

UNITED STATES OF AMERICA 151 FERC ¶ 62,126  
FEDERAL ENERGY REGULATORY COMMISSION

Osage Wind, LLC

Docket No. EC15-66-000

ORDER AUTHORIZATING DISPOSITION  
OF JURISDICTIONAL FACILITIES

(Issued May 20, 2015)

On January 29, 2015, as supplemented on April 27, 2015, Osage Wind, LLC (Osage Wind or Applicant) filed an application pursuant to section 203(a)(1) of the Federal Power Act (FPA)<sup>1</sup> requesting Commission authorization for the disposition of jurisdictional facilities resulting from the transfer to several investors (Class B Equity Investors)<sup>2</sup> of non-controlling, passive equity interests in Osage Wind (Proposed Transaction). The jurisdictional facilities involved in the Proposed Transaction consist of Osage Wind's market-based rate tariff and rate schedules, limited interconnection facilities, power purchase agreement, and various book and records.

Although Osage Wind states that the Proposed Transaction may not require Commission approval under FPA section 203(a)(1), it nevertheless asks the Commission to approve the Application. This order approves the Proposed Transaction without making any determination of jurisdiction.<sup>3</sup>

Osage Wind is a Delaware limited liability company that owns a 150.4 megawatt (MW) wind power project currently under development and located in Osage County, Oklahoma (Osage Project). The Osage Project is located within the balancing authority area (BAA) controlled by Associated Electric Cooperative, Inc. (AECI) in the southeast region. The Osage Project's output is committed to AECI under a long-term power purchase agreement. Applicant states that it expects to begin testing the Osage Project in May 2015 and to complete the Osage Project in June 2015. The Commission has authorized Osage Wind to make

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<sup>1</sup> 16 U.S.C. § 824b (2012).

<sup>2</sup> The Class B Equity Investors are: JP Capital Corporation, Antrim Corporation, and Northwestern Mutual.

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

wholesale sales of electric energy, capacity, and ancillary services at market-based rates. Applicant states it will own no transmission facilities other than limited interconnection facilities needed to connect the Osage Project with the AECI-controlled transmission system.

The membership interests in Osage Wind are owned by Enel Kansas, LLC (Enel Kansas) and EFS Osage Wind, LLC (EFS Osage). Enel Kansas is the managing member of Osage Wind, and has the right to control Osage Wind and the Osage Project on a day-to-day basis. Enel Kansas is a wholly-owned subsidiary of Enel Green Power North America, Inc. (Enel NA), a Delaware corporation. Enel NA is designated as the manager of Osage Wind. Enel NA's principal business is owning, operating, and developing hydroelectric and renewable energy generation facilities throughout the United States and Canada. Enel NA is a wholly-owned subsidiary of Enel Green Power International BV, a company organized under the laws of The Netherlands.

#### **The Class B Equity Investors:**

According to the Applicant, JPM Capital Corporation (JPM Capital) is an indirect wholly-owned subsidiary of JPMorgan Chase & Co. (JPMorgan Chase), an international financial services company. JPM Capital and JPMorgan Chase are not primarily engaged in energy-related business activities. None of JPMorgan Chase's affiliates own any electric transmission (other than limited interconnection facilities) or interstate natural gas pipeline facilities. Applicant states that JPMorgan Chase does not control and is not affiliated with any entity that controls any inputs to electricity products or electric power production in the AECI BAA.

According to the Applicant, through direct or indirect subsidiaries, JPMorgan Chase has a number of energy affiliates that engage in wholesale sales of electricity in the United States and that own various interests in electric generating facilities. Subsidiaries of JP Morgan Chase also may be engaged in the management of mutual funds and/or other collective investment vehicles and separate accounts as a fiduciary on behalf of persons who hold interests in such funds, or other investment vehicles or separate accounts; and such funds, investment vehicles, or other accounts may buy and sell securities of public utilities and other companies engaged in energy-related activities without exercising control over such public utilities or other companies. Applicant states that none of JPM Capital or its affiliates owns or controls any electric generation capacity in the AECI BAA.

Applicant states that Antrim Corporation (Antrim) is a Delaware corporation and is wholly-owned by State Street Bank and Trust Company (State

Street Bank). State Street Bank is an indirect wholly-owned subsidiary of State Street Corporation. State Street Bank is a publicly-owned Massachusetts corporation that is a financial holding company regulated by the Federal Reserve System. State Street Bank and State Street Corporation are not primarily engaged in energy-related business activities. Applicant states that Antrim, State Street Bank and State Street Corporation own or have a number of subsidiaries or affiliates that own directly or indirectly interests (including passive ownership interests) in electric generation facilities in various markets across the United States, but none of those subsidiaries or affiliates is a traditional franchised utility. Applicant states that Antrim, State Street Bank, State Street Corporation, and their subsidiaries or affiliates do not own electric transmission facilities (other than limited interconnection facilities) or interstate natural gas pipeline facilities. Applicant notes that none of Antrim, State Street Bank, and State Street Corporation, and their subsidiaries or affiliates currently has a direct or indirect ownership interest (including passive ownership interest) in any electric generation facilities within the AECI BAA. In addition, Applicant states that none of Antrim, State Street Bank, State Street Corporation, and their subsidiaries or affiliates own or control any inputs to electricity products or electric power production, including any inputs to electric generation located in the AECI BAA.

