

156 FERC ¶ 62,134

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Little Elk Wind Project, LLC

Docket No. EC16-152-000

ORDER AUTHORIZING ACQUISITION  
OF JURISDICTIONAL FACILITIES

(Issued August 19, 2016)

On July 18, 2016, Little Elk Wind Project, LLC (Little Elk) filed an application under section 203(a)(1) of the Federal Power Act (FPA)<sup>1</sup> requesting authorization for the acquisition of jurisdictional facilities. Specifically, Firststar Development, LLC (Firststar) will acquire from Bankers Commercial Corporation (Bankers) approximately 42 percent of its passive, non-controlling Class B Units in Little Elk (Proposed Transaction).<sup>2</sup> The affected jurisdictional facilities consist of a market-based rate tariff, a power purchase agreement, interconnection facilities, and associated books and records.

Little Elk states that the Proposed Transaction may not require authorization under section 203(a)(1); however, out of an abundance of caution, it nevertheless asks the Commission to authorize the Proposed Transaction. This order authorizes the Proposed Transaction without making any determination of jurisdiction.<sup>3</sup>

Little Elk is an exempt wholesale generator with market-based rate authority. Little Elk owns a 74 megawatt wind-powered project located in Kiowa and Washita Counties, Oklahoma (Facility). The Facility is situated within the Southwest Power Pool (SPP) market. Thus, according to Little Elk, the relevant market for the Proposed Transaction is SPP. Output from the Facility is committed under a long-term power purchase agreement.

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<sup>1</sup> 16 U.S.C. § 824b (2012).

<sup>2</sup> Little Elk states that the precise number of Class B Units to be purchased by Firststar will not be known until the closing date, but will be no greater than 45 percent of the existing Class B Units.

<sup>3</sup> *Ocean State Power*, 47 FERC ¶ 61,321 (1989).

The membership interests in Little Elk are divided into Class A Units, which are managing and controlling; and Class B Units, which are passive and non-controlling. Little Elk Wind Holdings, a corporation under the laws of Delaware, owns 100 percent of the Class A Units in Little Elk. Little Elk Holdings is directly, wholly owned by Enel Kansas, LLC, which, in turn, is indirectly owned by Enel S.p.A., a joint stock company under the laws of Italy. Bankers, a wholly owned non-bank subsidiary of MUFG Americas Holdings Corporation (MUAH), owns 100 percent of the Class B Units in Little Elk. MUAH is indirectly owned by Mitsubishi UFJ Financial Group, Inc., a publicly traded corporation organized under the laws of Japan.

Firststar is an indirect, wholly owned subsidiary of U.S. Bancorp, Inc. (Bancorp). Bancorp indirectly operates the fifth largest commercial bank in the United States, as well as providing banking, brokerage, insurance, investment, mortgage, trust, and payment services products to consumers, businesses, and institutions. According to Little Elk, within the SPP market, Bancorp holds direct or indirect passive, non-controlling interests in various companies that own and operate wind- and solar-powered electric generation facilities. Little Elk further represents that neither Bancorp nor any subsidiary or affiliate or upstream owner of Bancorp owns non-passive interests in, or controls within, the SPP market any electric generation; any electric transmission or distribution facilities; any intrastate natural gas transportation, intrastate natural gas storage or distribution facilities; any sites for generation capacity development; or physical coal supply sources and ownership of or control over who may access transportation of coal.

The Proposed Transaction involves a membership interest purchase agreement between Firststar and Bankers, including a letter of intent. Under the Proposed Transaction, according to Little Elk, Firststar will acquire approximately 42 percent of the passive, non-controlling Class B Units in Little Elk. The Class B Units will give Firststar only limited voting and consent rights necessary to protect its economic interests. Firststar will not have the ability to manage Little Elk or the Facility. Little Elk Holdings will continue to own all of the managing and controlling Class A Units. As holder of the Class A Units, Little Elk Holdings will continue to be managing member of Little Elk and will have the right to control Little Elk and the Facility on a day-to-day basis.

