,189, at P 6 (2016)).

²⁰ *Id.*

purposes, AEP Texas will maintain separate ledgers and identifiable costs of capital. This legacy debt will remain on separate ledgers, as it is currently recorded. Applicants further state that any new debt issued will be allocated across the two divisions consistent with appropriate cost causation principles. If in the future, AEP Texas decides to consolidate the separate Texas Central and Texas North rates, it will make the appropriate applications at that time. Also, Applicants state that there is currently no mechanism to recover the transaction-related costs from current Texas Central and Texas North customers. Based on these representations, we find that the Proposed Transaction will not have an adverse impact on rates.

c. Effect on Regulation

i. Applicants' Analysis

18. Applicants state that the Proposed Transaction will not have an adverse effect on regulation. Applicants maintain that as the Proposed Transaction pertains to federal regulation, the Commission will regulate AEP Texas in the same manner as it currently regulates Texas Central and Texas North. Further, Applicants state that AEP Texas will follow the Commission's policies on the pricing of non-power goods and services between affiliates. Accordingly, Applicants submit that the Proposed Transaction will have no adverse effect on federal regulation.²¹

19. Applicants submit that the Proposed Transaction will not have an adverse effect on state regulation. First, Applicants have already sought approval of the Texas Commission for the Proposed Transaction, pursuant to Texas law, and Applicants will not consummate the Proposed Transaction unless and until they secure Texas Commission approval to the extent required.²² Second, Applicants state that the Texas Commission will continue to regulate AEP Texas even after consummation of the Proposed Transaction. Accordingly, Applicants submit that the Proposed Transaction will not have an adverse impact on state regulation.²³

²¹ *Id.* at 9.

²² *See supra* note 5.

²³ Application at 9-10.

ii. Oklahoma Authority Comments

20. The Oklahoma Authority, referring to footnote 16²⁴ of the Application, requests that the Commission not address the issue of Commission jurisdiction over wholesale transmission service provided by Texas Central or Texas North facilities in the immediate proceeding.²⁵

iii. 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.²⁶ As to whether a proposed transaction will have an effect on state regulation, the Commission explained in the Merger Policy Statement that it ordinarily will not set the issue of the effect of a proposed transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the proposed transaction. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission may set the issue for hearing and it will address such circumstances on a case-by-case basis.²⁷ Based on Applicants' representations, we find no evidence that either state or federal regulation will be impaired by the Proposed Transaction. After the Proposed Transaction is consummated, the Commission will regulate AEP Texas in the same manner as it regulates Texas Central and Texas North today. Further, Applicants have already sought approval of the Texas Commission for the Proposed Transaction, and Applicants will not consummate the Proposed Transaction unless and until they secure Texas Commission approval to the extent required. Therefore, we find that there is no regulatory gap with respect to this transaction. Accordingly, the Oklahoma Authority's request is dismissed.

²⁴ In footnote 16, Applicants state that Texas Central and Texas North at one time consented to Commission jurisdiction over their transmission services, which is why these services have traditionally been treated as under Commission jurisdiction. However, Applicants highlight that, although this has traditionally been the case, "jurisdiction cannot be conferred by voluntary agreement." Application at note 16 (citations omitted).

²⁵ Oklahoma Authority Protest at 4.

²⁶ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

²⁷ *Id.*

d. Cross-Subsidization

i. Applicants' Analysis

22. Applicants state that, based on facts and circumstances known to them or that are reasonably foreseeable, the Proposed Transaction will not result in, at the time of the Proposed Transaction or in the future, any cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company, including: (1) any transfer 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 issuance 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 contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA.²⁸

ii. Commission Determination

23. Based on Applicants' representations, we find that the Proposed Transaction will not result in the cross-subsidization of a non-utility associate company by a utility company, or in a pledge or encumbrance of utility assets for the benefit of an associate company. We note that no party has argued otherwise.

3. Accounting Analysis

24. In Attachment A, Applicants provide *pro forma* accounting entries to record the effects of the Proposed Transaction on the books of Texas Central, Texas North, and AEP Utilities.²⁹ Applicants state that the incremental cost associated with approval and implementation of the merger will be captured in below-the-line accounts.

²⁸ Application at 11.

²⁹ See Application at Attachment A.

25. Applicants' *pro forma* accounting entries Journal 1 and 4 incorrectly propose to debit Account 129, Special Funds. The Commission's Uniform System of Accounts³⁰ restricts the use of Account 129 for non-major companies only. Applicants are considered major electric utilities under General Instruction No. 1 of the Uniform System of Accounts, and are therefore required to use the appropriate account for major electric utilities.

26. Applicants shall submit their final accounting entries within six months of the date that the Proposed Transaction is consummated. Additionally, the accounting submission shall provide all accounting entries made to Applicants' books and records, and should include narrative explanations describing the basis for the entries.

4. Other Considerations

27. Information and/or systems connected to the bulk system involved in this transaction may be subject to reliability and cybersecurity 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 database, 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, etc., must comply with all applicable reliability and cybersecurity standards. The Commission, North American Electric Reliability Corporation or the relevant regional entity may audit compliance with reliability and cybersecurity standards.

28. Section 301(c) of the FPA gives the Commission authority to examine the books and records of any person who controls, directly or indirectly, a jurisdictional public utility insofar as the books and records relate to transactions with or the business of such public utility. The approval of the Proposed Transaction is based on such examination ability. In addition, applicants subject to the Public Utility Holding Company Act of 2005 (PUHCA 2005)³¹ are subject to the record-keeping and books and records requirements of PUHCA 2005.

29. Order No. 652 requires that sellers with market-based rate authority timely report to the Commission any change in status that would reflect a departure from the

³⁰ See 18 C.F.R. pt. 101 (2016).

³¹ 42 U.S.C. §§ 16,451 *et seq.* (2012).

characteristics the Commission relied upon in granting market-based rate authority.³² To the extent that a transaction authorized under FPA section 203 results in a change in status, sellers that have market-based rates are advised that they must comply with the requirements of Order No. 652.

The Commission orders:

(A) The Proposed Transaction is hereby authorized, as discussed in the body of this order.

(B) Applicants must inform the Commission of any material change in circumstances that departs from the facts or representations that the Commission relied upon in authorizing the Proposed Transaction within 30 days from the date of the material change in circumstances.

(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 not pending or may come before the Commission.

(D) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

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

(F) Applicants shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction.

(G) Applicants shall submit their final accounting entries within six months of the date that the Proposed Transaction is consummated, as discussed in the body of this order. Additionally, the accounting entries should include narrative explanations describing the basis for the entries.

³² *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005). *See* 18 C.F.R. § 35.42 (2016).

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.