139 FERC ¶ 62,201
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

AES Eastern Energy, L.P. EC12-93-000
AES Somerset, LLC
AES Cayuga, LLC
Somerset Cayuga Holding Company, Inc.
and its wholly-owned subsidiaries

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES AND ACQUISITION OF GENERATING FACILITIES

(Issued June 8, 2012)

On April 13, 2012, AES Eastern Energy, L.P. (AES Eastern), AES Somerset, LLC (AES Somerset), AES Cayuga, LLC (AES Cayuga, and together with AES Eastern and AES Somerset, the AES Entities) and Somerset Cayuga Holding Company, Inc., and its wholly-owned subsidiaries (NewCo, and together with the AES Entities, Applicants) filed an application pursuant to section 203(a)(1)(A) of the Federal Power Act (FPA)[1] requesting Commission authorization for the disposition of jurisdictional facilities resulting from the transaction (Transaction). Under the Transaction the AES Entities will transfer two coal-fired electric generation facilities, associated interconnection facilities, and certain other assets to NewCo, or one of NewCo's to-be formed wholly-owned subsidiaries. The jurisdictional facilities affected by the Transaction consist of interconnection facilities and assets necessary to operate the generation facilities.

Applicants state that the AES Entities are indirect subsidiaries of the AES Corporation (AES). AES is a global power company that owns and operates both traditional utility and competitive generating business segments. Applicants add that AES' worldwide assets include electric generation, transmission, and six distribution facilities in twenty-seven countries on five continents. In New York, the AES Entities indirectly own or lease interests in six electric generation facilities, including two that are leased by AES Eastern.

Applicants state that AES Eastern, a Delaware limited partnership, is a public utility under the FPA and an exempt wholesale generator (EWG) that leases and operates two coal-fired electric generation facilities, the Somerset Facility and

[1] 16 U.S.C. § 824b (2006).

the Cayuga Facility, both located in the New York Independent System Operator, Inc. (NYISO) control area. The Somerset Facility consists of a single coal-fired generating unit with a summer rating of 678 megawatts (MW). The Cayuga Facility consists of two coal-fired generating units with a combined summer rating of 313 MW.

Applicants state that AES Somerset is an EWG formed for the purpose of providing operation and maintenance services to its affiliate, AES Eastern, with respect to the Somerset Facility. Applicants state that AES Somerset does not make power sales decisions or dispatch decisions with respect to the Somerset Facility.

Applicants state that AES Cayuga is an EWG formed for the purpose of providing operation and maintenance services to its affiliate, AES Eastern, with respect to the Cayuga Facility.

Applicants state that the New York State Electric & Gas Corporation and its affiliate NGE Generation, Inc. (collectively, NYSEG) previously owned the Somerset and Cayuga Facilities. Applicants state that, on August 3, 1998, AES NY, L.L.C. (AES NY), entered into an Asset Purchase Agreement whereby AES NY agreed to purchase six generation facilities, including the Cayuga and Somerset Facilities, from NYSEG as part of NYSEG's divestiture of generating capacity in the State of New York. AES NY then assigned its rights and interests in these facilities to AES Eastern.

Applicants state that to finance the acquisition of the Cayuga and Somerset Facilities from NYSEG, AES Eastern entered into a leveraged lease transaction with twelve owner trusts (Owner Trusts) and the predecessor of Deutsche Bank Trust Company Americas, as Trustee, pursuant to certain lease documents (1999 Transaction). Applicants state that the twelve Owner Trusts each issued a series of debt securities to the predecessor to the Trustee, which twelve series aggregated $550 million of original principal (collectively, Notes). The Notes are secured by first priority security interests in and liens on the Somerset and Cayuga Facilities, in addition to certain other rights and property described in the related indentures. All the Notes and securities were conveyed to two pass-through trusts (Trusts) and the predecessor to the Trustee, which issued, collectively, $550 million of original principal in pass through certificates (collectively, Certificates). Applicants state that the $550 million raised through the sale of the Certificates was used to finance the Trusts' purchase of the Notes issued by the Owner Trusts and represented the entire debt capital utilized in the 1999 Transaction. As described further below, as a result of the Transaction, the holders of these Certificates (Certificate Holders) will own 100 percent of NewCo's outstanding equity.

