

142 FERC ¶ 62,066  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Fox Energy Company LLC  
Fox Energy OP, L.P.  
Fox River Power, LLC  
Wisconsin Public Service Corporation

Docket No. EC13-56-000

ORDER AUTHORIZING DISPOSITION OF  
JURISDICTIONAL FACILITIES

(Issued January 29, 2013)

On December 28, 2012, Wisconsin Public Service Corporation (WPSC), Fox Energy Company LLC (Fox Energy), Fox Energy OP, L.P. (Fox OP), and Fox River Power, LLC (Fox River) filed a joint application under sections 203(a)(1) of the Federal Power Act (FPA)<sup>1</sup> requesting Commission authorization for WPSC to purchase and for Fox OP and Fox River (Sellers) to sell 100 percent of the membership interests in Fox Energy, the owner of the Fox Energy Center (Fox Plant) (Proposed Transaction).<sup>2</sup> The jurisdictional facilities consist of interconnection facilities, market-based rate tariffs, and associated contracts, books and records.

Fox Energy is a single asset company that engages in the production and sale of electricity from the Fox Plant. Fox Energy sells this power pursuant to market-based rates and has no native load customers. Fox Energy's principal customer is WPSC which purchases approximately 500 megawatts (MW) and associated energy from the Fox Plant and supplies the natural gas used by the Fox Plant to generate that amount of electric power. Fox Energy sells the energy equivalent of approximately 50 MW of the Fox Plant's output, related to the Fox Plant's duct burning capability, in the Midwest Independent Transmission System Operator, Inc. (MISO) organized markets.

Fox OP is a Delaware limited partnership owned by Aircraft Services Corporation, which has a 1 percent general partnership interest, and General Electric Credit

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<sup>1</sup> 16 U.S.C. § 824b (2006).

<sup>2</sup> Immediately after closing of the Proposed Transaction, Fox Energy through an internal reorganization will be merged with and into WPSC, which will become the direct owner and operator of the Fox Plant. Applicants state that such reorganization, pursuant to section 33.1(c)(6) (2012) of the Commission's regulations, qualifies for blanket authorization.

Corporation of Tennessee, which has a 99 percent limited partnership in Fox OP. Both of Fox OP's owners are wholly-owned, indirect subsidiaries of the General Electric Company.

Fox River, a Delaware limited liability company, is a wholly-owned subsidiary of Tyr Energy, Inc. which in turn is owned by ITOCHU International, Inc. (ITOCHU International), which holds a 20 percent interest, and I-Power Investment Inc. (I-Power Investment), which holds an 80 percent interest. ITOCHU International, a New York corporation, is a wholly-owned subsidiary of ITOCHU Corporation, a Japanese corporation. I-Power Investment is a Delaware corporation and is a wholly-owned subsidiary of ITOCHU Corporation.

WPSC is a non-transmission owning member of MISO and a participant in MISO's various power markets. WPSC sells power under cost-based and market-based wholesale rates to customers in Eastern Wisconsin and the Upper Peninsula of Michigan. WPSC owns approximately 2,240 MW of summer seasonal capacity, and also purchases approximately 930 MW of summer seasonal capacity under long-term contracts which include the 500 MW purchase from the Fox Plant. WPSC is a wholly-owned subsidiary of Integrys Energy Group, Inc. (Integrys), which is a diversified energy holding company with both electric and gas distribution utility subsidiaries. The Integrys subsidiaries operating in the Midwest serve approximately 2.2 million electric and gas customers in Illinois, Michigan, Minnesota and Wisconsin. WPSC has only one public utility with native load customers, Upper Peninsula Power Company (UPPCO), which is chiefly in the electric distribution business and is a wholly-owned subsidiary of Integrys. UPPCO is also a non-transmission owning member of MISO and a participant in MISO's various power markets. UPPCO does not sell power under cost-based wholesale rates and does not provide transmission service.

Integrys is a partial indirect owner of American Transmission Company, LLC (ATC), which owns all the transmission in Eastern Wisconsin and the Upper Peninsula of Michigan as well as in a small portion of Illinois. ATC's ownership includes the transmission assets which connect WPSC and UPPCO to the MISO transmission system. ATC is operated as an independent company without Integrys control. MISO exercise operational control over the ATC transmission facilities and the MISO Tariff controls access to those transmission facilities.

