

158 FERC ¶ 62,019

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSIONTransCanada Hydro Northeast Inc.
Great River Hydro NE, LLC

Docket No. EC17-36-000

ORDER AUTHORIZING ACQUISITION AND
DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued January 10, 2017)

On November 18, 2016, TransCanada Hydro Northeast Inc. (TC Hydro) and Great River Hydro NE, LLC (Great River) (collectively, Applicants) filed an application under section 203(a)(1)(A) of the Federal Power Act (FPA)¹ requesting authorization for the disposition of jurisdictional facilities resulting from transactions whereby: (1) Great River will acquire 100 percent of TC Hydro from TransCanada PipeLine USA Ltd. (TC Pipeline USA) (Proposed Acquisition); and (2) one or more limited partners of ArcLight Fund VI will acquire a non-managing interest of between 10 percent and 49.9 percent in TC Hydro from Great River (Proposed Investment, and collectively with the Proposed Acquisition, Proposed Transactions). The jurisdictional facilities affected by the Proposed Transactions consist of TC Hydro's market-based rate tariff and any related wholesale power purchase agreements, interconnection facilities associated with the Hydro Assets, and related books and records.

Applicants state that the Proposed Acquisition may not require Commission approval under section 203(a)(1); however, out of an abundance of caution, they nevertheless ask the Commission to authorize the Proposed Acquisition. This order authorizes the Proposed Acquisition without making any determination of jurisdiction.²

Applicants state that TC Hydro is an exempt wholesale generator which the Commission has granted authority to make wholesale sales at market-based rates. TC Hydro owns and operates hydro assets in the ISO New England, Inc. (ISO-NE) market, with a total generating capacity of approximately 571 megawatts (collectively, Hydro Assets). Applicants represent that, because the Hydro Assets are located in the ISO-NE footprint, ISO-NE is the relevant geographic market for the Proposed Transactions.

¹ 16 U.S.C. § 824b (2012).

² *Ocean State Power*, 47 FERC ¶ 61,321 (1989).

According to Applicants, TC PipeLine USA is a direct, wholly owned subsidiary of TransCanada PipeLines Limited (TC PipeLines Limited), which is, in turn, a wholly owned subsidiary of TransCanada Corporation (TransCanada). TransCanada is an energy company formed under the laws of Canada, doing business in the United States and Canada. Common shares in TransCanada trade on the Toronto and New York stock exchanges. Applicants state that no shareholder owns 10 percent or more of the publicly traded stock of TransCanada.

Applicants submit that Great River is a wholly owned subsidiary of Great River Hydro Holdings, LLC, which is a wholly owned subsidiary of ArcLight Fund VI. ArcLight Capital Partners LLC (ArcLight Capital) ultimately manages and controls ArcLight Fund VI. ArcLight Capital also manages and controls ArcLight Energy Partners Fund II, L.P., ArcLight Energy Partners Fund III, L.P., ArcLight Fund IV, ArcLight Energy Partners Fund V, L.P., and ArcLight Liquid Energy Opportunities Fund, L.P. (collectively, ArcLight Funds), each of which is a private equity investment fund with a focus on the independent power sector.

According to Applicants, neither ArcLight Capital nor any of its affiliates are affiliated with any entity that owns or controls generation located in the ISO-NE market. Further, none of ArcLight Capital or any of its affiliates own a 10 percent or greater voting interest in or control any electric transmission facilities in the United States, other than limited interconnection facilities. Applicants add that none of ArcLight Capital or any of its affiliates own or control any inputs to electricity products or electric power production in the ISO-NE market. Finally, ArcLight Capital is not affiliated with any public utility with a franchised electric service territory.

According to Applicants, following the Proposed Acquisition, ArcLight Fund VI may permit certain of its limited partners (Investors) to acquire indirect, non-managing membership interests in TC Hydro in addition to the passive interests they will hold through their ArcLight Fund VI limited partnership interests. Applicants do not yet know which, if any, limited partners in ArcLight Fund VI may become an Investor. However, Great River represents that any ArcLight Fund VI limited partner that becomes an Investor and as a result, directly or indirectly obtains 10 percent or more of the membership interests in TC Hydro will satisfy criteria, which the Commission has previously accepted for unknown investors, to ensure that the Proposed Investment has no adverse effect on competition, rates, or regulation, and does not raise any cross-subsidization concerns.³

