

148 FERC ¶ 61,109
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, John R. Norris,
Tony Clark, and Norman C. Bay.

NRG Yield, Inc.
NRG Yield Operating LLC
Alta Wind I, LLC
Alta Wind II, LLC
Alta Wind III, LLC
Alta Wind IV, LLC
Alta Wind V, LLC
Alta Wind X, LLC
Alta Wind XI, LLC

Docket No. EC14-101-000

ORDER AUTHORIZING DISPOSITION
OF JURISDICTIONAL FACILITIES

(Issued August 11, 2014)

1. On June 10, 2014, NRG Yield, Inc. and NRG Yield Operating LLC (jointly, Buyers), together with Alta Wind I, LLC, Alta Wind II, LLC, Alta Wind III, LLC, Alta Wind IV, LLC, Alta Wind V, LLC, Alta Wind X, LLC, and Alta Wind XI, LLC (the Project Companies) (collectively, Applicants) filed a joint application (Application) under section 203(a)(1) of the Federal Power Act (FPA).¹ Applicants request Commission authorization of the indirect acquisition of 100 percent of the membership interests in the Project Companies by the Buyers (Proposed Transaction). The Proposed Transaction involves the acquisition of the Project Companies by the Buyers from various subsidiaries of Terra-Gen Power, LLC (Terra-Gen).

¹ 16 U.S.C. § 824b (2012).

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

I. Background

A. Description of the Parties

1. NRG Yield, Inc. and NRG Yield Operating LLC

3. Applicants state that NRG Yield Operating LLC is a Delaware limited liability company that holds interests in various renewable and conventional generation and thermal infrastructure assets in the United States. NRG Yield Operating LLC is entirely owned by NRG Yield LLC. NRG Yield LLC itself has two owners: NRG Yield, Inc. and NRG Energy, Inc. NRG Yield, Inc. owns 100 percent of the Class A membership units of NRG Yield LLC, which represent 34.5 percent of the economic interest in NRG Yield LLC. NRG Yield, Inc. is the sole managing member of NRG Yield LLC. 100 percent of the Class B membership units of NRG Yield LLC are owned by NRG Energy, Inc. These Class B membership units represent the remaining 63.5 percent economic interest in NRG Yield LLC.

4. Applicants state that NRG Yield, Inc. is a Delaware Corporation. NRG Energy, Inc. owns 100 percent of the Class B common stock of NRG Yield, which currently represents 65.5 percent of the voting interest in NRG Yield, but no economic interest. The Class A common stock of NRG Yield, Inc., which represents the remaining 34.5 percent of voting interest as well as the entire economic interest in NRG Yield, Inc., is publicly traded on the New York Stock Exchange. Applicants state that NRG Energy, Inc. is a Delaware corporation. Applicants state that two investor groups (T. Rowe Price Group, Inc. and Capital Research and Management Company) each own more than 10 percent of NRG Energy, Inc.'s common stock. Applicants note that the Commission has

² See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (*Merger Policy Statement*). See also *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (*Supplemental Policy Statement*), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008). See also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642 FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). See also *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

granted blanket section 203 authorization to these investor groups and their affiliates to acquire up to 20 percent of the voting securities of public utilities subject to certain conditions.³ NRG Energy, Inc. engages in three related electric businesses: 1) wholesale power generation and electricity and fuel trading; 2) retail electric supply and demand response; and 3) deployment and commercialization of alternative energy technologies, such as electric vehicle charging infrastructure, distributed solar and smart meter technology. Applicants state that NRG Energy, Inc., through NRG Yield, Yield Operating and other subsidiaries, owns or controls over 53,000 MW of electric generating capacity throughout the United States. These assets include 10,348 MW in the California Independent System Operator Corporation (CAISO) market, and 439 MW in the remainder of the Western Electricity Coordination Council.

2. Terra-Gen

5. Terra-Gen is a renewable energy company focused on developing, owning, and operating utility-scale wind, geothermal, and solar generation. Terra-Gen owns approximately 1,960 MW of renewable generating facilities across six states and 37 projects. Terra-Gen is owned by private equity investment funds managed by ArcLight Capital Partners, LLC, which own 61 percent of Terra-Gen, and Global Infrastructure Management, LLC, which owns the remaining 39 percent.

