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AUTH.NAME AUTHOR AFFILIATION
LESSY,R.P. El Paso Electric Co. See Reports
LESSY,R.P. Akin, Gump, Strauss, Hauer & Feld (formerly Akin, Gump, Hau
RECIP.NAME RECIPIENT AFFILIATION
GODY,A.T. Inspection & Licensing Policy Branch (Post 920712)

SUBJECT: Summarizes relevant provisions of encl orders issued on 940801 by FERC in proceedings re aquisition by Central & Southwest Corp of EPEC,on behalf of EPEC & CSWS.

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August 12, 1994

VIA HAND DELIVERY

Anthony T. Gody, Sr.
Chief, Inspection and Licensing Policy Branch
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
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Re: Arizona Public Service Company; El Paso Electric Company; Consideration of Indirect Transfer of Control of Ownership of License and Opportunity for Public Comment on Antitrust Issues
Docket Nos. STN 50-528, 50-529, 50-530

Dear Mr. Gody:

This letter is written on behalf of El Paso Electric Company (EPEC) and Central and South West Services, Inc. (CSWS), acting on behalf of Central and South West Corporation (CSW) and its four electric utility operating subsidiaries, Central Power and Light Company (CPL), West Texas Utilities Company (WTU), Public Service Company of Oklahoma (PSO), and Southwestern Electric Power Company (SWEPCO). CPL, WTU, PSO, and SWEPCO are hereinafter referred to as the CSW Operating Companies.

On August 1, 1994, the Federal Energy Regulatory Commission issued two orders in proceedings that relate to the acquisition by CSW of EPEC. The first order (203 Order) relates to an application filed by EPEC and CSWS pursuant to section 203

2998

per: W. Lambe

of the Federal Power Act (FPA) seeking FERC approval of CSW's acquisition of EPEC.[1] The second order (211 Order) relates to an application filed pursuant to section 211 of the FPA by CSWS on behalf of the CSW Operating Companies for an order requiring Southwestern Public Service Company (Southwestern) to provide firm and non-firm transmission service between EPEC and PSO control areas.[2]

We enclose copies of both orders. The following is a brief summary of relevant provisions of those orders.

Section 203 Order

In the 203 Order, the FERC announced a new standard by which merger applications will be judged.

> We . . . do not believe that we could find any newly filed merger consistent with the public interest if the merging public utilities do not offer comparable services, whether or not that merger results in an increase in market power. . . . Given the transition of the electric utility industry as a whole, we conclude that, absent other compelling public interest considerations, coordination in the public interest can best be secured only if merging utilities offer comparable transmission services.

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[1] A copy of that application is attached as Appendix IV to the Request for NRC Consent to the Indirect Transfer of Control of El Paso Electric Company's Interest in Operating License Nos. NPF-41, NPF-51 and NPF-74, and for Amendments to Operating License Nos. NPF-51 and NPF-74 to Delete Provisions for El Paso Electric Company's Sale-Leaseback Arrangements, dated January 13, 1994 (Request).

[2] A copy of that application is attached as Appendix V to the Request.

203 Order at 53. The FERC further concluded that any anticompetitive effects in this case

> can be adequately mitigated if the El Paso pro forma tariffs and the PSC Oklahoma/SWEPCO tariffs are modified to provide for comparable services. We will therefore condition approval of the merger on the Applicants' agreeing to file such modifications. However, . . . we will not further condition the merger to require that comparability tariffs be filed for services by Central Power and West Texas with ERCOT, despite our pronouncement above regarding coordination in the public interest. This decision is based solely on the unique physical and jurisdictional circumstances involving ERCOT.

203 Order at 54.

Based on this new standard, the FERC has ordered the applicants to notify the FERC within 15 days of the date of the order that they will offer comparable transmission services to third-party utilities and to file proposed tariff revisions offering such services. We enclose a copy of a letter to the FERC dated August 10, 1994 sent by the applicants in response to this requirement.

The 203 Order further requires that the applicants file the proposed tariff revisions by August 31, 1994. The FERC will then hold a hearing to determine appropriate comparability provisions.

In addition to transmission service issues, the order sets for hearing several issues regarding the impact on the

applicants' cost of the merger transaction. These issues include:

1. the reasonableness of the applicants' projection of lower production costs resulting from the merger;
2. the reasonableness of applicants' estimates for labor and administrative cost savings;
3. whether lowering the cost of capital of EPEC will be offset by increases in the cost of capital of the existing CSW Operating Companies;
4. whether the reacquisition by EPEC of fee title to the Palo Verde Nuclear Plant assets as part of the merger will result in cost savings over the remaining life of the assets; and
5. whether the costs and risks of the merger fall disproportionately on the CSW Operating Companies (and their rates).

The FERC rejected requests by certain intervenors that the approval of the merger be subjected to "hold harmless" conditions. The FERC indicated that, "[t]he hearing will address the concerns underlying the requests for conditions. If necessary, we will impose conditions in our final order if the merger is approved." 203 Order at 42. Because the proposed changes in the operating agreement among CSWS and the CSW Operating Companies (including the addition of EPEC as a party thereto) directly affect the distribution of costs and benefits

of the merger among the EPEC and the CSW Operating Companies, the FERC has also set for hearing the reasonableness of those changes.

The hearing in this case is expected to be held on an expedited basis, since the FERC has stated that "the presiding judge shall issue an Initial Decision no later than March 3, 1995." 203 Order at 65.

FERC Section 211 Transmission Application

In its section 211 order, also issued on August 1, 1994, the FERC preliminarily found that "a final order requiring Southwestern to provide the transmission service requested by the Applicants would comply with the statutory standards, once reliability concerns have been met." 211 Order at 24. The FERC's order rejected assertions made by SPS that the FERC has no authority under section 211 to order transmission service where the purpose of the service is to allow coordination of merging utilities' operations. The FERC stated: "We find nothing in the Energy Policy Act itself or in the legislative history that restricts transmission service on the basis of the length of the service, on the nature of the transaction, or the context in which the applicant applies for transmission service." 211 Order at 26.

The order directs Southwestern to perform reliability studies so that the FERC can determine whether provision of the requested transmission service will unreasonably impair

reliability. The order gives Southwestern 30 days to complete the studies and directs the applicants and Southwestern "to work together on these studies, and to exchange information during the study process with the goal of mutually resolving as many differences as possible." 211 Order at 31. After the studies are completed and filed with the FERC, Southwestern and the applicants are required to file supplemental pleadings to discuss the results of Southwestern's analysis.

If, after reviewing the studies and comments filed by Southwestern and the applicants, the FERC concludes that reliability will not be unreasonably impaired, the 211 Order provides that the FERC will issue a further "proposed order" that requires the applicants and Southwestern to negotiate the rates, terms and conditions on which the requested transmission service will be provided.

We hope that the foregoing information will be useful to the NRC Staff in its review of the Request referred to above. If we can answer any questions, or provide additional information, please let us know.

Respectfully submitted,

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

94 AUG -1 PM 4:34

Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.

El Paso Electric Company and Central and South West Services, Inc.	)))	Docket Nos. EC94-7-000 and ER94-898-000

ORDER ON MERGER APPLICATION AND RATE FILING

(Issued August 1, 1994)

I. Introduction

On January 10, 1994, 1/ El Paso Electric Company (El Paso) and Central and South West Services, Inc. (CSW Services), on behalf of the electric utility operating subsidiaries of Central and South West Corporation (CSW), Public Service Company of Oklahoma (PSC Oklahoma), West Texas Utilities Company (West Texas), Southwestern Electric Power Company (SWEPCO), and Central Power and Light Company (Central Power) (collectively, the Applicants), filed a joint application pursuant to section 203 of the Federal Power Act (FPA) 2/ requesting that the Commission approve a transaction (merger) by which El Paso would become the fifth electric utility operating subsidiary of CSW. 3/ The merger would implement the Agreement and Plan of Merger 4/ (Merger Agreement) that would merge El Paso with CSW Sub, Inc., a CSW subsidiary, in a transaction in which El Paso would be the surviving corporation. 5/ El Paso, consequently, will have disposed of its control over its jurisdictional facilities, as

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1/ The Application was supplemented on January 13, January 28, and February 3, 1994.

2/ 16 U.S.C. § 824b (1988).

3/ Application at 1.

4/ The Merger Agreement is dated May 3, 1993 (as amended on May 18, 1993, August 26, 1993, and December 1, 1993).

5/ Id.

contemplated by the Modified Third Amended Plan of Reorganization (Plan) confirmed by the Bankruptcy Court. 6/

The Applicants state that they will go forward with the merger only if several conditions are met. One of the main conditions is the Commission's issuance of an order enabling Applicants to coordinate their operations using firm and non-firm transmission services to be provided by Southwestern Public Service Company (Southwestern). 7/ As discussed below, the Applicants have filed a section 211 application in Docket No. TX94-2-000 requesting these transmission services (TX Application).

The Applicants argue that the proposed merger is in the public interest because, inter alia, the proposed merger will allow El Paso to emerge from bankruptcy. They also claim that the merger will result in substantial benefits, described in detail below, and that it will not adversely affect the existing competitive situation, in part because of "open access" transmission.

The Applicants request that the Commission approve the merger without an evidentiary hearing. Alternatively, they request that the Commission define narrowly the scope of any such hearing, as it has done in past similar cases. 8/ They urge the Commission to conduct any such hearing on an expedited basis, so that an initial decision may be issued by September 15, 1994, and a Commission opinion by late December 1994.

Also on January 10, 1994, the Applicants filed a rate schedule change pursuant to section 205 of the FPA 9/ to amend the Restated and Amended Operating Agreement (New Operating Agreement) among the CSW utility subsidiaries to add El Paso as a party in anticipation of El Paso's merger into the CSW system.

As explained below, the Commission will consolidate the merger application (Docket No. EC94-7-000) and the rate schedule change (Docket No. ER94-898-000). We will not consolidate those

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6/ United States Bankruptcy Court for the Western District of Texas, Austin Division, Case No. 92-10148-FM, December 8, 1993.

7/ Application Vol. I at 35.

8/ Application Cover Letter at 3, citing Entergy Services, Inc. and Gulf States Utilities Company (Entergy), 62 FERC ¶ 61,073 (1993), reh'g denied, 64 FERC ¶ 61,001 (1993), clarification denied, 64 FERC ¶ 61,191 (1993).

9/ 16 U.S.C. § 824d (1988).

two dockets with the section 211 application (Docket No. TX94-2-000).

We find that the merger will not be consistent with the public interest unless the relevant transmission tariffs provide "comparable" services. Accordingly, if the Applicants agree within 15 days of the date of this order that they will amend the relevant tariffs to provide comparable services, we will establish hearing procedures to ensure that the tariffs meet the comparability standard set forth in American Electric Power Service Corporation. 10/ We will also set for a trial-type evidentiary hearing the proposed merger's effect on costs and rate levels (including the indirect effect on the cost of capital), and the rates contained in the section 205 filing. If the Applicants do not agree to the comparability condition, we will deny the merger application as being inconsistent with the public interest and will dismiss the rate filing.

II. Background

A. Description of the Applicants

1. The CSW System

CSW is a registered public utility holding company that owns all of the outstanding shares of common stock of its four subsidiary operating companies (Central Power, West Texas, PSC Oklahoma, and SWEPCO, collectively CSW Operating Companies) and various other companies.

The CSW Operating Companies are engaged in generating, purchasing, transmitting, distributing and selling electricity at wholesale and retail. 11/ The electric utility facilities operated by the CSW Operating Companies are referred to herein as the CSW system. Applicants state that the CSW Operating Companies serve approximately 1.6 million retail customers and 32 wholesale customer groups. West Texas operates its system in Texas. Central Power operates in south and central west Texas; PSC Oklahoma operates in eastern and southwestern Oklahoma; and SWEPCO operates in northeastern Texas, northwestern Louisiana and western Arkansas.

As of December 31, 1992, the CSW Operating Companies owned and operated 13,465 MW of generating capacity, consisting of: 12,414 MW of fossil-fired steam capacity, 630 MW of nuclear

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10/ 67 FERC ¶ 61,168 (1994) (AEP).

11/ Application Vol. I at 4.

capacity, 415 MW of combustion turbine and diesel capacity, and 6 MW of hydroelectric capacity. 12/

The CSW Operating Companies own and operate approximately 1900 miles of 345 kV alternating current (AC) transmission lines, 6700 miles of 138 kV AC transmission lines and over 7100 miles of 69 kV AC transmission lines in Texas, Oklahoma, Arkansas, and Louisiana. The existing CSW Operating Companies operate in two electric reliability councils. PSC Oklahoma and SWEPCO operate their systems within the Southwest Power Pool (SPP). West Texas operates part of its system within the Electric Reliability Council of Texas (ERCOT) and the remainder of its system within the SPP. Central Power operates all of its system within ERCOT. West Texas and PSC Oklahoma own and operate a 220 megawatt (MW) high voltage, direct current (HVDC) interconnection located near Vernon, Texas (the North Interconnection). 13/ A similar HVDC interconnection is currently being constructed in Titus County in east Texas. This 600 MW tie (the East Interconnection) will interconnect SWEPCO with Texas Utilities Electric Company (Texas Utilities). SWEPCO and Central Power will collectively own 300 MW of the East Interconnection. 14/

2. El Paso

El Paso is a public utility under the FPA and is engaged in the generation and distribution of electricity through an interconnected system to approximately 261,000 retail customers in El Paso, Texas and an area of the Rio Grande Valley in west Texas and southern New Mexico, and to wholesale customers (some of which are served through transmission arrangements with others) located in southern California, Texas, New Mexico, and Mexico.

El Paso owns and operates approximately 6,532 miles of transmission and distribution lines in Texas and New Mexico, including 165 miles of 500 kV transmission lines, 940 miles of 345 kV transmission lines, 414 miles of 115 kV transmission lines, and 301 miles of 69 kV transmission lines. 15/ It operates its system within the Western Systems Coordinating Council (WSCC); its system is also interconnected through an HVDC interconnection described below with the transmission system of Southwestern in the SPP.

12/ See Exh. APP-15.

13/ Application Vol. I at 19.

14/ Id. at 20.

15/ Application Vol. I at 19.

El Paso's generating facilities have a net capacity of 1,497 MW, consisting of an entitlement of 600 MW from the Palo Verde Nuclear Generating Station Units 1, 2, and 3; 104 MW from the Four Corners Generating Project (Four Corners); 246 MW from the Rio Grande Power Station; 478 MW from the Newman Power Station; and 69 MW from the Copper Station. Geographically, El Paso's service area extends approximately 100 miles northwesterly from the City of El Paso to the Caballo Dam in New Mexico, and approximately 120 miles southeasterly from the City of El Paso to Van Horn, Texas.

El Paso's transmission lines include: (1) the Arizona Interconnection Project (AIP), a 313-mile long 345 kV line that facilitates El Paso's imports of energy from the Arizona and New Mexico power grids; (2) a 230-mile long, 345 kV line from the Arroyo Substation near Las Cruces, New Mexico, to Albuquerque, New Mexico, at which point El Paso's entitlement from Four Corners is delivered from 150 miles of transmission lines owned by Public Service Company of New Mexico; (3) certain undivided interests in a 200-mile long 345 kV line from the Newman Power Station across southern New Mexico to Greenlee, Arizona; and (4) an undivided 66 percent interest in a 125-mile long, 345 kV line running between El Paso's Amrad Substation and El Paso's Eddy County Substation near Artesia, New Mexico. The Applicants state that the line terminates with a direct current converter facility connected with Southwestern, providing El Paso and Texas-New Mexico Power Company (TNP), the co-owner of the line and direct current converter, with 200 MW of transfer capability between the WSCC and the SPP. 16/

B. The El Paso Bankruptcy Proceeding

On January 8, 1992, El Paso filed a voluntary petition for reorganization under Chapter 11 of the U.S. Bankruptcy Code (Chapter 11). El Paso's attempts to reorganize were unsuccessful, and by late 1992 El Paso began to seek a business combination in order to emerge from Chapter 11. The most promising course of action appeared to be a merger with either CSW or Southwestern. After months of intensive negotiations, the El Paso Board of Directors determined that CSW would be the better partner. Southwestern moved to file a competing plan of reorganization, which was denied on September 17, 1993. Because El Paso is operating as a debtor-in-possession under Chapter 11, its creditors and the Bankruptcy Court had to agree to its plan of reorganization. The objectives of CSW's Plan were to avoid protracted litigation and to allow El Paso to emerge from bankruptcy with an investment-grade credit rating. On December 8, 1993, the Bankruptcy Court confirmed the Plan of Reorganization between CSW and El Paso (Plan) and approved the

16/ Application Vol. I at 27-28.

merger. The Bankruptcy Court, in its Findings of Fact, stated that ". . . no other alternative, including the alternative presented by the [Southwestern] proposal, is or would be appropriate for [El Paso] at this time. . . . " 17/

C. Filings at Issue Here

1. Merger Application -- Docket No. EC94-7-000

a. The Applicants' Proposal

Under the Merger Agreement, CSW would acquire all of El Paso's common stock and El Paso would become the fifth CSW Operating Company. To effect the merger, El Paso would merge with a wholly-owned shell subsidiary established by CSW (CSW Sub) for the purpose of acquiring all of El Paso's common stock. El Paso would be the survivor. The merger and the Bankruptcy Court Plan of Reorganization would become effective on the same date (Effective Date). As part of the merger, in exchange for existing El Paso securities and claims against El Paso, El Paso's current stockholders and debtholders would receive shares of common stock, $3.00 par value, of CSW (CSW Common Stock), new securities of Reorganized El Paso, and cash. Common shareholders of the reorganized El Paso may receive up to an additional $1.50 per share, which can be converted to CSW common stock, contingent upon the proceeds received by El Paso from the disposition of certain assets or the reduction of certain claims. 18/ Existing El Paso preferred stock would be converted into the right to receive preferred stock of the reorganized El Paso based on the ratio derived by dividing (a) $68 million by (b) $78,205,000 (the par value of outstanding El Paso preferred stock). 19/ Existing El Paso secured debt would be converted

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17/ Application Vol. I at 12, citing Exh. H-3, Paragraph 19.

18/ Each share of reorganized El Paso common stock would be converted into the fraction of a share of CSW common stock equal to dividing (a) the sum of (i) $3.00 plus (ii) a pro rata share of the proceeds received from the dispositions of certain assets or reductions of certain claims (up to $1.50) plus (iii) dividends that would have been paid on (i) and (ii) had they been used to purchase CSW common stock, by (b) $29.4583 (the average price of CSW stock for a designated period prior to December 8, 1993, the date the Bankruptcy Court approved El Paso's plan of reorganization). King testimony, Exh. APP-11 at 33; Exh. H-1 at 2-3, 15.

19/ According to Applicants, El Paso's preferred shareholders would receive approximately 82 percent of their claim for par value and accrued dividends. King testimony, Exh. APP-11 at 31-32.

to an equivalent amount of reorganized El Paso debt. El Paso's unsecured debt would be converted to reorganized El Paso debt and CSW common stock; this would satisfy approximately 95.5 percent of the unsecured creditors' claims. The Palo Verde lease obligation bondholders would receive a combination of reorganized El Paso debt and CSW common stock sufficient to satisfy approximately 95.5 percent of their claims. 20/

Applicants state that, because they have requested that the Securities and Exchange Commission (SEC) authorize the issuance of such securities pursuant to the Public Utility Holding Company Act of 1935, they are not requesting that the Commission authorize the issuance of those securities. See 18 U.S.C. § 825q (1988). 21/

Applicants state that the total consideration for the merger would be approximately $2.1 billion, a portion of which would consist of securities of Reorganized El Paso and a portion of which would consist of new shares of CSW Common Stock and/or cash. 22/ Applicants estimate that the consideration would consist of approximately $773 million in CSW Common Stock, approximately $1.19 billion in securities of Reorganized El Paso, and approximately $149 million in cash. 23/ Applicants acknowledge that "because the amount of consideration paid to holders of [El Paso] Common Stock is subject to certain contingencies, the total [merger] consideration may be somewhat higher than $2.1 billion." 24/ Applicants also explain how the various classes of El Paso's bankruptcy creditors would be treated under the Plan. 25/

20/ Id. at 29-30.

21/ Application Vol. 1 at 2-3.

22/ Application Vol. I at 21.

23/ Applicants state that the figures are approximations because the Plan and the Merger Agreement allow CSW to substitute CSW Common Stock or cash for certain securities of Reorganized El Paso and to substitute cash for CSW Common Stock. Application Vol. I at 20-21.

24/ Id.

25/ Application Vol. I at 21-22.

The purchase price reflects a $956.9 million payment to regain ownership of the Palo Verde nuclear assets, which are now the subject of a sale/leaseback arrangement by El Paso. 26/

Applicants state that the merger is subject to a number of conditions, 27/ including:

> receipt of all necessary regulatory approvals from the Commission, the [SEC], the Nuclear Regulatory Commission (NRC) and certain state regulatory authorities; the expiration or termination of all applicable waiting periods under the Hart-Scott-Rodino Act without action by the Department of Justice and the Federal Trade Commission; and receipt of rate orders from the Public Utility Commission of Texas ("PUCT") and the New Mexico Public Utility Commission (the "NMPUC") establishing certain ratemaking, accounting, and regulatory treatments; . . . . [28/]

As stated above, the merger would involve the disposition of all of El Paso's jurisdictional facilities. After the implementation of the Plan, El Paso, as an operating company subsidiary of CSW, would remain subject to Commission jurisdiction. All of El Paso's jurisdictional facilities would

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26/ In 1986 and 1987, El Paso sold 100 percent of its interest in Palo Verde Unit 2 and 39.5 percent of its interest in Palo Verde Unit 3 and simultaneously entered into leaseback arrangements with owner trustees. See El Paso Electric Company, 36 FERC ¶ 61,055 (1986)). In order to finance the purchase of the leased Palo Verde interests, secured and unsecured lease obligation bonds in an aggregate amount of $742 million were issued by two special purpose funding corporations. King testimony, Exh. APP-11 at 41-42.

The buyback price is comprised of a $685.5 million settlement with the lease obligation bondholders (representing 95.5 percent of their total $700 million claim) and a $288.4 million payment to the owner participants for their draws on letters of credit. According to Applicants, El Paso's rates post-merger will reflect only the net book value of the Palo Verde leased assets of approximately $605 million (at June 30, 1993). Id. at 49-51.

27/ Application at 12-13.

28/ Application at 12.

be accounted for pursuant to the Commission's Uniform System of Accounts. 29/

Once the merger is consummated, El Paso would file "open access" firm and non-firm transmission service tariffs similar to those filed by PSO and SWEPCO and approved by the Commission in Docket No. ER93-938-000, et al. 30/ It claims that these tariffs would mitigate any increased market power. El Paso's proposed open access tariffs provide generally for the following: 31/

(1) point-to-point short-term (1 month to 1 year) or long-term (more than 1 year but no more than 20 years) firm service available to any electric utility, not available to (a) retail customers or any other entity that is not an electric utility as defined in the tariff, and (b) any electric utility that has committed to take or pay for transmission service from El Paso under other agreements (except when such agreements do not provide for continued service, are terminated or not renewed);

(2) availability subject to adequate transfer capability (as determined by El Paso) to reliably meet (a) native load requirements (consistent with WSCC, Inland Power Pool and New Mexico Power Pool criteria) and (b) prior contractual commitments, and without burdening native load with costs properly allocable to the customer seeking transmission service;

(3) firm service will have a curtailment priority equivalent to native load;

(4) if system capacity is inadequate, El Paso will construct transmission facilities or operate out of economic dispatch if necessary to accommodate service requests;

29/ Application at 28.

30/ See Southwestern Electric Power Company and Public Service Company of Oklahoma, 65 FERC ¶ 61,212 (1993), reh'g denied, 66 FERC ¶ 61,099 (1994) (PSO/SWEPCO Tariff Case). Compliance filings consistent with these orders were accepted for filing under delegated authority by unpublished letter dated May 18, 1994.

31/ See Shockley testimony, Exh. APP-1 at 31-33; Exh. APP-6; Exh. APP-7.

(5) firm service rate (not yet specified) will consist of (a) the higher of El Paso's average system cost rate or the incremental cost incurred (expansion cost or opportunity cost capped at expansion cost), (b) a charge for losses (if customer elects to have El Paso supply losses) reflecting fixed and variable production costs, (c) cost of any direct assignment facilities (defined as facilities that are not an integral part of the transmission system), and (d) stranded investment costs;

(6) non-firm service will be provided hourly, daily, weekly and monthly under ceiling rates (not yet specified) plus 1 mill/kWh for difficult to quantify costs with no provision for opportunity cost charges;

(7) excludes wheeling of power originating in or destined for a foreign country (i.e., Mexico);

(8) availability of service may be affected by WSCC requirements and/or transmission constraints in New Mexico; and

(9) customers owning or controlling transmission facilities, who request service under the tariffs, are required to provide reciprocal transmission service to El Paso on similar terms and conditions and over comparable facilities.

b. The Applicants' Supporting Arguments

The Applicants raise numerous arguments in support of the merger. (These arguments are discussed in more detail below.) They argue that the proposed merger is consistent with the public interest for a variety of reasons, as discussed below. The Applicants also state that the merger will result in benefits to both CSW and El Paso, their customers, shareholders, and creditors, and to the communities they serve.

First, the Applicants state that the consensual settlement of El Paso's bankruptcy proceeding would result in immediate savings of money and other company resources. The Applicants stress that the Bankruptcy Court found that it is not feasible for El Paso to attempt to emerge from Chapter 11 on a stand-alone basis. They contend that the merger will provide approximately $422 million in cost savings and synergies in the first 10 years after the completion of the merger, in the areas of non-fuel

operating and maintenance (O&M) expenses, financial synergies, and net production and transmission costs. 32/

The Applicants also state that El Paso's emergence from bankruptcy with an investment grade bond rating will reduce its financing costs and provide it with access to a much larger capital market than that which exists for non-investment grade companies. They estimate that such financial savings will range from $70 million to $152 million during the 1995-2004 period. 33/ According to the Applicants, the coordinated operations of the El Paso and CSW Operating Companies systems, using firm and nonfirm transmission provided by Southwestern, 34/ will produce an approximate net savings of at least $34 million over the 1995-2004 period (taking into account the costs of system integration). The Applicants describe two types of cost savings: (1) fuel cost savings from the displacement of higher-cost gas-fired generation by more efficient generation; 35/ and (2) capacity cost savings from the shared use of existing system generating capacity in order to avoid building new capacity or buying capacity from unaffiliated entities. 36/ The Applicants claim that the merger will reduce the risk and cost of power purchases for El Paso because the operating agreement among the CSW Operating Companies provides a cost-based pricing mechanism for capacity purchases.

32/ Applicants estimate the net savings in these areas during the 1995 - 2004 period as follows:

Non-Fuel O&M	$236,000,000
Financial	152,000,000
Production and Transmission	34,000,000
Total Net Savings	$422,000,000

Application Vol. I at 32.

33/ Testimony of Samuel Hadaway, Exh. APP-56 at 24.

34/ As stated above, El Paso and the CSW Operating Companies have, in Docket No. TX94-2-000, requested that Southwestern provide them with bi-directional transmission service between the El Paso and PSC Oklahoma control areas.

35/ Although energy and capacity will be exchanged during the 1995-2004 period, Applicants expect that on balance El Paso will be a net exporter of relatively low-cost energy to CSW.

36/ Application at 35.

37/ Additionally, El Paso will have greater flexibility regarding capacity purchases from the CSW Operating Companies. The Applicants also expect the merger to create opportunities for further cost savings, synergies and benefits that are not yet identifiable or quantifiable.