³ Applicants cite *Rising Tree Wind Farm LLC, et al.*, 149 FERC ¶ 62,196 (2014); *Headwaters Wind Farm LLC*, 148 FERC ¶ 62,176 (2014); *Steele Flats Wind Project, LLC*, 145 FERC ¶ 62,200 (2013); and *Ashtabula Wind II, LLC, et al.*, 130 FERC ¶ 62,216 (2011). If any of the Investors does not satisfy the criteria set forth in this Application, Applicants commit that the transfer to such investor will not occur until after separate

Applicants represent that Investors and their affiliates may own or control electric generation facilities in the ISO-NE market. However, any overlap between the operations of Investors and their affiliates in the ISO-NE market and the operations of ArcLight Funds and their affiliates in the ISO-NE market (including TC Hydro) will be *de minimis*. Specifically, the combined generation market share of Investors and their affiliates together with the ArcLight Funds and their affiliates in the ISO-NE market will not exceed two percent of the total installed capacity in the market.

In addition, Investors and their affiliates will not own or control any electric transmission or distribution facilities in the United States, except for the limited interconnection facilities used solely to connect individual generating facilities to the transmission grid, facilities for which the Commission has granted a waiver of the requirement to file an open access transmission tariff (OATT) or that qualify for the blanket OATT waiver, or transmission facilities that are subject to a Commission-accepted OATT. Investors and their affiliates also will not own or control any essential inputs to electricity products or electric generation in the relevant market. In addition, none of Investors or any of their affiliates will be a public utility with a franchised electric service territory in the United States.

Great River commits to inform the Commission of the identities of ArcLight Fund VI limited partners that become Investors at the time Great River notifies the Commission of the consummation of the transfers to Investors. Great River also will confirm compliance by each Investor with the criteria set forth above.

Applicants state that, under the Purchase and Sale Agreement, dated November 1, 2016, Great River will acquire from TC PipeLine USA all of the equity interests in TC Hydro. As part of the Proposed Acquisition, prior to the disposition of equity interests to Great River, TC Hydro will convert its form of organization from a corporation to a limited liability company.⁴ Following closing of the Proposed Acquisition, Great River will directly own 100 percent of the membership interests in TC Hydro, and Great River will have an indirect 100 percent ownership interest in all the jurisdictional facilities owned by TC Hydro. Applicants continue that, following approval for, and closing on, the Proposed Acquisition, TC Hydro's existing power purchase agreement with TC PipeLines Limited will be terminated and TC Hydro will sell the output of the Hydro

authorization is obtained from the Commission pursuant to section 203 of the FPA, to the extent required.

⁴ Applicants claim that this transfer qualifies for a blanket authorization under section 203(a)(1) of the FPA, specifically under 18 C.F.R. § 33.1(c)(6). Applicants do not seek in the application an authorization under section 203 of the FPA for this transfer and none is granted by this order.

Assets on a merchant basis into the ISO-NE market pursuant to its market-based rate authority.

Applicants represent that, following the Proposed Acquisition, ArcLight Fund VI may sell a portion of the indirect membership interests in TC Hydro to one or more Investors pursuant to one or more closings that will occur within one year from the date on which the Commission issues an order authorizing the Proposed Investment. Pursuant to the Proposed Investment, Investors may collectively acquire up to 49.9 percent of the indirect membership interests in TC Hydro. ArcLight Fund VI will continue to indirectly own at least 50.1 percent of the membership interests in TC Hydro, and, as a result, ArcLight Capital will have exclusive authority to manage and control the business and affairs of TC Hydro. Applicants state that Investors will hold only non-managing interests with limited consent or veto rights.

Applicants state that the Proposed Transactions are consistent with the public interest because they will not have an adverse effect on competition, rates, or regulation and will not result in cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company.

According to Applicants, the Proposed Transactions will have no adverse impact on horizontal competition because neither Great River nor its affiliates currently own or control any generation capacity in ISO-NE. As a result, the Proposed Acquisition will not result in any new affiliation or combination of electric generating assets that could have an impact on horizontal competition in the relevant market. Applicants state that the Proposed Investment will have no adverse effect on horizontal competition because Investors will indirectly acquire only non-managing membership interests in TC Hydro and will not acquire any day-to-day control over TC Hydro as a result of the Proposed Investment. Therefore, Applicants state that the Proposed Transactions do not raise horizontal market power concerns in any geographic markets.