Applicant states that subsidiaries of State Street Corporation may hold other debt and equity positions from time to time in energy companies in connection with their broker/dealer, financial trading, or banking activities. Applicant notes that these are non-controlling, passive interests that do not give State Street Corporation any discretion as to how and when power may be sold. Subsidiaries of State Street Corporation also may be engaged in the management of mutual funds and/or other collective investment vehicles as a fiduciary on behalf of persons who hold interests in such funds or other investment vehicles, and such funds or other investment vehicles may buy and sell securities of public utilities and other companies engaged in energy-related activities without exercising control over such public utilities or other companies.

According to Applicant, Northwestern Mutual is a Wisconsin mutual insurance company. Northwestern Mutual and its affiliates own certain passive, non-managing interests in entities that own or control electric generation facilities located in various markets in the United States. Applicant states that neither Northwestern Mutual nor any of its affiliates own or control any electric generation capacity in the AECI BAA. Also, according to Applicant, one of Northwestern Mutual's affiliates holds a passive interest in an entity that owns a 600 MW transmission line located within the PJM Interconnection, L.L.C. BAA. Other than interests in the transmission line, neither Northwestern Mutual nor any of its affiliates own or control any electric transmission or distribution facilities in the United States, aside from passive interests in limited interconnection

equipment. In addition, Applicant states that Northwestern Mutual and its affiliates do not own or control any inputs to electricity products or electric power production, including any inputs to electric generation located in the AECI BAA. Applicant states that Northwestern Mutual is not affiliated with any jurisdictional public utility with a franchised electric service territory in the United States.

Applicant states that, prior to the closing of the Proposed Transaction, Enel Kansas and EFS Osage will form Class A Holdco as a Delaware limited liability company and subsidiary of Enel Kansas and EFS Osage for the sole purpose of owning the Class A Membership Interests in Osage Wind upon the consummation of the Proposed Transaction. Applicant explains that, immediately prior to the closing of the Proposed Transaction, Enel Kansas and EFS Osage will transfer 100 percent of the membership interests in Osage Wind to Class A Holdco in exchange for membership interests in Class A Holdco.<sup>4</sup> Enel Kansas and EFS Osage will each hold 50 percent membership interest in Class A Holdco. According to Applicant, Enel Kansas will be the managing member of Class A Holdco and, as such, Enel Kansas will have the right to control Class A Holdco and, through Class A Holdco, Osage Wind, on a day-to-day basis. Enel NA will be designated the manager of Class A Holdco.

According to the application, Applicant's Class B Membership Interest will be held by Class A Holdco. Applicant states that, pursuant to the Proposed Transaction, each Class B Equity Investor or its affiliate will make a capital contribution to Applicant at the time of the Osage Project's commercial operation date, and, in exchange, the Class B Equity Investors each will receive a percentage of the non-controlling, passive, Class B Membership Interests in Applicant in proportion to its respective capital contribution to Applicant. Applicant notes that, subject to the provisions of the Fifth Amended and Restated Limited Liability Company Agreement of Osage Wind, each of the Class B Equity Investors will receive certain tax benefits and cash distributions, and rights to cash or other assets upon liquidation. The Class B Equity Investors will have only limited rights with respect to the actions of Applicant, such as consent rights necessary for the Class B Equity Investors to protect their economic investment interests. Applicant states that none of the Class B Equity Investors will, by virtue of the Proposed Transaction or their Class B Membership Interests, have the ability to manage Applicant or the Osage Project. Applicant states that they will have only non-controlling, passive equity interests in Applicant. Upon the closing of the

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<sup>4</sup> Applicant states that the transfer of membership interests in Osage Wind from Enel Kansas and EFS Osage to Class A Holdco immediately prior to the consummation of the Proposed Transaction, and the simultaneous issuance of membership interest in Class A Holdco to Enel Kansas and EFS Osage, qualifies for blanket authorization under Section 203(a)(1) of the FPA with respect to each of Enel Kansas and EFS Osage.

Proposed Transaction, Applicant's total membership interests will be divided into Class A Membership Interests and Class B Membership Interests. Class A Holdco will own one hundred percent of Applicant's Class A Membership Interests and the Class B Equity Investors will collectively own one hundred percent of Applicant's non-controlling, passive Class B Membership Interests.