Finally, the Applicants argue that the merger would not adversely affect competition because of the open-access tariffs.

2. System Agreement Amendment -- Docket No. ER94-898-000

Applicants state that the New Operating Agreement forms the basis upon which Central Power, PSC Oklahoma, SWEPCO, and West Texas: (1) engage in interchange of capacity and energy and coordinate operations of the CSW system, and (2) distribute among the CSW operating companies specified costs associated with such interchanges and coordinated operations. They filed an amendment to the New Operating Agreement along with the merger application. They explain that the purpose of this filing is to add El Paso as a party to the New Operating Agreement, because once El Paso merges with the CSW system it will be the fifth electric utility operating company of the CSW system.

The Applicants state that the Agreement to Amend: (1) becomes effective as a supplement to the New Operating Agreement when the merger is effective, and (2) provides for a change in the distribution of investment costs of certain transmission facilities under the New Operating Agreement in the next several years. The Applicants state that this change will have a material effect on the distribution of costs and savings among the CSW operating companies and El Paso. However, they assert that the addition of El Paso will not have an immediate significant effect on rates, but will change the levels of the carrying charge rates in certain schedules contained in the New Operating Agreement. Finally, the Applicants assert that the addition of El Paso will require other non-rate related changes, including: (1) revising various implementing definitions, (2) identifying El Paso's interest in the high voltage direct current (HVDC) and alternating current transmission facilities that connect the WSCC with the SPP, and (3) changing generating units that are joint units to recognize El Paso's units. The Applicants also state that since El Paso is a member of the WSCC, the Planning Reserve Criteria will be modified to recognize El Paso's adherence to the criteria used by the WSCC.

D. The Transmission Case -- Docket No. TX94-2-000

Southwestern is geographically situated between El Paso and certain parts of the CSW system, most notably PSC Oklahoma.

37/ Application at 37.

Because El Paso is not directly interconnected with any of the CSW Operating Companies, it must either obtain transmission from Southwestern or construct new transmission facilities to establish the interconnection. Applicants contend that the more economical solution is to obtain transmission service from Southwestern. They state that they requested such service in May 1993, but that Southwestern declined to provide it.

On November 4, 1994, the Applicants filed the TX Application. The Applicants request that Southwestern provide up to 133 megawatts of firm and non-firm transmission service between the control areas of El Paso and PSC Oklahoma, which would enable the Applicants to maintain the coordinated operation of their electric systems following the merger of El Paso and CSW Sub, Inc. The Applicants state that they will require non-firm transmission service as early as January 1, 1995, but do not expect to require firm service until January 1, 1999, though the exact date will depend on when the merger is consummated. They state that as part of the CSW system, El Paso will undertake economy energy transactions with other CSW Operating Companies that will require non-firm transmission service. The Applicants also state that El Paso will need the firm transmission service to import energy provided by the other CSW Operating Companies or to export firm power and associated energy to the Operating Companies. The power involved would be delivered to the Southwestern system at Southwestern's points of interconnection with PSC Oklahoma and the northern division of West Texas. It would then be delivered across Southwestern's interconnection with El Paso at Eddy County for redelivery to Southwestern's points of interconnection with PSC Oklahoma and West Texas. The Applicants describe this transmission request as flexible point-to point, bi-directional service. 38/

III. Interventions and Responsive Pleadings 39/

The intervenors and their respective interests in this proceeding are described immediately below. The specific arguments of the intervenors, organized according to the

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38/ See Proposed Order on Transmission Service and Establishing Further Procedures in Docket No. TX94-2-000 for a more detailed description of the TX application and issues. We are issuing that Proposed Order simultaneously with this order.

39/ As stated above, the Application was supplemented three times. Upon motion of several intervenors, the comment deadline was extended until March 4, 1994.

particular issue raised, are discussed in detail in the following sections of this order. 40/

On January 21, 1994, the Arkansas Public Service Commission (Arkansas Commission) filed notices of intervention in both dockets. On January 28, 1994, in Docket No. ER94-898-000, the Louisiana Public Service Commission (Louisiana Commission) filed a notice of intervention. On February 8, 1994, in Docket No. ER94-898-000, Texas Utilities filed a motion to intervene.

On February 23, 1994, the Arizona Public Service Company (Arizona Company) and the Salt River Project Agricultural Improvement and Power District (Salt River Project) filed motions to intervene in both dockets. The Arizona Company makes no specific protest, but requests party status to protect its interests that may be directly affected by the outcome of this proceeding. The Salt River Project seeks to intervene because it is a co-owner of various generating or transmission facilities that are also partly owned by El Paso. Thus, the Salt River Project asserts that El Paso's financial situation has a significant impact on the Salt River Project, and these proceedings are of substantial importance to the Salt River Project.

On February 25, 1993, Houston Lighting & Power Company (Houston Power) filed a motion to intervene in both dockets. Houston Power states that it will be directly affected by the outcome of the case because under the merger proposal and the proposed amendments, the power and energy generated by each of the CSW operating companies will be transmitted to, from, and over the North Interconnection and the East Interconnection. Houston Power states that it provides transmission service under a Commission tariff and Transmission Service Agreements for such transfers. 41/

40/ A number of intervenors filed identical pleadings in both dockets. Some intervenors only filed in one docket, or filed different pleadings in each docket. Issues unique to Docket No. ER94-898-000 will be discussed separately below; otherwise, because we are consolidating the two dockets for hearing and decision, we do not specify in which docket each intervention was filed. Additionally, some intervenors filed identical pleadings in Docket No. TX94-2-000, but because that docket is addressed in a separate order, we do not here specify which pleadings those are.

41/ Houston Power provides certain wheeling services to the CSW Operating Companies under a Commission tariff applicable to transfers of electric power and energy to, from, and over the North Interconnection, which is located in North Texas.

(continued...)

On February 25, 1994, in both dockets, Cajun Electric Power Cooperative, Inc. (Cajun) filed a motion to intervene, protest, and request for hearing.

On February 25, 1994, in both dockets, the Louisiana Commission filed a protest, request for hearing, and a motion for consolidation.

On February 25, 1994, in both dockets, the Arkansas Public Service Commission (Arkansas Commission) filed a protest and a request for a hearing.

On February 25, 1994, in both dockets, the Public Utility Commission of Texas (Texas Commission) filed a notice of intervention, protest, motion for consolidation, and request for hearing. The Texas Commission states that it has no position on many issues in this proceeding because similar issues will be addressed in a proceeding presently pending before the Texas Commission. Those concerns that the Texas Commission does express are discussed in the appropriate sections below.

On February 25, 1994, in both dockets, the Texas Office of Public Utility Counsel (Texas Counsel) filed a motion to intervene, motion for consolidation, protest, and request for hearing. The Texas Counsel asks that the Commission: (1) grant its request to intervene in Docket Nos. EC94-7-000 and ER94-898-000, (2) consolidate Docket Nos. EC94-7-000, ER94-898-000, TX94-2-000 for hearing and decision, (3) conduct an evidentiary hearing for the consolidated dockets on all disputed issues of fact, and (4) deny the Applicants' motion for an expedited disposition of these dockets.

The following parties filed timely, unopposed notices or motions to intervene in Docket No. EC94-7-000, raising no substantive issues: the New Mexico Industrial Energy Consumers (New Mexico Consumers); the New Mexico Public Utility Commission (New Mexico Commission); Texas-New Mexico Power Company (Texas-

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41/(...continued)
Houston Power will also provide wheeling service to the CSW Operating Companies to, from, and over the East Interconnection when it becomes operational. See Central Power & Light Co., et al., 40 FERC ¶ 60,077 (1987). This wheeling service implements requirements of the Commission orders issued under sections 210 and 211 of the FPA that provide for the interconnection of ERCOT and the SPP by means of the North and East Interconnections. Central Power & Light Co., et al., 17 FERC ¶ 61,078 (1981), order on reh'g, 18 FERC ¶ 61,100 (1982); see also Texas Utilities Electric Co., 38 FERC ¶ 61,050 (1987).

New Mexico); Southern California Public Power Authority (Southern California Authority); Dona Ana County, New Mexico (Dona Ana); Northeast Texas Electric Cooperative, Inc. (Northeast Texas); and Southern California Edison Company (SoCal Edison). 42/

The City of El Paso filed a notice of intervention, stating that it has retail rate regulatory authority within the El Paso city limits. Tucson Electric Power Company (Tucson) filed a motion to intervene, stating that Tucson and El Paso, together with several other entities, are joint owners of Units 4 and 5 of the Four Corners Generating Project, located in northwestern New Mexico. 43/ Motions to intervene were also filed by Texas Utilities, 44/ Tex-La Electric Cooperative of Texas, Inc. (Tex-La) 45/ and TDU Customers, a group of municipal entities or cooperative operations that are wholesale customers of a CSW operating utility subsidiary, of El Paso, and/or of Southwestern. 46/

On February 25, 1994, Plains Electric Generation and Transmission Cooperative, Inc. (Plains) filed a motion to intervene, protest and request for hearing.

42/ SoCal Edison is a co-owner of both Palo Verde and the Four Corners Generating Project.

43/ Tucson Intervention at 2.

44/ Texas Utilities Intervention at 9. Texas Utilities is directly interconnected with West Texas, and indirectly with Central Power. By means of the North Interconnection, Texas Utilities is indirectly interconnected with PSC Oklahoma and SWEPCO. Texas Utilities provides transmission service for the CSW Operating Companies to, from, and over the North Interconnection.

45/ Tex-La states that it is presently a customer of both SWEPCO and Central Power. Additionally, Tex-La intends to become a customer of West Texas in June 1994.

46/ TDU Customers include Golden Spread Electric Cooperative, Magic Valley Electric Cooperative, Inc., Mid-Tex Electric Cooperative, Inc. and its members, and Rio Grande Electric Cooperative, Inc. They state that certain of the TDU Customers sell power at wholesale for resale and are thus competitors with one or more CSW Operating Companies, El Paso, and/or of Southwestern for sales of bulk power; all of the TDU Customers compete with one or more CSW Operating Companies, El Paso, and/or Southwestern for supplies of bulk power; the TDU Customers are transmission dependent in whole or in part on either CSW or Southwestern.

On February 25, 1994, Entergy Services, Inc. (Entergy Services), the service company for Entergy Corporation, filed a motion to intervene, raising no substantive issues. 47/ Entergy Services states that the Entergy Operating Companies operate in the SPP, and that there is a direct connection between the Entergy Operating Companies and CSW. Entergy Services also notes that the Entergy Operating Companies are competitors with the merging parties and with Southwestern.

On February 25, 1994, the Imperial Irrigation District (Imperial), a California irrigation district, filed a motion to intervene, raising no substantive issues. Imperial states that it is a customer of El Paso, and that it has an entitlement interest in 14.63 MW of capacity in the Palo Verde nuclear plant.

On February 25, 1994, the New Mexico Attorney General (New Mexico AG) filed a motion to intervene and protest. The New Mexico AG requests a consolidated hearing on the questions raised in this proceeding and in Docket No. TX94-2-000.

On February 25, 1994, the City of Las Cruces, New Mexico (Las Cruces) filed a motion to intervene and protest. Las Cruces is a retail customer of El Paso, purchasing about 75 MW at retail from El Paso. It established a municipally-owned utility in 1991 and is currently exploring the possibility of obtaining facilities necessary to operate such a utility within the city by purchasing El Paso facilities or by building new facilities. Also, it has issued a request for proposals to identify potential wholesale suppliers of power other than El Paso. Las Cruces notes that its current franchise with El Paso expires March 18, 1994, and that it is actively seeking alternative suppliers; nevertheless, it says that Applicants appear to assume that they will be providing continued service to Las Cruces. 48/

On February 25, 1994, Southwestern filed a motion to intervene, protest, motion to consolidate, and request for hearing. Southwestern alleges that the proposed merger would not be consistent with the public interest for several reasons, discussed below.

47/ Entergy Services filed on behalf of itself and Entergy Corporation's five operating electric utility subsidiaries: Arkansas Power & Light Company (Arkansas Power), Gulf States Utilities Company (Gulf States), Louisiana Power & Light Company (Louisiana Power), Mississippi Power & Light Company (Mississippi Power), and New Orleans Public Service, Inc. (NOPSI) (collectively, Entergy Operating Companies).

48/ We note that, on June 6, 1994, Las Cruces announced that it has chosen Southwestern to supply power and to operate its municipal electric system.

On February 28, 1994, the Oklahoma Corporation Commission (Oklahoma Commission) filed a notice of intervention, raising no substantive issues.

On February 28, 1994, the Public Service Company of New Mexico (PSC New Mexico) filed a protest, motion to intervene, request for hearing, and motion to consolidate this proceeding with that in Docket No. TX94-2-000.

On March 4, 1994, the American Forest and Paper Association (American Paper) filed a motion to intervene and protest in both dockets and a motion to consolidate Docket Nos. EC94-7-000, TX94-2-000 and ER93-938-002 (the PSO and SWEPCO open access tariffs case). American Paper argues that the proposed merger would significantly decrease competition in El Paso's service area by giving CSW and its operating companies the exclusive opportunity to control the supply of capacity needs of El Paso through the SPP and to purchase power from El Paso.

On March 4, 1994, the Public Utilities Board of the City of Brownsville, Texas (Brownsville) filed a motion to intervene, protest, and answer.

On March 1, 1994, in each docket, Applicants filed identical responses to the New Mexico Commission's intervention. Applicants state that they disagree with the New Mexico Commission's assertion that after the merger, CSW will become a New Mexico public utility subject to regulation by the New Mexico Commission. 49/ Applicants acknowledge that ultimately the New Mexico Commission will decide the question of its jurisdiction over CSW, but state that they wish to notify this Commission of the possible dispute.

On March 21, 1994, the Applicants filed an Answer to the various interventions and protests in both dockets in which it responds to various arguments, as discussed below.

On March 31, 1994, the New Mexico Commission filed a reply to CSW Services' response that it characterizes as an "advisement" to this Commission. The New Mexico Commission asserts that CSW Service's response is immaterial because it does not challenge the New Mexico Commission's intervention in this proceeding. Also, CSW Services has acknowledged that any

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49/ In its Intervention, the New Mexico Commission states, "If this merger proposal gains FERC's and all other necessary regulatory approvals (including the [New Mexico Commission's]), then CSW will become a New Mexico utility subject to the regulation of the [New Mexico Commission]. CSW is not now regulated by the [New Mexico Commission]." New Mexico Commission Intervention at 2.

disputes between CSW Services and the New Mexico Commission concerning the New Mexico Commission's jurisdiction over CSW Services in state regulatory matters must be resolved by the New Mexico Commission.

On April 5, 1994, in both dockets, Cajun filed a motion for leave to file a reply and a reply to Applicants' Answer. Its arguments are discussed below.

On April 5, 1994, PSC New Mexico filed a motion for leave to file a response and a response to Applicants' answer. Its arguments are discussed below.

On April 5, 1994, Southwestern filed an answer opposing Applicants' request for leave to respond to the protests in this proceeding (contained in the March 21 Answer).

On April 5, 1994, American Paper filed a reply to Applicants' March 21 answer. American Paper reiterates its earlier arguments and asserts that the March 21 Answer does not respond to them. American Paper requests that the Commission reject Applicants' March 21 Answer or, in the alternative, set the issues for an evidentiary hearing or at least a thorough paper hearing.

On April 5, 1994, the Texas Commission filed a response to Applicants' March 21 Answer. The Texas Commission states that the Applicants have misstated the Texas Commission's procedural schedule in El Paso's rate case pending before the Texas Commission. El Paso's March 21 Answer states that the Texas Commission has suggested that that rate case will be completed no later than February 1995. 50/ The Texas Commission clarifies that, as submitted in Exhibit 1 of its protest in this proceeding (Affidavit of Lacy L. Seybold), its decision in the El Paso rate case can be expected to issue no sooner than February 1, 1995. The Texas Commission explains that it does not suggest that this Commission refrain from acting until the Texas Commission sets El Paso's rates; rather, it states that this Commission need not feel pressured to act quickly, when there is ample time for full discovery and hearing before the Texas Commission makes its initial determination in El Paso's retail rate case.

On April 5, 1994, Las Cruces filed a motion to reply to Applicants' March 21 Answer, and an answer. Las Cruces argues that, given the complex issues in this case and the nature of the record, the Commission should not grant Applicants' repeated request for summary approval of the merger. Las Cruces asserts that the key issues in this case that require a hearing, if not

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50/ Texas Commission April 5 Answer at 2, citing Applicants' March 21 Answer at 121.

summary disposition against Applicants, include: (1) whether, as a result of the merger, El Paso will monopolize available transmission capacity to southern New Mexico; (2) whether the Eddy Tie is an essential facility which would be monopolized as a result of the merger; (3) whether, as a result of the merger, El Paso will use its monopoly power over transmission to foreclose competition for retail and wholesale customers. 51/

On April 19, 1994, Applicants filed a response to the answers to Applicants' Answer. Applicants reiterate their earlier arguments and request that if the Commission investigates further any issue in this proceeding, it do so through a "paper hearing" rather than a full evidentiary hearing.

On May 2, 1994, Southwestern filed an answer to the Applicants' April 19 filing. Southwestern states that "[t]he Commission should reject Applicants' repeated efforts to submit contentious facts to the Commission in a manner that gives other parties no opportunity to examine their underlying foundations, if any, and present rebuttal." 52/ Southwestern urges the Commission to reject Applicants' unauthorized pleadings and to dismiss the TX Application; or, if the TX case is not dismissed, to consolidate it and Docket No. EC94-7-000 for hearing. In the alternative, if the Commission does not reject the merger, Southwestern requests that the Commission impose conditions to protect Southwestern from substantial harm.

On May 17, 1994, Applicants filed a letter with attachments, informing the Commission that in the ongoing Texas Commission proceeding, Applicants' witness Harrell has reduced his estimate of labor cost savings resulting from the merger during the 1995-2004 period from approximately $132,295,000 to approximately $121,936,000. Additionally, Applicants state that they have recently hired a consulting firm to provide a new analysis of the effect of the merger on employee health insurance. Whereas Applicants' witness Harrell's testimony in this proceeding estimates a $4.3 million increase in El Paso's costs of supplying employees with health insurance, the consulting firm's new analysis suggests that El Paso would actually save $3.93 million by providing health insurance under CSW's plan during the 1995-2004 period.

51/ Las Cruces April 5 Answer at 1-2.

52/ Southwestern's May 2 Answer at 11.

IV. Discussion

A. Procedural Issues

1. Interventions

Under Rule 214(a)(2) of the Commission's Rules of Practice and Procedure, 53/ the notices of intervention from the Louisiana Commission, the Texas Commission, the New Mexico Commission, the Arkansas Commission, the Oklahoma Commission, and the Southern California Authority serve to make them parties to this proceeding.

Under Rule 214(b) of the Commission's Rules of Practice and Procedure, 54/ the following entities are parties to this proceeding by means of their timely, unopposed motions to intervene: American Paper, Arizona Public Service, Brownsville, Cajun, Dona Ana, City of El Paso, Entergy Services, Houston Power, Imperial Irrigation, New Mexico Industrial Energy Consumers, Northeast Texas Coop, Salt River, SoCal Edison, Las Cruces, New Mexico AG, Plains, Southwestern, Texas Counsel, Tex-La, Texas-New Mexico Power Company, Texas Utilities, Tucson, and the TDU Customers. We will grant PSC New Mexico's motion to intervene one day out of time because of the early stage of the proceeding and the absence of any prejudice or delay.

2. Responsive Pleadings

While our rules do not permit answers to protests, 55/ we may, for good cause, waive a rule. 56/ We find that good cause exists here because of the nature and complexity of this proceeding. We believe that allowing the Applicants to answer Intervenors' arguments will help to develop a full record. We therefore accept the Applicants' March 21 Answer. 57/ For the same reason, we accept the April 5 pleadings filed by several

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53/ 18 C.F.R. § 385.214(a)(2) (1993).

54/ 18 C.F.R. § 385.214(b) (1993).

55/ See 18 C.F.R. § 385.213(a)(2) (1993). Although Applicants refer to their pleading as an answer to motions to intervene, it obviously addresses arguments in the parties' protests.

56/ 18 C.F.R. § 385.101(e) (1993).

57/ See, e.g., Florida Power & Light Company, 65 FERC ¶ 61,155 at 61,764 & n.9 (1993); Ocean State Power, et al., 63 FERC ¶ 61,072 at 61,313 & n.15 (1993), reh'g pending; Arkla Energy Resources, et al., 61 FERC ¶ 61,004 at 61,031 & n.63 (1992).

intervenors in response to Applicants' March 21 Answer; the Applicants' April 19 response to the April 5 pleadings; Southwestern's May 2 and May 26 pleadings; Applicants' May 17 pleading; and the June 10 pleadings filed by Applicants, Las Cruces, and Plains. We emphasize that, were it not for the number and complexity of the issues, and the recent articulation of the AEP comparability standard, we would not find good cause to accept many of these responsive pleadings.

3. Consolidation

A number of intervenors request that the Commission consolidate the merger application with the section 205 and section 211 filings because the filings raise interrelated issues.

According to the New Mexico AG, consolidation of the merger application and the section 205 filing with the section 211 filing is warranted because the merger cannot occur without the use of Southwestern's transmission system (or construction of other facilities), and because the merger proceeding itself will determine the requirements for use of those transmission facilities. Southwestern also requests that the Commission consolidate the 203 and 211 applications and set them for hearing.

The Texas Commission requests that the Commission consolidate Docket Nos. TX94-2-000, EC94-7-000, and ER94-898-000. It argues that the section 211 proceeding is inextricably linked to the section 203 and section 205 issues. It states that the section 211 case is moot if the merger is not otherwise consistent with the public interest, and the sections 203 and 205 filings presuppose that the Commission will require Southwestern to provide the requested transmission service at issue in the section 211 proceeding. The Texas Commission asserts that the Commission should order discovery, followed by a technical conference while discovery proceeds on the remaining issues in the consolidated proceeding. Finally, the Texas Commission requests an evidentiary hearing on disputed factual issues.

The Texas Counsel agrees that Docket Nos. EC94-7-000 and ER94-898-000 are interrelated and should be consolidated. In addition, the Texas Counsel argues that the Commission should consolidate Docket No. TX94-2-000 with Docket Nos. EC94-7-000 and ER94-898-000 because the sections 203 and 205 filings are contingent on the section 211 filing. The Texas Counsel states that to implement the merger the Public Utility Holding Company Act of 1935 (PUHCA) requires that CSW's system be interconnected with El Paso's system. It states that to comply with PUHCA, CSW and El Paso will use Southwestern's system, and the Applicants made their section 211 filing to achieve the required interconnection. Additionally, the Texas Counsel argues that the

Commission's decision on the pricing mechanism and on the section 211 filing will affect the calculation of merger-related costs.

We find that the section 203 and 205 proceedings present common questions of law or fact. Accordingly, we will grant the requests that the section 203 filing in Docket No. EC94-7-000 be consolidated with the section 205 filing in Docket No. ER94-898-000. However, we defer deciding whether to grant the requests that these filings be consolidated with the section 211 application. We believe that it is too early in the proceedings to determine whether consolidation is appropriate. Indeed, if the Applicants do not accept the comparability condition (and notify the Commission within 15 days), then the Commission will deny this merger application and dismiss the section 205 rate filing. Additionally, in the TX proceeding Southwestern must still provide information on reliability and the Commission must then decide whether the transmission service requested by the Applicants will unreasonably impair the continued reliability of affected electric systems. Consequently, since substantive decisions in these proceedings (including whether to proceed further) remain unresolved, we find it premature to decide whether to consolidate the section 211 application with these proceedings.

4. Requests for "Paper Hearing" and for Expedited Action

The Applicants urge the Commission to summarily affirm the rate filing in Docket No. ER94-898-000, and to proceed expeditiously with the rest of the proceeding. The Applicants maintain that the disputed issues can be resolved without an evidentiary hearing, or, alternatively, with a paper hearing limited to particular issues.

We will deny Applicants' request in the alternative for an abbreviated ("paper") hearing. As discussed below, we believe that a trial type hearing is appropriate to develop the necessary record on the issues we are setting for hearing.

Among other things, PSC New Mexico argues that the Applicants do not satisfactorily resolve the questions of fact relating to the proposed merger's effect on the reliability of the New Mexico grid. It argues further that, consistent with the Commission's recent order on remand in Northeast Utilities Service Company, 58/ the Commission is bound to examine the potential harmful effects of a contract between two parties upon third parties, who are part of the public interest. PSC New Mexico argues finally that the Applicants have improperly disclosed certain PSC New Mexico/El Paso Phase Shifter Support

58/ 66 FERC ¶ 61,332 (1994).

Principles, which are the subject of confidential discussion between the two parties; the Principles have yet to be incorporated into enabling agreements and operating procedures, which will then be subject to approval by the New Mexico Commission and this Commission.

If the Commission sets the matter for trial-type hearing, the Applicants initially requested that the Commission direct the administrative law judge to issue an initial decision by September 15, 1994 and that the Commission issue a final opinion in this case by late December 1994. Later, in their March 21 Answer, the Applicants have requested a final Commission opinion by February 1995. 59/

Several intervenors oppose such a schedule. The Arkansas Commission asserts that because of the complexity of issues, at a minimum the Commission should direct the judge to issue an initial decision no earlier than ten months from the date of a Commission order establishing a hearing. The Texas Commission states that, because its decision will not issue until February 1995 at the earliest, this Commission should not have the impression that its approval will be the only regulatory approval still required after December 1994.

The Texas Counsel maintains that, if the Commission were to follow the hearing schedules in previous merger cases, the initial decision would be issued in January 1995 and the Commission should then issue a final opinion in April or May 1995. It argues that a year-end 1994 deadline is unreasonable because the Applicants have agreed to a longer schedule in the Texas Commission proceeding.

We find that, given the number of intervenors, the nature and complexity of the issues, and other matters, we cannot be sure of giving this case sufficient attention in the abbreviated

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59/ The Applicants disagree with the Texas Commission's original assertion that the public interest determination here cannot be made until after the rate proceeding before the Texas Commission has concluded. According to Applicants, because the merger will create savings for them and will not lessen competition, the merger is consistent with the public interest regardless of what rates the Texas Commission ultimately sets. Applicants request that, as in Entergy, the Commission and the Texas Commission evaluate the merger concurrently. Applicants do not expect the Texas Commission to issue its final decision any earlier than February 1995. Applicants' March 21 Answer at 120-21.

time period requested. 60/ We intend to conclude this proceeding as expeditiously as possible, as we are mindful of the importance of concluding the process of reorganizing a bankrupt utility. However, we must carry out our own regulatory responsibilities in a thorough manner. Therefore, consistent with the time frame provided in Entergy, unless this proceeding settles, we direct the presiding judge to issue an Initial Decision no later than March 3, 1995. 61/ We also direct the parties to file Briefs on Exceptions 20 days after the date of issuance of the Initial Decision; and Briefs Opposing Exceptions shall be filed 15 days after Briefs on Exceptions are due.

5. Southwestern's Motion to Supplement the Record

On July 8, 1994, Southwestern filed a motion for leave to supplement the record. Southwestern submits two pages of Morgan Stanley's presentation to the CSW Board of Directors regarding the merger, which Southwestern states was not released to the public by CSW until July 7, 1994. The Morgan Stanley presentation states that CSW's acquisition of El Paso would provide CSW with control of the Texas/Mexico border; such control would be a "defensive benefit," i.e., CSW would "dictate expansion into Mexico by the other strong Texas utilities." 62/ According to Southwestern, these statements demonstrate that CSW has an anticompetitive intent in acquiring El Paso.