Applicants submit that the Proposed Transactions will have no adverse impact on vertical competition. The Proposed Transactions do not involve any transmission facilities except for limited interconnection facilities, or any essential inputs to electricity products or electric power production. Applicants represent that further, none of the ArcLight Funds, Investors, or any of their affiliates own a 10 percent or greater voting interest in, operate, or control any electric transmission facilities in the United States, other than limited interconnection facilities necessary to connect individual generating facilities to the grid, facilities for which the Commission has granted a waiver of the requirement to file an OATT or that qualify for blanket OATT waiver, or transmission facilities that are subject to a Commission-accepted OATT. In addition, none of the ArcLight Funds, Investors, or any of their affiliates own or control any essential inputs to electricity products or electric power production in the relevant market. Thus, Applicants state that the Proposed Transactions will not have an adverse impact on vertical

competition.

According to Applicants, the Proposed Transaction will have no adverse impact on rates. Applicants state that TC Hydro will continue to make all wholesale power sales under its market-based rate authority. Applicants further submit that the Proposed Transactions do not involve transmission rates or transmission customers. Thus, Applicants state that the Proposed Transactions will have no adverse effect on wholesale ratepayers or transmission customers.

Applicants represent that the Proposed Transactions will not impair the ability of the Commission or any state regulatory authority to regulate Applicants or the Hydro Assets. The Commission will continue to exercise the same jurisdiction over sales of electricity by TC Hydro after the Proposed Transactions are consummated that it exercises currently. Further, Applicants submit that the Proposed Transactions will have no effect on state commission jurisdiction over the Applicants or Hydro Assets. Therefore, Applicants state that the Proposed Transactions will not have any adverse effect on regulation.

According to Applicants, the Proposed Transactions fall within one of the “safe harbors” established by the Commission for which detailed explanation and evidentiary support to demonstrate a lack of cross-subsidization is not required. Specifically, Applicants state that the Proposed Transactions fall within the “safe harbor” for transactions that do not involve a franchised public utility with captive customers.

Applicants verify that, based on facts and circumstances known to them or that are reasonably foreseeable, the Proposed Transactions will not result in, at the time of the Proposed Transactions or in the future, any cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company, including: (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 November 21, 2016, with comments, protests, or interventions due on or before December 9, 2016. None were received.

Information and/or systems connected to the bulk system involved in these transactions 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 Transactions 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.⁵ 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 Transactions are consistent with the public interest and is hereby authorized, subject to the following conditions:

- (1) The Proposed Transactions are authorized upon the terms and conditions and for the purposes set forth in the application;

⁵ *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).

- (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 Transactions within 30 days from 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 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 Transactions result in changes in the status or upstream ownership of Applicants' affiliated qualifying facilities, 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 any appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transactions; and
- (8) Applicants shall notify the Commission within 10 days of the date that the disposition of jurisdictional facilities has been consummated.

The section 203 authorization in this proceeding does not prejudice the Commission's determinations in the license transfer proceedings involving the Hydro Assets.⁶ The authorization in this proceeding is made under section 203 of the FPA, and

⁶ An Application for approval to transfer hydro licenses was filed on November 18, 2016 in Docket Nos. P-1855, P-1892, P-1904, P-2077, and P-2323. *See SUEZ Energy North America, Inc.*, 125 FERC ¶ 61,188, at P 46 (2008) (stating that issues related to hydroelectric relicensing proceedings are wholly separate from, and unrelated to, the Commission's section 203 analysis). *See also Portland General Electric Co.*, 93 FERC ¶ 61,184, at 61,606 (2000); *New England Power Co.*, 82 FERC ¶ 61,179, at n.2, *reh'g denied*, 83 FERC ¶ 61,275, at n.20 (1998) (addressing FPA section 203 applications and stating that the Commission will address license transfer applications in a separate order).

is not an authorization for the licensee to transfer the Facilities until authorization is also received pursuant to section 8 of the FPA.⁷

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

⁷ Section 8 of the FPA, 16 U.S.C. § 801 (2012), provides that the voluntary transfer of any license can only be made with the written approval of the Commission. The project can be operated while the transfer proceeding is ongoing, but the licensee remains the current licensee until the Commission approves the transfer and whatever conditions it imposes are satisfied.

Document Content(s)

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