The Fox Plant is a gas-fired combined cycle electric generation facility with a summer rating of approximately 548 MW and a winter rating of approximately 638 MW. Based on summer conditions, the facility can produce approximately 500 MW (net plant output) in combined cycle operation, with an additional 50 MW of peaking capacity available with duct firing. WPSC acts as the Scheduling Agent to bid the energy from the Fox Plant's base capacity and the duct burners into the MISO market, and to settle all payments and charges with MISO.

Pursuant to the Purchase and Sale Agreement (PSA), Sellers will sell their respective 50 percent membership interests in Fox Energy to WPSC. The PSA provides in Section 2.01 that the existing Tolling Agreement between WPSC and Fox River will terminate on the closing of the sale to WPSC. The PSA also includes a form of a CSA Management Agreement (CSAMA) which the parties will execute upon the closing of the Proposed Transaction. The CSAMA provides protection against the risk of higher costs associated with replacement or repair of certain of the Fox Plant's gas turbines parts and/or the conversion of the Fox Plant to update gas turbine technology. The PSA also incorporates a "Form of New Tolling Agreement" that will become effective July 31, 2013 if the Proposed Transaction has not closed by that date and will effectively extend the two terms of the existing Tolling Agreement for three years. The existing Tolling Agreement terminates in two equal tranches, each representing 50 percent of the Fox Plant's non-duct capacity, on May 31, 2015 and May 31, 2016, which dates would be extended to May 31, 2018 and May 31, 2019 pursuant to the New Tolling Agreement.

Applicants state that the Proposed Transaction is consistent with the public interest and will have no adverse effect on competition, rates, or regulation, nor will it result in any cross-subsidization or the pledge or encumbrance of utility assets to any associated company. With respect to horizontal market power concerns, Applicants state that WPSC already exercise control over 500 MW of the Fox Plant's capability through the Tolling Agreement, and also the additional 50 MW of duct capability through its role as the MISO scheduling agent. Applicants state that the Proposed Transaction lacks adverse competitive effects because WPSC and the Fox Energy Center are located within the operating area of MISO, which has Commission-approved market power monitoring and mitigation procedures. Further, Applicant's state that the Fox Plant's capacity represents approximately 0.4 percent of the 142,000 MW of installed generating capacity located in the MISO market. In addition, Applicants state that the 50 MW of the Fox Plant's capacity not already under contract to WPSC represents 0.04 percent of MISO generating capacity.

With respect to vertical market power issues, Applicants state that the Proposed Transaction does not create or enhance the ability of WPSC or its affiliates to exercise market power in downstream electricity markets by control over the supply of natural gas or other inputs used by rival producers of electricity. Applicants state that the only electric transmission which WPSC will acquire as a consequence of the Proposed Transaction will be the Fox Plant's three 18 kV/345 step-up transformers, a 345 kV transmission line extending from the Fox Plant to the ATC transmission system, and miscellaneous equipment. Applicants also state that these are exclusive use facilities whose sole function is the delivery of the Fox Plant's energy to the grid. In addition, Applicants state that WPSC does not own or control network transmission facilities since WPSC is connected to the grid through transmission facilities which are owned by ATC. Moreover, Applicants state that ATC does not control access to its transmission facilities,

all of which is under the control of the MISO tariff. Further, Applicants state that nothing in the Proposed Transaction will give WPSC or any WPSC affiliate control over sites for rival generation plants or over any other inputs to electric generation.

With regard to the effect on rates, Applicants state that the Proposed Transaction will not have an adverse effect on rates for transmission service because WPSC does not own transmission facilities or provide transmission service. WPSC pledges to hold harmless its five cost-based wholesale requirements customers who are served under identical cost-based formula rates that are contained in its W-1A Tariff (Tariff Customers). WPSC states that it will refrain from recovering any component of Fox ownership and non-fuel operating cost without making a filing with the Commission. WPSC states that this commitment extends to and includes the cost of acquiring the Fox Plant, the buyout of the remaining term of the existing Tolling Agreement, and certain additional plant-related costs. WPSC also states that compliance with the aforesaid Rate Procedures assures that Tariff Customers will not pay for related costs that would exceed the benefits that will accrue to the Tariff Customers as a consequence of WPSC's purchase of the Fox Plant. WPSC states that this commitment would include all transaction-related costs, which is interpreted to include not only costs related to consummating the Proposed Transactions.<sup>3</sup> The Commission will be able to monitor the Applicants' hold harmless provision under its authority under section 301 (c) of the FPA and the books and records provision of PUHCA 2005, and the commitment is fully enforceable based on the Commission's authority under section 203 of the FPA.<sup>4</sup>

