

154 FERC ¶ 62,067

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION8point3 Energy Partners LP
Kingbird Solar A, LLC
Kingbird Solar B, LLC

Docket No. EC16-41-000

ORDER AUTHORIZING DISPOSITION
OF JURISDICTIONAL FACILITIES

(Issued January 29, 2016)

On November 25, 2015, 8point3 Energy Partners LP (8point3 Partners), Kingbird Solar A, LLC (Kingbird A), and Kingbird Solar B, LLC (Kingbird B) (collectively, Applicants) filed an application pursuant to sections 203(a)(1) and 203(a)(2) of the Federal Power Act (FPA)¹ requesting authorization for the sale by First Solar, Inc. (First Solar) of indirect equity interests in Kingbird A and Kingbird B to 8Point3 Operating Company, LLC (OpCo), a company controlled and partially owned by 8point3 Partners (Proposed Transaction). The jurisdictional facilities involved in the Proposed Transaction consist of market-based rate tariffs, power purchase agreements, shared facilities agreements, associated books, records, and accounts, and interconnection facilities.

OpCo is a Delaware limited liability company jointly owned by 8point3 Partners, First Solar and SunPower Corporation (SunPower, and together with First Solar, Sponsors) that indirectly holds ownership interests in a portfolio of solar projects transferred by the Sponsors as part of an initial contribution of assets approved by the Commission (Initial Contribution).² Applicants state that OpCo currently holds equity interests in approximately 377 megawatts (MW) of solar electric wholesale generation capacity located in the California Independent System Operator Corporation (CAISO) and PJM Interconnection, L.L.C. (PJM) markets and the Imperial Irrigation District (IID) balancing authority area (BAA). OpCo also owns 16 MW of behind the-meter, non-jurisdictional commercial and industrial solar facilities in California and 39 MW of behind-the-meter, non-jurisdictional residential rooftop solar facilities located in nine states. The jurisdictional solar electric generation facilities in which OpCo holds interests

¹ 16 U.S.C. § 824b (2012).

² *8point3 Energy Partners, LP*, 151 FERC ¶ 62,162 (2015).

are all either qualifying facilities under the Public Utility Regulatory Policies Act of 1978 or directly owned by public utilities with market-based rate authorizations subject to the Commission's jurisdiction.

Applicants state that 8point3 Partners owns a minority economic interest in OpCo and controls OpCo through the ownership of a non-economic, managing member interest. The majority of the economic interests in OpCo are held by the Sponsors and 8point3 Partners is indirectly controlled by the Sponsors.

Applicants state there are two classes of limited partnership interests in 8point3 Partners. According to Applicants, the Class A Shares were previously sold to the public in an initial public offering in June 2015 and are currently publically traded. The Class A shares represent a minority of the limited voting rights in 8point3 Partners but are entitled to 100 percent of the economic interest in 8point3 Partners. The Class B Shares are held by the Sponsors, do not carry any economic interest and represent a majority of the limited voting rights in 8point3 Partners.

Applicants state that 8point3 Partners is a yieldco formed by the Sponsors as a vehicle for monetizing the value of certain of their contracted solar electric generation assets. 8point3 Partners is able to make predictable cash distribution to the owners of its Class A shares as the result of its ownership interest in OpCo and OpCo's ownership interests in the contracted generation assets acquired in the Initial Contribution. Applicants state that in order to ensure that cash distributions by 8point3 Partners are maintained and increase over time, each of the Sponsors has entered into a Right of First Offer Agreement (ROFO Agreement) with OpCo pursuant to which the Sponsors will sell interests in certain of its generation facilities to OpCo in certain circumstances. The Proposed Transaction for which approval is sought will occur pursuant to First Solar's ROFO Agreement with OpCo.

Applicants state that First Solar is a Delaware corporation engaged in the business of manufacturing thin film solar photovoltaic modules for sale, and developing solar power generating facilities through special purpose project companies. According to Applicants, First Solar typically sells the generating projects it develops to purchasers and provides ongoing operations and maintenance services for the facilities under the direction of the new owners. First Solar's stock is publicly traded. Applicants maintain that JCL FSLR Holdings, LLC (JCL FSLR Holdings), an investment vehicle formed for the benefit of members of the Walton family, holds 24.8 percent of the outstanding shares of First Solar. Applicants assert that no other entity directly or indirectly owns, controls, or holds, with power to vote, 10 percent or more of the voting securities of First Solar. Furthermore, Applicants represent that neither JCL FSLR Holdings nor any person or entity controlling JCL FSLR Holdings, directly or indirectly owns, controls, or holds, with power to vote, 10 percent or more of the voting securities of any company owning (i) electric generation, transmission or distribution facilities other than through First

Solar, (ii) intrastate natural gas pipelines, (iii) intrastate natural gas storage or distribution facilities, (iv) sites for generation capacity development, or (v) physical coal supply sources and ownership or control over who may access transportation of coal supplies.