3. The Project Companies

6. The Project Companies, Alta Wind I-V and X-XI, own and operate 947 MW of wind generating capacity at the Alta Wind Energy Center at the Tehachapi Pass in California. Each of Alta Wind I-V is a Delaware limited liability company and a wholly-owned indirect subsidiary of Terra-Gen Finance Company, LLC.⁴ Alta Wind X and XI are Delaware limited liability companies and wholly-owned subsidiaries of CHIPS Alta Wind X Holding Company and CHIPS Alta Wind XI Holding Company respectively.⁵ Terra-Gen Finance Company, LLC, CHIPS Alta Wind X Holding Company and CHIPS Alta Wind XI Holding Company are all wholly-owned indirect subsidiaries of Terra-Gen.

³ See *T. Rowe Price Group, Inc.*, 143 FERC ¶ 62,003 (2013); *Capital Research & Mgmt. Co.*, 141 FERC ¶ 62,231 (2012). Applicants argue that as a result of the blanket authorizations, neither group should be regarded as controlling NRG Energy, Inc.

⁴ See *Alta Wind I, LLC*, Docket No. ER10-2086-000, *et al.* (Oct. 22, 2010) (letter order granting market-based rate authorization to Alta Wind I-V).

⁵ See *Alta Wind X, LLC*, Docket No. ER13-1150-000, *et al.* (May 1, 2013) (letter order granting market-based rate authorization to Alta Wind X-XI).

7. According to Applicants, the entire output of the generation facilities owned by Alta Wind I-V is committed to Southern California Edison Company (Edison) under long-term contracts, with remaining terms in excess of 20 years. Beginning on or before January 1, 2016, the entire output of the generation facilities owned by Alta Wind X and XI will also be committed to Edison under long-term contracts.

8. Applicants state that the Project Companies share ownership of certain common facilities necessary for the operation of their facilities, including interconnection facilities, with other phases of the Alta Wind Energy Center. Specifically, they own undivided interests in radial generator lead lines and related structures and equipment necessary to interconnect to the grid.⁶

B. Proposed Transaction

9. Applicants state that, pursuant to the Purchase and Sale Agreement, dated as of June 3, 2014, the Buyers will indirectly acquire all the interests in the Project Companies and certain associated non-jurisdictional entities. Upon consummation of the Proposed Transaction, each of the Project Companies will be an indirect subsidiary of the Buyers. The sellers – TG Finance, NTC AWAM Holdings, LLC, CHIPS Alta Wind X and CHIPS Alta Wind XI – will no longer hold any ownership interests in the Project Companies following the Proposed Transaction.

II. Notice of Filing and Responsive Pleadings

10. Notice of the Application was published in the *Federal Register*, 79 Fed. Reg. 36,503 (2014), with interventions and protests due on or before June 18, 2014. On June 18, 2014, Applicants filed an Amendment to the Application, removing the Appendix A competition analysis and substituting a “2AB” analysis, described below. Notice of the Amendment was published in the *Federal Register*, 79 Fed. Reg. 31,156 (2014), with interventions and protests due on or before July 9, 2014. None was filed.

⁶ See *Alta Wind I, LLC*, 134 FERC ¶ 61,109, at P 22 (2011) (finding that the generator lead lines are limited and discrete transmission facilities and waiving the Commission requirement to file an open access transmission tariff until a valid third party request for service is received).

III. Discussion

A. Standard of Review Under Section 203

11. Section 203(a)(4) of the FPA requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest.⁷ The Commission's analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.⁸ Section 203(a)(4) also requires the Commission to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."⁹ The Commission's regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.¹⁰

B. Analysis Under Section 203

1. Effect on Horizontal Competition

a. Applicants' Analysis

12. Applicants assert that the Proposed Transaction will have no adverse impact on horizontal competition in the CAISO market, the relevant market for the Proposed Transaction, where the Project Companies' generation is located. Applicants submit that, until the long-term contracts take effect under which Alta Wind X and Alta Wind XI will sell the entire output of their generating facilities to Edison, the Proposed Transaction will result in an increase in the market share of Buyers and their affiliates in the CAISO market.¹¹

⁷ 16 U.S.C. § 824b(a)(4) (2006).

⁸ See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

⁹ 16 U.S.C. § 824b(a)(4).

¹⁰ 18 C.F.R. § 33.2(j) (2013).