Little Elk states that the Proposed Transaction is consistent with the public interest and will have no adverse effect on competition, rates, or regulation. With respect to horizontal market power, Little Elk states that the Proposed Transaction raises no concern. Little Elk states that output from the Facility is fully committed to a non-affiliated purchaser under a long-term agreement. Little Elk also states that neither Firststar nor its affiliates control electric generating facilities in the SPP market and thus asserts that the Proposed Transaction cannot result in competitive overlap in that market. In addition, Little Elk states that Firststar's acquisition of the passive Class B Units will not result in a change in the market share of Firststar because Firststar will not gain control over the Facility.

With regard to vertical market power, Little Elk states that the Proposed Transaction raises no concern. Little Elk states that neither it nor any of its affiliates own or control transmission facilities, other than interconnection facilities, in any market. Little Elk also states that neither Firststar nor its affiliates own or control transmission facilities in any market, other than through passive tax equity interests. In addition, Little Elk states that neither it, Firststar, nor their respective affiliates, own or control intrastate natural gas transportation, storage or distribution facilities, sources of coal supplies or equipment for transporting coal supplies. Lastly, Little Elk states that neither it, Firststar, nor their respective affiliates own or control any sites in the United States to develop new generating capacity that could raise vertical market power concerns.

With regard to rates, Little Elk states that the Proposed Transaction will not have an adverse effect. Little Elk states that all sales resulting from the Facility are made at market-based rates, and that the Proposed Transaction will not alter the terms and conditions of the power purchase agreement.

With regard to regulation, Little Elk states that the Proposed Transaction will not have an adverse effect. Little Elk states that the Proposed Transaction will not affect the extent to which the Commission may regulate it. Little Elk also states that the Proposed Transaction is not subject to regulation by any state entity. Little Elk thus states that the Proposed Transaction will not create a regulatory gap at the federal or state level or shift regulatory authority between the Commission and any state commission.

Little Elk states that, based on facts and circumstances known to it or that are reasonably foreseeable, the Proposed Transaction will not result in, at the time of the closing or in the future, cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company. Specifically, Little Elk states that the Proposed Transaction does not involve a franchised utility with captive customers and will not result in: (1) any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) any new issuance of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) any new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and service agreements subject to review under sections 205 and 206 of the FPA.

The filing was noticed on July 18, 2016, with comments, protests, or interventions due on or before August 8, 2016. None were received.

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

When a controlling interest in a public utility is acquired by another company, whether a domestic company or a foreign company, the Commission's ability to adequately protect public utility customers against inappropriate cross-subsidization may be impaired absent access to the parent company's books and records. Section 301(c) of the FPA gives the Commission authority to examine the books and records of any person who controls, directly or indirectly, a jurisdictional public utility insofar as the books and records relate to transactions with or the business of such public utility. The approval of the Proposed Transaction is based on such examination ability.

Order No. 652 requires that sellers with market-based rate authority timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.<sup>4</sup> The foregoing authorization may result in a change in status. Accordingly, applicants that have market-based rates 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 Proposed Transaction.

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

- (1) The Proposed Transaction is authorized upon the terms and conditions and

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<sup>4</sup> *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).

for the purposes set forth in the application;

- (2) Little Elk must inform the Commission of any material change in circumstances that departs from the facts or representations that the Commission relied upon in authorizing the Proposed Transaction within 30 days from the date of material change in circumstances;
- (3) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission;
- (4) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted;
- (5) If the Proposed Transaction results in changes in the status or upstream ownership of Little Elk's affiliated qualifying facilities, an appropriate filing for recertification pursuant to 18 C.F.R. § 292.207 (2015) shall be made;
- (6) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate;
- (7) Little Elk shall make appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction; and
- (8) Little Elk shall notify the Commission within 10 days of the date that the acquisition 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 (2015). This order constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days of the date of issuance of this order, pursuant to 18 C.F.R. § 385.713 (2015).

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

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