On July 15, 1994, Applicants filed an answer in opposition to Southwestern's July 8 motion. Applicants argue that Southwestern is merely repeating its prior arguments, and that CSW does not expect to impair competition for Mexican business by virtue of the El Paso acquisition. Applicants also characterize Morgan Stanley's reference to control of the Texas-Mexico border as a "shorthand expression" which means only that: (1) the merger will enhance CSW's competitive position concerning construction and operation of new generation facilities in Mexico, and (2) the post-merger CSW system should be in a better position to serve retail customers in Mexico. 63/

We will grant the motion in order to supplement the record.

60/ We note that Applicants amended their Application three times after their initial January 10 filing date.

61/ See 62 FERC at 61,378.

62/ Southwestern's July 8 Motion at 1.

63/ Applicants' July 15 Answer at 4-5.

B. Merger Proposal -- Docket No. EC94-7-000

1. Standard of Review

Under section 203(a) of the FPA, 64/ the Commission must approve a proposed disposition of jurisdictional facilities with a value in excess of $50,000 if, after notice and opportunity for hearing, it finds that the disposition "will be consistent with the public interest." 65/ Section 203(a) of the FPA provides that:

> No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, . . . or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, . . . without first having secured an order of the Commission to do so.

Under section 203(b), 66/ the Commission may condition its approval on "such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and proper coordination in the public interest of facilities subject to the jurisdiction of the Commission."

In Commonwealth Edison Co., 67/ the Commission set out a non-exclusive list of factors relevant to a determination of whether a proposed merger will be consistent with the public interest:

(1) the effect on the applicants' operating costs and rate levels;

(2) the contemplated accounting treatment;

(3) the reasonableness of the purchase price;

(4) whether the acquiring utility has coerced the to-be-acquired utility into acceptance of the merger;

64/ 16 U.S.C. § 824b(a) (1988).

65/ 16 U.S.C. § 824b(a) (1988).

66/ 16 U.S.C. § 824b(b) (1988).

67/ Commonwealth Edison Co., et al., 36 FPC 927, 938 (1966), aff'd sub nom. Utility Users League v. FPC, 394 F.2d 16 (7th Cir. 1968), cert. denied, 393 U.S. 953 (1968).

(5) the effect on competition; and

(6) the impact on the effectiveness of state and Federal regulation.

Merger applicants must fully disclose all material facts and show affirmatively that the merger is consistent with the public interest. 68/ In demonstrating consistency with the public interest, the applicants need not show that a positive benefit to the public will result from a proposed merger. 69/ Rather, it is sufficient if the "probable merger benefits . . . add up to substantially more than the costs of the merger." 70/

On the record before us, it is not possible for the Commission to ascertain whether the proposed merger is consistent with the public interest. As discussed below, the Commission concludes that it cannot find the merger consistent with the public interest unless the Applicants agree to provide comparable transmission services over their non-ERCOT transmission facilities. Thus, if the Applicants accept the comparability condition, we will set for evidentiary hearing the El Paso pro forma tariffs and the PSO/SWEPCO tariffs to determine how they must be revised to meet the AEP comparability standard. 71/ In addition, other issues of material fact have been raised regarding the effect of the merger on Applicants' operating costs and rate levels. Therefore, if the Applicants accept the

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68/ Pacific Power & Light Company v. FPC (PP&L), 111 F.2d 1014, 1017 (9th Cir. 1940).

69/ See Utah Power & Light Company, PacifiCorp, and PC/UP&L Merging Corporation (UPL), Opinion No. 318, 45 FERC ¶ 61,095 (1988), order on reh'g, Opinion No. 318-A, 47 FERC ¶ 61,209 at 61,750, order on reh'g, Opinion No. 318-B, 48 FERC ¶ 61,035 (1989), order on remand, 57 FERC ¶ 61,363 (1991) (Utah); PP&L, 111 F.2d at 1017.

70/ See Opinion No. 318-A, supra, 47 FERC at 61,750. See also Northeast Utilities Service Company (Re: Public Service Company of New Hampshire) (Northeast Utilities), Opinion No. 364, 56 FERC ¶ 61,269 at 61,994 (1991), order on reh'g, Opinion No. 364-A, 58 FERC ¶ 61,070 (1992), affirmed in relevant aspects, Northeast Utilities Service Co. v. FERC, 993 F.2d 937, 945 (1st Cir. 1993) (Northeast Utilities).

71/ In AEP, supra n.11, the Commission stated that an open-access tariff that is not unduly discriminatory or anticompetitive should offer third parties access on the same or comparable basis, and under the same or comparable terms and conditions, as the transmission provider's uses of its system. 67 FERC at 61,490.

comparability condition, we will also set for evidentiary hearing the effect of the merger on the Applicants' costs and rate levels.

2. Effect on Operating Costs and Rate Levels

a. Arguments

i. Merger Savings

Applicants request that the Commission find that the merger will produce net benefits and will not lessen competition and that the Commission determine in the section 211 case the terms under which it will order Southwestern to transmit power and energy for the Applicants. They estimate that El Paso's ability to purchase power from other CSW Operating Companies in lieu of buying power from a non-CSW source would create gross capacity savings to El Paso of $22.6 million. 72/ The savings, however, would be offset to some extent by the cost of securing transmission from Southwestern or of constructing new transmission facilities. The least cost alternative, according to Applicants, is to obtain transmission service from Southwestern, which Applicants estimate will cost approximately $50 million over the ten-year period. 73/

Applicants expect that El Paso's improved financial status and credit rating as a result of the merger will produce capital cost savings between $70 million and $152 million during the ten-year period. El Paso's poor credit rating has limited its financing to the junk bond market or to issuing equity below book value. Applicants' analysis compares the difference between El Paso's cost of capital before the merger and its cost of capital after the merger. 74/

72/ Bruggeman testimony, Exh. APP-39 at 25.

73/ Id. at 36. There is an unexplained discrepancy as to what the projected Southwestern wheeling charges will total for the first ten years. Exh. APP-54 shows total wheeling charges for the period at $23.6 million.

74/ The wide range in potential capital cost savings as a result of the merger ($70-$152 million) reflects two different assumptions. Under the first scenario, El Paso is assumed on a stand alone basis (pre-merger) to have the minimum investment-grade rating of BBB under Standard and Poor's ratings and an A rating after the merger, producing estimated savings of $70 million. Under the second scenario, El Paso is assumed to have a non-investment grade rating on a stand-alone basis pre-merger and an investment

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ii. Palo Verde Assets.

As part of the merger transaction, Applicants propose to reacquire the Palo Verde nuclear assets, which were part of a sale/leaseback arrangement by El Paso. Beginning in 1986, El Paso entered into sale/leaseback arrangements for 100 percent of its interest in Palo Verde Unit No. 2 and 39.5 percent of Palo Verde Unit No. 3. In order to finance the leaseback arrangement, El Paso secured lease obligation bonds and draws on letters of credit by owner participants. The Commission approved the sale/leaseback arrangement in 1986. 75/ In that proceeding, El Paso projected that the sale/leaseback arrangement would reduce financing costs and result in substantial savings to the customers of approximately $338 million over the life of the facilities.

In order to satisfy all claims by bondholders and owner participants in the bankruptcy proceeding and to avoid protracted litigation, El Paso agreed to a settlement amount of $956 million with the bondholders and owner participants in satisfaction of their claims against El Paso and a restoration to El Paso of full title to the Palo Verde assets. 76/

Applicants claim that discontinuing the leaseback arrangement and reacquiring the Palo Verde assets is the most practical and least cost alternative. In support, Applicants state that consideration was given to El Paso's desire to achieve an investment-grade rating and a 40% equity component in its capital structure. 77/ Applicants argue that absent an infusion of equity capital, continued leasing would prevent El Paso from attaining an investment-grade rating. They also claim

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74/(...continued)
grade rating of BBB after the merger, producing estimated financial savings of $152 million. Hadaway testimony, Exh. APP-56 at 24.

75/ See 36 FERC ¶ 61,055 at 61,118 (1986). The Commission disclaimed jurisdiction under section 203 since transmission facilities were not part of the transaction.

76/ The $956.9 million is comprised of a $668.5 million settlement with bondholders, or 95.5% of the total $700 million claim; and $288.4 million with the owner participants for their draws on the letters of credit. See King testimony, Exh. APP-11 at 49-50.

77/ The plan proposes to replace the Lease Obligation Bonds and other lease claims with CSW common stock. If the lease could be modified, CSW equity would replace other debt. See King testimony, Exh. APP-11 at 54.

that El Paso's customers will realize lower overall revenue requirements under ownership versus a modified lease arrangement as well as a reduction to rate base through deferred taxes generated by accelerated depreciation. Applicants state that they considered modifying the Palo Verde leases but determined that it would not resolve El Paso's capital structure problems (such as overleveraged capital structure and leases treated as debt instruments) and would cost more than ownership. 78/ Applicants conclude that the loss of tax benefits under a modified lease arrangement and the nearly impossible requirement that Lease Obligation Bondholders unanimously agree to any modification made lease modification infeasible. They also say that they considered an outright rejection and abandonment of the Palo Verde leases and replacing 280 MW of capacity, but that they found that course of action to be more expensive than reacquiring the assets.

Applicants submit that it is more economical for the restructured El Paso to reacquire the Palo Verde assets than to continue to lease back those assets or to abandon the Palo Verde leases. 79/ Applicants believe that the combination of termination provisions and replacement power costs under the lease abandonment option would exceed the cost of reacquiring the Palo Verde assets. Also, the combination of the requirement that any lease modification receive 100% approval by the bondholders, the negative impact on the capital structure and certain undesirable tax consequences of the lease obligations led Applicants to conclude that modifying the leases was impractical and uneconomical. 80/

In addition to El Paso's savings from purchasing power from the other CSW subsidiaries and El Paso's improved credit rating, Applicants submit that the following financial benefits would result from the merger: (1) debt as a percentage of total capital would decline; (2) El Paso's nuclear risk profile would be reduced significantly, with nuclear capacity being reduced from 40% of the El Paso system to 8% of the merged system; (3) CSW'S financial strength would allow it to settle with El Paso's retail customers to establish retail rates below what is cost justified; and (4) El Paso would reduce its short-term

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78/ Exh. APP-60 provides the quantitive analysis supporting the Applicants' buy-versus-lease decision.

79/ El Paso entered into sale/leaseback arrangements with owner trustees, which in turn leased the interest back to El Paso under lease and other financial obligations. King testimony, Exh. APP-11 at 41.

80/ King testimony, Exh. APP-11 at 60-61.

borrowing costs as a result of its participation in the CSW money pool.

With regard to benefits expected for the Applicants' customers, Applicants claim total merger savings of $420 million (in nominal dollars) for the first ten years. The CSW Operating Companies' share of these savings is expected to be $35 million (8 percent), while El Paso's share is expected to be $385 million (92 percent). 81/ A breakdown of customer benefits for the combined system over the first 10 years includes: fuel savings of $37.9 million; non-fuel O&M savings of $236.2 million; purchased power capacity savings of $22.6 million; and reduced capital costs of $152 million. Applicants estimate that additional savings will occur in the second decade as a result of a deferral of capacity additions. Applicants estimate that the deferred capacity savings for the second ten-year period would be $119 million (computed using CSW's least-cost planning process). 82/ They also project net transmission related costs of $27 million. 83/

iii. Merger Costs

Intervenors raise numerous issues concerning Applicants' analysis of the anticipated merger savings and benefits. PSC New Mexico argues that the proposed merger will harm the operations of adjacent and interconnected utilities in ways that the Applicants do not disclose. 84/ It stresses that the CSW system operates in two electric reliability councils (ERCOT and SPP) and that El Paso operates in a third reliability council

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81/ On May 17, 1994, Applicants filed a supplement to their merger application, revising the estimate for El Paso's merger savings from $387 million to $385 million, which Applicants represent as being equivalent to $256 million on a net present value basis.

82/ Applicants expect the fuel savings to be realized from: (1) an improved generation mix on the combined system (e.g., greater reliance on lower cost nuclear and coal-fired generation and less reliance on higher cost gas-and oil-fired generation); (2) efficiencies resulting from the joint dispatching of the generation of both systems (e.g., higher load factors on generating units and more bulk power purchase opportunities); and (3) El Paso becoming the primary seller of economy energy in the combined systems which will produce an estimated energy savings of $27 million. Bruggeman testimony, Exh. APP-39 at 32.

83/ Exh. APP-4, at 1.

84/ PSC New Mexico Intervention at 2.

(WSCC). Coordination among these systems is asynchronous, and depends upon high voltage direct current converters. According to PSC New Mexico, this is the first time the Commission has been asked to approve a merger that the Applicants concede depends upon the wheeling across the system of a third party. PSC New Mexico alleges that the claimed production cost savings are greatly overstated by the Applicants. Also, the Applicants fail to take into account the effect of the proposed merger on other parties, particularly the reliability of neighboring transmission systems (since PSC New Mexico is directly interconnected with both El Paso and Southwestern).

Specifically, PSC New Mexico believes that the plan of operations for the merged system would likely harm PSC New Mexico's system. PSC New Mexico presently purchases 100 MW of capacity and energy from Southwestern, and this purchase will increase to 200 MW in 1995. 85/ If Southwestern is required to wheel power across its system for the merged entity, then PSC New Mexico's system reliability may be impaired; also, such service could lead to higher costs on its system.

PSC New Mexico contends that although the merger application assumes that the parties have reached binding, final agreements, in fact the parties have only achieved principles of agreement. For example, PSC New Mexico states that to obtain the $33.5 million in net production cost savings during the first ten years after the merger, the Applicants and Southwestern must have a transmission service agreement for 133 MW of bi-directional transfer capability. 86/ PSC New Mexico stresses that definitive agreements related to transmission limitations on the PSC New Mexico system due to certain contractual obligations with El Paso, regarding the delivery of capacity from Four Corners, have not yet been reached. 87/ Additionally, PSC New Mexico is concerned that it is unable to determine whether the Applicants' plan to increase sales of energy to El Paso from the east will affect the availability of PSC New Mexico's rights to 39 MW of capacity in El Paso's local generating unit.

Applicants insist that any effect on wholesale rates may be very limited, and argue that the claimed harm caused by the

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85/ The purchased power is received at PSC New Mexico's Blackwater Station (near Clovis, New Mexico), through back-to-back AC-DC-AC conversion facilities. Southwestern is obligated to supply this service through May 31, 2011. Miller Affidavit at 2 (attached to PSC New Mexico Intervention).

86/ PSC New Mexico Intervention at 15.

87/ PSC New Mexico Intervention at 10.

merger to interconnected utilities is not a basis upon which to reject the merger. They contend that PSC New Mexico has failed to show any harm that would result from the merger, and that Plains' disputes with El Paso are not related to the merger and therefore need not be addressed here at all. 88/

The New Mexico AG contends that Southwestern and several other utilities serving New Mexico ratepayers 89/ are concerned that the granting of Applicants' section 211 transmission request could result in a deterioration of service (especially a compromising of system reliability) or an increase in cost to those utilities' customers. 90/ According to the New Mexico AG, Southwestern depends upon two transmission ties to PSC Oklahoma when one of its 550 MW Tolk units is lost under peak loading conditions. The New Mexico AG states that, according to Southwestern, if those transmission ties were loaded with firm transfers to El Paso at a time when Southwestern needed them, "they would not provide adequate support to preclude a frequency excursion with the potential to 'black out' portions of [Southwestern's] native load." 91/

According to the New Mexico AG, PSC New Mexico could be harmed by the merger in the following three ways. First, if Southwestern's reliability were compromised by the merger, the availability of the 200 MW of demand and energy delivered by Southwestern to PSC New Mexico through the HVDC interconnection would be reduced. Second, when El Paso provides economy energy to PSC Oklahoma, the power will likely come from El Paso's resources at Four Corners or Palo Verde. Due to the location of those resources, a portion of the power must be delivered over PSC New Mexico's northern New Mexico transmission system, which is already constrained at heavy load times. If the proposed merger increases those types of deliveries, then PSC New Mexico will have to operate gas-fired generators a greater number of hours than it presently does (in order to relieve the transmission constraints), which will result in higher cost electricity for New Mexico ratepayers. Third, any import or export between PSC Oklahoma and El Paso that is not backed up by

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88/ Plains alleges that El Paso has failed to comply with a 1987 letter agreement between El Paso and Plains, under which El Paso agreed to provide Plains with certain transmission rights and interests in New Mexico. Plains Intervention at 3.

89/ Those utilities include PSC New Mexico, Texas-New Mexico Power, and Las Cruces. New Mexico AG Intervention at 3.

90/ Id. at 3.

91/ Id. at 3-4.

the WSCC will affect PSC New Mexico when the Eddy County HVDC facilities are forced out of service. Although El Paso is a member of the Inland Power Pool (and therefore can rely on emergency support from the power pool when necessary), the need to plan for such a contingency could affect the operation of the New Mexico transmission system and increase costs.

Brownsville is concerned that the merger would increase costs to users of the Central Power and West Texas transmission systems. It states that the proposed merger may hamper Central Power's ability to provide various services to Brownsville, since Central Power has over the years alluded to capacity constraints. Brownsville argues that neighboring utilities such as itself will not gain access to the entire CSW transmission system, but will only have piecemeal access to the ERCOT, SPP, and WSCC regions. 92/ Brownsville notes that PSC Oklahoma and SWEPCO have not yet revised their "to-from-and-over" tariffs, which govern transactions between ERCOT and the SPP. 93/ Additionally, Brownsville notes that the Commission has not yet ruled on applications for rehearing on FPA section 207 issues concerning the CSW system and its neighbors that were raised in Central Power & Light Co. 94/

According to Southwestern, the merger is not consistent with the public interest because the costs outweigh the benefits. It argues that the Applicants greatly overstate their production-cost savings (capacity and energy) and that they greatly understate the costs of obtaining transmission. The Applicants' claimed financial benefits are speculative, according to Southwestern. It says that El Paso will be an investment grade utility with or without this merger; that the Applicants ignore the increased capital costs for CSW that the merger will produce; that the Applicants' quantitative analysis of the financial benefits is unsupported; that there may be significant financial detriments to the Applicants' termination of the sale/leaseback

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92/ Brownsville Intervention at 3.

93/ Brownsville Intervention at 4, citing Southwestern Electric Power Co. and Public Service Company of Oklahoma, 65 FERC ¶ 61,212 at 61,985 & n.13 (1993) (SWEPCO).

94/ 59 FPC ¶ 1665 (1977). The Commission believes that the issues raised by the Oklahoma Commission in that proceeding were mooted when the Commission ordered interconnection and transmission pursuant to sections 210 and 211 with respect to the North and East Interconnections. See supra n. 41. However, if this is incorrect, given the 17 years since the Commission issued its order, the Oklahoma Commission should file a new petition addressing current conditions.

of the Palo Verde nuclear generating units; and that the claimed non-fuel O&M savings are speculative and unsupported.

iv. El Paso's Emergence From Bankruptcy

The Arkansas Commission disagrees with the Applicants' position that El Paso's emergence from bankruptcy is a benefit to the public interest. It counters that whether emergence from bankruptcy is a benefit to the public interest, as distinct from a benefit to a private interest like that of El Paso's creditors, is a question of fact that must be explored at hearing. Furthermore, the Arkansas Commission asserts that emergence from bankruptcy alone is insufficient to require that the Commission approve the proposed merger; rather, the Arkansas Commission asserts that it is critical that the Commission examine the claimed level of costs and benefits.

The Texas Commission opposes Applicants' characterization that all parties to the bankruptcy proceedings supported the Plan of Reorganization under which CSW proposes to acquire El Paso. The Texas Commission states that neither it nor any representative of El Paso's ratepayers voted for the Plan of Reorganization or otherwise indicated their approval or support for the Plan of Reorganization. The Texas Commission argues that the Applicants' merger proposal differs from the Northeast Utilities/Public Service Company of New Hampshire merger because in that case, the New Hampshire state legislature supported the negotiated merger and rates embodied in the plan of reorganization, which was confirmed by the bankruptcy court and presented to this Commission for approval. 95/ Thus, the Texas Commission argues that the Commission has no basis to conclude that the approval of the merger by El Paso's creditors and shareholders or the bankruptcy court makes this merger consistent with the public interest. The Texas Counsel similarly argues that the Applicants incorrectly state that the proposed merger was supported by all parties to the El Paso reorganization.

v. The Section 211 Proceeding

Southwestern argues that the Applicants cannot operate the merged system as planned and obtain the benefits claimed because they cannot compel transmission services under section 211. It says that the Applicants are not accounting for the decrease in reliability of Southwestern's system and the transmission rate they will have to pay if Southwestern is compelled to provide transmission service. The Applicants counter that the Commission

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95/ See Northeast Utilities Service Company, 50 FERC ¶ 61,266 at 61,821 (1990), reh'g granted in part and denied in part, 51 FERC ¶ 61,177 (1990).

should use its authority to order the requested transmission services, and that Southwestern has failed to justify its alleged need for extensive system improvements should such transmission be ordered.

The Texas Commission states that the concerns it raised in Docket No. TX94-2-000, including reliability and competition concerns, affect whether the proposed merger is consistent with the public interest, and that the section 211 request is a critical component of the proposed merger. Therefore, the Texas Commission asserts that it is impossible for the Commission to decide whether the proposed merger is consistent with the public interest without considering the impact of the section 211 request on all parties.

Similarly, the Louisiana Commission points out that the Applicants assume in calculating the merger benefits that the Commission will grant the Applicants' transmission request. However, if the Commission denies the transmission request, the Applicants will need to construct additional transmission facilities, which will eliminate most of the merger benefits.

The Arkansas Commission asserts that this case raises two issues: (1) whether section 211 should ever be used to make an otherwise uneconomic merger feasible, and (2) whether section 211 can be used to force an uneconomic transaction in order to comply with PUHCA's integrated operations requirements. According to the Arkansas Commission, the primary reason for the section 211 request is to enable the merged system to comply with the requirements of PUHCA. The Arkansas Commission contends that the Applicants' cost/benefit study on the requested transmission service shows $11 million in cost reductions over the ten-year period. However, it argues that this reduction is overstated because it is likely that the transmission costs are understated. In addition, the Arkansas Commission argues that section 205 will be violated if the costs of an uneconomic transaction are recovered in rates, since the rates will not be just and reasonable, and that the recovery of transmission costs under the New Operating Agreement will not be just and reasonable to the extent that these costs exceed the least cost alternative means of producing the same cost reductions.

vi. Capital Costs

The Texas Commission states that the wholesale rates and the cost of capital of the current CSW operating companies may increase as a result of the addition of El Paso to the CSW system. It requests that the Commission condition the merger to protect the public interest. The Louisiana Commission similarly argues that the Applicants have not adequately considered the substantial economic effects on the cost of capital that may result from the merger.

The Arkansas Commission protests Applicants' position that since the merger will result in approximately $422 million in cost savings and synergies to the merged companies, the merger is in the public interest. The Arkansas Commission asserts that the dollar figure is overstated in that there is no present value analysis, and that the cost/benefit calculation does not include as a cost the estimated acquisition premium of approximately $26 million. It also argues that the merger depends on a proposed amendment to the New Operating Agreement that unfairly allocates the potential cost savings to El Paso and its ratepayers while increasing the potential cost increases and risks to the CSW Operating Companies' ratepayers without any provision for protecting those ratepayers. The Arkansas Commission states that 92% of the alleged cost savings would benefit El Paso even though El Paso would account for only 20% of the merged system's total assets and 14% of the merged system's operating revenues. This situation is compounded by the potential that the merger will shift risks from El Paso to the CSW Operating Companies. The Arkansas Commission asserts that El Paso could increase CSW's capital costs, which could convert the alleged savings into $4.7 million per year worth of harm. It argues that the customers of CSW's existing subsidiaries should not bear such risks.

vii. Capacity Cost Savings

The Louisiana Commission contends that Applicants' capacity cost savings estimates ignore displaced revenues that the CSW Operating Companies will receive from off-system capacity sales. The Louisiana Commission notes that the Applicants project an estimated $37.9 million in fuel-related cost savings resulting from the merger, but that they do not reduce the fuel benefits from displaced off-system sales that would have been obtained by El Paso and the CSW operating companies absent the merger.

viii. Non-Fuel O&M Savings

The Louisiana Commission alleges that the Applicants inflate the non-fuel operating and maintenance savings calculation and do not account for the costs that will be incurred to achieve that level of benefits. 96/ It argues that the Applicants do not

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96/ Applicants' estimated non-fuel operation and maintenance expense (O&M) savings of $236.3 million includes approximately $151.9 million of net savings to El Paso ($247 million of gross savings less $95.6 million of billings by CSW). The lion's share of these savings are projected from labor cost savings of $132.3 million due to the elimination of 250 positions within El Paso. Pension and benefit savings of $39 million and insurance savings of $30 million are projected as a result of cost efficiencies on the CSW

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present their merger calculations in terms of net present value, which overinflates the merger benefits. Similarly, with respect to the operating costs, the Texas Counsel argues that the Applicants have failed to show merger-related costs and savings on a present value basis, which leads to an overstatement of merger-related benefits.

b. Resolution

Applicants have not provided adequate information concerning the effect of the merger on costs and rate levels. For example, Applicants estimate that El Paso's ability to purchase power from other CSW Operating Companies in lieu of buying power from a non-CSW source would create gross capacity savings to El Paso of $22.6 million. Applicants neglect to note, however, that those savings would be offset to some extent by the cost of getting transmission from Southwestern. Moreover, the estimate assumes that El Paso would in fact have to purchase power for the period 1994-2004 in order to meet its load requirements. Applicants' analysis discounts the possibility of El Paso losing load during that time period. Las Cruces, in its intervention and by its Request For Proposals, has stated its intention of finding an alternative supplier to El Paso, preferably Southwestern. 97/ In addition, Applicants assume that if purchases of capacity by El Paso are necessary, the CSW Operating Companies would be El Paso's least cost option. Applicants fail to support the conclusion, shown in Exhibit APP-47, that for the first ten-year period El Paso will either be able to purchase less expensive capacity from its affiliates or forego capacity purchases entirely as a result of interchange transactions under the CSW Operating Agreement.

As a consequence of economic dispatch, higher cost generation of one CSW company will be displaced by lower cost generation from another CSW company. Since it claims to have the lowest production costs, El Paso is expected to be a net seller of economy energy to the other CSW affiliates. Applicants estimate that the merger will produce energy savings of approximately $38.7 million on the combined CSW-El Paso system with El Paso alone realizing approximately $27 million of the energy benefits. 98/ Southwestern disputes Applicants' energy savings estimates, citing historical energy purchases, which show

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96/(...continued)
system. The remaining savings are expected from operational efficiencies and synergies in electrical operations and business practices. Harrell testimony, Exh. APP-61 at 5.

97/ See supra n. 48 and accompanying text.

98/ Bruggeman testimony, Exh. APP-39 at 33.

that the existing CSW Operating Companies' production costs have generally been lower than El Paso's. We agree that the energy savings estimate needs to be further investigated.

The largest portion of the estimated merger benefits ($236 million) results from projected savings in labor and administrative costs. The majority of these savings are to be realized through the elimination of El Paso employees and savings in pension and benefit costs through CSW cost efficiencies. Southwestern contends that Applicants' assumptions regarding the level of attrition for El Paso and the matching of these eliminated positions with positions in the merged companies is highly speculative. Southwestern also claims that the labor and administrative savings estimates fail to account for the costs to shift employees to new positions. PSC New Mexico argues that the Applicants have ignored the possibility that certain labor costs on the CSW system will increase as a result of the merger. We agree that the Applicants' estimates for labor and administrative cost savings need to be further investigated.