¹¹ Application at 16.

13. To analyze this increase in market share, Applicants provide a simplified “2AB”¹² analysis of the effect of the Proposed Transaction on the CAISO market, where there is overlap between generation capacity owned or controlled by Buyers and their affiliates and generation capacity owned or controlled by the entities being acquired through the Proposed Transaction. Buyers and their affiliates own or control approximately 4,671 MW of uncommitted capacity (equal to 10,347.7 MW (“NRG Energy Generation in CAISO” subtotal on Exhibit J-3) minus 5,676.6 MW (“NRG Energy Purchases (Sales) in CAISO” subtotal on Exhibit J-3))¹³ in the CAISO market and will acquire an additional approximately 227 MW of uncommitted capacity (“Acquired Generation Net Total Owned and Purchased” on Exhibit J-3) in the CAISO market through the Proposed Transaction. Applicants state that there is approximately 53,612 MW of installed capacity in the CAISO market, against which NRG’s market share translates into roughly 8.7 percent, and the market share to be acquired through the Proposed Transaction translates into roughly 0.4 percent. Applicants thus compute the Herfindahl-Hirschman Index (HHI)¹⁴ change as $2AB = 2 * 8.7 * 0.4 = 6.96$ points. Alternatively, Applicants

¹² If A equals the market share of Buyers and their affiliates and B equals the market share of the entities being acquired, one may approximate the HHI change resulting from Transaction as $(A + B)^2 - (A^2 + B^2) = A^2 + B^2 + 2AB - (A^2 + B^2) = 2AB$. *Horizontal Merger Guidelines*, 87 Fed. Reg at 41,558, n. 18 (1992).

¹³ $10,347.7 \text{ MW} - 5,676.6 \text{ MW} = 4671.1 \text{ MW}$. 4671.1 MW is thus the net amount of generation that NRG Energy, Inc. and its affiliates have available to serve the CAISO energy market (its Available Economic Capacity). 5,676.6 MW is subtracted from the total capacity holdings, because this amount is committed to third parties under contract.

¹⁴ The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are considered to be unconcentrated; markets in which the HHI is greater than or equal to 1,000 but less than 1,800 points are considered to be moderately concentrated; and markets in which the HHI is greater than or equal to 1,800 points are considered to be highly concentrated. In a horizontal merger, an increase of more than 50 HHI points in a highly concentrated market or an increase of 100 HHI points in a moderately concentrated market fails its screen and warrants further review. *Merger Policy Statement*, FERC Stats. & Regs. ¶ 31,044 at 30,129; see also *Analysis of Horizontal Market Power under the Federal Power Act*, 138 FERC ¶ 61,109 (2012) (affirming the Commission’s use of the thresholds adopted in the *Merger Policy Statement*).

compute the HHI change as the difference in sums of squares, as $9.12^2 - (8.72^2 + 0.42^2)$, or $82.81 - 75.85 = 6.96$ points.

b. Commission Determination

14. We find that the combination of generation resulting from the Proposed Transaction will not have an adverse effect on horizontal competition. Applicants have demonstrated that the Proposed Transaction will not result in any screen failures in the relevant market for the Proposed Transaction. Applicants note that the majority of the generation involved in the Proposed Transaction is currently committed under long-term contracts.¹⁵ For the period in which Alta Wind X and XI will not be under long-term contract(s), Applicants provide a 2AB analysis to show no competitive harm.¹⁶

2. Effect on Vertical Competition

a. Applicants' Analysis

15. Applicants argue that the transaction does not raise any vertical market power concerns. Although the Project Companies each own pro rata interests in shared generator lead lines, Applicants submit that the Commission has determined that the lines are limited and discrete transmission facilities and granted waiver of the requirement to file an OATT.¹⁷ Applicants state that none of Buyers and their affiliates own or control any transmission facilities, other than limited interconnection facilities necessary to connect individual generating facilities to the grid. Applicants further state that none of Buyers and their affiliates or the Project Companies own or control inputs to electricity products that could be used to erect barriers to entry, and the Proposed Transaction does not involve inputs to electricity products. Accordingly, Applicants maintain that the Proposed Transaction presents no vertical market power concerns, and no vertical market power analysis is required.¹⁸

¹⁵ See *Startrans IO, L.L.C.*, 122 FERC ¶ 61,307, at P 18 (2008).