With respect to the effect on regulation, Applicants state that the Public Service Commission of Wisconsin and the Michigan Public Service Commission and the Commission will continue to exercise jurisdiction over WPSC and its affiliates after the Proposed Transaction just as they have before the Proposed Transaction.

Applicants assert 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 closing or in the future, cross-subsidization of a non-utility associate company or the pledge or encumbrance of assets of a traditional public utility that has captive customers or that owns or provides transmission service over jurisdictional facilities for the benefit of an associate company. Applicants state that the Proposed Transaction will not result in, now 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

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<sup>3</sup> *PPL Corporation and E.ON U.S. LLC*, 133 FERC ¶ 61,083 (2010).

<sup>4</sup> *PPL Corporation and E.ON U.S. LLC*, 133 FERC ¶ 61,083 (2010), *ITC Midwest LLC and Northern States Power Company*, 133 FERC ¶ 61,169 (2010), and *BHE Holdings Inc. and Main & Maritimes Corporation*, 133 FERC ¶ 61,231 (2010).

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 December 31, 2012, with comments, protests, or interventions due on or before January 18, 2013. ATC filed a timely motion to intervene raising no issues. Notices of intervention and unopposed timely filed motions to intervene are granted pursuant to the operation of Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214) (2012). Any opposed or untimely filed motion to intervene is governed by the provisions of Rule 214.

If Applicants seek to recover transaction-related costs through their wholesale power or transmission rates they must submit a compliance filing that details how they are satisfying the hold harmless requirement. If Applicants seek to recover transaction-related costs in an existing formula rate that allows for such recovery, then that compliance filing must be filed in the section 205 docket in which the formula rate was approved by the Commission, as well as in the instant 203 docket. In this case the filing would be a compliance filing in both the section 203 and section 205 dockets. If Applicants seek to recover transaction related costs in a filing whereby they are proposing a *new* rate (either a new formula rate or a new stated rate), then that filing must be made in a *new* section 205 docket as well as in the instant 203 docket. In this case the filing would be a compliance filing in the section 203 docket, but a rate application in the section 205 docket. The Commission will notice such filings for public comment. In such filings, Applicants must: (1) specifically identify the transaction-related costs they are seeking to recover, and (2) demonstrate that those costs are exceeded by the savings produced by the transaction, in addition to any requirements associated with filings made under section 205.<sup>5</sup> Such a hold harmless commitment will protect customers' wholesale power and transmission rates from being adversely affected by the proposed transaction.

Information and/or systems connected to the bulk system involved in this transaction may be subject to reliability and cybersecurity standards approved by the

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<sup>5</sup> *Id.*

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 this 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>6</sup> The foregoing authorization may result in a change in status. Accordingly, Applicants are advised that they must comply with the requirements of Order No. 652. In addition, Applicants shall make any necessary filings under section 205 of the FPA to implement the 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 for the purposes set forth in the application;
- (2) 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

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<sup>6</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).

- Commission;
- (3) 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;
  - (4) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate;
  - (5) If the Proposed Transaction results in changes in the status or upstream ownership of Applicants' affiliated qualifying facilities, if any, an appropriate filing for recertification pursuant to 18 C.F.R. § 292.207 (2012) shall be made;
  - (6) Applicants shall make appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction;
  - (7) Applicants shall notify the Commission within 10 days of the date that the disposition of jurisdictional facilities has been consummated; and
  - (8) WPSC shall account for the transaction in accordance with Electric Plant Instruction No. 5 and Account 102, Electric Plant Purchased or Sold, of the Uniform System of Accounts. WPSC shall submit its final accounting entries within six months of the date that the transaction is consummated, and the accounting submission shall provide all accounting entries and amounts related to the transfer along with narrative explanations describing the basis for the entries.

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 (2012). 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 (2012).

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