155 FERC ¶ 62,091

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

The Empire District Electric Company
Liberty Utilities (Central) Co.

Docket No. EC16-88-000

# ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued May 6, 2016)

On March 18, 2016, as supplemented on April 8, 2016,The Empire District Electric Company (Empire) and Liberty Utilities (Central) Co. (LU Central) on behalf of its public utility affiliates (LU Central Affiliates) (collectively, Applicants) filed an application under section 203(a)(1) of the Federal Power Act (FPA)[1] requesting authorization for the disposition of jurisdictional facilities. Specifically, as detailed below, LU Central will acquire all of the issued and outstanding common stock of Empire (Proposed Transaction). The affected jurisdictional facilities consist of transmission facilities, including interconnection facilities; an open access transmission tariff (OATT), a market-based rate tariff, a reactive power tariff, and a full requirements tariff; agreements; and books and records.

Empire is an investor-owned utility with market-based authority. Empire owns electric generating facilities that have a total combined capacity of 1,019 megawatts (MWs) and are located in Missouri and Kansas. The 1,109 MWs of generation is situated within Southwest Power Pool, Inc. (SPP). Empire is also a transmission-owning member of SSP in which SPP has functional control of Empire's transmissions facilities and provides service on Empire's transmission system under an OATT. Furthermore, Empire indirectly owns a natural gas facility that is located in western Missouri and is situated also within SPP. In addition to the assets within SPP, Empire owns a 7.5 percent interest in the Plum Point Energy Station located in Mississippi. The Plum Point Energy Station is situated within Midcontinent Independent System Operator, Inc. (MISO), and Empire receives 50 MWs of generation capacity from that facility. Applicants therefore represent that the relevant markets for the Proposed Transaction are SPP and MISO.

[1] 16 U.S.C. § 824b (2006).

Besides a market-based rate tariff, Empire also has on file with the Commission a reactive power tariff and a full requirements tariff. Applicants state that the reactive power tariff sets forth the revenue requirement that Empire receives from the Plum Point Energy Station, and that the full requirements tariff contains a formula rate pursuant to which Empire offers requirements service to eligible customers.

LU Central, according to Applicants, was created to acquire Empire. LU Central is an indirect, wholly owned subsidiary of Algonquin Power Utilities Corp. (Algonquin), a company that indirectly owns and operates renewable electric generation, electric transmission, and utility businesses throughout North America. Emera Incorporated (Emera), a publicly-traded utility holding company, holds a 20.8 percent interest in Algonquin. Applicants represent that, other than Emera, no single investor or affiliated group of investors owns more than 10 percent of Algonquin. Applicants further represent that none of the LU Central Affiliates own or control any electric assets within SPP or MISO.

The Proposed Transaction involves an Agreement and Plan of Merger between Empire, LU Central, and Liberty Sub Corp. Under the Proposed Transaction, according to Applicants, Liberty Sub Corp., a special purpose corporation that is a wholly owned subsidiary of LU Central, will merge with and into Empire, with Empire emerging as the surviving corporation. LU Central will then acquire all of the capital stock of Empire. Empire will thus become a wholly owned subsidiary of LU Central.

Applicants state that the Proposed Transaction is consistent with the public interest and will have no adverse effect on competition, rates, or regulation. With respect to horizontal market power, Applicants state that the Proposed Transaction raises no concern. Applicants state that all electric generation facilities owned or controlled by Empire are located within SPP or MISO, whereas none of the LU Central Affiliates own or control any electric generation facilities located within SPP or MISO. Applicants assert that Empire and the LU Central Affiliates do not currently conduct business in the same geographic area.

With respect to vertical market power, Applicants state that the Proposed Transaction raises no concern. Applicants state that all the electric and natural gas facilities owned or controlled by Empire are located in SPP, whereas all the electric and natural gas facilities owned by the LU Central Affiliates are located in California, Florida, Georgia, Illinois, Iowa, Missouri,[2] Texas, Maine, Connecticut, Pennsylvania, and

[2] Applicants state that Liberty Utilities (Midstates Natural Gas) Corp. (Liberty Midstates), which is an affiliate of LU Central, is a natural gas utility providing gas service to customers in Missouri, as well as Illinois and Iowa. Applicants represent that the natural gas capacity on interstate pipeline systems held by Liberty Midstates is not an

New England. Thus, Applicants assert that there is no geographic overlap between the electric and natural gas assets owned by Empire and those owned by the LU Central Affiliates. With regard to MISO, Applicants represent that the LU Central Affiliates have no jurisdictional assets within that market. Moreover, Applicants state that all jurisdictional transmission assets owned or controlled by Empire or LU Central Affiliates, other than limited interconnection facilities necessary to interconnect electric generation facilities to the grid, are subject to OATTs on file with the Commission.