Applicants assume that as a result of the merger, El Paso would realize financial (capital cost) benefits between $70 million and $152 million. These savings would be a direct result of El Paso emerging from bankruptcy with an investment-grade rating, a more favorable debt-to-equity ratio, and other reduced risks which Applicants assert will be realized by becoming part of CSW. However, as intervenors note, Applicants fail to account for the possibility that the merger will increase the debt or equity costs of the existing CSW Operating Companies. The Commission agrees that the potential effect upon CSW of assuming the risks associated with acquiring a non-investment grade utility with a substantial nuclear exposure must be further investigated.

There are also other aspects of Applicants' financial analysis that warrant further investigation. The utilities chosen for the proxy group, their debt costs, and the time period used to compare financial costs between investment grade and non-investment-grade utilities are not fully supported; in addition, the results of the analysis vary significantly depending on which set of assumptions and methodologies are employed.

In addition to the quantifiable benefits expected from the merger, Applicants claim that the merger will produce another significant benefit -- the emergence of El Paso from bankruptcy. In Northeast Utilities, the Commission recognized the importance of maximizing the value of the assets that can be salvaged from bankruptcy. Likewise, in this case the Commission must consider the public interest benefit of removing El Paso from bankruptcy;

we do not agree with intervenors who argue that this is not a benefit. 99/

The Commission lacks sufficient information to determine whether the reacquisition of the Palo Verde assets as part of the merger will result in cost savings over the remaining life of the assets. Furthermore, in light of the Commission's determination and El Paso's contention in a prior proceeding (Docket No. EC86-18-000) that the sale/leaseback arrangement was the least cost alternative over the life of the Palo Verde units, Applicants' analysis of the buy/lease option should be scrutinized. 100/

Finally, several intervenors are concerned that the allocation of merger benefits will disproportionately accrue to El Paso (and its ratepayers), while the costs and risks of the merger will fall disproportionately to the CSW Operating Companies (and their ratepayers). In this regard, we note that while Applicants estimate overall merger savings for the combined system, Applicants' analyses indicate that the merger might impose net costs on some of the Operating Companies (such as SWEPCO). Moreover, the merger could impose additional costs upon the CSW Operating Companies if, for example, the cost of capital increases as a result of the merger or the cost of Southwestern's transmission service is higher than Applicants project. The varying impacts of the merger on different groups of ratepayers is a matter that should be addressed at hearing.

However, as we indicated in Entergy Services, Inc. (Entergy), 101/ the Applicants need not demonstrate that the cost savings can only be accomplished through the proposed merger. The Commission is setting the costs and benefits issue for hearing because, based on the record before us, it is not clear what the cost savings, and other benefits, if any, are.

As explained below, the Commission is considering the Applicants' section 211 application in a separate proceeding and is issuing a proposed order simultaneously with this one. If we have issued a final order in the section 211 docket before the judge makes a decision on the costs and benefits of the merger, the judge will know whether transmission service will be provided by Southwestern and, if so, at what price. On the other hand, if we have not issued a final order in the section 211 case when the

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99/ See 65 FERC at 61,834.

100/ See supra note 26.

101/ 62 FERC ¶ 61,073, reh'g denied, 64 FERC ¶ 61,001 (1993) (Commission reiterated its position that parties are not required to show that merger is the only means necessary to accomplish overall objectives of FPA).

judge issues his initial decision in this case, the judge should consider the possible effect on costs and rates under two alternative scenarios: (1) if service is provided at the rate Southwestern advocates in the section 211 docket; and (2) if service is provided at the rate the Applicants advocate in the section 211 docket. 102/

c. Conditions proposed to hold various parties harmless

Cajun states that under the terms of the Cajun-SWEPCO transmission service agreement, SWEPCO provides transmission to enable Cajun to serve Cajun's delivery point loads on the SWEPCO system. It states that the rates for this firm transmission service are formula rates. Cajun argues that since the merger would affect SWEPCO's costs under the Cajun-SWEPCO Agreement, Cajun will be harmed by the merger. This is allegedly the case because El Paso is a risky company and once El Paso is added to CSW, CSW's return on equity will increase, which will increase the CSW Operating Companies' costs and the rates Cajun pays to SWEPCO under the Cajun-SWEPCO Agreement. Therefore, Cajun requests that the Commission impose a condition on the merger by which the return on equity under the Cajun-SWEPCO Agreement will be calculated without factoring in El Paso's presence as a CSW subsidiary.

Cajun argues that even if all CSW's projections of savings are accurate, SWEPCO will receive only minimal savings (only $600,000 over the entire ten-year period). Thus, Cajun argues that even the smallest variance from the Applicants' projections would result in a detriment to SWEPCO that could be flowed through to Cajun in the form of increased rates under the Cajun-SWEPCO Agreement. Cajun argues further that it may be harmed even if the Applicants' savings projections are true. It states that the Applicants' Exhibit APP-5 shows that SWEPCO's transmission costs are expected to increase by $22.3 million once El Paso is added to the operating companies, but that any loss will be eradicated by the expected capacity savings of $5.2 million, which will lower CSW Services' billings to SWEPCO by $18.9 million. Cajun argues, however, that these savings will not flow to Cajun. It explains that since it does not purchase firm power from SWEPCO, none of the $5.2 million in capacity savings will benefit Cajun, and since CSW Services provides a variety of services on behalf of the CSW operating Companies, a large portion of the $18.9 million will not be transmission-related and will not benefit Cajun as a firm transmission customer of SWEPCO. Therefore, Cajun requests that the Commission impose a condition on the merger that will hold Cajun

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102/ Applicants and Southwestern must file the relevant information with the judge within 75 days of the date of this order.

harmless from any increased transmission costs that will result from the merger.

The Louisiana Commission argues that the merger application does not address conditions that may be required to protect the CSW Operating Companies from adverse economic consequences of the merger. The Texas Commission requests that, to the extent that any increased cost of capital or costs under the New Operating Agreement are not clearly offset by merger benefits, the Commission should impose a hold harmless condition in any order approving the merger and the addition of El Paso to the New Operating Agreement. 103/ Plains requests a "hold harmless" condition of the type approved by the Commission in Cincinnati Gas & Electric Co.. 104/

The Applicants state that the various changes and conditions to the tariffs and the merger that intervenors seek should not be granted. They reassert their arguments that the merger is in the public interest, and they allege that no intervenor has demonstrated otherwise.

We will not now impose any of the requested conditions. The hearing will address the concerns underlying the requests for conditions. If necessary, we will impose conditions in our final order if the merger is approved.

3. Effect on Competition

a. Arguments

Applicants state that the merger would not have detrimental effects on competition, nor would it create or enhance market power in any relevant market. They claim that the merger would not: (1) allow the post-merger CSW System to dominate the market for short-run capacity sales; (2) increase concentration in Southwestern's first-tier market; (3) establish or enhance the ability of the post-merger CSW System to block entry to the long-run firm power market; (4) allow it to exercise market power over non-firm energy transactions; or (5) significantly affect retail competition.

Applicants have included as Exhibit Nos. APP-6 and APP-7 pro-forma firm and non-firm transmission tariffs that they intend for El Paso to file once the merger is consummated. According to Applicants, these tariffs are modeled after the PSO/SWEPCO

103/ Texas Commission's Intervention at 9.

104/ 64 FERC ¶ 61,237 at 62,714-15 (1993), approval withdrawn, 66 FERC ¶ 61,028 (1994), reh'g pending. Plains Intervention at 19.

transmission tariffs and will alleviate any concerns about the merger's effect on competition. The Applicants state that, to remove any doubt about the availability of transmission service, they will amend El Paso's pro forma tariffs 105/ as explained below:

> Section 1.34 of the Firm tariff defines Transmission System to exclude [El Paso's] transmission facilities related to its remote generating stations, Four Corners and Palo Verde, because those facilities are not a part of [El Paso's] core transmission system. However, the definition does not exclude the Eddy County tie or the related AC facilities. To avoid any possibility of confusion, [El Paso] will amend its pro forma tariffs to specify that the Eddy County tie and the related 345 kV line to [El Paso's] Amrad substation are included in the definition of Transmission System. [106/]

Many of the intervenors characterize the El Paso and the PSO/SWEPCO tariffs' terms and conditions as anticompetitive and unduly restrictive. They allege that the tariffs would, for example:

(1) exclude the transfer of any power that has its origin or destination in Mexico;

(2) exclude transmission over the Eddy Tie; 107/

(3) exclude sales to ERCOT utilities;

(4) exclude service to newly-formed electric utilities that were previously customers of El Paso;

(5) give El Paso broad discretion in its ability to recover stranded investment costs; 108/

105/ See Exhibits (TVS-5) APP-6 and (TVS-6) APP-7, attached to the testimony of Applicants' witness Shockley.

106/ Applicants' March 21 Answer at 23 & n.37.

107/ We note that the language quoted above makes it clear that the Eddy Tie is not excluded.

108/ On June 29, 1994, the Commission issued a Notice of Proposed Rulemaking concerning the recovery of stranded costs. Recovery of Stranded Costs by Public Utilities and

(continued...)

(6) require customers desiring to transmit across various CSW Operating Companies to pay separate pancaked rates in lieu of system-wide rates;

(7) give El Paso broad authority to recover opportunity costs; and

(8) restrict competition because of the inclusion of a reciprocity provision.

i. Access to Mexico

Southwestern argues that the merger would eliminate its access to the Mexican markets. Currently, Southwestern sells up to 75 MW to El Paso for resale to the Mexican national utility, Comision Federal de Electricidad (CFE). The resale arrangement is a result, according to Southwestern, of El Paso's unwillingness to supply wheeling service to Southwestern so that it can directly sell power to CFE. Southwestern claims that the power it sells to El Paso is marked up approximately 66 percent before it is resold to CFE. According to Southwestern, this is a clear exercise of monopsony power. It disagrees with Applicants' contention that there will be no market for power in Mexico in the foreseeable future. Its own analysis indicates that there will be strong growth in the Mexican market, thereby requiring continued imports from the United States. 109/ Additionally, Southwestern argues that Applicants' own action in pursuit of the Mexican market belies their claim that there is no market for United States-generated power in Mexico. 110/

ii. The Eddy Tie

At present, the only interconnection between El Paso and Southwestern is the Eddy Tie, jointly owned by El Paso (133 MW) and Texas-New Mexico (67 MW). Southwestern states that Applicants plan to reserve El Paso's share of Eddy Tie capacity to integrate El Paso with the other CSW Operating Companies, including capacity that Southwestern currently uses for its sales to El Paso for resale to Mexico. However, Southwestern contends that Applicants only propose to use 53 MW for firm transactions. The remainder of El Paso's Eddy Tie capacity is intended for Applicants' non-firm economy transactions. Southwestern argues that its exclusion from the Eddy Tie capacity will prevent it

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108/(...continued)
Transmitting Utilities, Docket No. RM94-7-000, 67 FERC ¶ 61,394 (1994)(Stranded Costs NOPR).

109/ Southwestern Intervention at 34.

110/ Id. at 35.

from competing against the CSW Companies for customers throughout the region, including the ERCOT and Mexican markets.

Southwestern claims that it is a comparatively low cost supplier. As a result, it has engaged in numerous wholesale power sales beyond its service territory. 111/ It asserts that if Applicants use all of El Paso's Eddy Tie capacity as contemplated by the merger, there will be no transmission path over which to market its low cost power. 112/ Southwestern cites Northeast Utilities Service Company, (Northeast Utilities), 113/ where the Commission held that Northeast Utilities' attempt to deny firm wheeling service because of its reservation of transmission capacity for economy sales was anticompetitive. As further evidence that the tariffs are anticompetitive, Southwestern notes the restriction on sales to the ERCOT market. Not only do the PSO/SWEPCO tariffs exclude sales to ERCOT, according to Southwestern, but if Southwestern were able to sell to ERCOT it would have to pay pancaked rates to various intervening CSW utilities.

American Paper believes that the proposed merger may decrease competition by giving CSW and its operating companies a virtual lock on the ability to supply the capacity needs of El Paso and to purchase power from El Paso. American Paper alleges that the merged companies will favor their affiliates for power purchases even if the American Paper members' power is cheaper. In addition, if the merged companies obtain transmission service from Southwestern, they will control sales to and from El Paso. Thus, American Paper claims that the CSW companies will be able to force IPPs to sell to a CSW affiliate at a low price, which the CSW affiliate will then be able to broker or mark up before reselling the power to El Paso. American Paper also objects to the recovery of any opportunity costs under the pro forma tariff.

111/ In the past decade, Southwestern consummated firm power sales to El Paso (75 MW), PSC New Mexico (200 MW), Texas-New Mexico Power (66 MW), and Empire District Electric Company (34 MW). In addition, Cap Rock Electric Cooperative physically removed its system from ERCOT in order to purchase from Southwestern. Currently, Southwestern claims that Las Cruces (80 MW load) and the Department of Defense have expressed an interest in being served by Southwestern. Southwestern Intervention at 22.

112/ The cost of adding a new DC tie would be approximately $36 million, which would allegedly prevent Southwestern from competing in wholesale markets in WSCC. Southwestern Intervention at 25.

113/ 56 FERC ¶ 61,269 (1991), order on reh'g, 58 FERC ¶ 61,070 (1992).

It believes that those charges will distort the economic pricing of transmission service and reduce competition by over-pricing transmission to a utility's competitor.

Las Cruces contends that given the severe restrictions on the use of the Eddy Tie capacity under El Paso's proposed transmission tariffs and the excessive price if service is available, it will be impossible for Las Cruces to obtain wheeling from El Paso. As noted, Las Cruces is in the process of forming its own municipal electric utility and discontinuing wholesale service from El Paso. 114/ It says that the tariff does not allow service to utilities that were previously customers of El Paso. 115/ However, Las Cruces argues Applicants' plan to use 100% of the Eddy Tie line capacity eliminates Las Cruces' ability to purchase from SPS unless the tie line capacity is expended at a prohibitive cost. 116/ While Applicants' witness Hall suggests that Las Cruces is not precluded from self-generating or purchasing from a non-utility generator or IPP, Las Cruces argues that Applicants' attempt to foreclose its power supply options is anticompetitive.

iii. Stranded Investment Costs

Several intervenors object to the tariff provision that would give El Paso broad authority to recover stranded investment costs. American Paper contends that any inclusion of a stranded investment cost recovery provision in the tariff would eliminate any long-term transmission transactions for any existing El Paso or CSW customer and thus would not mitigate the Applicants' market power. In lieu of permitting the collection of stranded investment costs, American Paper recommends that the Commission allow the CSW companies to establish a reasonable notice period for the termination of service to allow them to plan for any changes in the use of their system. Las Cruces notes that when El Paso previously calculated stranded investment costs, it included nuclear power plant costs that had been disallowed by retail regulatory commissions. Implementation by El Paso of the stranded investment recovery provision of the tariff, according

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114/ In early June 1994, Las Cruces announced that it had chosen Southwestern to operate its new municipal utility, and to sell power to that utility.

115/ However, we note that Applicants concede that if Las Cruces becomes a municipal distribution utility that offers to serve the public at large and not just a select group of industrial customers, it likely will be an eligible utility under the tariff. Applicants' April 19, 1994 Response at p. 14, n.14.

116/ El Paso Transmission Study at 2.

to the City, would make its attempt to change power suppliers prohibitively expensive.

iv. The Reciprocity Provision

Plains and Southwestern state that the reciprocity provision in the proposed tariffs maintain and reinforce El Paso's market power. 117/ Plains cites Northeast Utilities Service Company, 118/ where the Commission found that the provision of service under a proposed tariff should not be conditioned upon the customer requesting service being required to provide a similar tariff or transmission service. Southwestern says that the provision is inappropriate because the transmission tariffs are supposed to mitigate the Applicants' market power. Moreover, they argue the reciprocity provision is one-sided, since it could compel ERCOT utilities to provide transmission to the Applicants, but not vice versa.

Plains is also concerned that the merger will have significant anticompetitive effects on short-term capacity and transmission markets in southern New Mexico. Plains believes that the costs of the merger and the buyout of the Palo Verde leases create significant incentives for the merged entity to exercise market power in the southern New Mexico geographic market for short-term capacity. Plains believes that El Paso's existing control of key transmission facilities already gives it the ability to control the price of bulk power and transmission and to exclude competitors in the southern New Mexico market.

American Paper requests that the Commission reopen and consolidate the PSO/SWEPCO tariffs approved in Docket No. ER93-938-000, et al. with this case. It argues that an El Paso tariff in isolation does not provide its customers with a needed bridge to other transmission systems and power markets beyond El Paso. It alleges that the PSO and SWEPCO systems, which could provide such a link, can only be used under the tariffs approved in Docket No. ER93-938-000, et al., which American Forest views as anticompetitive and unduly restrictive.

v. The AEP Comparability Standard

The Commission's recent May 11, 1994 order in AEP gave rise to another round of pleadings. In AEP, the Commission explained its statutory responsibility to evaluate undue discrimination in light of changing conditions in the electric utility industry. The Commission announced in that case a new standard of

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117/ See Exh. APP-6, Section 2.11 at 13 and Exh. APP-7, Section 2.8. at 6.

118/ 62 FERC ¶ 61,294 at 62,915 (1993).

comparability to be applied to its determinations of whether transmission tariffs are unduly discriminatory or anticompetitive. The Commission stated:

> an open access tariff that is not unduly discriminatory or anticompetitive should offer third parties access on the same or comparable basis and under the same or comparable terms and conditions as the transmission provider's use of its system. [119/]

On May 26, 1994, Southwestern filed a motion for leave to amend its protest to address the application of the Commission's newly announced policy regarding comparability of service. Southwestern argues that CSW's proposed post-merger transmission tariffs violate the comparability standard in the following ways. CSW proposes a single-system transmission tariff for its operating companies, but would impose separate charges for each operating company in the combined system (El Paso, Central Power, West Texas, and PSC Oklahoma and SWEPCO), with pancaked multiple charges for service across the various parts of the transmission system. Southwestern asserts that PSC Oklahoma/SWEPCO transmission tariffs exclude any access to ERCOT, and that PSC Oklahoma/SWEPCO are not obligated to upgrade the DC ties to the ERCOT operating companies. It argues that under the CSW Operating Agreement, CSW will equalize transmission investment costs among the Operating Companies, and that CSW proposes a rate for service on El Paso's system that is twice the rate for service on the PSC Oklahoma/SWEPCO System.

Additionally, Southwestern argues that CSW will favor its own wholesale transactions over wholesale transactions of third parties in that: (1) CSW proposes opportunity costs to firm transmission customers that may result in changes to its nonfirm wholesale energy transactions among its own operating companies, and may deny requests for nonfirm service; (2) CSW's tariffs do not provide access to El Paso's transmission facilities in Arizona that connect El Paso's system to points west, thus excluding Southwestern from selling to the west; (3) third parties, such as Southwestern, must pay multiple pancaked transmission charges for service into and out of ERCOT (TFO tariff for PSC Oklahoma/SWEPCO) and under the TFO tariff for Central Power and West Texas. Southwestern asserts that the TFO tariffs are discriminatory, anticompetitive, and violate the Commission's comparability principle because firm transmission service for third parties is subordinate to CSW's service to its native load; nonfirm service can be curtailed in CSW's sole discretion; and the tariffs do not require the enlargement of

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119/ 67 FERC at 61,490.

facilities. Southwestern also argues that unlike the multiple, unequal, pancaked charges imposed on third parties, the five CSW Operating Companies will equalize their transmission investment under the CSW Operating Agreement. The Operating Companies will not have to pay multiple charges, and will not take service under the tariffs. Finally, Southwestern points out that CSW's proposed tariffs totally exclude transmission service to Mexico. Therefore, Southwestern requests that the Commission direct CSW to refile its transmission tariffs "to offer third parties transmission access on the same or comparable basis, and under the same or comparable terms and conditions, as [CSW's] uses of its system." Southwestern also asks that the Commission set the comparability issue for hearing.

On June 10, 1994, Las Cruces and Plains filed answers in support of Southwestern's May 26 pleading. Plains asserts that, in order to meet the AEP comparability standard, Applicants will have to file a tariff that incorporates single-system access and single-system pricing over the systems of the post-merger CSW Operating Companies. Plains also argues that the inclusion of charges for opportunity costs would be inconsistent with Applicants' intrasystem transmission pricing.

On June 10, 1994, Applicants filed an answer urging the Commission to reject Southwestern's May 26 pleading. Applicants claim that their transmission tariffs should not be required to be comparable. Applicants argue that the AEP comparability standard has only been applied in the context of section 205 rate proceedings, and that the Commission has stated that the comparability standard will only apply to newly filed transmission tariffs. 120/ Thus, according to Applicants, the PSO/SWEPCO tariffs and TFO tariff are not subject to AEP. Applicants also assert that the issue of the pro forma tariffs' compliance with AEP is premature at this point; it should be raised only when the pro forma tariffs are actually filed under section 205 of the FPA.

On June 28, 1994, Applicants filed a response to the June 10 pleadings of Las Cruces and Plains. Applicants incorporate by reference their answer to (filed also on June 10) Southwestern's May 26 pleading, asserting that the three pleadings contain many of the same arguments. Applicants also dispute Las Cruces' assertion that El Paso plans to charge a rate of $10 per kW/month for transmission service from Southwestern to any future Las Cruces municipal electric utility.

120/ Applicants' June 10 Answer at 5.

b. Resolution

Following the general approach used in past merger cases, the Commission has evaluated the merger's effects on markets for wholesale power and transmission services. We find that the merger has potential anticompetitive effects in the market in which Southwestern buys and sells electricity. Southwestern is interconnected to both the CSW and El Paso systems and thus would lose an alternative buyer and seller of power and transmission services as a result of the merger.

The Commission finds that the merger may give Applicants greater market power in the short-run power market through increased ownership of generation capacity, as well as through increased transmission control over Southwestern's access to alternative sellers and buyers. In evaluating Southwestern as a potential buyer of short-run power, the Commission considered the merger's effects on consolidating (1) generating capacity (total and uncommitted) among Southwestern's alternative first-tier suppliers and (2) transmission import capacity (total and available) from the first-tier utilities to Southwestern. Our analysis of the pre-merger situation limited Southwestern's suppliers to those it could reach through direct interconnections. The directly interconnected suppliers are located in WSCC and SPP. 121/ Our analysis did not take account of suppliers that could be reached with the PSC Oklahoma/SWEPCO transmission tariff because that tariff does not provide comparable services. We find that the concentration of generation and transmission facilities will increase significantly as a result of the merger, 122/ with potential anticompetitive effects.

We also evaluated Southwestern as a seller of power. We reviewed Southwestern's analysis of the merger's effects on its ability in the short run to sell power to utilities with

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121/ Southwestern is directly interconnected to El Paso, PSC Oklahoma, PSC New Mexico, Texas-New Mexico, and West Plains Energy.

122/ Projected pre- and post-merger HHIs for 1998 uncommitted generating capacity are .498 and .534, respectively, and the merged company's market share is 63 percent. For current total capacity, the pre- and post-merger HHIs are .453 and .542, respectively, with a market share of 71 percent. Under the DOJ Guidelines, an increase in the HHI of more than .005 points in a highly concentrated market (HHI above .180) potentially raises significant competitive concerns. Further, the merged company will control 67 percent of the total and the available transmission import capacity to Southwestern.

projected capacity needs and separately addressed control of the transmission export capacity from Southwestern to its first-tier utilities. While we do not adopt Southwestern's analysis completely, we concur in its conclusion that the merger may have anticompetitive effects on Southwestern as a seller of electricity. For example, if Southwestern is blocked as a seller, its own wholesale requirements customers will be harmed by not receiving the benefits from Southwestern's off-system sales. Further, we find that, after the merger, all available transmission capacity by which Southwestern could make new power sales would be controlled by the merged company. Thus, Southwestern would need to get wheeling services from the merged company to make any new power sales. 123/

We have also evaluated the merger's effects on transmission market power as it relates to the increased ability of the merged company to withhold transmission services along important interregional transmission corridors located beyond Southwestern's first-tier utilities. Four important corridors are identified by Applicants and intervenors:

- Between SPP and WSCC (controlled by El Paso, Texas-New Mexico and PSC New Mexico before the merger).
- Between the United States and the Norte (north) region of Mexico's electric system (controlled by El Paso before the merger).
- Between SPP and ERCOT (controlled by CSW's subsidiaries PSC Oklahoma and SWEPCO before the merger).
- Between the United States and the Noreste (northeast) region of Mexico's electric system (controlled by CSW's subsidiary Central Power before the merger).

Before the merger, Southwestern can turn to either CSW or El Paso to make sales out of the region. It can turn to El Paso for access to WSCC and to the Norte region of Mexico and it can turn to CSW for access to ERCOT and through ERCOT to the

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123/ The Commission also looked at the merger's effects on the ability of the merged system to erect or control other barriers to entry into bulk power markets. Transmission control can be adequately addressed by ensuring comparable transmission access. The other entry barriers that we examined include sites for new capacity development, key inputs to generation, and the transportation of key inputs. We find the evidence provided by Applicants adequate for us to conclude that the merger will not result in an enhanced ability by the merged company to erect or control other entry barriers.

Noreste region of Mexico. After the merger, Southwestern will have only one way of accessing out-of-region markets -- through the merged company. The merger thus would result in an increased ability to foreclose Southwestern from trading out-of-region.

Based on these findings that the merger would result in increased market power in both generation and transmission, and the resulting potential anticompetitive effects, we cannot find the merger consistent with the public interest unless the merged company's transmission market power is adequately mitigated. This is discussed below. In addition, as also discussed below, we announce herein a new standard of how we will analyze whether a merger is consistent with the public interest, whether or not the merger would result in an increase in the market power of the merged systems.

The Commission's standard of what is necessary to mitigate transmission market power has necessarily been an evolving one, beginning with the Utah merger analysis in 1987. As conditions in the electric utility industry have begun to change significantly in recent years, the Commission has had to analyze transmission market power based not only on the facts specific to a particular utility, but also in light of the substantial, evolving competitive changes taking place in the electric industry in general. These changes, including the Energy Policy Act of 1992, have prompted us to more closely examine issues related to transmission market power and, where appropriate, to expand or change our traditional analyses under the FPA. For example, the Commission recently clarified how it will analyze whether new transmission tariffs are unduly discriminatory under the FPA. In AEP, supra, the Commission stated its belief that "an open access tariff that is not unduly discriminatory or anticompetitive should offer third parties access on the same or comparable basis, and under the same or comparable terms and conditions, as the transmission provider's uses of its system." 124/

In the merger area, the Commission's past focus on transmission market power has been on potential increases in market power as a result of the merger. The Commission has previously found that transmission service provided on a point-to-point basis, under certain specified terms and conditions, has been adequate to mitigate increased market power. 125/ However, consistent with our responsibility under the FPA to analyze anticompetitive effects of the regulated aspects of interstate utility operations, and to fulfill this responsibility

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124/ 67 FERC at 61,490.

125/ See, e.g., Utah Power & Light, Northeast Utilities, and Entergy, supra.

in light of changing conditions in the electric industry, we no longer believe that increases in transmission market power as a result of a merger can be adequately mitigated without an offer of comparable transmission services.