¹⁶ The 2AB method has been accepted in other cases approving applications under FPA section 203. See, e.g., *Bishop Hill Energy LLC*, 138 FERC ¶ 62,200 (2012); *SUEZ Energy North America, Inc.* 125 FERC ¶ 61,188 (2008).

¹⁷ See *supra* n.6.

¹⁸ Application at 17.

b. Commission Determination

16. We find that the Proposed Transaction does not raise any vertical market power concerns. The only transmission facilities involved in the Proposed Transaction are limited interconnection facilities necessary to connect the relevant generating facilities to the transmission grid. Additionally, Applicants state that none of Buyers and their affiliates or the Project Companies has any ownership interest in or control of fuel supplies, fuel delivery systems, other inputs to electricity markets or any new sites for electric generation that could raise barriers to entry. We note that no party contends that the Proposed Transaction could adversely affect vertical competition.

3. Effect on Rates

a. Applicants' Analysis

17. Applicants argue that the Proposed Transaction will not have any adverse effect on rates because the Project Companies will continue to make all sales of electric energy, capacity and ancillary services at market-based rates authorized by the Commission,¹⁹ and the Proposed Transaction will have no effect on the rates for such sales. In addition, none of Applicants has any captive retail or wholesale customers or provide unbundled transmission service. Applicants state that no cost-based rate schedules are involved in the Proposed Transaction. Accordingly, Applicants state that the Proposed Transaction will not have an adverse impact on rates charged to captive wholesale or transmission customers.²⁰

b. Commission Determination

18. We find that the Proposed Transaction will not have an adverse effect on rates. All sales of electric energy, capacity and ancillary services by the Project Companies will continue to be made under market-based rate authorizations issued by the Commission. Further, none of Applicants have any transmission customers whose rates could be affected by the Proposed Transaction. We note that no party asserts that the Proposed Transaction will adversely affect rates.

¹⁹ See *supra* n.4, 5.

²⁰ Application at 17-18.

4. Effect on Regulation

a. Applicants' Analysis

19. Applicants maintain that the Proposed Transaction will not have any adverse effect on the effectiveness of federal or state regulation, as Applicants' regulatory status will remain unchanged and no gaps in regulation will be created.²¹

b. Commission Determination

20. We find no evidence that either state or federal regulation will be impaired by the Proposed Transaction. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap at the federal or state level.²² We find that the Proposed Transaction will not create a regulatory gap at the federal level because the Commission will retain its regulatory authority over the companies after the Proposed Transaction is consummated.

21. In the Merger Policy Statement, the Commission stated that it ordinarily will not set the issue of the effect of a transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the transaction. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission stated that it may set the issue for hearing, and that it will address such circumstances on a case-by-case basis.²³ We note that no party alleges that regulation would be impaired by the Proposed Transaction, and no state commission has requested that the Commission address the issue of the effect on state regulation.

5. Cross-Subsidization

a. Applicants' Analysis

22. With respect to cross-subsidization, Applicants argue that the Proposed Transaction falls squarely within the safe harbor for transactions that do not involve a franchised public utility with captive customers.²⁴ Further, Applicants submit that the Proposed Transaction is a *bona fide*, arm's length, bargained-for exchange between non-

²¹ *Id.* at 18.

²² Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

²³ *Id.*

²⁴ Application at 18-19 (citing Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 16).

affiliated entities. Applicants maintain that under such circumstances, the Commission has recognized that there is not potential for harm to customers.²⁵

23. Nonetheless, Applicants verify that the Proposed Transaction will not now or in the future result in: (1) transfers of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) new issuances of securities by traditional public utility associate companies that have captive customers or that own or provide transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) new pledges or encumbrances 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) new affiliate contracts between non-utility associate companies and traditional public utility associate companies that have captive customers or that own or provide transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review pursuant to FPA sections 205 and 206.

b. Commission Determination

24. Based on the facts as presented in the Application, we find that the Proposed Transaction will not result in cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company. We note that no party has argued otherwise.

C. Other Considerations

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

²⁵ Application at 19 (citing Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 17).

The Commission orders:

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

(B) Applicants must inform the Commission within 30 days of any material change in circumstances that departs from the facts the Commission relied upon in granting the application.

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

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

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

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

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

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Document Content(s)

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