With respect to rates, Applicants state that the Proposed Transaction raises no concerns. Applicants state that they and their affiliates pledge to hold harmless all wholesale power and transmission customers from any costs associated with the Proposed Transaction. We accept Applicants' commitment to hold customers harmless from costs related to the Proposed Transaction. We interpret Applicants' hold harmless commitment to apply to all transaction-related costs, including costs related to consummating the Proposed Transaction, incurred prior to the consummation of the Proposed Transaction, or in the 5 years after the Proposed Transaction's consummation.

The Commission has established that, where applicants make hold harmless commitments in the context of FPA section 203 transactions, in order to recover transaction-related costs, applicants must demonstrate offsetting benefits at the time they apply to recover those costs. The Commission has clarified its procedures for recovery of such costs under FPA sections 203 and 205.[3] Consistent with those clarifications, and given the commitment by Applicants to hold wholesale power and transmission customers harmless from transaction-related costs, if Applicants seek to recover transaction-related costs incurred prior to the consummation of the Proposed Transaction or in the 5 years after the consummation of the Proposed Transaction, then Applicants must make that filing in a new FPA section 205 docket[4] and submit that same filing as a concurrent information filing in this FPA section 203 docket.[5] The Commission will notice the new FPA section 205 filing for public comment.

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input to electricity production because the capacity is dedicated to meeting the needs of Liberty Midstates' local distribution customers and is held under long-term contracts.

[3] *Exelon Corp.* 149 FERC ¶ 61,148, at PP 106-109 (2014).

[4] The Commission will not authorize the recovery of transaction-related costs in an annual informational filing under existing formula rates.

[5] Upon receipt, the Commission will not act on or notice the concurrent informational filing.

In the FPA section 205 proceeding, the Commission will determine first, whether Applicants have demonstrated offsetting savings, supported by sufficient evidence, to customers served under Commission jurisdictional rate schedules such that recovery of transaction-related costs is consistent with the hold harmless commitment and, second, whether the resulting new rate is just and reasonable in light of all the other factors underlying the proposed new rate. In the FPA section 205 filing, Applicants must: (1) specifically identify the transaction-related costs they are seeking to recover, and (2) demonstrate that those costs are exceeded by the savings produced by the proposed transaction. Applicants must show that the proposed rate is just and reasonable in addition to providing appropriate evidentiary support, such as reasonable documentation and estimates of the costs avoided, demonstrating that transaction-related costs have been offset by transaction-related savings in order to recover those transaction-related costs and comply with its hold harmless commitment. Those savings must be realized prior to, or concurrent with, any authorized recovery of transaction-related costs, and cannot be based on estimates or projections of future savings, but must be based on a demonstration of actual transaction-related savings realized by jurisdictional customers.[6] The Commission will consider rates not to be "just and reasonable" if they include recovery of costs subject to a hold harmless commitment made in connection with an FPA section 203 application and if Applicants fail to show offsetting savings due to the transaction.[7]

Applicants represent that Empire will continue to sell power at market-based rates, and that it has on file with the Commission its full requirements tariff and reactive power tariff. Applicants also state that, except for Liberties Utilities (CalPeco Electric) LLC (CalPeco) and Tampa Electric Company (Tampa Electric), which is a wholly owned, indirect subsidiary of Emera, all the agreements to which the other LU Central Affiliates provide wholesale power service are entered into pursuant to qualifying facility status or market-based rate authority. Applicants explain that CalPeco sells wholesale power to Pacific Gas & Electric Company under a service agreement on file with the Commission, and to Sierra Pacific Power Company under a borderline customer agreement and an emergency backup service agreement. As for Tampa Electric, Applicants explain that Tampa Electric sells wholesale power pursuant to the following: a cost-based rate tariff; an all requirements tariff; and a market-based rate tariff, each of which is on file with the Commission. Lastly, Applicants state that Empire and the LU Central Affiliates provide transmission service pursuant to OATTs.[8]

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[6] *See Audit Report of National Grid, USA*, Docket No. FA09-10-000 (Feb. 11, 2011) at 55; *see also Ameren Corp.*, 140 FERC ¶ 61,034, at PP 36-37 (2012).