Applicants state that pursuant to the terms of the 1999 Transaction, AES Eastern, for FPA purposes, effectively owns the Somerset and Cayuga Facilities because it has control and decision-making authority over these facilities. Applicants add that each of the Somerset and Cayuga Facilities is interconnected with the transmission system owned by NYSEG. All of the power produced by the Somerset and Cayuga Facilities is sold pursuant to AES Eastern's market-based rate authority into the markets operated by the NYISO.

Applicants state that NewCo is a Delaware corporation. Upon consummation of the Transaction, 100 percent of NewCo's outstanding common stock will be transferred to and owned by the Certificate Holders pursuant to such Certificate Holders' percentage ownership in the outstanding Certificates. Applicants state that NewCo will use existing employees at the Somerset and Cayuga Facilities to manage day-to-day operation of those facilities. Applicants add that, of the five entities that will own ten percent or more of NewCo's stock,[2] only two, Carlyle and J.P. Morgan, own interests in energy affiliates.[3]

Applicants state that on December 30, 2011, the AES Entities, and several of their affiliates (collectively, AES Debtors), each commenced a voluntary case under chapter 11 of title 11 of the United States Bankruptcy Code (the Bankruptcy Code) in the Bankruptcy Court. According to Applicants, on January 4, 2012, following negotiations, the AES Debtors and a majority of the Certificate Holders entered into a non-binding term sheet (Term Sheet) resolving issues regarding the 1999 Transaction and providing for, among other things, the sale of the Somerset and Cayuga Facilities and related assets necessary for operation of these facilities, to NewCo, subject to higher and better offers in any auction process. No qualified bidders were identified by the March 19, 2012, deadline and as a result, no auction was conducted. On April 11, 2012, the Bankruptcy Court issued the Sale Order approving the sale to NewCo.

Applicants state that the Transaction is consistent with the public interest and will not have an adverse effect on competition, rates or regulation, nor will it

---

[2] Of the Certificate Holders, five entities (each, a Backstop Party and collectively, the Backstop Parties) have committed to purchase their pro rata share of the PIK Notes, which are non-voting debt securities, convertible into NewCo common stock, and, if necessary any PIK Notes not otherwise purchased by other Certificate Holders. The Backstop Parties are: Carlyle, Standard General, J.P. Morgan, Marathon, and CalPERS.

[3] J.P. Morgan has a passive interest in an entity, Noble Environmental I Power (Noble), and Applicants assume affiliation for purposes of this application out of an abundance of caution. Noble owns or controls approximately 606 MW in the NYISO market.

result in any cross-subsidization or the pledge or encumbrance of utility assets to any associate company. Applicants state that the Transaction will have no adverse effect on horizontal competition. Applicants state that NewCo, through its wholly-owned subsidiaries, will acquire approximately 922 MW of generation capacity, the aggregate gross capacity of the Somerset and Cayuga Facilities. Applicants state that the 606 MW of Noble, Applicants' affiliate, is wind generation. Applicants add that the Commission permits energy limited resources such as wind and hydro to be derated in competitive analysis screens based on their actual capacity factors. Applicants state that the standard period for such calculations is five years, but that they have only two years of data on which to base their calculations (because the facilities were built in 2008). Applicants state that the capacity factors for these units were 14.2 percent and 21.5 percent, for 2009 and 2010, respectively, yielding an average capacity factor of 17.85 percent. Applicants calculate derated capacity to be 108 MW.

Applicants state that the remaining assets owned or controlled by affiliates to NewCo in NYISO, the market in which the Somerset and Cayuga Facilities are located (and thus the relevant market for the Transaction), represents approximately 96 MW. Therefore, Applicants state that NewCo's affiliates currently own or control approximately 204 MW of generation in NYISO. Applicants continue that NewCo's affiliates own or control approximately 30.7 MW of generation capacity potentially available for import into the NYISO market (accounting for import limitations into NYISO). When combined, NewCo's pre-transaction market share in NYISO is less than 0.53 percent, and following consummation of the Transaction, NewCo's share will be less than 2.7 percent. Applicants further compute changes in the Herfindahl-Hirschman Index of approximately 1.5 points in the summer and 1.4. Based on these data, Applicants assert that the Transaction has a *de minimis* impact on competition in the NYISO market.

