

157 FERC ¶ 62,186

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Innovative Solar 43, LLC
Innovative Owner 43, LLC

Docket No. EC17-28-000

ORDER AUTHORIZING ACQUISITION
OF JURISDICTIONAL FACILITIES

(Issued December 13, 2016)

On November 7, 2016, Innovative Solar 43, LLC (Innovative Solar) and Innovative Owner 43, LLC (Innovative Owner) (collectively, Applicants) filed an application (Application) pursuant to section 203(a)(1)(A) of the Federal Power Act (FPA)¹ requesting authorization for the acquisition by Cypress Creek Holdings, LLC (Cypress Holdings), of one hundred percent of the outstanding common and preferred stock in FLS Energy, Inc. (FLS Energy), from the stockholders of FLS Energy (Proposed Transaction). Upon consummation of the Proposed Transaction, Cypress Holdings will acquire an indirect controlling interest in both Applicants and, as a result, in a 38.9 megawatt (MW) photovoltaic generation facility currently under development (Project). The jurisdictional facilities affected by the Proposed Transaction consist of a market-based rate tariff, limited interconnection facilities, a power purchase agreement, and other books and records.

Applicants state that Innovative Solar and Innovative Owner are affiliates and indirect subsidiaries of FLS Energy. FLS Energy, indirectly through its subsidiaries, owns and operates a portfolio of solar energy assets in North Carolina. Innovative Owner owns the Project and Innovative Solar will operate the Project, control all physical assets comprising the Project, and sell all of the output of the Project. Innovative Solar's sole business will be the operation of the Project and Innovative Owner's sole business is ownership of the Project.

Applicants state that the Project is located within the Duke Energy Progress (DEP) balancing authority area (DEP BAA). Applicants state that they expect the Project to begin generating test power in December 2016 and to commence commercial operation prior to January 1, 2017. Innovative Solar is committed to sell the entire output from the

¹ 16 U.S.C. § 824b (2012).

Project under a 10-year power purchase agreement with DEP, a non-affiliated buyer. Innovative Solar is an exempt wholesale generator (EWG), with market-based rate authorization and has filed a notice of the Project's status as a qualifying small power production facility. Innovative Owner is also an EWG. Applicants state that neither Innovative Solar nor Innovative Owner will own or control any transmission facilities other than limited interconnection facilities needed to connect the Project with the DEP transmission system.

Applicants state that Cypress Holdings has its primary place of business in Santa Monica, California, is engaged in the energy industry and in constructing renewable energy projects. Furthermore, Applicants state that the indirect, upstream owners who control ten percent or more of Cypress Holdings are private individuals, none of whom are otherwise engaged, with limited exceptions,² in the energy industry or otherwise own or control 10 percent or more of any other operating electric industry assets or other inputs to power production.

Applicants state that Cypress Holdings does not directly own or control any electric generating or transmission assets or generation output. Ownership of the renewable projects of Cypress Holdings is structured primarily through two subsidiaries, Cypress Creek Renewables, LLC and Cypress Creek Power, LLC and, through these subsidiaries, Cypress Holdings builds solar farms..

Upon consummation of the Proposed Transaction, Cypress Holdings will own one hundred percent of the outstanding common and preferred stock in FLS Energy and have the right, through FLS Energy, to control the Applicants and the Project on a day-to-day basis. In addition, following the closing of the Proposed Transaction, Innovative Owner will continue to own the physical assets of the Project, Innovative Solar will continue to have full operational control of the jurisdictional assets.

Applicants state that the Proposed Transaction is consistent with the public interest and will have no adverse effect on competition, rates, or regulation and will not result in cross-subsidization. With respect to horizontal market power, Applicants state that the full output of the Project is committed to DEP under a long-term power purchase agreement, and the Proposed Transaction will have no effect on the agreement. According to Applicants, prior to the Proposed

² Applicants state that there are two exceptions. First, one of the individuals owns a non-controlling interest of over 10 percent in an entity which provides licensed retail electric services in competitive utility service territories but does not itself own or control electric generation. Second, several of the individuals own controlling interests in other QF solar facilities in North Carolina with an aggregate capacity of approximately 35 MW, the output of which is committed under long-term power purchase agreements to non-affiliated entities.