Applicants state that Kingbird A is a Delaware limited liability company indirectly owned by First Solar that owns a 20 MW photovoltaic generating facility (Kingbird A Project) located in Kern County, California. The Kingbird A Project is expected to begin commercial operation in early 2016 and will interconnect to transmission facilities owned by Southern California Edison Company within the CAISO market. The entire output of the Kingbird A Project is committed to the City of Pasadena pursuant to a long-term power purchase agreement.

Applicants state that Kingbird B is a limited liability company indirectly owned by First Solar that owns a 20 MW photovoltaic generating facility (Kingbird B Project) located in Kern County, California. The Kingbird B Project will also interconnect to transmission facilities owned by Southern California Edison Company. Applicants state the entire output of the Kingbird B Facility is committed to Southern California Edison Company pursuant to a long-term power purchase agreement.

Applicants state that SunPower is a vertically-integrated solar products and services company organized in Delaware that is publically traded. Applicants state that Total Energies Nouvelles Activités USA, a wholly owned subsidiary of Total S.A. (Total) owns, approximately 60 percent of the issued and outstanding shares of SunPower's common stock. No other entity directly or indirectly owns, controls, or holds, with power to vote, 10 percent or more of SunPower's outstanding voting securities.

Applicants state that Total is a multinational energy company with operation in more than 130 countries. In the U.S., affiliates of Total own two Commission-regulated crude oil pipelines, and various intrastate natural gas and other pipelines that are used to service industrial operations in Texas and Louisiana. Affiliates of Total also have interests in qualifying cogeneration facilities in Texas.

Applicants state that, under the terms of each ROFO Agreement in the event that a Sponsor decided to sell certain equity interests in certain electric generation facilities it must first offer the interests to OpCo and attempt to negotiate the commercial terms and conditions of a sale to OpCo in good faith. Applicants state that First Solar has decided to make an offer to sell equity interests in Kingbird A and Kingbird B that are subject to the ROFO Agreement with OpCo. Thus, First Solar and OpCo are negotiating the sale of such interests to OpCo through the Proposed Transaction.

Applicants state that the Proposed Transaction is consistent with the public interest and will not have an adverse impact on competition, rates, or regulation. With respect to

horizontal competition, Applicants state the entire output of Kingbird A and Kingbird B is fully committed to unaffiliated third parties pursuant to long-term contracts. Applicants therefore state that the Proposed Transaction would not result in an overlap of generation in any relevant geographic market.

With regard to vertical market power, Applicants state that the Proposed Transaction will not have an adverse effect. Applicants state that neither OpCo nor the Sponsors, nor any of their affiliates owns or controls any electric transmission or distribution facilities other than the limited interconnection facilities necessary for interconnecting generation facilities to the transmission grid. Furthermore, Applicants explain that neither OpCo nor the sponsors, nor any of their affiliates owns or controls in any relevant geographic market: (i) intrastate natural gas transportation or storage facilities or natural gas distribution facilities, (ii) sites for generation capacity development that could constitute a barrier to entry to electric generation, (iii) physical coal supply sources, or (iv) coal transportation. Therefore Applicants conclude that the Proposed Transaction does not raise any vertical market power concerns.

Applicants state that the Proposed Transaction will not have an adverse effect on the rates charged to either wholesale sales or transmission service customers. After consummation of the Proposed Transaction, Applicants state that all wholesale sales of electric energy by generation-owning entities in which OpCo or the Sponsors own interests and that compete in the wholesale market will be made pursuant to market-based rate authority granted by the Commission. Applicants also state that while Kingbird A and Kingbird B have not yet obtained market-based rate authority, the entire output of their generating facilities is already committed pursuant to long-term contracts and therefore cannot have an adverse effect on wholesale rates. Finally, Applicants represent that none of OpCo, the Sponsors, the ROFO Utilities, or any of their affiliates have captive wholesale sales customers or provides any transmission service to third parties.

Applicants assert that the Proposed Transaction will have no adverse effect on regulation. Applicants' state that the Commission will continue to have the same jurisdiction over wholesale sales of electric energy by OpCo, First Solar, SunPower and their affiliates after the Proposed Transaction is consummated as it had before. Applicants further state that the Proposed Transaction has no effect on state commission regulation and does not require any state commission approval.

Applicants state that the Proposed Transaction will not result in the cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company. According to Applicants, the Proposed Transaction falls within one of the "safe harbors" established by the Commission, because the Proposed Transaction does not involve a franchised public utility associate company that has captive ratepayers.

Additionally, Applicants verify that, based on facts and circumstances known to them 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 contracts 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 27, 2015, with comments, protests or interventions due on or before December 16, 2015. 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.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 this order;
- (2) Applicants must inform the Commission of a 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 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 Transaction results in changes in the status or the upstream ownership of Applicants' 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) Applicants shall make 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, 70 Fed. Reg. 8,253 (Feb. 18, 2005), 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 acquisition of the 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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