Applicants claim that the Transaction presents no vertical market power concerns. Applicants state that the Transaction does not involve any transmission facilities, except for those limited facilities necessary to interconnect the Somerset and Cayuga Facilities to the transmission grid, and that the Transaction does not involve any other inputs to generation. Applicants state that the Transaction will not have an adverse effect on the rates charged to wholesale ratepayers. Applicants state that none of them have captive wholesale requirements customers; therefore, the Transaction will not have an adverse impact on these kinds of customers. To the extent that Applicants or their affiliates make retail sales, Applicants state that the Transaction will not modify or abridge in any way any contract with such retail customers. Applicants add that all sales of electric energy, capacity, and ancillary services will continue to be made at market-based rates.

Applicants state that the Transaction will not affect the ability of the Commission to regulate any of the Applicants with respect to their Commission-jurisdictional activities. Applicants state that after the Transaction is consummated, the Commission will continue to have the same jurisdiction that it has now over Applicants. Applicants add that the Transaction will not have any adverse effect on state regulation.

According to Applicants, the Transaction will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of assets of a traditional public utility that has captive customers or that owns or provides transmission service over jurisdictional facilities for the benefit of an associate company. Applicants assert that the proposed Transaction falls within one of the "safe harbors" adopted by the Commission for which detailed explanation and evidentiary support to demonstrate a lack of cross-subsidization is not required. Applicants more specifically state that the proposed Transaction does not involve a franchised public utility with captive customers. Additionally, Applicants state that, based on the facts and circumstances known to them or that are reasonably foreseeable, the proposed Transaction will not result in, at the time of the transaction or in the future: (1) any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) any new issuance of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) any new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA.

The filing was noticed on April 17, 2012, with comments, protests, or interventions due on or before May 4, 2012. NYSEG filed a timely motion to intervene on April 20, 2012, a protest on May 4, 2012 and a Response to Applicants' Answer to Protest on May 10, 2012. The NYISO filed a timely motion to intervene on May 4, 2012, and the Maryland Public Service Commission filed a motion to intervene out of time on May 8, 2012. Applicants filed answers to NYSEG on April 20, 2012, and May 8, 2012. NYSEG withdrew withdraw all protests, pleadings, challenges and claims in this proceeding on May 22, 2012, and Applicants withdrew their answers on May 23, 2012. Notices of

intervention and unopposed timely filed motions to intervene are granted pursuant to the operation of Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214). Any opposed or untimely filed motion to intervene is governed by the provisions of Rule 214.

Information and/or systems connected to the bulk power system involved in this transaction may be subject to reliability and cybersecurity standards approved by the Commission pursuant to FPA section 215. Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information databases, and operating systems. If affiliates, personnel or investors are not authorized for access to such information and/or systems connected to the bulk power system, a public utility is obligated to take the appropriate measures to deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, etc., must comply with all applicable reliability and cybersecurity standards. The Commission, NERC or the relevant regional entity may audit compliance with reliability and cybersecurity standards.

Order No. 652 requires that sellers with market-based rate authority timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.[4] The foregoing authorization may result in a change in status. Accordingly, the Applicants are advised that they must comply with the requirements of Order No. 652. In addition, Applicants shall make appropriate filings under section 205 of the FPA, to implement the Transaction.

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

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

(2) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of cost, or any other matter whatsoever now pending or which may come before the Commission;

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

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

(4) The Commission retains authority under Sections 203(b) and 309 of the FPA to issue further orders as appropriate;

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

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

(7) Applicants must inform the Commission of any change in circumstances that would reflect a departure from the facts the Commission relied upon in authorizing the Transaction; and

(8) Applicants shall notify the Commission within 10 days of the date that the disposition of jurisdictional facilities has been consummated.

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

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

Document Content(s)

EC12-93-000.DOC.....1-7