Transaction, Applicants and their affiliates own zero MW of uncommitted capacity in the DEP BAA or in first-tier markets, because all affiliated capacity in the DEP BAA or in first-tier markets is committed under long-term power purchase agreements with non-affiliates. Additionally, and for the same reason, Cypress Holdings and its affiliates own zero MW of uncommitted in the DEP BAA or in first-tier markets. Applicants assert that even if the approximately 172 MW of capacity affiliated with Cypress Holdings in the DEP BAA that is committed under long-term power purchase agreements was considered uncommitted, that capacity would represent 1.26 percent of the approximately 13,689 MW of the installed capacity in the DEP BAA, which is, according to Applicants, *de minimis*. Therefore, according to Applicants, the Proposed Transaction does not raise any horizontal market power concerns.

With respect to vertical market power, Applicants state that, upon closing the Proposed Transaction, they will own or control no transmission facilities in any geographic market other than those limited interconnection facilities necessary for connecting the Project with the DEP-controlled transmission system, nor will Applicants own or control other inputs to power production. In addition, as a result of the Proposed Transaction, Applicants will not become affiliated with any entity or person that owns, controls, or operates transmission facilities. Therefore, according to Applicants, the Proposed Transaction does not raise any vertical market power concerns.

With respect to rates, Applicants state that various mechanisms are acceptable for protecting ratepayers, including the existence of market-based rates; here, according to Applicants, all sales from the Project will be made at market-based rates, and the Proposed Transaction will not alter the terms of the long-term power purchase agreement with DEP. Additionally, the Proposed Transaction does not involve transmission rates or transmission customers. Therefore, according to Applicants, the Proposed Transaction will have no effect on rates.

With respect to regulation, Applicants state that the Proposed Transaction will not affect the manner or extent to which the Commission, any state, or any other federal agency may regulate Applicants. Applicants assert that the extent to which Applicants and its affiliates are subject to the Commission's jurisdiction, will not change, as a result of the Proposed Transaction. Therefore, according to Applicants, the Proposed Transaction will have no adverse effect on federal or state regulation.

Applicants state that the Proposed 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. Applicants further state that the Proposed Transaction qualifies for the safe harbor for transactions that do not involve a franchised public utility with captive customers. In addition, Applicants represent that, based on

facts and circumstances known to Applicants or that are reasonably foreseeable, the Proposed Transaction will not result in, at the time of the Proposed 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.

This filing was noticed on November 7, 2016, with comments, protests or interventions due on or before November 28, 2016. None were received.

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.

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.³ To the extent that a transaction authorized under FPA section 203 results in a change in status, sellers that have market-based rates are advised that they must comply with the requirements of Order No. 652.

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

- (1) The Proposed Transaction is authorized upon the terms and conditions and for the purposes set forth in the Application;
- (2) Applicants must inform the Commission of any material change in circumstances that departs from the facts or representations that the Commission relied upon in authorizing the Proposed Transaction within 30 days of the date of the material change in circumstances;
- (3) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of cost, 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 the upstream ownership of Applicants' affiliated qualifying facilities, if any, an appropriate filing for recertification pursuant to 18 C.F.R. § 292.207 (2016) shall be made;
- (6) The Commission retains authority under Sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate;
- (7) Applicants shall make the appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction; and

³ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

- (8) Applicants shall notify the Commission within 10 days of the date that the Proposed Transaction 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 (2016). 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 (2016).

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

Docket No. EC17-28-000

- 7 -

Document Content(s)

EC17-28-000.DOC.....1-7