[7] *Exelon Corp.*, 149 FERC ¶ 61,148 at P 107.

[8] Applicants state that Emera and Maine Electric Power Company are LU Central's only public utility affiliates that own or control transmission assets other than

With respect to regulation, Applicants state that the Proposed Transaction raises no concern. Applicants state that the Proposed Transaction will not affect the manner or extent to which the Commission, any state, or any other federal agency may regulate Empire and the LU Central Affiliates.

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 closing or in the future, cross-subsidization of a non-utility associate company or the pledge or encumbrance of assets for the benefit of an associate company. Specifically, Applicants state that the Proposed Transaction will not result in: (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 service agreements subject to review under sections 205 and 206 of the FPA.

Applicants state that the Proposed Transaction will not impact the accounts of any of their affiliates that are within the Commission's jurisdiction. Applicants further represent that, if the Proposed Transaction does, however, impact the jurisdictional accounts of any of their public utility affiliates, they will submit the required final accounting entries within 6 months of the date the Proposed Transaction closes.

Since Applicants state that the Proposed Transaction will not impact the accounts of any of their affiliates that are within the Commission's jurisdiction, and Applicants do not propose any changes to the books and records of the jurisdictional subsidiaries, we have no objection to Applicants' request for waiver of the rules under 33.5. However, if the Proposed Transaction affects the books and records of a jurisdictional subsidiary required to follow the Commission's Uniform System of Accounts, Applicants shall promptly inform the Commission and provide the related accounting journal entries for review.

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limited interconnection facilities.

The filings were noticed on March 17, 2016 and April 8, 2016, with comments, protests, or interventions due on or before April 22, 2016. On March 22, 2016, Missouri Public Service Commission and Kansas City Power & Light Company each filed a motion to intervene. On April 4, 2016, ITC Great Plains, LLC filed a motion to intervene. Notices of intervention and unopposed timely motions to intervene serve to make entities that filed them parties to the procedure pursuant to the operation of Rule 214 of the Commission's Rules of Practice and Procedure. No substantive issues were raised in any of the filings.

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 America Electric Reliability Corporation or the relevant regional entity may audit compliance with reliability and cybersecurity standards.

When a controlling interest in a public utility is acquired by another company, whether a domestic company or a foreign company, the Commission's ability to adequately protect public utility customers against inappropriate cross-subsidization may be impaired absent access to the parent company's books and records. 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.

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 characteristics the Commission relied upon in granting market-based rate authority.[9] 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.

[9] Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, order on reh'g, 111 FERC ¶ 61,413 (2005).

After consideration, it is concluded that the Proposed Transaction is consistent with the public interest and is authorized, subject to the following conditions:

(1) The Proposed Transaction is authorized upon the terms and conditions and for the purposes set forth in the application;

(2) 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;

(3) 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;

(4) 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;

(5) If the Proposed Transaction results in changes in the status or upstream ownership of Applicants' affiliated qualifying facilities, an appropriate filing for recertification pursuant to 18 C.F.R. § 292.207 (2015) shall be made;

(6) The Commission retains authority under section 203(b) and 309 of the FPA to issue supplemental orders as appropriate;

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

(8) Applicants shall notify the Commission within 10 days of the date that the Proposed Transaction has been consummated; and

(9) If the Proposed Transaction affects the books and records of a jurisdictional subsidiary required to follow the Commission's Uniform System of Accounts, then Applicants shall submit their final accounting entries within 6 months of the date that the Proposed Transaction is consummated, and the accounting submissions shall provide all the accounting entries and amounts related to the Proposed Transaction along with narrative explanations describing the basis for the entries.

This action is taken pursuant to the authority delegated to the Director, Division of Electric Power Regulation - West, under 18 C.F.R. § 375.307 (2015). This order constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days of the date of issuance of this order, pursuant to 18 C.F.R. § 385.713 (2015).

Steve P. Rodgers, Director
Division of Electric Power
Regulation – West