We also do not believe that we could find any newly filed merger consistent with the public interest if the merging public utilities do not offer comparable services, whether or not that merger results in an increase in market power. There are two reasons for this conclusion. First, as we stated in AEP, a transmission tariff that is not unduly discriminatory should offer comparable services. Second, given the competitive bulk power market envisioned in the Energy Policy Act of 1992, the significant movement in the industry toward achieving that goal, 126/ and the fact that mergers by their very nature raise concerns of decreased competition, we no longer can find that it is in the public interest to allow utilities to merge transmission facilities that do not provide comparable transmission services. In this regard, we note section 203(b) of the FPA, 16 U.S.C. § 824b(b), which gives the Commission authority to impose

> such terms and conditions as it finds necessary or appropriate to secure . . . the coordination in the public interest of facilities subject to the jurisdiction of the Commission. (Emphasis added.)

Given the transition of the electric utility industry as a whole, we conclude that, absent other compelling public interest considerations, coordination in the public interest can best be secured only if merging utilities offer comparable transmission services. 127/

126/ See Stranded Costs NOPR, supra n. 106 at pp. 10-14 and 19-23.

127/ This conclusion is supported not only by FPA section 203(b), which gives us specific conditioning authority, but also by section 203(a) which requires us to approve a merger that is "consistent with the public interest." In Pacific Power & Light Co. v. Federal Power Commission, 111 F.2d 1014 (9th Cir. 1940), the court interpreted section 203(a) to require, not a showing of promotion of the public interest, but "a showing that mergers will not result in detriment to consumers or investors or other legitimate national interests." 111 F.2d at 1016. We conclude that given the national interest in establishing a competitive wholesale bulk power market, the critical importance of comparable transmission services in establishing such a market, and the ongoing fundamental changes occurring in the electric

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In announcing a transmission comparability requirement for all new mergers, the Commission is not eliminating its analysis of the effect of a merger on competition. While we believe that, as a general matter, comparable transmission access should adequately mitigate any utility's increased transmission market power and in any event is in the public interest for merging utilities, we nevertheless will continue to evaluate a merger's effects on concentration of generation as well as transmission, and other barriers to entry in bulk power markets. It is possible that, in some circumstances, a merger's effect on these factors could be so significant that, even with comparable transmission services being offered, the Commission could not find a merger consistent with the public interest.

Here, as discussed, we find that the merger will result in an increase in market power and potential anticompetitive effects. We believe that these effects can be adequately mitigated if the El Paso pro forma tariffs and the PSC Oklahoma/SWEPCO tariffs are modified to provide for comparable services. We will therefore condition approval of the merger on the Applicants' agreeing to file such modifications. 128/ However, as discussed below, we will not further condition the merger to require that comparability tariffs be filed for services by Central Power and West Texas within ERCOT, despite our pronouncement above regarding coordination in the public interest. This decision is based solely on the unique physical and jurisdictional circumstances involving ERCOT.

Our concerns with the potential anticompetitive effects of the merger will be mitigated by the provision of comparable transmission services over the merged company's non-ERCOT facilities. Such access over the PSC Oklahoma and SWEPCO transmission systems would give Southwestern access to eleven

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127/(...continued)
industry as a whole, it would be a detriment to the national interest to allow mergers or consolidations that do not offer comparable transmission access, absent other compelling public interest factors that would outweigh these interests.

128/ Concerning Applicants' assertion that the AEP comparability standard should not be applied here because these are not "new" tariffs, we note that in AEP we applied the standard to tariffs under review in that ongoing proceeding, not only to transmission tariffs filed after the date of that order. See also Commonwealth Edison Company, 67 FERC ¶ 61,325 (1994), slip op. at 5 (comparability standard applied to tariff filed before AEP). Moreover, comparability is needed to mitigate what would otherwise be potential anticompetitive effects of the merger.

additional utilities and access over the El Paso system would allow it to reach five more existing utilities (including CFE). As a result, the concentration of generating capacity would be substantially reduced, thus mitigating the incremental effects of the merger. Comparable access would also mitigate the merged company's control over the transmission capacity Southwestern must use to buy and sell power.

The increased ability to foreclose access to out-of-region markets is also adequately mitigated if the merged company provides services that are comparable to the merged companies' uses of the PSC Oklahoma/SWEPCO and El Paso transmission grids. For example, comparable services will allow Southwestern to have the same access to WSCC and Mexico as the company provides to itself. Access to WSCC and the Norte region of Mexico will adequately mitigate the incremental ability to foreclose Southwestern's trading that results from the merger because it ensures that there is no consolidated control of Southwestern's access to out-of-region markets. The merged company will not be able to foreclose Southwestern's trade over the El Paso-controlled corridors because Southwestern will be able to get access over El Paso's system to WSCC and to Mexico under a comparable services tariff.

Intervenors argue that comparable services should include the merged company's facilities in ERCOT. Based on our pronouncement above concerning coordination in the public interest, ordinarily we would agree with Intervenors. However, there are countervailing public interest factors in this particular case which we believe outweigh the interest of requiring comparable services in ERCOT in the context of a section 203 proceeding. Because of the unique physical and jurisdictional status of ERCOT, whereby ERCOT is interconnected with the interstate transmission grid solely by virtue of a 1981 order approving a settlement under sections 210, 211 and 212 of the FPA, and most of ERCOT is regulated solely by the Texas PUC, at this time we believe the more appropriate vehicle for addressing transmission services within ERCOT is section 211. 129/ We note that any eligible entity may apply to the Commission under sections 211 and 212 for an order requiring transmission services involving CSW's ERCOT facilities. We note further that a request under 211 and 212 may be for an access arrangement similar to that established in a transmission tariff that provides for comparable services. Requests under sections 211 and 212 need not be restricted to specific transactions or specific services.

129/ Section 212(k), added to the FPA by the Energy Policy Act, provides special criteria for section 211 transmission services by ERCOT utilities.

Accordingly, if the Applicants notify the Commission within 15 days of the date of this order that they will amend the El Paso and PSC Oklahoma/SWEPCO tariffs to offer comparable services, the Commission will establish hearing procedures to address comparable services. These procedures, which the presiding judge should ensure are those established in the AEP case, supra, will provide the evidentiary record to ensure that the companies offer comparable services to third parties, and thereby mitigate their transmission market power. If Applicants notify the Commission that they accept the comparability condition, the Applicants should file in these dockets proposed comparable tariffs within 30 days of the date of this order.

If Applicants advise the Commission that they will not amend the specified tariffs to offer comparable services, the merger will be rejected, since we find that, absent such modifications, the merger would have an adverse effect on competition and would therefore not be consistent with the public interest.

We also find, assuming CSW agrees to provide comparable services as discussed above, that several issues concerning the tariffs can be decided summarily on the basis of the record before us. First, if the merger is ultimately consummated, the merged company should file a transmission tariff that provides service over all its non-ERCOT facilities at a single systemwide rate reflecting the costs of the non-ERCOT transmission facilities. We find that, by Applicants' own admission, 130/ the CSW Operating Companies would be integrated. The fact that El Paso and the other CSW affiliates are located in asynchronous electrical regions is not a deterrent to the integration of the CSW system; therefore, we find that a single system tariff would be appropriate for the merged company's non-ERCOT transmission facilities. Accordingly, we will condition the merger on the merged company's implementation of a single system tariff.

We will also condition our approval of the merger on the Applicants' modification of their definition of "transmission system." We agree with intervenors that the crucial determinant of what constitutes a utility's transmission system is whether the utility controls the system (e.g., under a lease), not simply whether the utility is the owner of the system. Similarly, we will order Applicants to include in their definition of "transmission system" those facilities that are operated asynchronously as well as in synchronism. Additionally, we will order that Applicants remove the exclusion of certain facilities from section 1.34 of the pro forma tariffs' definition of transmission system.

130/ See Testimony of Applicants' Witness Bruggeman, Exh. APP-39.

Regarding Plains' and Southwestern's general concern about the appropriateness of the reciprocity condition, they raise no arguments not considered in previous cases. The Commission has previously found that reciprocity requirements are needed to maximize trade in bulk power services. 131/

Regarding Southwestern's concern about a one-sided obligation, the plain language of the reciprocity condition included in the current PSC Oklahoma/SWEPCO and the pro forma El Paso tariffs precludes such a result. Basically, the provision states that requesters and their affiliates that own or control transmission facilities must agree to provide "comparable service to [the merged company and its affiliates] on similar terms and conditions and over comparable facilities" (§ 2.11, emphasis added).

Assuming that the Applicants accept the comparability condition, we will also require that they delete the stranded cost provisions from the PSC Oklahoma/SWEPCO and El Paso transmission tariffs. The Court of Appeals recently issued a decision in Cajun Electric Power Cooperative, Inc. v. FERC, No. 92-1461 (D.C. Cir. 1994), 132/ raising questions concerning whether open access transmission tariffs including stranded costs recovery provisions mitigate the market power of the transmission owner(s). The Commission currently is developing a generic policy on stranded cost recovery in a notice of proposed rulemaking proceeding. 133/ That proceeding will provide the generic evidentiary basis and legal rationale for stranded cost recovery by all jurisdictional utilities, 134/ including those involved in this proceeding. Accordingly, we will require that the stranded cost provisions of the identified tariffs be deleted pending the ongoing rulemaking. Applicants will have whatever opportunities other utilities are allowed to seek recovery of stranded costs consistent with the provisions of the final rule we adopt in the rulemaking proceeding.

131/ Southwestern Electric Power Co. and Public Service Company of Oklahoma, 65 FERC at 61,982; Entergy, 58 FERC at 61,767.

132/ On July 20, 1994, Las Cruces filed a motion to lodge the Cajun decision with the Commission. We have taken official notice of that court decision; as a public document, it does not need to be lodged in the record.

133/ See note 106.

134/ Of course, utilities would still on a case-by-case basis have to justify the recovery of individual stranded costs, e.g., show that such costs are legitimate, verifiable and prudent.

The Cajun court, slip op. at 13, also identified four other transmission tariff provisions that could act to lessen the mitigation of market power: (1) retaining sole discretion to determine the amount of transmission capacity available to competitors; (2) limiting service to point-to-point; (3) failing to impose reasonable time limits to respond to requests for transmission service; and (4) reserving the right to cancel service in certain instances, even where a customer has paid for transmission system modifications. We believe that the merged company will not be able to use the provisions of the PSC Oklahoma/SWEPCO and El Paso tariffs to gain any competitive advantage assuming that the services it provides third parties are comparable to the uses it makes of the system. However, the parties can pursue these issues before the presiding judge.

American Paper opposes opportunity cost pricing for a number of reasons. We agree with Applicants that American Paper's concerns are premature. Accordingly, we decline to depart from our current policy on opportunity cost pricing. 135/ We note that we are presently conducting a broad generic inquiry into our transmission pricing policies. 136/

4. Proposed Accounting Treatment

The Accounting Principles Board Opinion No. 16, Business Combinations (APB 16) provides for two methods of accounting for

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135/ Under the Commission's present pricing policy, when a utility adds new capacity to relieve a transmission constraint, the Commission permits the utility to charge either the higher of an embedded cost rate or a rate based on the incremental cost of expansion. When a utility decides not to add new capacity to relieve a transmission constraint, the Commission permits the utility to charge the higher of an embedded cost rate or a rate based on opportunity costs capped at the incremental cost of expansion. See Northeast Utilities Service Company (Re Public Service Company of New Hampshire), Opinion No. 364-A, 58 FERC ¶ 61,070, reh'g denied, Opinion No. 364-B, 59 FERC ¶ 61,042, order granting motion to vacate and dismissing request for reh'g, 59 FERC ¶ 61,089 (1992), aff'd in part and remanded in part sub nom. Northeast Utilities Service Company v. FERC, 993 F.2d 937, (1st Cir. 1993); Pennsylvania Electric Company, 58 FERC ¶ 61,278, reh'g denied and pricing policy clarified, 60 FERC ¶ 61,034 (1992), aff'd sub nom. Pennsylvania Electric Co. v. FERC, 11 F.3d (D.C. Cir. 1993).

136/ Inquiry Concerning the Commission's Pricing Policy For Transmission Services Provided by Public Utilities Under the Federal Power Act, Docket No. RM93-19-000, FERC Stats. and Regs. ¶ 35,024 (1993).

a business combination: the purchase method and the pooling of interests method. 137/ The methods specified in APB 16 are not alternatives for one another. Rather, which method is used depends on the characteristics of each business combination. Twelve conditions are specified in APB 16 for a business combination to be accounted for as a pooling of interests. If a business combination meets all twelve conditions, it is mandatory under GAAP that it be accounted for under the pooling of interests method. Any business combination that does not meet all 12 conditions must be accounted for under the purchase method.

Applicants claim that the acquisition fails to meet all of the conditions prescribed by APB 16 to account for the acquisition under the pooling of interests method. 138/ Witness Hargus cites two examples:

(1) The existing El Paso shareholders' interest in the post-merger El Paso will change dramatically; and

(2) the merger agreement allows CSW to distribute cash instead of stock for certain El Paso obligations.

Applicants propose to account for the business combination by using the purchase method of accounting and by recording on El Paso's books an acquisition premium estimated at about $26

137/ Generally Accepted Accounting Principles (GAAP) provide two methods of accounting for business combinations, the purchase method and the pooling method. (See APB Opinion No. 16, Business Combinations, FASB Original Pronouncements, Accounting Standards as of June 1, 1993, Vol. II (APB 16)).

The purchase method accounts for a business combination as the acquisition of one company by another. The acquiring corporation records at its cost the acquired assets less liabilities assumed. The reported income of an acquiring company thereby includes the operations of the acquired company after date of acquisition based on the cost to the acquiring company.

The pooling of interests method accounts for a business combination as the uniting of the ownership interests of companies by exchange of equity securities. No acquisition is recognized because the combination is accomplished without disbursing resources of the constituents. Ownership interests continue and the former bases of accounting are retained.

138/ See Applicants' Witness Hargus' testimony.

million. 139/ They claim that the acquisition premium represents the portion of the purchase cost that exceeds the depreciated original cost of El Paso's assets as adjusted. 140/ By recording the acquisition premium on El Paso's books, Applicants propose to "push-down" the acquisition price to El Paso's books and records, an acceptable option under GAAP.

As noted in Entergy, 141/ the Commission, while not bound to follow APB 16, generally follows GAAP, provided that doing so does not conflict with sound regulatory principles. In Entergy, the Commission noted that the:

> [p]ooling of interests method is more consistent with the long-standing regulatory principles followed by this Commission; however, because of the undesirable effects that may result from potentially having different financial statements presented for regulatory and general financial purposes, we will permit the purchase method to be followed in this instance. 142/

The Arkansas Commission claims that Applicants' use of the purchase method is not properly supported. We do not agree. The Applicants have indicated that the planned merger does not qualify under APB-16 for treatment under the pooling of interests method.

Consistent with our finding in Entergy, 143/ we find that the pooling of interests method best meets the Commission's ratemaking needs. We will, however, allow the Applicants to use the purchase method to record the merger in view of their assertions that the merger fails to qualify for pooling of interests treatment under APB 16. We will also require that the

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139/ Under the purchase method of accounting, a new basis of accounting for assets is recognized. To the extent that the acquisition cost exceeds fair value, an intangible asset (such as goodwill) is recorded for the excess.

140/ As part of their filing (Exhibit WGH-1, APP-111), Applicants include a series of accounting entries that adjust the recorded values of El Paso's assets and liabilities. These entries were not supported or adequately explained in the filing.

141/ Opinion No. 385, 65 FERC ¶ 61,332 (1993).

142/ 65 FERC at 62,534-35 (footnote omitted).

143/ 65 FERC at 62,536.

companies maintain full and complete information related to the business combination so that accounting that would have resulted from use of the pooling method can be reconstructed for all future accounting periods if necessary to do so for ratemaking purposes.

The Texas Counsel requests a hearing on the treatment of the acquisition adjustment. It contends that the acquisition adjustment should be recorded on CSW's books, not El Paso's, since it is CSW's shareholders that will primarily benefit from the merger.

Consistent with Entergy and the Uniform System of Accounts, we will allow Applicants to record the amount paid by CSW to acquire El Paso in excess of book value less depreciation as an acquisition adjustment on El Paso's books. In Entergy, the Commission noted, however, that an appropriate showing must be made in a rate proceeding for a company to include an acquisition adjustment in its rates. We will require the same showing in this case.

In addition, we note that Applicants' proposal to use the purchase method of accounting for the merger and to record an acquisition premium on El Paso's books will result in a corresponding increase in El Paso's stockholders' equity. The amount of the acquisition premium will be the difference between the fair market value of the consideration given by CSW and the book value of El Paso. Applicants estimate this amount to be approximately $26 million. In order for the original cost concept to be fully followed through in ratemaking, appropriate recognition must be given to equity balances as well as asset values. Otherwise an artificially high equity balance may be used for rate of return purposes. Our requirement that Applicants maintain accounting information as if the pooling method had been used for the merger will allow for an evaluation of the effects of the merger on common equity.

Also, we will direct the Applicants to submit their proposed final accounting entries to the Commission for approval within six months after the merger is consummated. 144/ The final accounting submittal must include a comprehensive list of all accounting entries necessary to reflect the merger, along with narrative explanations describing the bases for the accounting entries.

144/ The Commission was not able to fully evaluate the Applicants' proposed accounting because there was insufficient supporting information for the proposed entries. The Applicants' final accounting entries must contain adequate support for all entries.

The Commission has the authority to request any information necessary to complete to its satisfaction its review of Applicants' proposed accounting .

5. Other Commonwealth Factors

a. Reasonableness of the Purchase Price

The City of El Paso and Texas Counsel were the only intervenors to raise the issue of the reasonableness of the purchase price. Neither party presented specific arguments. Moreover, the purchase price was established in the bidding process in El Paso's bankruptcy proceeding. Accordingly, we will not order a hearing on this issue. 145/

b. Evidence of Coercion

There is no indication that CSW coerced El Paso to merge. CSW's offer was a result of a bidding process in the bankruptcy proceeding. Furthermore, although several intervenors ask that each of the Commonwealth factors be set for hearing, no party offered any discussion or made any specific claims related to coercion. Therefore, we will not set this matter for hearing.

c. Impairment of Effective Regulation

No party argues that the merger would impair effective regulation and we find no reason to set this matter for hearing.

C. Amendment to the System Agreement -- Docket No. ER94-898-000

The Applicants state that the purpose of this filing is to add El Paso as a party to the New Operating Agreement as the fifth electric utility operating company of the CSW system. Although the Applicants assert that the addition of El Paso will not have an immediate significant effect on rates, the addition of El Paso will have a material effect on the distribution of costs and savings among the CSW Operating Companies and El Paso.

As indicated above, concerns have been raised regarding the effect of the merger on costs and rate levels. Intervenors argue that including El Paso as a party to the operating agreement and changing CSW's method of distributing transmission could increase CSW's costs and rates, and have requested that the Commission set for hearing the section 205 filing. Because a determination of the reasonableness of the proposed section 205 filing is directly related to the merger and in light of the Commission's decision

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145/ However, to the extent the purchase price affects CSW's capital structure and capital costs, this issue may be pursued at hearing. See 62 FERC at 61,372.

to set the proposed merger's effect on costs and rate levels for hearing, the Commission will also set the section 205 filing for hearing.

D. Other Matters

Applicants request waiver of Part 33.3, Exhibit I of the section 203 filing requirements. 146/ Exhibit I requires maps on a scale of not more than 20 miles to the inch showing the properties of each party to the transaction. Applicants have provided several maps of their systems in their filed exhibits, and no party has opposed this requested waiver. The Commission has found the maps sufficient for its analysis. Therefore, we find that good cause exists to grant the requested waiver.

The Commission orders:

(A) The untimely, unopposed motion to intervene of PSC New Mexico is hereby granted.

(B) Applicants are directed to notify the Commission within 15 days of the date of this order whether they accept the comparability condition. If the Applicants fail to do so, their merger application is denied as being inconsistent with the public interest and their rate filing is dismissed as moot.

(C) Conditioned upon Applicants accepting the comparability condition as provided in Ordering Paragraph (B):

(1) Applicants shall file, within 30 days of the date of this order, revisions to the PSC Oklahoma/SWEPCO and El Paso transmission tariffs to provide third parties access on the same or comparable basis and under the same or comparable terms and conditions, as the transmission provider's uses of its system and to reflect the summary dispositions ordered herein.

(2) Applicants' amendment to the System Agreement is hereby accepted for filing and suspended for a nominal period, to become effective on the date of the merger of El Paso and CSW, subject to refund.

(3) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy

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146/ 18 C.F.R. § 33.3 (1993).

Organization Act and by the Federal Power Act, particularly sections 203, 205, and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held for the purpose of: (a) determining the effect of the proposed merger on operating costs and rate levels; (b) how to modify the existing PSO/SWEPCO tariffs and the proposed El Paso pro forma tariffs to meet the comparability standard adopted in AEP; and (c) determining the justness and reasonableness of the rate filing in Docket No. ER94-898-000, as discussed in the body of this order.

(4) Certain issues are hereby summarily disposed of, as discussed in the body of this order.

(5) The motions to consolidate Docket Nos. EC94-7-000 and ER94-898-000 are hereby granted, as discussed in the body of this order.

(6) The motions to consolidate Docket Nos. EC94-7-000 and ER94-898-000 with Docket No. TX94-2-000 are hereby deferred, as discussed in the body of this order.

(7) Applicants' motions for expedited proceedings, a "paper hearing," and a limited hearing, are hereby denied.

(8) A presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a prehearing conference in this proceeding within 10 days of the date on which Applicants notify the Commission that they accept the comparability condition, to be held in a hearing room of the Federal Energy Regulatory Commission, 810 First Street, N.E., Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule consistent with the discussion in the body of this order. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided for in the Commission's Rules of Practice and Procedure.

(9) Unless the proceeding settles in its entirety, the presiding judge shall issue an Initial Decision no later than March 3, 1995.

(10) Briefs on Exceptions shall be due 20 days after the date of issuance of the Initial Decision. Briefs Opposing Exceptions shall be due 15 days after Briefs on Exceptions are due.

By the Commission. Commissioner Hoecker concurred with a separate statement attached. Commissioner Massey concurred in part and dissented in part with a separate statement attached.

(S E A L)

Linwood A. Watson, Jr.,
Acting Secretary.

El Paso Electric Company and Central and South West Services, Inc.	)))	Docket Nos. EC94-7-000 and ER94-898-000

(Issued August 1, 1994)

HOECKER, Commissioner, concurring:

Today's Order on the joint merger application of El Paso Electric Company (El Paso) and Central and South West Services, Inc. (CSW), including the Commission's decision to establish a hearing on costs and rates, comports with the public interest. I support it. In addressing the potential anticompetitive effects of the merger, however, the Order fails in important respects to do what Commission merger precedent would seem to require and fails to accomplish what the comparability concept logically dictates in this context. For the reasons stated below, I contend that the Commission should ensure that the Public Utility Commission of Texas (PUC) has a timely opportunity to address the competitive implications of the proposed merger for the Electric Reliability Council of Texas (ERCOT) and the affected utilities therein.

I.

Moving beyond our traditional means of mitigating market power in merger cases, we today hold that "increases in transmission market power as a result of a merger . . . .[cannot] be adequately mitigated without an offer of comparable transmission services." Slip op. at 53. Indeed, the Commission announces, that even if market power is not at issue, it will henceforth require merging utilities to offer comparable services. Id. The foundation laid for this change in policy involves "the national interest in establishing a competitive wholesale bulk power market, the critical importance of comparable transmission services in establishing such a market, and the ongoing fundamental changes occurring in the electric industry as a whole." Id. at n.127. The Order clearly regards these as compelling matters of national interest, and as supported by the intent of Congress in passing the Energy Policy Act. In considering the extent to which it will require comparability in this case, the Commission nevertheless finds these factors to be "outweighed" by "the unique physical and jurisdictional circumstances" of ERCOT. Id. at 55. We therefore balk at requiring service comparability for those portions of the merged company that will operate within ERCOT, i.e.,the southern division of West Texas Utilities Company (WTU) and Central Power & Light Company (CP&L). Instead, the Order expresses a

preference for addressing transmission issues within ERCOT, presumably including comparability, only under section 211 of the Federal Power Act. Id. at 56.

II.

I am not entirely persuaded by the Order's novel balancing of interests, which will result in market power mitigation for only non-ERCOT companies and transactions. I believe that this gaping exception to the comparability standard is an unnecessary policy innovation, for the following reasons.

First, under its prevailing merger precedent, the Commission always mitigates potential market power and adopts measures that otherwise secure the public interest on a system-wide basis. 1/ This approach has been followed even where imposing open access requirements on less than a system-wide basis might have been feasible. For example, in curbing the potential anticompetitive effects of the merger between Northeast Utilities and Public Service Company of New Hampshire, the Commission had the opportunity to adopt an incremental remedy and did not do so. 2/ Conspicuously absent from today's Order is the type of reasoned analysis that the Commission used in Northeast Utilities to explain the need to mitigate market power throughout the broadest geographical market. The Commission stated:

> [R]eduction in competitive options does not depend on whether all [New England] utilities are directly interconnected with both PSNH and NU. Instead, the Commission's conclusion rests on the existence of major strategic corridors even if they are not directly connected

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1/ See e.g., Northeast Utilities Service Co. (Re Public Service Co. of New Hampshire), Opinion No. 364, 56 FERC ¶ 61,269 (1991), order on reh'g, Opinion No. 364-A, 58 FERC ¶ 61,070 (1992), affirmed in relevant part, Northeast Utilities Service Co. v. FERC, 993 F.2d 937 (1st Cir. 1993) (Northeast Utilities); Entergy Services, Inc. and Gulf States Utilities Co., 62 FERC ¶ 61,073 (1993), order on reh'g, 64 FERC ¶ 61,001 (1993), appeal pending, Entergy v. FERC, 94-1414 (D.C. Cir.).

2/ Northeast Utilities, 56 FERC at 62,000 (1991). In the Northeast Utilities case, the Commission identified four relevant geographic markets, three of which are subregions of the New England region, which was (in its entirety) also identified as a relevant market. The Commission rejected several plausible arguments that any conditions necessary to mitigate the market power of the merged company need extend only to certain of the subregions of New England.

> to them. Thus, a utility controlling the strategic corridors may have market power over utilities that are not directed connected to the corridors. The relevant markets in this case are characterized by two strategic corridors: one, controlled by NU, to the south and west and the other, controlled by PSNH, to the north and west. These corridors are essential paths between buyers and sellers to conduct electricity trade. ... Thus, contrary to NU's argument, NU's potential market power is not limited to those utilities with which it is directly interconnected . . . 3/

This analysis is more compelling when one considers that, at the time of the Northeast Utilities case, the Commission did not identify service comparability with the public interest under section 203. It nevertheless refused the half-measure chosen today. In the instant Order, no similar effort is undertaken to assure that potential buyers and sellers in ERCOT and SPP are not cut off from one another. Clearly, existing and future interconnections between ERCOT and SPP are largely within CSW's control. Despite the open access and comparability tariff requirement that the Commission applies to the non-ERCOT portions of CSW to mitigate the market power of the merged company, it represents an incremental approach that is inconsistent with the spirit of the Northeast Utilities case.

This is not to say that an incremental approach which mitigates only as much market power as the merger creates in individual relevant markets is indefensible -- only that the comparability standard announced today renders it inappropriate as a matter of policy. Under the approach taken in the Order, Southwestern Public Service Company (SPS) is found to be the relevant market because it is interconnected to both of the merging companies and thus would lose an alternative buyer and seller of generation and transmission services as a result of the merger. The merger would increase the ability of the merged company to dominate and foreclose the supply of electric generation to SPS, and the demand for electric generation from SPS, using its consolidated control of transmission corridors. Slip op. at 50-52. This incremental increase in market power is all that the Commission is concerned with and the Order simply mitigates it by requiring comparable transmission service over the merged company's non-ERCOT facilities. In other words, SPS is left no worse off after the merger than before the merger. Id. at 55.