Applicant states that following closing of the Proposed Transaction: (1) Applicant will continue to have operational control and full ownership of its jurisdictional assets; (2) Class A Holdco will own one hundred percent of the Class A Membership Interests in Applicant; (3) Class A Holdco will be the Managing Member of Applicant with the right to control Applicant on a day-to-day basis; (4) Enel Kansas and EFS Osage will own one hundred percent of the membership interests in Class A Holdco; (5) Enel Kansas will be the managing member of Class A Holdco with the right to control Class A Holdco and, through Class A Holdco, Applicant on a day-to-day basis; and (6) the Class B Equity Investors will own the Class B Membership Interests in Applicant.

Applicant states that the Proposed Transaction is consistent with the public interest and will not adversely affect competition, rates or regulations. With respect to competition, Applicant states that the Proposed Transaction will have no adverse effect on competition. Applicant states that Proposed Transaction does not raise any horizontal market power concerns because the full output of the Osage Project is committed to AECl, a non-affiliated purchaser, under a long-term power purchase agreement, and the Proposed Transaction will have no effect on this arrangement.

Applicant states that the Class B Equity Investors' acquisition of the Class B Membership Interests in Osage Wind will not result in a change in the market share of any of the Class B Equity Investors because none of the Class B Equity Investors will gain control over the Osage Project as a result of the Proposed Transaction. Applicant states that the Class B Equity Investors' interests in Osage Wind give them only those limited rights that are necessary to protect their investments. The Class B Equity Investors will not have voting control over wholesale power sales or day-to-day operation of power generation or transmission facilities. In any event, Applicant states that even if the Proposed Transaction resulted in the Class B Equity Investors acquiring control of the Osage Project, the acquisition would shift no share of the market to the Class B Equity Investors or their affiliates, due to the output of the Osage Project being fully committed under a long-term power purchased agreement.

Applicant also states that the Proposed Transaction does not raise vertical market power concerns. Applicant does not own or control any transmission facilities or other inputs to power production, as Applicant's jurisdictional assets are currently limited to its electric tariff and power purchase agreement. Applicant asserts that, when the Osage Project is operational, it will own no transmission facilities in any market other than those

limited interconnection facilities necessary for connecting the Osage Project with the transmission system, nor will Applicant own or control other inputs to power production. Applicant further states that, as a result of the Proposed Transaction, Applicant will not become affiliated with any entity or person that owns, controls, or operates transmission facilities or other inputs to power production in the same market as the Osage Project; and none of Applicant or Class B Equity Investors, or their affiliates, owns or controls any unique sites in the United States to develop new generating capacity that raise vertical market power concerns.

With respect to rates, Applicant states that the Proposed Transaction will not have an adverse effect on rates. Applicant states that the Proposed Transaction will not subject wholesale customers to increased rates, and once the Osage Project becomes operational wholesale power sales of electric energy will be made pursuant to its market-based rate tariff, and the long-term power purchase agreement will not be affected by the Proposed Transaction.

With respect to regulation, Applicant states that the Proposed Transaction will not adversely affect state or federal regulation. Applicant notes that the Proposed Transaction is not subject to regulation by any state entity and the Proposed Transaction will not affect the extent to which the Commission may regulate Applicant. Therefore, Applicant 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.

Applicant states 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. Applicant asserts that the Proposed Transaction falls within one of the “safe harbors” adopted by the Commission for which detailed explanation and evidentiary support to demonstrate a lack of cross-subsidization is not required. Applicant more specifically states that the Proposed Transaction does not involve a franchised public utility with captive customers.

Additionally, Applicant verifies that, based on the 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 nor 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 January 29, 2015 and April 28, 2015, with comments, protests or interventions due on or before February 19, 2015 and May 7, 2015. None was filed. 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). Any opposed or untimely filed motion to intervene is governed by the provision of Rule 214.

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 transaction is based on such examination ability.

Information and/or systems connected to the bulk power system involved in this Proposed 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.

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>5</sup> The foregoing authorization may result in a change in status. Accordingly, Applicants are advised that it must comply with the requirements of Order No.652. In addition,

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<sup>5</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).

Applicants shall make appropriate 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 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) 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 determination of cost or any other matter whatsoever now pending or which may come before the 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 the upstream ownership of Applicant's affiliated Qualifying Facilities, if any, an appropriate filing for recertification pursuant to 18 C.F.R. § 292.207 shall be made;
- (6) Applicant shall make appropriate filings under section 205 of the FPA, as necessary, to implement the Transaction;
- (7) Applicant must inform the Commission of any changes in circumstances that would reflect a departure from the facts the Commission relied upon in authorizing the Proposed Transaction; and



- (8) Applicant shall notify the Commission within 10 days of the date that the disposition 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. 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.

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