Contrary to this approach, Commission merger case law appears to me to evince an unwillingness to approve, as

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3/ 58 FERC at 61,194 (1992).

consistent with the public interest, incremental solutions that produce sub-regional or other sub-optimal service distinctions. 4/ In fact, today's Order says as much: "We no longer believe that increases in transmission market power as a result of a merger can be adequately mitigated without an offer of comparable transmission service." Id. at 53.

Second, the Order appeals to "countervailing" physical considerations and implies that these restrictions insulate ERCOT from interstate commerce and any Commission interest in the state of competition therein. The physical uniqueness of ERCOT is arguably only a matter of degree, I believe. I am unsure that, by itself, it justifies an exception to the comparability requirement established today. In fact, the Order appears to recognize the diminishing importance of ERCOT's physical distinctions. It states unequivocally that "[t]he fact that El Paso and the other CSW affiliates are located in asynochronous electrical regions is not a deterrent to the integration of the CSW system." Id. at 56. It is evident from the joint application that, pre- and post-merger, all CSW operating companies are integrated and engage in a mutual trade. 5/ One might therefore conclude that they are all part of the same relevant market, which exists both inside and outside of ERCOT.

This brings me to the third and decisive factor upon which today's Order hinges. I acknowledge fully that there are difficult jurisdictional questions about requiring tariffs that achieve open access and comparable transmission CSW-wide. 6/

4/ See supra note 1.

5/ The merged company will integrate its resources located in the Southwestern Power Pool (SPP), ERCOT, and Western Systems Coordinating Council (WSCC) regions to enhance its ability to be a reliable and economic supplier of power. It is apparent on the face of the merger application that the merged company will not be constrained by physical circumstances in its resource integration and competitive activities. As things stand, however, there will be little competition against CSW for sales both across the SPP-ERCOT interface and within ERCOT. There are some transmission opportunities using CSW's so called "to, from, and over" tariff (the TFO tariff) to bridge interconnection, but these opportunities are extremely limited.

6/ ERCOT facilities are not connected with the interstate grid except pursuant to an order issued in 1981 approving a settlement providing for certain interconnections between ERCOT and SPP, and approving the TFO tariff. Central Power

(continued...)

The extent of this Commission's jurisdiction over individual utilities within ERCOT is not at issue here, however. In fact, I readily concede that the Commission may not have direct authority under the FPA with respect to the ERCOT facilities of WTU and CP&L. Nonetheless, because the Commission is authorized, indeed required, by the FPA to ensure that regulated activities, including mergers, do not interfere with a competitive marketplace, it must achieve that objective if lawful means are available. I submit that such means to further the Commission's pro-competitive objectives, including advancing the comparability principle in pursuit of a national competitive bulk power market, are available in this case and do not raise jurisdictional concerns.

Simply put, today's Order should have required CSW to file an open access, comparability tariff with the PUC as a condition of the merger. Such a condition would defer to the PUC all (non-section 211) substantive issues concerning transmission access and comparability within ERCOT. This approach does not present the issue of whether this Commission has authority, under section 203, to impose substantive merger conditions on WTU and CP&L. 7/ Compliance with such a condition would be voluntary,

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6/(...continued)
& Light Co., 17 FERC ¶ 61,078 (1981), order on reh'g, 18 FERC ¶ 61,100 (1982). The order approving the interconnections and the TFO tariff was issued pursuant to sections 210 and 211 of the Federal Power Act (FPA). An argument can be made that facilities located within ERCOT are not directly subject to this Commission's jurisdiction except under sections 210, 211, and 212 of the FPA, and that ownership or operation of such facilities does not make an entity a "public utility" under section 201 or 203. While this argument may have some validity with respect to direct rate regulation, WTU and CP&L appear to accede to this Commission's jurisdiction when they submit their rate filings here.

7/ Significantly, this Commission has accepted several open access comparability filings from utilities which were required to be filed by the Wisconsin Public Service Commission (WPSC). Wisconsin Public Service Corp., 52 FERC ¶ 61,042 (1990); Wisconsin Power & Light Co., 51 FERC ¶ 61,016 (1990); Northern States Power Co. (Minnesota) and Northern States Power Co. (Wisconsin), 53 FERC ¶ 61,462 (1990), Opinion No. 383, 64 FERC ¶ 61,342 (1993). More recently, the WPSC has conditioned its certification of transmission facilities by requiring certain Wisconsin utilities to file network tariffs with this Commission.
(continued...)

just as CSW may choose to decline to adhere to other conditions that it file a comparability tariff with this Commission for its non-ERCOT transmission facilities. The condition I commend to my colleagues and the PUC gives the PUC an opportunity to consider comparability and open access issues on a timely basis and based on the same conditions of service that CSW must include in its PSO and SWEPCO filings. This may, in fact, provide the PUC with an opportunity it would not otherwise have, given its limited authority to review mergers under section 63 of the Public Utility Regulatory Act (PURA), Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1993).

The merger condition that I envision would be satisfied upon CSW's filing of tariffs at the PUC that propose open access and service comparability over the ERCOT-area transmission facilities of WTU and CP&L equivalent to that which CSW files with this Commission in response to the comparability condition imposed by the Order. Under the circumstances, I can conceive of no reason why the PUC should not be given the opportunity to review the ERCOT-related implications of the merger now, rather than after the fact.

This alternative is preferable to the approach in today's Order for another reason. Under the Order, all issues about access and comparability within ERCOT will be addressed in section 211 proceedings. See e.g., Tex-La Electric Cooperative of Texas, Inc., 67 FERC ¶ 61,019 (1994). Section 211 encourages the negotiation of wheeling agreements but it also entails procedural delays. Moreover, any final order establishing transmission services inside ERCOT under section 211 will primarily bear the imprint of federal policy. Indeed, the Order contemplates broad, comprehensive section 211 proceedings that would "not be restricted to specific transactions or specific services," but provide for "an access arrangement similar to that established in a transmission tariff that provides for comparable service." Id. at 56. In that regard, the approach adopted today may, in the long run, disadvantage the PUC and the unique competing interests within ERCOT more than would a condition of the kind I recommend here. I prefer instead to accord the applicants, the intervenors, the PUC, and this Commission an opportunity to achieve open access and service comparability over the transmission systems of the CSW family of companies, within a

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7/(...continued)
See, WPSC's Notice of Intervention, filed June 29, 1994, in Docket No. ER94-475-000, Wisconsin Power & Light Company. This exercise of the WPSC's conditioning authority is not apparently regarded here as an infringement upon the jurisdiction of the FERC.

reasonable time, and without infringing upon the jurisdictional integrity of ERCOT.

III.

Naturally, the approach I advocate would prove meaningless if the PUC were predisposed against open access transmission or comparability. However, based on recent testimony by the PUC Chairman before the Texas Legislative Interim Committee and the U.S. Securities and Exchange Commission, I perceive no antagonism to the pro-competitive trends beginning throughout the industry. In fact, Chairman Gee stated before this Commission on April 8, 1994:

> We believe that the Texas Commission should be the initial forum for the resolution of transmission pricing and access disputes within ERCOT. Since the Texas Commission presided over the development of the ERCOT wheeling market and established pricing and access regulations for this region, we believe we are in a superior position to understand the unique regulatory and operational history of the ERCOT system. We would thus strongly urge the FERC to recognize the value of the Texas Commission's experience and judgement in the area of transmission pricing and access policy for ERCOT utilities. This approach, in our view, is consistent with the FERC's stated willingness to promote cooperation with state regulators on transmission issues and to defer to regional resolutions of transmission pricing and access disputes.

The PUC thus deserves an opportunity to evaluate the competitive implications of the merger. I urge the PUC to express its views on this matter during the period for filing rehearing applications on today's Order. If the PUC does not do so, however, the approach adopted today will still prove to be a defensible result, even if an unfortunate precedent.

James J. Hoecker /by BB
James J. Hoecker
Commissioner

El Paso Electric Company and Central and South West Services, Inc.	)))	Docket Nos. EC94-7-000 and ER94-898-000

(Issued August 1, 1994)

MASSEY, Commissioner, concurring in part and dissenting in part:

I strongly support much of this order. Three of our conclusions are particularly noteworthy. First, the order concludes that an evidentiary hearing is needed on a number of cost and benefit issues. Order at pp. 38-41. One of these issues is the Applicants' proposed buyback of the Palo Verde nuclear assets. Another is the Applicants' projection that El Paso will receive 92 percent of the merger's benefits, while the current CSW affiliates will receive only eight percent. I agree that a hearing and a vigorous factual inquiry are needed on these and other cost and benefit issues.

Second, the order interprets broadly our authority under section 211 of the Federal Power Act. Order at pp. 55-56. We suggest that Southwestern Public Service and others can use our new 211 authority to secure transmission access anywhere on the merged company's system. The order says that a request for service under section 211 may be for "an access arrangement similar to that established in a transmission tariff that provides for comparable services" and "need not be restricted to specific transactions or specific services." I agree with this bold view of our new wheeling authority. Future 211 applicants may wish to fashion their requests for transmission services accordingly.

Third, and perhaps most importantly, the order finds that the applicants in all future merger cases must meet our comparability standard for us to find their merger consistent with the public interest. Order at p. 53. That is, they must offer to provide transmission service to others at rates, terms and conditions comparable to how they themselves use their transmission facilities. This applies regardless of whether or not the merger would increase the applicants' market power.

This landmark conclusion is supported by strong policy considerations. The order states, for example, that:

> . . . given the national interest in establishing a competitive wholesale bulk power market, the critical importance of comparable transmission services in establishing such a market, and the ongoing fundamental changes occurring in the electric industry as a whole, it would be a detriment to the national interest to allow mergers or consolidations that do not offer comparable

> transmission access, absent other compelling public interest factors that would outweigh these interests. [Order at 53-54, n.127].

Where I depart from the majority is on their firm conclusion that, in this case, partial rather than full comparability is sufficient to meet the public interest test. The majority finds that a countervailing public interest justifies us in not requiring CSW's affiliates within ERCOT to offer comparability. Order at pp. 55-56. According to the majority, this countervailing public interest derives from ERCOT's unique physical and jurisdictional status. That is, ERCOT is interconnected with the interstate grid solely by means of a settlement under sections 210, 211 and 212, and most of ERCOT is regulated solely by the Texas PUC.

I agree that the uniqueness of ERCOT is a present reality. I am dissenting in part, however, because I am not ready to conclude that these factors warrant an exception from our conclusion that full comparability is needed for a merger to be in the public interest. In other words, I am not sure that the fact of ERCOT constitutes a ccuntervailing public interest sufficient to outweigh the very strong public interest in requiring full comparability. Is partial comparability, which is what we achieve in this case, really sufficient in a competitive era?

My concern is heightened by the potential anticompetitive harm of this proposed merger. As the Order notes at p. 51, "all available transmission capacity by which Southwestern could make new power sales would be controlled by the merged company." The merger also will give CSW control of the two main corridors for sales into Mexico. In such circumstances, we must be particularly careful to ensure that the potential anticompetitive harm from the merger is fully, not just partially, mitigated.

One consideration that I would find highly relevant in determining the public interest in this case is the view of the Texas PUC. Would the Texas PUC itself place a higher value on achieving comparability than on the countervailing factors cited by the majority?

Specifically, I am interested in at least the following points. Would the Texas PUC consider it appropriate for the Commission to require CSW's ERCOT affiliates, as a condition of the merger, to file a tariff with the Texas PUC for comparability within ERCOT? Would the Texas PUC consider it appropriate for us to require the filing of a comparability tariff for service to, from and over the ERCOT wall? If we required the ERCOT affiliates to make a filing at this Commission, would the Texas PUC consider that proceeding an appropriate one for a joint state board, or similar joint regulatory approach?

In short, before we conclude that the physical and jurisdictional status of ERCOT represents such a strong public interest as to warrant an exception from our vitally important comparability policy, we should hear what the Texas PUC has to say. Perhaps the Texas PUC would welcome the opportunity to work with this Commission to achieve systemwide comparability for the merging companies. I would invite the Texas PUC to make its views known to us during the process of rehearing on this order. I would find the Texas PUC's views on comparability with respect to ERCOT to be highly relevant in deciding where the public interest lies in this case.

For the foregoing reasons, I concur in part and dissent in part.

William L. Massey
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.

El Paso Electric Company and Central and South West Services, Inc., as agent for Public Service Company of Oklahoma, West Texas Utilities Company, Southwestern Electric Power Company, and Central Power and Light Company	)	
v.	)	Docket No. TX94-2-000
Southwestern Public Service Company	)	

PROPOSED ORDER ON TRANSMISSION SERVICES AND ESTABLISHING FURTHER PROCEDURES

(Issued August 1, 1994)

On November 4, 1993, El Paso Electric Company (El Paso) and Central and South West Services, Inc. (CSW Services), as agent for the public utility operating subsidiaries of Central and South West Corporation (CSW), Public Service Company of Oklahoma (PSC Oklahoma), West Texas Utilities Company (West Texas), Southwestern Electric Power Company (SWEPCO), and Central Power and Light Company (Central Power) 1/ (collectively, the Applicants) filed an application (TX application) requesting that the Commission issue an order under sections 211 and 212 of the Federal Power Act (FPA), as amended by the Energy Policy Act of 1992, 2/ requiring that Southwestern Public Service Company (Southwestern) provide transmission services. The Applicants request that Southwestern provide up to 133 megawatts of firm transmission service between the control areas of El Paso and PSC Oklahoma, beginning January 1, 1999, and non-firm transmission

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1/ Central Power and West Texas are members of the Electric Reliability Council of Texas (ERCOT). PSC Oklahoma, SWEPCO and West Texas (for its Northern Division) operate in the Southwest Power Pool (SPP), and El Paso operates in the Western Systems Coordinating Council (WSCC). ERCOT is currently connected with SPP by a 220 megawatts high voltage direct current (HVDC) interconnection between West Texas and PSC Oklahoma.

2/ 16 U.S.C.A. §§ 824j-824k (West 1985 & Supp. 1993).

service beginning January 1, 1995. 3/ Since El Paso is geographically separated from the CSW operating companies by Southwestern, the Applicants state that this service will enable them to maintain the coordinated operation of their electric systems following the proposed merger of El Paso and CSW Sub, Inc., a subsidiary of CSW. 4/

We are issuing simultaneously with this order an order in related proceedings concerning the proposed merger between CSW and El Paso. In that order we direct the Applicants to notify the Commission within 15 days whether they accept a condition under which the Applicants would modify certain of their transmission tariffs to provide for comparable services. That order states that if the Applicants do not agree to offer comparable service, the Commission will deny their merger application and dismiss their related rate filing.

As described more fully below, we make a preliminary determination that a final order requiring Southwestern to provide transmission service to the Applicants would comply with the statutory standards, if reliability concerns can be satisfied. Accordingly, assuming the Applicants notify the Commission in the related proceedings that they accept the comparability condition, 5/ we direct Southwestern to perform studies on reliability so that the Commission can determine whether the transmission service requested would unreasonably impair the continued reliability of electric systems affected by the order. We provide Southwestern 30 days to complete the studies, with the 30-day period to commence on the date the Applicants notify the Commission that they accept the comparability condition, and provide the results to the

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3/ El Paso is interconnected with Southwestern in Artesia, New Mexico at the site of the Eddy County HVDC Interconnection. The Eddy County Interconnection has a nominal transfer capability of 200 megawatts, of which El Paso is entitled to use 133 megawatts. The Applicants state that they do not anticipate that firm transmission service will be required in any year in amounts in excess of the 133 megawatts capacity of the Eddy County Interconnection owned by El Paso.

4/ CSW is a registered public utility holding company; CSW Services is its wholly-owned subsidiary; and CSW Sub, Inc. is a wholly-owned subsidiary formed to effect CSW's acquisition of El Paso. Under the Merger Agreement, CSW Sub, Inc. will be merged with and into El Paso, and the separate corporate existence of CSW Sub, Inc. will cease.

5/ If the Applicants do not accept the comparability condition, this proceeding will also be dismissed.

Applicants to evaluate for an additional 30 days. The Commission also encourages the Applicants and Southwestern to work together on these studies, and to exchange information during the study process with a goal of mutually resolving as many differences as possible. We further direct Southwestern to file the results of its studies with the Commission within 60 days after the date the Applicants notify the Commission that they accept the comparability condition, and direct the Applicants and Southwestern to file supplemental pleadings at that time, detailing their views of the results of the study. If we conclude that reliability will not be unreasonably impaired after reviewing the supplemental documents, the Commission will then issue a proposed order that gives the Applicants and Southwestern an appropriate period to negotiate the rates, terms, and conditions of the transmission service requested. We will address rate issues in a later order, if necessary.

I. Background

El Paso is a public utility operating its electric utility business under chapter 11 of the United States Bankruptcy Code. 6/ On August 27, 1993, El Paso filed with the United States Bankruptcy Court for the Western District of Texas (Bankruptcy Court) El Paso's Modified Third Amended Plan of Reorganization (Plan), under which El Paso would become a wholly-owned subsidiary of CSW. 7/ The Bankruptcy Court confirmed the Plan, and on January 10, 1994, the Applicants filed applications with the Commission for approval of: (1) the merger under section 203, and (2) an Agreement to Amend the Restated and Amended Operating Agreement among the CSW operating subsidiaries under section 205. 8/ If the merger is consummated, El Paso will be a wholly-owned subsidiary of CSW and the fifth electric

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6/ 11 U.S.C. §§ 101 et seq. (1988).

7/ Southwestern filed a motion to provide a competing plan of reorganization. The Bankruptcy Court denied Southwestern's motion because there was no creditor support for Southwestern's plan. The Bankruptcy Court also noted that if it allowed Southwestern to file a competing plan, El Paso's reorganization would be delayed, and that result was contrary to the purposes of chapter 11 of the Bankruptcy Code.

8/ The Restated and Amended Operating Agreement dated October 1, 1993, among CSW Services, PSC Oklahoma, West Texas, SWEPCO, and Central Power forms the basis for the coordinated operations of the CSW system and allocates the costs of the system among the operating companies. The purpose of the section 205 filing is to add El Paso as a party to the operating agreement.

utility operating company of the CSW system. El Paso's system would then operate in coordination with the systems of the other four CSW operating companies. The Applicants claim that because of this coordination, the expanded CSW system will experience lower electricity production costs. They also say that the least cost method of coordinating the operations of the El Paso and the existing CSW system is to obtain firm and non-firm transmission services from Southwestern. The Applicants state that the next-least-cost alternative is the construction of a new transmission line, which would cost approximately $120 million.

II. TX Application

In their TX application, the Applicants state that they will require non-firm transmission service as early as January 1, 1995, but do not expect to require firm service until January 1, 1999. They state that as part of the CSW system, El Paso will undertake economy energy transactions with the other CSW operating companies that will require the non-firm transmission service. The Applicants also state that El Paso will need the firm transmission service to import firm capacity and associated energy provided by the CSW operating companies or to export firm power and associated energy to one or more of the operating companies. However, the Applicants explain that the exact date of the commencement of service will depend on obtaining the necessary approvals to complete the merger of El Paso with CSW Sub, Inc.

The Applicants describe the transmission request as flexible point-to-point, bi-directional service. 2/ The power involved will be delivered to the Southwestern system at Southwestern's points of interconnection with PSC Oklahoma and the Northern Division of West Texas. The power will then be delivered across the Southwestern transmission system to Southwestern's interconnection with El Paso at Eddy County for redelivery to Southwestern's points of interconnection with PSC Oklahoma and West Texas. The Applicants ask that the Commission find that their request is consistent with the Commission's Good Faith

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2/ The term point-to-point service has no industry-wide accepted definition. However, the Commission has characterized point-to-point service as involving designated points of entry into and exit from the transmitting utility's system, with a designated amount of transfer capability at each point. See Entergy Services, Inc., 58 FERC ¶ 61,234 at 61,768 (1992).

Policy Statement, 10/ and not premature, and that Southwestern did not respond in good faith to their request.

The Applicants also argue that since they have requested bi-directional or flexible point-to-point service, the Commission should reject multiple charges for each direction of flow. They state that the price they should pay for the service is either the higher of Southwestern's average embedded costs or the incremental costs of the transmission service. The Applicants argue that Southwestern's system will require only minor modifications to provide the requested service, and thus the Commission should apply average embedded cost pricing. 11/

In addition, the Applicants note that in order for Southwestern to provide all the requested transmission service, it will be necessary to reinforce the existing alternating current transmission system in the Southwest Power Pool (SPP) by replacing the existing transmission line with a new 345 kV line. 12/ They request that Southwestern perform a system study to analyze whether the transmission service can be provided, including the effects on system reliability of constructing the new 345 kV facilities. The Applicants state that CSW has agreed to pay the costs of the study, but argue that in return, CSW and El Paso should be able to participate in the

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10/ Policy Statement Regarding Good Faith Requests for Transmission Services and Responses by Transmitting Utilities Under Sections 211(a) and 213(a) of the Federal Power Act, as Amended and Added by the Energy Policy Act of 1992, III FERC Stats. & Regs. ¶ 30,975 (1993), 58 Fed. Reg. 38,964 (July 21, 1993) (Good Faith Policy Statement).

11/ Specifically, the Applicants state that once Southwestern modifies its system to provide firm transmission service, the Applicants will bear that portion of Southwestern's annual embedded average transmission costs that is equal to a fraction that has as its numerator 133 megawatts and as its denominator the peak load on Southwestern's transmission system. Before that change, the Applicants propose to pay on an hourly or daily basis appropriate charges for the transmission service they actually use.

12/ CSW Services believes that the least cost method for reinforcing the current system would be to construct a new 345 kV transmission line to replace the existing 230 kV transmission line that extends from Southwestern's Harrington/Nichols generating station in Amarillo, Texas easterly to PSC Oklahoma's Elk City substation, and to construct 65 miles of new 345 kV transmission line from Elk City to PSC Oklahoma's Southwestern Station in Anadarko, Oklahoma.

process. Therefore, the Applicants request that the Commission order Southwestern to attend a technical conference to determine: (1) the validity of Applicants' studies regarding the transmission service, (2) whether further studies are necessary, and (3) the extent to which Southwestern's system must be modified to provide the service. Based on the outcome of the technical conference, the Commission should issue an order requiring Southwestern to provide up to 133 megawatts of transmission service, and should provide the parties up to 60 days to reach an agreement on the rates, terms, and conditions under which Southwestern will provide those services, they say.

The Applicants also incorporate in the TX application a series of letters between the Applicants and Southwestern that provide the chronology and basis for the request. The exchange of correspondence describes the Applicants' and Southwestern's positions, which are repeated in their pleadings and discussed below. The Applicants state that in accordance with section 211(a), the letters show that at least 60 days prior to the date of the TX application, El Paso and the CSW operating companies made a good faith request for transmission service from Southwestern.

Notice of application in the instant proceeding was published in the Federal Register, 13/ with motions to intervene and protests due on or before December 1, 1993. 14/

III. Interventions

A. Intervenors Raising No Arguments

On November 24, 1993, the Louisiana Public Service Commission (Louisiana Commission) filed a notice of intervention in this proceeding. On December 1, 1993, the New Mexico Public Utility Commission (New Mexico Commission) filed a motion to intervene.

13/ 58 Fed. Reg. 60,616 (1993).

14/ On November 17, 1993, Southwestern filed a motion for an extension of time to file interventions and a request for expedited action on the motion. In support of its motion, Southwestern states that the TX application contains voluminous, complex, and technical information. On November 18, 1993, the Applicants filed an answer opposing Southwestern's request for an extension of time, asserting that Southwestern's request is a dilatory tactic. On November 22, 1993, the Commission issued a notice extending the time for filing protests or interventions through December 22, 1993, and the time to answer interventions through January 13, 1994.

On December 15, 1993, Western Farmers Electric Cooperative (Western Farmers) filed a motion to intervene. Western Farmers states that it believes that the Applicants' request would increase the parallel flows of electric energy across Western Farmers' transmission facilities. Therefore, Western Farmers seeks to be included in any technical conference on the proposed service, and to be advised about any load flow or other studies that may be performed.

On December 20, 1993, the Public Service Company of New Mexico (PSC New Mexico) filed a motion to intervene stating that as a neighboring system and one that is interconnected with the systems at issue here, it has an interest in the proceeding and may be directly affected by the outcome.

On December 22, 1993, Dona Ana County, New Mexico (Dona Ana County), the WestPlains Energy Division of UtiliCorp United Inc. (UtiliCorp), the New Mexico Industrial Energy Consumers (Energy Consumers), Houston Lighting & Power Company (Houston Power), and Texas Utilities Electric Company (Texas Utilities) filed motions to intervene. Dona Ana County states that since its residents are customers of El Paso, Dona Ana County has an interest in ensuring that its residents have access in the future to the lowest cost suppliers of power --- including alternatives to El Paso. In addition, Dona Ana County is concerned that the filing may affect the proposed merger between El Paso and CSW, which will also affect Dona Ana County residents' electricity service and rates. UtiliCorp states that since the WestPlains Energy Division is interconnected with Southwestern, there is a possibility that the proposed transaction will affect the WestPlains Energy Division because of the interconnected nature of the grid. Energy Consumers states that it is composed of large industrial energy consumers that purchase power from El Paso, Southwestern, Public Service Company of New Mexico, and rural cooperatives in the State of New Mexico.

Houston Power states that it provides certain wheeling services to the CSW operating companies under a Commission tariff applicable to transfers of electric power and energy to, from, and over the North HVDC Interconnection, located in north Texas. This wheeling service implements Commission orders issued under sections 210, 211, and 212 that provide for the interconnection of ERCOT with the SPP. 15/ Houston Power states that the Applicants plan to transmit power and energy generated by each of the CSW operating companies, including El Paso, to, from, and over the North HVDC Interconnection in order to integrate El Paso's operations with the CSW system. Thus, Houston Power

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15/ See Central Power & Light Co., et al., 17 FERC ¶ 61,078 (1981), order on reh'g, 18 FERC ¶ 61,100 (1982); Texas Utilities Electric Co., 38 FERC ¶ 61,050 (1987).

argues that since it provides transmission service under a Commission tariff for such transfers, it could be directly affected by the outcome of the case.

Texas Utilities states that it is directly interconnected with West Texas within ERCOT; indirectly interconnected with Central Power within ERCOT; and, by means of the North HVDC Interconnection, is also indirectly interconnected with PSC Oklahoma and Southwestern. Therefore, Texas Utilities states that it has a long-standing relationship with the CSW operating companies and their parent. Texas Utilities states that the Applicants intend to transmit power and energy generated by each of the CSW operating companies, including El Paso, to, from, and over the North HVDC Interconnection in order to integrate El Paso's operations with those of the other four CSW operating companies. Thus, Texas Utilities argues that it has a direct interest in ensuring that the public interest will be served and that the operation and reliability of its transmission system and the ERCOT grid will not be harmed by this proceeding.

On December 22, 1993, Duke Power Company (Duke Power) and PSI Energy, Inc. (PSI) filed motions to intervene. Duke Power and PSI argue that they need to participate because the Commission's decision in this case may have precedential impact.

B. Intervenors Raising Arguments

On December 16, 1993, the City of El Paso (City) filed a motion to intervene. The City states that under Texas law it has exclusive jurisdiction over electric rates, operations and services within its corporate limits, and that El Paso provides electric services within the City under a 30-year franchise agreement dated March 25, 1971. The City requests that the Commission conduct a hearing to determine whether granting the proposed transmission services will promote economically efficient transmission and generation of electricity for the City during and after the term of its current franchise agreement with El Paso.

On December 20, 1993, the Wholesale Customers of Southwestern (Southwestern Customers) 16/ filed a motion to intervene and a protest. Southwestern Customers assert that the Applicants' filing should be set for hearing either in this proceeding or consolidated with the Applicants' section 203 merger application. The Southwestern Customers argue that the Applicants' proposal: (1) may be anticompetitive, since CSW will preempt the remaining capacity of the HVDC Interconnection at

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16/ The Southwestern Customers are rural electric cooperatives who are full requirements wholesale customers of Southwestern, and are located in New Mexico and Texas.

Artesia, New Mexico and the Southwestern Customers' rates may be raised by the decrease in future off-system sales; (2) may decrease Southwestern's system reliability, which will decrease the Southwestern Customers own system reliability; (3) will force Southwestern to redispatch its system, as a result of which Southwestern will derate its on-system units, which will cause both reliability and economic injury to the Southwestern Customers; and (4) may cause the Southwestern Customers to pay the costs to upgrade the Southwestern system.

On December 22, 1993, the Arkansas Public Service Commission (Arkansas Commission) filed a notice of intervention. The Arkansas Commission requests that the Commission delay issuing a final order in this proceeding until a final order in the Applicants' section 203 proceeding is issued. It argues that it would be impossible to determine whether an order in this proceeding, which facilitates the merger, is in the public interest before determining that the merger itself is in the public interest.

On December 22, 1993, the Public Utility Commission of Texas (Texas Commission) filed a notice of intervention. The Texas Commission is concerned that the requested service may decrease reliability, and at a minimum requests that it receive detailed load flow and stability analyses to determine whether the reliability requirement of section 211 can be satisfied. The Texas Commission also requests that the Commission conduct a hearing in this case to address whether the Applicants' request will have anticompetitive effects and harm reliability.

On December 22, 1993, Arkansas Electric Cooperative Corporation, Cap Rock Electric Cooperative, Inc., Golden Spread Electric Cooperative, Inc. and its members, 17/ Magic Valley Electric Cooperative, Inc., Mid-Tex Electric Cooperative, Inc. and its members, 18/ Oklahoma Municipal Power Authority,

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17/ Golden Spread Electric Cooperative, Inc.'s members are as follows: Bailey County Electric Cooperative Association, Deaf Smith Electric Cooperative, Inc., Greenbelt Electric Cooperative, Inc., Lamb County Electric Cooperative, Inc., Lighthouse Electric Cooperative, Inc., Midwest Electric Cooperative, Inc., North Plains Electric Cooperative, Inc., Rita Blanca Electric Cooperative, Inc., South Plains Electric Cooperative, Inc., Swisher Electric Cooperative, Inc., and Tri-County Electric Cooperative, Inc. (Oklahoma).

18/ Mid-Tex Electric Cooperative Inc.'s members are as follows: Brazos Electric Cooperative, Inc., City of Brady, Texas, Coleman County Electric Cooperative, Inc., Golden Spread Electric Cooperative, Inc., Concho Valley Electric

(continued...)

(Oklahoma Municipal) 19/ and Rayburn Country Electric Cooperative, Inc. (jointly referred to as TDU Customers) filed a joint and several motion to intervene and request that the Commission initiate hearing procedures in this case. 20/ The TDU Customers are concerned that this proceeding establish appropriate transmission pricing principles that are equitable for both transmission suppliers and transmission requesters. They request that, at a minimum, the Commission set for hearing the issue of whether sufficient transmission capability currently exists on the Southwestern system.

On December 22, 1993, the Texas Office of the Public Utility Counsel (Texas Counsel) filed a motion to intervene, a protest, and a motion to deny summary disposition. The Texas Counsel represents the interests of Texas residential and small commercial ratepayers. Specifically, the Texas Counsel protests the pricing mechanism under which El Paso and CSW propose to compensate Southwestern for the use of Southwestern's system and the required system upgrades. It argues that the pricing mechanism is inadequate to cover Southwestern's embedded cost plus the cost of the system upgrades that Southwestern will have to undertake, which will allegedly result in Southwestern's ratepayers subsidizing the cost of the El Paso and CSW merger. The Texas Counsel also argues that the proposal will harm Southwestern's system reliability and Southwestern's ability to make off-system sales for the benefit of Southwestern's retail ratepayers. It argues that El Paso's and the CSW operating companies' retail ratepayers will be obliged to pay for unneeded transmission capacity or transmission upgrades as part of plant

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18/(...continued)
Cooperative, Inc., Kimble Electric Cooperative, Inc., Lighthouse Electric Cooperative, Inc., Midwest Electric Cooperative, Inc., Rio Grande Electric Cooperative, Inc., Southwest Texas Electric Cooperative, Inc., Stamford Electric Cooperative, Inc., and Taylor Electric Cooperative, Inc.

19/ On June 10, 1994, the Oklahoma Municipal filed a notice of withdrawal of its motion to intervene in this proceeding. Oklahoma Municipal states that this notice of withdrawal is not meant to affect the motion of the other TDU Customers.

20/ The TDU customers are municipal entities or cooperative corporations that are wholesale customers of a CSW utility subsidiary, Southwestern, or both. TDU Customers are also transmission dependent, in whole or in part, on either CSW or Southwestern. The purpose of each of the TDU Customers is to deliver electric power and energy at reasonable cost to its customers or members/consumers.

in service in retail rate cases or as part of the wheeling and transmission component of purchased power expenses. The Texas Counsel asserts that the TX application is an attempt to transfer the cost of the proposed merger from El Paso's and CSW's shareholders to Southwestern's, El Paso's, and CSW's operating companies' retail ratepayers. The Texas Counsel argues that the Commission should: (1) deny summary disposition; (2) conduct a full hearing on this application; (3) consolidate this docket with the merger application; and (4) conduct a joint hearing on the interrelated applications.

On December 22, 1993, the City of Las Cruces, New Mexico (Las Cruces) filed a motion to intervene and a protest. Las Cruces states that it is currently a retail customer of El Paso, but that it may construct or purchase a distribution system and is exploring alternative power suppliers. Las Cruces states that Southwestern appears to be the lowest cost producer of wholesale power in the area and that Southwestern will probably supply wholesale power to a municipal electric utility that is owned and operated by Las Cruces. It argues that power from Southwestern to Las Cruces will be transmitted over the Artesia Interconnection through the El Paso transmission system, but that there is limited transmission capacity (including limited capacity at and over the Artesia Interconnection) that will be used by El Paso and CSW. Specifically, Las Cruces argues that if the Commission grants the Applicants' transmission request, the merged companies will use all available capacity and any inexpensive means available to upgrade the transmission system to avoid current transmission restraints. Thus, as a later entity seeking to use the transmission facilities, Las Cruces could be required either to forego transmission entirely or to pay exorbitant costs for transmission upgrades. Las Cruces asserts that by forcing it into the position of foregoing transmission access or paying a prohibitive rate for such access, El Paso and CSW could retain Las Cruces as a captive customer either at wholesale or retail. Therefore, Las Cruces argues that if El Paso and CSW have the first position as a transmission purchaser, Las Cruces will be precluded from competing with the merged company at retail, which will be anticompetitive and contrary to the public interest.

Thus, Las Cruces asks that the Commission hold a hearing to determine whether the proposed wheeling will physically or economically preclude future service to Las Cruces. Las Cruces requests that: (1) the Commission convene a hearing to examine the effect of the proposed transmission access, (2) the hearing be consolidated with a hearing on the proposed merger, and (3) the Commission condition any transmission access to require that El Paso and CSW pay for any future system upgrades needed to accommodate the transmission needs of Las Cruces. Las Cruces asks that the Commission analyze the Applicants' request in light of its potential anticompetitive effect, and that this analysis

be part of a hearing on both the section 211 and section 203 applications.

On December 23, 1993, the New Mexico Attorney General (New Mexico AG) filed a motion to intervene and a protest. The New Mexico AG argues that the filing raises several issues that must be set for hearing and consolidated with the Applicants' merger application. The issues include: system reliability, cost allocation of the proposed transaction, transmission system operation, competition and open access, and impact on rates, especially in light of other unexplored options. 21/

On January 6, 1994, the United States Department of Defense (DOD) filed a late motion to intervene and protest. It states that its filing was late because of miscommunication by the Commission's federal agency liaison. DOD states that it operates two bases, Holloman Air Force Base (Holloman) and White Sands Missile Range (White Sands), that currently obtain power from El Paso and are preference customers for Western Area Power Administration (WAPA). DOD states that the contract between Holloman and El Paso will expire in 1994. Therefore, Holloman has issued a request for proposals to competitively select a new provider for Holloman's electric needs, and White Sands may elect to issue requests for proposals for another electric provider in the future. Consequently, DOD asserts that if the Applicants' request for transmission access is granted, it will eliminate several prospective bidders from offering to provide service and will constrain transmission service to Holloman and White Sands. DOD also argues that the Applicants' request raises certain factual issues that must be resolved by an evidentiary hearing, and that are most appropriate for consolidation with the Applicants' section 203 merger application.

IV. Southwestern's Protest, Motion to Dismiss, Motion to Intervene, and Answer

On December 22, 1994, Southwestern filed a protest, motion to dismiss, motion to intervene, and answer. Southwestern argues that the Commission must dismiss the application because: (1) it

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21/ On March 1, 1994, the New Mexico AG filed a letter explaining that its motion to intervene and protest was filed one day late because of delivery problems due to inclement weather. The New Mexico AG argues that the single day delay in the filing will not cause any hardship to the Commission or any party or delay the timely completion of the case. Therefore, the New Mexico AG requests that its pleading be considered either timely filed or a motion for late intervention. On March 7, 1994, the Applicants submitted a letter to the Commission stating that they do not oppose New Mexico AG's request.

is inconsistent with the Energy Policy Act's goals as well as with the Act's basic structure; (2) it is anticompetitive and therefore is not in the public interest; (3) it does not satisfy the reliability requirement of section 211(b) of the FPA; and (4) the Applicants did not comply with the Commission's regulations and intentionally withheld essential information.

With respect to (1), Southwestern argues that because the Applicants request an indefinite term for the transmission service, the Commission must find that reliability may be harmed. Southwestern asserts that in this circumstance, transmitting utilities and their native load customers may be economically harmed over the term of the requested transmission service, which is contrary to sections 211 and 212. It argues that the Applicants' requested service would give them a portion of Southwestern's transmission system with no pre-scheduling and no term limit. It argues that this integration of multiple utility systems permits a transmitting customer to use a third party's system as if the system were the customer's own, which allegedly is not the transmission Congress intended the Commission to order under sections 211 and 212.

With respect to (2), Southwestern argues that the Applicants are attempting to bar Southwestern, the least expensive supplier, from markets that the Applicants want to dominate. In support of this position, Southwestern asserts that CSW has stated that access to Mexico is the primary reason for the merger and the requested transmission service. Thus, Southwestern argues that the Applicants will restrict critical transmission capacity and reduce or eliminate Southwestern as a competitor for sales to Mexico. It asserts that by preempting transmission capacity, the Applicants will also make it more difficult for Southwestern to provide service to current El Paso customers or others further west.

With respect to (3), Southwestern argues that because of the indefinite term of the request and Southwestern's past operating experience, past and current studies confirm that Southwestern cannot provide the requested service without reliability being adversely impacted. Southwestern asserts that the Applicants' own studies show reliability problems; and related to reliability, Southwestern asserts, are the additional costs that it will incur to provide service to the Applicants by re-dispatching its system and derating units.

With respect to (4), Southwestern argues that the Applicants intentionally withheld the bulk of their reliability study from Southwestern and saved the study for litigation. It asserts that the Applicants also failed to provide detailed load or transaction profiles even though the Applicants' claim that the transactions will produce merger benefits must be based on such profiles. In addition, Southwestern asserts that the Applicants

did not provide the information required by the Good Faith Policy Statement. For example, Southwestern argues that the Applicants failed to meet the specificity requirement in that Applicants do not define their request for flexible point-to-point service. Southwestern claims that the Applicants failed to provide a proposed date for terminating the requested transmission services, and that they want the services to last indefinitely. Southwestern also argues that the Applicants did not provide a description of the expected transaction profile, i.e., the hourly quantities of power the requesting party would expect to deliver. Instead Southwestern asserts that the Applicants provided a simplistic, nonspecific statement that firm transactions are expected to occur with a composite annual load factor under 25 percent. Moreover, Southwestern argues that the Applicants failed to specify proposed rates, terms, and conditions for the requested service, as required by section 213.

Southwestern asserts that if the Commission does not dismiss the TX application, the Commission must order an evidentiary hearing and consolidate the instant proceeding with the merger case. Southwestern claims that the relationship between the two cases is clear in that the Applicants have tied the requisite public interest determination in this case to their merger, and that if the merger is not approved, the section 211 transmission application will be moot by its own terms. Southwestern argues that there are material issues of fact regarding reliability, foreclosure of competition, the public interest determination, the need to construct new facilities, the price of any transmission or new facilities and other costs associated with the service, which Southwestern asserts cannot be resolved by a technical conference.

It also argues that the Commission must reject the Applicants' proposals regarding pricing or set the issues for hearing if it does not dismiss the TX application. Southwestern argues that the TX application raises two basic pricing issues: (1) whether the payment of a single firm charge entitles the Applicants to bi-directional service, and (2) whether the Applicants should adhere to the Commission's current and/or pricing guidelines. Southwestern asserts that the Commission has already determined that transmission in opposite directions involves two separate services and may require two separate charges. It claims that the facts presented here describe two separate services (from PSC Oklahoma to El Paso and from El Paso to PSC Oklahoma) that involve different transactions and different power flows and that operationally would affect Southwestern's system in different ways. Southwestern also argues that the Energy Policy Act requires the recovery of embedded costs plus costs of upgrades and other costs.

In sum, Southwestern requests that the Commission: (1) deny the Applicants' motion for summary disposition; (2) find that the

Applicants did not make a good faith request for transmission service; (3) summarily find that the requested service is improper under the FPA; and (4) summarily find that separate rates based on the direction of power flow are proper.

V. The Applicants' Response to Southwestern

On January 13, 1994, the Applicants filed a response to Southwestern. 22/ The Applicants reiterate that the TX application was necessary because Southwestern refused to provide bi-directional transmission services between the El Paso and PSC Oklahoma control areas and because Southwestern refused to engage in studies on reasonable terms of its ability to provide the requested services. The Applicants restate their proposal to convene a technical conference and prepare further studies to develop the issues of feasibility, reliability, and cost, followed by a Commission decision on any remaining issues.

The Applicants argue that the Commission has the authority to order the requested service, contrary to Southwestern's contention. They state that under section 211(a), the Commission may issue an order requiring transmission services if it finds that such an order would be in the public interest, unless the Commission finds that under section 211(b), to do so would unreasonably impair the continued reliability of electric systems affected by the order. In response to Southwestern's assertion that the requested transmission service will continue indefinitely, the Applicants counter that they have indicated a willingness to enter a long-term contract for a definite period of years. Moreover, they assert that the network service that the Commission ordered in Florida Municipal Power Agency v. Florida Power & Light Company (Florida Municipal) 23/ is

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22/ The Applicants argue that Southwestern and others have styled their pleadings "protests" in order to seek refuge in Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, which prohibits answers to protests. Consequently, the Applicants request that the Commission grant them leave to respond to Southwestern's and such intervenors' arguments in order to facilitate the decisional process and aid in the explication of the issues and the development of a full record. We agree, and accept the Applicants' answer, as well as subsequent pleadings by the parties in this case. See, e.g., Florida Power & Light Co., 65 FERC ¶ 61,155 at 61,764 n. 9 (1993); Ocean State Power, 63 FERC ¶ 61,072 at 61,313 n.15 (1993), reh'g pending; Ohio Edison Co., 58 FERC ¶ 61,315 at 62,007 n.11 (1992).

23/ Florida Municipal Power Agency v. Florida Power & Light Co. (Florida Municipal), 65 FERC ¶ 61,125, reh'g dismissed, 65

(continued...)

hardly less indefinite in its duration than the service the Applicants seek here for the coordination of their system operations.

Additionally, the Applicants argue that Southwestern has offered no basis for dismissing or delaying consideration of the application because of noncompliance with the Commission's Good Faith Policy Statement. Applicants argue that nothing in the provisions of sections 211 and 213 or the Commission's Good Faith Policy Statement places an obligation on an applicant to perform studies of the transmitting utility's system, since it is the transmitting utility's duty to do so. However, the Applicants state that they did prepare a study to assure that coordinating the systems' operations was feasible. The Applicants did not share the detailed results of their studies with Southwestern because they believed that Southwestern would use the information to subvert the process.

The Applicants argue that they provided as much specificity as circumstances would allow regarding the requested service, and that it was Southwestern that failed to respond to the request with a detailed written explanation. They argue that Southwestern merely asserted that the request for service was improper because section 211 does not permit the Commission to order Southwestern to provide transmission service in order to effectuate the merger. The Applicants assert that Southwestern later responded that it was willing to undertake system studies, but on the condition that the Applicants pay in excess of $260,000 to finance the study. In addition, Applicants argue that Southwestern failed to comply with the Good Faith Policy Statement by not providing detailed information about the nature of the constraints on the requested service.

The Applicants also challenge Southwestern's argument that the requested service would have significant anticompetitive effects. In response to Southwestern's argument that the Applicants will use the 133 megawatts El Paso owns to prevent Southwestern from competing with the post-merger CSW system, the Applicants assert instead that it is Southwestern that is monopolizing the transfer capability between the SPP and the West. They state that Southwestern claims it should be entitled to control 100 percent of the transfer capability between the SPP and WSCC, and yet it does not own any of that capability.

As for the issues of consolidation and an evidentiary hearing, the Applicants say that the Commission need not address these issues now. They argue that the immediate issues are what,

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23/(...continued)
FERC ¶ 61,372 (1993), final order, 67 FERC ¶ 61,167 (1994), reh'g pending.

if any, modifications must be made to the Southwestern system for the required services. Moreover, the Applicants request that the Commission act immediately to convene a technical conference so that the necessary study work can be completed. They state that if the Commission consolidates and delays this proceeding to consider the section 203 application, no party's interest would be well served except Southwestern's because its goal is to frustrate the merger. The Applicants also argue that with a technical conference and the preparation of additional studies, the Commission can focus on factual issues to determine whether there are any disputed issues of material fact that must be resolved through an evidentiary hearing.

Next, the Applicants argue that the requested service can be provided without unreasonably impairing reliability, and that the only question is what modifications of Southwestern's system are necessary. In response to Southwestern's position that the transmission service would impair reliability because it would limit Southwestern's ability to import electricity from the east in emergency situations, the Applicants counter that Southwestern offers no technical information to support this conclusion. In addition, they argue that the past system separations that Southwestern asserts may recur have been remedied by the construction of Southwestern's 345 kV tie to PSC Oklahoma in 1985. The Applicants argue that their studies were offered to show the feasibility of the requested services and as prima facie evidence that Southwestern could likely provide such services without extensive modifications to its system.

In response to Southwestern's argument that east-to-west transmission would eliminate Southwestern's ability to import essential power from the east in the event of an emergency, the Applicants respond that this is an unnecessary concern. The Applicants argue that they have never sought priority over Southwestern's native load. Additionally, the Applicants assert that Southwestern can terminate the Applicants' schedules and use Southwestern's ties to the PSC Oklahoma control area to import power for Southwestern's own emergency use.

The Applicants argue that the Commission must not allow separate charges for each direction of flow of the bi-directional, flexible, point-to-point transmission service. 24/ They argue that the Eddy County Interconnection can only operate in one direction at a time and that flow across Southwestern's system will not exceed 133 megawatts at any time. Thus, the Applicants assert that Southwestern may impose only a single charge for the bi-directional service the Applicants have requested. The Applicants argue that the Commission must not

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24/ In support of this position, Applicants cite Pacific Gas and Electric Co., 53 FERC ¶ 61,146 (1990).

permit multiple charges for simultaneous transmissions in opposite directions along the same transmission path. Furthermore, the Applicants state that the Commission should defer other issues relating to pricing pending the Commission's order in the pending transmission inquiry. 25/

In addition, the Applicants respond to Southwestern's argument on the either/or pricing issue. They state that the Commission is presently reviewing the matter in the pending transmission inquiry. Thus, the Applicants argue that the most appropriate course is to defer consideration of this pricing issue until later in the proceeding to await the Commission's further deliberations.

In response to the other motions to intervene, the Applicants assert that the Commission should grant the interventions of the state regulatory bodies (the Arkansas Commission, the New Mexico Commission, the New Mexico AG, and the Texas Commission).

With respect to the entities that claim an impact because they interconnect with Southwestern, the Applicants argue that the Commission should only grant Western Farmers' and UtiliCorp's motions to intervene, since these entities are directly connected to Southwestern in such a way that they could experience some impact from providing the requested service.

The Applicants argue that since Texas Utilities and Houston Power both operate in ERCOT, they will not be affected by the flows taking place across Southwestern's system in the SPP. The Applicants also contend that since PSC New Mexico is connected to Southwestern only by a HVDC interconnection, PSC New Mexico's system will not be affected by changes in flows on Southwestern's system.

The Applicants oppose the interventions of Duke Power and PSI Energy, who seek to intervene on the basis of potential precedential impact. Although the Applicants acknowledge that the Commission has granted such interventions in prior section 211 proceedings, they argue that there is no obvious reason why that practice should continue.

With respect to the motions to intervene from entities that represent the interests of retail or wholesale consumers

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25/ Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act, Docket No. RM93-19-000, Notice of Technical Conference and Request for Comments, IV FERC Stats. & Regs. ¶ 35,024 (1993), 58 Fed. Reg. 36,400 (July 7, 1993).

(including the City, Las Cruces, Dona Ana County, the Southwestern Customers, the Energy Consumers, DOD, the Texas Counsel, and the TDU Customers of CSW or Southwestern), the Applicants argue that all of the issues that they raise will be adequately represented by Southwestern. However, the Applicants propose that these entities participate in a limited way as "friends of the Commission" but not participate in the technical conference or any hearing. The Applicants contend that this process will allow these entities to participate on the issues of pricing and continued availability of service, where their primary interest lies, but will not disrupt the proceedings.

VI. Additional Pleadings

On January 13, 1994, the New Mexico Commission filed a statement in support of a public evidentiary hearing. The New Mexico Commission states that if CSW Services obtains all of the regulatory approvals for its proposed merger with El Paso, CSW Services will be regulated by the New Mexico Commission, and that the outcome of the case may have a significant effect on the New Mexico rates and service of both CSW Services/El Paso and Southwestern. The New Mexico Commission states that it takes no position on the issues in this case but asserts that, according to the pleadings filed by CSW Services/El Paso and Southwestern, many issues of fact exist. Therefore, it requests that in view of the importance of the public policy issues and the number and importance of the contested factual issues in this matter, the Commission hold a public evidentiary hearing on the contested issues of fact.

On January 26, 1994, Southwestern filed a motion requesting leave to reply to the Applicants' response. 26/ Basically, Southwestern repeats the arguments it made earlier that the Applicants propose to effectuate their merger by using Southwestern's transmission system. Southwestern argues that it must protect its customers and shareholders from: (1) unlawfully becoming partners in the merger, (2) suffering dramatic reliability impacts, (3) bearing substantial uncompensated costs from construction of additional Southwestern facilities, redispatch and derating of Southwestern generating facilities and foregone economic opportunities, and (4) being excluded from Southwest and Mexican markets by the anticompetitive consequences of the Applicants' proposed exclusion of future competition to

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26/ Southwestern argues that it should be permitted to file this pleading because the Applicants have revised their transmission request and supplemented their application. Southwestern further states its pleading will aid the Commission because of the complex nature of the transmission request, which is tied to the Applicants' section 203 filing.

the growing Mexican market. These concerns, Southwestern argues, are repeated by every affected customer and regulatory body. It claims that, contrary to the Applicants' assertion, these concerns are not related to Southwestern's failed attempt to acquire El Paso.

Southwestern argues that there are alternatives available to CSW, including constructing transmission facilities. 27/ It also reasserts that the Commission should dismiss the TX application because: (1) it is legally deficient since the service is undefined and unending, (2) the Applicants did not make a good faith request for service in that the Applicants are still revising their request, 28/ and (3) the Applicants have failed to provide the load profiles in their possession. Southwestern argues that given the complex issues in dispute (including reliability and anticompetitive concerns), the Commission must convene a full hearing and not a technical conference.

On January 28, 1994, Texas Utilities filed a motion for leave to file a reply to the Applicants' January 13 response. Texas Utilities states that the Applicants mischaracterize factual matters concerning the controversy. 29/ Texas Utilities notes that under the terms of the Restated and Amended Operating Agreement, El Paso's operations will be integrated with the operations of the four CSW operating companies. In order to achieve integration, Texas Utilities maintains that transmission over the HVDC interconnections and transmission over Southwestern's transmission system is necessary. In response to the Applicants' assertion that Texas Utilities does not have an

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27/ See Exhibit E, Proposed Disclosure Statement to Third Amended Plan of Reorganization attached to Southwestern's Motion to Dismiss, Motion to Intervene, and Answer dated December 22, 1993.

28/ Southwestern states that the Applicants no longer request a 4-second dispatch, but will schedule the service hourly, and that they no longer want firm service that is equal to native load. It states that the Applicants have redefined their analyses so as to require only 53 megawatts of firm service, but still request to reserve the full 133 megawatts of capacity for non-firm transactions, which they expect to use up to 75% of the time.

29/ Therefore, Texas Utilities asserts that its reply is necessary to clarify the issues, provide a more complete record upon which the Commission can base its decision, and assist in the understanding of the parties' positions. Texas Utilities states that its silence on other issues does not mean concurrence.

interest in the proceeding because it operates in ERCOT and will be unaffected by flows taking place across Southwestern's system in the SPP, Texas Utilities counters that the integration of the operations of the CSW operating companies and El Paso would require both the use of the HVDC interconnections and Southwestern's transmission system. It states that it provides transmission service for the transfer of power and energy to, from, and over the North HVDC Interconnection from West Texas and Central Power to PSC Oklahoma and SWEPCO, and from PSC Oklahoma and SWEPCO to West Texas and Central Power, and will provide transmission service for the CSW operating companies to, from, and over the East HVDC Interconnection upon its completion in 1995. Thus, because of the integrated operations of the CSW operating companies and in the near future of El Paso, the transfers of power and energy over Southwestern's transmission system could have a direct impact on the transfer of power and energy over the HVDC interconnections and could affect Texas Utilities's transmission system.

Texas Utilities points out that under section 211(b), the Commission is required to make findings regarding whether a section 211 order "would unreasonably impair the continued reliability of electric systems affected by the order" and that under section 211(a), the Commission must find that a transmission order is in the public interest. It argues that the TX application and the Restated and Amended Operating Agreement may affect the operation and reliability of Texas Utilities' transmission system and the ERCOT grid, which are interests that the Commission must address and that cannot be adequately represented by any other party. Therefore, Texas Utilities argues that it has a direct interest in ensuring that the public interest will be served, and that the operation and reliability of its transmission system and the ERCOT grid will not be harmed.

On January 28, 1994, PSC New Mexico filed a reply to the Applicants' response opposing the PSC New Mexico's motion to intervene. In response to the Applicants' assertion that PSC New Mexico will not be affected by any changes in flows on the Southwestern system, PSC New Mexico argues that the Applicants mischaracterize the extent of the PSC New Mexico's interconnection with both El Paso and Southwestern. PSC New Mexico states that it is interconnected to both Southwestern and El Paso, and relies on up to 200 megawatts of demand and energy delivered by Southwestern through the HVDC interconnection as a major system resource. It argues that it intervened in the proceeding to ensure that this resource is not degraded, which would adversely affect PSC New Mexico's own system. Furthermore, it states that changes in El Paso's import/export schedules through Eddy County will affect flows through PSC New Mexico's system when the displaced generation is from El Paso's Four Corners or Palo Verde resources. PSC New Mexico states that any schedules between PSC Oklahoma and El Paso not supported by WSCC

reserves will affect PSC New Mexico when the Eddy County HVDC facilities are out of service. Thus, it argues that it has an interest in the proceeding that cannot be adequately represented by any other party, and the Commission should grant its motion to intervene.

On February 3, 1994, the Applicants filed an answer to Southwestern's motion for leave to file and reply to the Applicants' January 13 response to the motions to intervene. The Applicants assert that Southwestern's reply merely reiterates prior arguments and adds nothing new to the record. The Applicants repeat that they have requested in good faith specific service for a defined period that will not unreasonably impair the reliability of the transmission service at a just and reasonable rate, and have provided all the information Southwestern reasonably needs to evaluate the request. The Applicants assert that Southwestern has only shown that it is unwilling, and not unable, to provide the service the Applicants request. Finally, the Applicants again argue that the Commission should convene a technical conference to focus on whether there are disputed issues of fact that may be resolved later in an evidentiary hearing. The Applicants note that the central issues here relate to Southwestern's future system reliability, which are engineering issues not normally resolved through cross-examination and a judge's assessment of witness credibility.

On February 10, 1994, the Applicants filed an answer to the motions of PSC New Mexico and Texas Utilities. The Applicants state that upon reconsideration, they believe that PSC New Mexico may have an interest in this proceeding relating to exports from El Paso to the SPP that cannot be adequately protected by other parties. However, the Applicants state that Texas Utilities' agreements with West Texas and Central Power allow the CSW operating companies to use Texas Utilities' transmission system to transfer energy and power across the North and East HVDC interconnections in amounts up to the transfer capability controlled by the CSW operating companies in the two HVDC interconnections. The Applicants state that the transactions for which they have asked Southwestern to provide transmission service cannot physically increase the use of the Texas Utilities transmission service beyond the use for which Texas Utilities and the CSW operating companies have already contracted. Thus, the Applicants argue that Texas Utilities has no cognizable interest in this proceeding.

On March 4, 1994, Texas Utilities filed another pleading in support of its motion to intervene. 30/ Texas Utilities

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30/ Texas Utilities styled its pleading a motion for leave to file and reply to the Applicants' answer to Texas Utilities' (continued...)

argues that it has an interest in the proceeding because it provides transmission service for the CSW operating companies under certain agreements. It says that these agreements determine the term and the manner in which Texas Utilities will transfer energy over the North and East HVDC Interconnections. It responds to the Applicants' position that Texas Utilities has no interest in the proceeding because the transmission service agreements provide the maximum use by each of the CSW operating companies and the use of Texas Utilities system will not increase beyond the contract arrangements; it counters that its transmission service agreements are not coterminous with the Applicants' requested term for transmission service. Thus, Texas Utilities argues that it has a valid interest, since the Commission could require Southwestern to transmit power and energy for El Paso for a term extending beyond the term of the transmission service agreements, or cancel the contracts prior to the actual termination date under the agreements. Additionally, Texas Utilities argues that the Commission may issue an order containing terms and conditions that could violate the provisions of the transmission service agreements. Texas Utilities also notes that as an alternative to the proposed merger, CSW may construct additional HVDC interconnections and CSW may request that the Commission order Texas Utilities, among others, to remain interconnected with Central Power and West Texas. As further showing of its interest in this proceeding, Texas Utilities states that CSW may also request that the Commission declare that the jurisdictional status of ERCOT utilities, such as Texas Utilities, will not be affected by the construction and use of additional HVDC interconnections.

On March 21, 1994, the Applicants filed a pleading in opposition to Texas Utilities' motion to intervene. 31/ The Applicants reiterate that they oppose Texas Utilities being granted intervenor status in this proceeding. The Applicants again assert that Texas Utilities operates wholly within ERCOT, and as such cannot be affected electrically by transactions between PSC Oklahoma and the El Paso control area. Although the Applicants concede that Texas Utilities provides transmission

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30/(...continued)
reply to the Applicants' response to Texas Utilities' motion to intervene. Texas Utilities states that its reply is necessary to clarify the issues in the proceeding, citing to Buckeye Pipe Line Co., L.P., 45 FERC ¶ 61,046 at 61,160 (1988); Kansas City Power & Light Co., 53 FERC ¶ 61,097 at 61,282 (1990).

31/ The Applicants styled their pleading an answer opposing the motion of Texas Utilities for leave to file and reply to the Applicants' answer to Texas Utilities reply to the Applicants' response to its motion to intervene.

services to the CSW operating companies in connection with their coordinated system operations, they repeat that Texas Utilities, Central Power, and West Texas are parties to contracts that allow the full use of all the capacity in the North HVDC Interconnection and prospectively in the East HVDC Interconnection that the CSW operating companies control. Therefore, the Applicants assert, adding El Paso to the CSW system and using Southwestern's transmission facilities will not increase the CSW operating companies' use of Texas Utilities' transmission system beyond the levels already established in existing contracts. In response to Texas Utilities' argument that it may be affected in the future if Southwestern is ordered to provide transmission service beyond the length of the existing contracts, the Applicants counter that Texas Utilities and the CSW operating companies can make the necessary arrangements when those contracts terminate.

VII. Discussion

We make a preliminary determination (in accordance with our decision in Florida Municipal) 32/ that a final order requiring Southwestern to provide the transmission service requested by the Applicants would comply with the statutory standards, once reliability concerns have been met. Presently, we find that such an order would be in the public interest, as long as it would not unreasonably affect the continued reliability of electric systems affected by the order. We also find that an order would not violate section 211(c), which pertains to the replacement of electric energy required by contract to be provided or that is currently provided by the transmitting utility under a rate schedule on file with the Commission. However, as described below, we cannot now make the requisite finding that the transmission service requested by the Applicants would not unreasonably impair the continued reliability of affected electric systems. 33/

32/ In the Florida Municipal decision, 65 FERC at 61,613, we determined that it is in our discretion, when issuing a proposed order under section 211, to reserve judgment on some or all of the prerequisites of a final order. See also Minnesota Municipal Power Agency v. Southern Minnesota Municipal Power Agency, 66 FERC ¶ 61,223 at 61,510 (1994); Minnesota Municipal Power Agency v. Northern States Power Co., 66 FERC ¶ 61,114 at 61,189, reh'g dismissed, 66 FERC ¶ 61,323 (1994).

33/ Since this is a proposed order making preliminary findings, it is not reviewable or enforceable in any court. We also note that this proposed order is an interlocutory order not subject to requests for rehearing. See Florida Municipal at 65 FERC at 61,613.

A. Procedural Matters

1. Interventions

Under Rule 214 of the Commission's Rules of Practice and Procedure, 34/ the timely, unopposed motions to intervene filed by Western Farmers, the City, PSC New Mexico, Southwestern Customers, Dona Ana County, UtiliCorp, Energy Consumers, and the New Mexico AG serves to make them parties to this proceeding. The timely, unopposed notices/motions of intervention of the Louisiana Commission, the New Mexico Commission, the Texas Commission, and the Arkansas Commission serve to make them parties to this proceeding. We will grant the Texas Counsel's motion to intervene one day late, for good cause shown. We will also grant DOD's late-filed motion to intervene and protest for good cause shown.

Under the Commission's Rules of Practice and Procedure, 35/ a potential intervenor must normally demonstrate that it has or represents an interest that may be directly affected by the outcome of the proceeding, or that its participation is otherwise in the public interest. Generally, an interest based solely on the possible precedential impact of the Commission's decision in a proceeding does not constitute a sufficiently direct interest to justify intervenor status in that proceeding. 36/ However, this proceeding raises significant issues concerning transmission access. We are also sensitive to the concern that an order in this proceeding could have the effect of establishing Commission policy on an important issue affecting the entire industry. Accordingly, in these circumstances, we find that it is in the public interest to grant all of the contested interventions.

2. Consolidation

We defer whether to grant the requests for consolidation of this proceeding with Docket Nos. EC94-7-000 and ER94-898-000. We believe that it is too early in the proceedings to determine whether consolidation is appropriate. Indeed, in the related proceedings, the Commission will deny the Applicants' merger application and dismiss their rate filing if the Applicants do not accept the comparability condition and notify the Commission within 15 days. Additionally, in this TX proceeding, Southwestern must provide information on reliability and the

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34/ 18 C.F.R. § 385.214 (1993).

35/ See 18 C.F.R. § 385.214 (b)(2) (1993).

36/ See, e.g., Northeast Utilities Service Co., 53 FERC ¶ 61,135 at 61,465 (1990).

Commission must then decide whether the transmission service requested by the Applicants will unreasonably impair the continued reliability of affected electric systems. Consequently, since substantive decisions in these proceedings (including whether to proceed further) remain unresolved, we find that deciding the consolidation issue at this time would be premature.

3. Motion to Dismiss

We deny Southwestern's request that the Commission dismiss the Applicants' filing because of the allegedly indefinite nature of the service and the dynamics of the power flows requested and because the TX application is meant to effectuate the merger which Southwestern argues violates the Energy Policy Act. We find nothing in the Energy Policy Act itself or in the legislative history that restricts transmission service on the basis of the length of the service, on the nature of the transaction, or the context in which the applicant applies for transmission service. Moreover, the Applicants have agreed to enter into a long-term contract with Southwestern for a definite term of service. In response to Southwestern's concern regarding the dynamics of the power flows, we are not convinced that Southwestern cannot propose terms and conditions that will allow it to meet the Applicants' requirements without jeopardizing its own operations. We also note that the transmission services requested by the Applicants will not have precedence over Southwestern's use of the system for its native load. In sum, we agree with the Applicants that the network service that the Commission ordered in Florida Municipal is hardly more definite in its duration than the service the Applicants seek in this proceeding for the coordination of their system operations.

B. Statutory Standards

1. Good Faith Request and Response

We do not believe that we can fairly apply retroactively the components contained in the Good Faith Policy Statement, since the Applicants first requested service from Southwestern before our policy statement was issued. 37/

Although the Applicants first requested transmission service 60 days prior to the date of their present TX application, the Applicants and Southwestern appeared to have reached an impasse at the time. Consequently, the Applicants and Southwestern failed to provide the information necessary for the Commission to

37/ See Florida Municipal, 65 FERC at 61,616-17; Minnesota Municipal Power Agency v. Southern Minnesota Municipal Power Agency, 66 FERC ¶ 61,223 (1994).

issue a final order making the requisite statutory findings. 38/ Because of the unsatisfactory negotiations between the Applicants and Southwestern, the Commission must now obtain additional information on reliability in order to analyze all aspects of the TX application adequately.

2. Reliability

Under section 211(b), the Commission may not order transmission service if it would unreasonably impair the continued reliability of electric systems affected by that order. In the present case, Southwestern contends that the proposed service will affect reliability on its system, but states that it has not yet performed the necessary studies on this issue because the Applicants severed negotiations. The Applicants respond that the negotiations were not productive because Southwestern made unreasonable demands for system studies. The Applicants assert that the requested service can be provided without unreasonably impairing reliability, and that the only issue is what modifications must be made to Southwestern's system to provide the service. They request that the Commission convene a technical conference to narrow or resolve the reliability concerns. However, Southwestern counters that the Commission must instead order an evidentiary hearing because there are material issues of fact regarding reliability.

We do not at this time agree with the Applicants' contention that there will be no reliability impacts and that the Commission should merely focus on the necessary system modifications. We find that the supporting documents filed by the Applicants and Southwestern provide insufficient information to make the requisite finding on reliability. Therefore, we direct Southwestern to perform studies on reliability so that we can determine whether the transmission service would unreasonably impair reliability. 39/

38/ The Commission expects both parties to be forthcoming with necessary information without regard to how the other might use such information. Very simply, we will not tolerate further stonewalling on either party's part. Moreover, in future cases we will not tolerate unsubstantiated allegations that reliability will be impaired, and expect that parties will provide support for their claims.

39/ See Attachment A, in which we direct that Southwestern perform specific studies, using SPP transmission reliability criteria and Southwestern's Form No. 715, to evaluate the reliability impacts of the proposed transmission service. Applicants shall reimburse Southwestern for the reasonable costs of the directed studies.

We also deny the Applicants' request that we convene a technical conference. The studies we are directing Southwestern to perform are standard and are dictated by Southwestern's and SPP's reliability requirements. Thus, convening a technical conference at this time would be premature. Likewise, we deny the requests for an evidentiary hearing without prejudice to renewal, if appropriate, later in this proceeding.

Accordingly, we will provide Southwestern 30 days, beginning on the date on which the Applicants notify the Commission that they accept the comparability condition, to complete studies (described in Attachment A) testing the contingency cases that are consistent with its Form No. 715. To the extent that Southwestern performs studies of any other contingencies, it should demonstrate that the criteria used are consistent with SPP planning requirements. Southwestern is directed to provide these data to the Applicants at the end of the 30-day period, together with any base case data necessary for the Applicants to replicate the studies. We also direct Southwestern to submit to the Applicants at the same time a comprehensive proposal of modifications that, consistent with good utility practice, would mitigate any reliability problems its studies indicate. We direct Southwestern to file the results of its studies with the Commission 30 days after the date they are provided to the Applicants. We direct Southwestern and the Applicants to file supplemental pleadings 30 days after the date the Applicants are provided with Southwestern's study results, detailing the results of their analyses. We direct the Applicants and Southwestern to work together on these studies, and to exchange information during the study process with a goal of mutually resolving as many differences as possible. For example, we note that the Applicants may believe that modifications different from those proposed by Southwestern would resolve reliability problems, and they may propose such alternatives to Southwestern in an attempt to resolve those issues before filing supplemental pleadings with the Commission.

After reviewing the supplemental information, if the Commission concludes that reliability will not be unreasonably impaired, we will then issue a further Proposed Order that gives the Applicants and Southwestern an appropriate period to negotiate the rates, terms, and conditions of the transmission service proposed.

3. Public Interest

Under section 211(a), we may order transmission, if in addition to meeting the other statutory requirements, to do so would be in the public interest. The Applicants state that the proposed transmission service is in the public interest because once the merger is consummated, El Paso's system will operate in coordination with the other CSW operating companies, and as a

result of this coordination, the CSW system will experience lower electricity production rates. They state that the least cost means of coordinating El Paso's and CSW's operations is obtaining transmission services from Southwestern.

Southwestern argues that the transmission service will not be in the public interest because it will enhance the Applicants' market power, allow the Applicants to restrict critical transmission capacity, and potentially eliminate Southwestern as a competitor for sales to western and Mexican markets by the Applicants' control of key transmission facilities. As noted above, several intervenors, including the Southwestern Customers, the Texas Commission, the Arkansas Commission, New Mexico AG, Texas Counsel, Las Cruces, and DOD also raise public interest concerns.

In Florida Municipal, we decided that as a general matter, the availability of transmission service will enhance competition in the market for power supplies over the long run because it will increase both the power supply options available to transmission customers and the sales options to consumers, which should result in lower costs for consumers. We also stated that, if an applicant believes that transmission service will allow it to serve its customers more efficiently, the public interest will be served by requiring that service to be provided as long as the transmitting utility is fully and fairly compensated and there is no unreasonable impairment of reliability. 40/ In this case, the transmission service requested by the Applicants will provide them greater flexibility and the ability to use the CSW system more efficiently. It is in the public interest for the Applicants to achieve greater efficiency, which will result in lower costs for consumers. Accordingly, we find that if the reliability concerns can be met, the transmission service the Applicants request will be in the public interest. 41/

40/ 65 FERC at 61,615.

41/ We reject claims that ordering the requested transmission service in these circumstances will be anticompetitive. The simple answer is that the Commission is to protect competition in the bulk power markets, not individual competitors in those markets. Environmental Action, Inc. et al. v. Federal Energy Regulatory Commission, 939 F.2d 1057, 1061 (D.C. Cir. 1991). Moreover, intervenors do not claim that they need the service Applicants are requesting today; rather, they speculate that they may need such service in the future. If they need Southwestern and/or Applicants to provide transmission services in the future and are unable to obtain such service

(continued...)

4. Effect on Preexisting Contracts

Under section 211(c)(2), the Commission cannot issue a transmission order:

> which requires the transmitting utility subject to the order to transmit, during any period, an amount of electric energy which replaces any amount of electric energy--
>
> (A) required to be provided to such applicant pursuant to a contract during such period; or
>
> (B) currently provided to the applicant by the utility subject to the order pursuant to a rate schedule on file during such period with the Commission: Provided, That nothing in this paragraph shall prevent an application for an order hereunder to be filed prior to termination or modification of an existing rate schedule: Provided, That such order shall not become effective until termination of such rate schedule or the modification becomes effective.

Presently, El Paso purchases power from Southwestern under a contract that terminates on December 31, 1995. The Applicants state that El Paso will continue to purchase power from Southwestern under this contract until that date, and that the Applicants' request for transmission services does not apply to this power. Thus, we find that the Applicants' request is not barred by the preexisting power sale agreement between Southwestern and the Applicant. Moreover, no party contends that section 211(c)(2) precludes an order requiring transmission in this case. Accordingly, we find that section 211(c)(2) does not preclude an order for transmission service.

The Commission orders:

(A) All the timely, opposed motions to intervene are hereby granted.

41/(...continued)
voluntarily, they may file a section 211 application. Additionally, we note that Southwestern's arguments on the competition issue are addressed in our order on the merger and rate filings. In that order, we conclude that the potential anticompetitive effects resulting from the merger, including the potential anticompetitive effects on Southwestern as a buyer and seller of electricity, can be adequately mitigated if Applicants' tariffs (El Paso and PSC Oklahoma/SWEPCO) are modified to provide for comparable services.

(B) Southwestern's motion to dismiss is hereby denied.

(C) Southwestern is hereby directed to perform the studies described on Attachment A, within 30 days after the date the Applicants notify the Commission that they accept the comparability condition, i.e., within 15 days of the date of the Commission's order in the related merger and rate proceedings. To the extent that Southwestern performs studies of any other contingencies, it should demonstrate that those criteria are consistent with SPP planning requirements.

(D) Southwestern is directed to provide the studies described in Ordering Paragraph (B) to the Applicants, together with any base case data necessary for the Applicants to replicate the studies, within 30 days after the date the Applicants notify the Commission that they accept the comparability condition, i.e., within 15 days of the date of the Commission's order in the related merger and rate proceedings. Southwestern is also directed to submit to the Applicants at the same time a comprehensive proposal of modifications that, consistent with good utility practice, would mitigate any reliability problems its studies indicate.

(E) Southwestern is directed to file the results of its studies with the Commission within 30 days after the date Southwestern provides the studies described on Attachment A to the Applicants.

(F) Southwestern and the Applicants are directed to file supplemental pleadings with the Commission, within 30 days after the date Southwestern provides the studies described on Attachment A to the Applicants.

(G) The parties are directed to work together on these studies and to exchange information during the study process with a goal of mutually resolving as many differences as possible.

(H) Applicants' TX application in Docket No. TX94-2-000 will be dismissed as of the date of this order unless they notify the Commission within 15 days that they accept the comparability condition, as mandated in the related merger and rate proceedings.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Acting Secretary.

Attachment A

Southwestern is in the SPP reliability council. The Commission has reviewed the SPP transmission reliability criteria and Southwestern's company-specific criteria as reported in Southwestern's FERC Form No. 715. As discussed below, there are specific studies which Southwestern should conduct to evaluate the reliability impacts of the proposed transmission service.

Southwest Power Pool Transmission Reliability Criteria

There are two types of assessments that are generally performed to evaluate changes in operations, including additional transfers of power on the transmission system. Industry practice is that a system should withstand more probable contingencies without loading equipment above emergency ratings and that some loss of load is allowed for less probable contingencies, but no cascading outages. With respect to these studies, SPP states:

> It is also impossible to anticipate and test for all combinations of contingencies that could occur on an interconnected electric network. Therefore, the security and adequacy testing criteria should be such as to thoroughly search out the most severe, credible contingencies for examination, creating the assurance that the many possible contingencies not studied are less severe. [1/]

SPP reliability criteria for most probable contingency testing require that three operating modes be used in load flow simulations: (1) Installed Incremental Transfer (to test the level of incremental transfers that the system can withstand without contingencies); (2) First Contingency Incremental Transfer Capability (to test the level of incremental transfers that the system can withstand following an outage of one key facility); and (3) Second Contingency Incremental Transfer Capability (to test the level of incremental transfers that the system can withstand following an outage of one additional key facility).

Form No. 715

In Part 4 of Southwestern's Form No. 715 filed on April 1, 1994, Southwestern states that it subscribes to the SPP Reliability Criteria as provided to the Department of Energy in the OE-411 report and to the NERC Operating Guides as they relate to transmission planning and system reliability.

1/ SPP - Reliability Criteria and Guides, submitted April 1, 1994 to the Department of Energy (DOE) with the OE-411 report.

As is typical in the industry, Southwestern has company-specific reliability criteria and assessment practices that reflect Southwestern's experience with operating its own system. Southwestern's Form No. 715, Part 4, describes its own specific transmission planning reliability criteria which are applied in the development of the power flow data and conducting studies. Southwestern's Form No. 715, Part 5, describes its transmission planning assessment practices wherein it states:

> To test Southwestern's system for reliability, the appropriate contingency from the list is used to determine the impacts of proposed imports and exports. This list is not all-inclusive and other contingency studies may be required to fully assess the network impact. Some contingencies listed below are for the loss of generation with a tie-line out of service. This is considered a more probable event based on Southwestern's operating history.

Included in Part 5 are lists of specific contingencies and network conditions that Southwestern would use to test the following:

1) Simultaneous Import into Southwestern from WSCC and Export to SPP (i.e., El Paso to CSW), and

2) Simultaneous Import into Southwestern from SPP and Export to WSCC (i.e., CSW to El Paso).

JONES, DAY, REAVIS & POGUE

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August 10, 1994

BY HAND

Ms. Lois D. Cashell
Secretary
Federal Energy Regulatory Commission
825 North Capitol Street, N.E.
Washington, DC 20426

Re: El Paso Electric Company and Central and South West Services, Inc.
Docket Nos. EC94-7-000 and ER94-898-000

Dear Ms. Cashell:

Please refer to the Commission's Initial Order on Merger Application and Rate Filing, issued in the above referenced proceeding on August 1, 1994 (the "Order"). In the Order, the Commission states:

> . . . if the Applicants notify the Commission within 15 days of the date of this order that they will amend the El Paso and PSC Oklahoma/SWEPCO tariffs to offer comparable services, the Commission will establish hearing procedures to address comparable services. These procedures, which the presiding judge should ensure are those established in the AEP case, supra, will provide the evidentiary record to ensure that the companies offer comparable services to third parties, and thereby mitigate their transmission market power. If Applicants notify the Commission that they accept the comparability condition, the Applicants should file in these dockets proposed comparable tariffs within 30 days of the date of this order.

Id., slip op. at 56.

In accordance with ordering paragraph (B) of the Commission's order, id., slip op. at 63, El Paso Electric Company ("EPEC") and Central and South West Services, Inc. ("CSWS"),

acting on behalf of the four operating electric utility subsidiaries of Central and South West Corporation ("CSW"), Central Power and Light Company, West Texas Utilities Company, Public Service Company of Oklahoma (PSO) and Southwestern Electric Power Company (SWEPCO)(EPEC and CSWS being hereinafter referred to collectively as the "Applicants"), hereby notify the Commission that, they will accept, as a condition to the Commission's approval of CSW's acquisition of EPEC, which is the subject of the Application filed in Docket NO. EC94-7-000, the requirement to amend the tariffs identified in the Order to offer "comparable services." This acceptance is based on the Applicants' understanding of the Order explained below.

As the Applicants understand the Order, no later than August 31, 1994, they will file in this consolidated proceeding proposed revisions of the pro forma EPEC "open access" transmission service tariffs submitted in Docket No. EC94-7-000 with the prepared direct testimony of Thomas V. Shockley, III, as Exhibits APP-6 and APP-7, and to the "open access" tariffs of PSO and SWEPCO, accepted for filing by letter order issued May 18, 1994 in Docket No. ER93-938-000. Of course, as of this writing, the "comparability" standard, which the Commission first announced on May 11, 1994 in American Electric Power Services, Inc., Docket No. ER93-540-000 (AEP), has yet to be applied or explained as a part of a final Commission order in any rate or other proceeding. Therefore, the Applicants will file tariff revisions that reflect their understanding of what the Commission intends by "comparable service" in the circumstances of their post-merger operations.[1] Those proposed revisions will then serve as the focal point of testimony and other evidence to be offered by other parties and the Commission's trial staff in the hearings to be conducted in these proceedings regarding the nature of the uses the Applicants make of their non-ERCOT transmission facilities and, in light of such uses, the nature of the services that should be offered to others in order to avoid the Federal Power Act proscription against undue discrimination.

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[1] The Applicants do not understand the Commission's order as abandoning the protections that established Commission policy and the Energy Policy Act of 1992 have afforded Native Load Customers (as that term is defined in Section 1.21 of the proposed EPEC Firm Transmission Service Tariff referred to earlier). See Northeast Utilities Service Company, Order No. 364-A, 58 FERC ¶ 61,070 at 61,199 (1992) ("under no circumstances will [a transmission service provider] be required to provide firm wheeling service out of existing transmission capacity where doing so would impair or degrade reliability of service to native load customers.") (emphasis in original); 16 U.S.C. §§ 824j(b) and 824k(a).

On the basis of such evidence, Presiding Administrative Law Judge Nelson will make findings of the kind that are contemplated by the Commission's "Order on Rehearing and Clarification," issued May 11, 1994 and its "Order on Certified Question," issued on June 15, 1994, in AEP. Subsequently, on the basis of the record thus compiled, the Commission, if it otherwise finds the proposed merger to be consistent with the public interest (in accordance with section 203 of the Federal Power Act), will make findings in its final order as to the characteristics that comparable transmission service tariffs offering the use of the Applicants' non-ERCOT transmission facilities will bear. Then, if the merger is thereafter consummated, the Applicants will formally file with the Commission, pursuant to section 205 of the Federal Power Act, transmission service tariffs that conform to the Commission's findings and order.

In agreeing to accept as a condition to the Commission's approval of the proposed merger a requirement that "comparable service" be provided over the Applicants' non-ERCOT transmission facilities, the Applicants do not understand the Commission as intending or requiring that they accept in advance any possible interpretation or application of the "comparability" standard announced in AEP. Because what is encompassed by "comparable service" is not yet fully known by the Applicants, any other party to these proceedings or even the Commission, by accepting the requirement to amend their transmission service tariffs to offer "comparable" service, the Applicants do not intend to waive or otherwise prejudice any of their rights, including but not limited to the right to seek rehearing of the Order or any other order the Commission later enters in these proceedings or their right under the Federal Power Act to seek judicial review of the Order or any subsequent order or orders, if and to the extent the Applicants deem such action necessary or advisable.

Respectfully submitted,

Clark Evans Downs

One of the Attorneys for
EL PASO ELECTRIC COMPANY AND
CENTRAL AND SOUTH WEST SERVICES, INC.

cc: Chair Moler
Commissioner Bailey
Commissioner Hoecker
Commissioner Massey
Commissioner Santa
Judge Nelson
All Parties