

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Black Hills/Colorado Electric Utility Company, LP
000
Peak View Wind Energy LLC

Docket No. EC16-191-

ORDER AUTHORIZING THE ACQUISITION OF EXISTING GENERATION
FACILITIES

(Issued November 1, 2016)

On September 26, 2016 Black Hills/Colorado Electric Utility Company, LP (Black Hills Colorado) and Peak View Wind Energy LLC (Peak View, with Black Hills Colorado, Applicants) filed an application pursuant to section 203(a)(1) of the Federal Power Act (FPA)¹ requesting authorization for Black Hills Colorado to acquire 100 percent of the membership interests in Peak View from Invenergy Wind Development Colorado, LLC, then Peak View will merge with and into Black Hills Colorado (Proposed Transaction). The jurisdictional facilities involved with the Proposed Transaction include Peak View's market-based rate tariff, associated books records, and accounts and related agreements and interconnection facilities.

Applicants state that Peak View owns an approximately 60 megawatt (MW) wind-powered electric generating facility (Peak View Facility) located in Huerfano and Las Animas Counties, Colorado. The Peak View Facility is interconnected with the Black Hills Colorado transmission system. Applicants state that Peak View does not have any energy subsidiaries, and other than the Peak View Facility and its related interconnection facilities, does not own any generation facilities, or transmission facilities. The Peak View Facility is located in the Public Service Company of Colorado balancing authority area.

Peak View is a wholly owned subsidiary of Invenergy Wind Development Colorado, LLC which is, in turn, owned by Invenergy Wind, LLC. Applicants state that Invenergy is affiliated with Spindle Hill Energy, LLC which owns and operates a 494 MW dual gas-/oil fired generation facility and Spring Canyon Energy LLC which owns and operates a 60 MW wind-powered generation facility both within the Public Service Company of Colorado balancing authority area.

Black Hills Colorado is a wholly owned subsidiary of Black Hills Corporation (Black Hills). Black Hills Colorado is a vertically integrated public utility providing electric generation, transmission and distribution service in south central Colorado, within the Public Service Company of Colorado balancing authority area. Applicants state that following the closing of the Proposed

¹ 16 U.S.C. § 824 (2012).

Transaction, the Peak View Facility will be placed into full commercial operations as a Black Hills Colorado owned and operated generation resource.

Applicants state that Black Hills is an energy holding company that operates utilities and non-regulated energy businesses. Black Hills' electric utility business is conducted in South Dakota, Wyoming, Montana, and Colorado through wholly owned subsidiaries, Black Hills Power, Inc., Cheyenne Light, Fuel and Power Company, and Black Hills Colorado. Black Hills conducts its wholesale energy production business through its wholly owned subsidiary, Black Hills Non-Regulated Holdings (Holdings). Holdings owns Black Hills Electric Generation, LLC which holds a 76.5 percent indirect interest in the Wygen I generation facility, an approximately 90 MW generation facility located near Gillette, Wyoming in the Western Area Power Administration – Colorado-Missouri balancing authority area and a 50.1 percent indirect interest in the Pueblo Airport Generation Facility, which consists of two 100 MW combined cycle gas-fired units in Pueblo, Colorado.

Black Hills also owns an oil and gas exploration and production business and a coal mining business, with a mine located near Gillette Wyoming.

Invenergy Wind Development Colorado will transfer 100 percent of its equity ownership interests in Peak View to Black Hills Colorado. After the transfer of Peak View closes, Black Hills Colorado plans to merge Peak View into Black Hills Colorado, with the result being that Peak View will cease to exist and the Peak View Facility will be directly owned by Black Hills Colorado.

Applicants state that the Proposed Transaction does not raise horizontal market power concerns. Applicants state that, in the Public Service Company of Colorado balancing authority area, the Peak View Facility accounts for less than one percent of the total uncommitted generation capacity and less than one percent of the total installed capacity. Applicants state that the extent of Applicants capacity in the same geographic market is *de minimis*.

Applicants state that the Proposed Transaction presents no vertical market power concerns. Applicants state that the Proposed Transaction does not involve any new combination of transmission or gas assets and, other than the limited interconnection facilities associated with the Peak View Facility, does not involve any electric transmission facilities. Applicants state that Black Hills Colorado provides open access transmission service under its Commission-approved Open Access Transmission Tariff (OATT) and will continue to provide such access following the Proposed Transaction.

Applicants state that the Proposed Transaction will have no adverse effect on rates. Applicants state that each of Peak View and Black Hills Colorado has market-based rate authority and all wholesale sales of energy capacity, and ancillary services will be made at market-based rates following the Proposed Transaction. Applicants state that Peak View does not provide transmission service and none of the facilities acquired by Black Hills Colorado through the Proposed Transaction would adversely affect transmission rates pursuant to

Black Hills Colorado's OATT.

In addition, Black Hills commits to hold its transmission and wholesale power service customers with cost-based rates, as well as its transmission customers, harmless from rate effects for a period of five years. Applicants state that for that five-year period, Black Hills Colorado will not include transaction-related costs in its transmission rates or in any cost-based wholesale requirements, cost-based wholesale power, or cost-based wholesale distribution service rates, except to the extent it can demonstrate that merger-related savings are equal to or in excess of all the transaction-related costs so included in a separate section 205 proceeding.

We accept Black Hills Colorado's commitment to hold transmission customers harmless from costs related to the Proposed Transaction. We interpret Black Hills Colorado's hold harmless commitment to apply to all transaction-related costs, including costs related to consummating the Proposed Transaction, incurred prior to the consummation of the Proposed Transaction, or in the five years after the Proposed Transaction's consummation.

The Commission has established that, where applicants make hold harmless commitments in the context of FPA section 203 transactions, in order to recover transaction-related costs, applicants must demonstrate offsetting benefits at the time they apply to recover those costs. The Commission has clarified its procedures for recovery of such costs under FPA sections 203 and 205.² Consistent with those clarifications, and given the commitment by Black Hills Colorado to hold transmission and wholesale power customers harmless from transaction-related costs, if Black Hills Colorado seeks to recover transaction-related costs incurred prior to the consummation of the Proposed Transaction or in the five years after the consummation of the Proposed Transaction, then Black Hills Colorado must make that filing in a new FPA section 205 docket³ and submit that same filing as a concurrent information filing in this FPA section 203 docket.⁴ The Commission will notice the new FPA section 205 filing for public comment.

In the FPA section 205 proceeding, the Commission will determine first, whether Black Hills Colorado has demonstrated offsetting savings, supported by sufficient evidence, to customers served under Commission jurisdictional rate schedules such that recovery of transaction-related costs is consistent with the hold harmless commitment and, second, whether the resulting new rate is just and reasonable in light of all the other factors underlying the proposed new rate. In the FPA section 205 filing, Black Hills Colorado must: (1) specifically identify

² *Exelon Corp.* 149 FERC ¶ 61,148, at PP 106-109 (2014).

³ The Commission will not authorize the recovery of transaction-related costs in an annual informational filing under existing formula rates.

⁴ Upon receipt, the Commission will not act on or notice the concurrent informational filing.

the transaction-related costs it is seeking to recover, and (2) demonstrate that those costs are exceeded by the savings produced by the Proposed Transaction. Black Hills Colorado must show that the proposed rate is just and reasonable in addition to providing appropriate evidentiary support, such as reasonable documentation and estimates of the costs avoided, demonstrating that transaction-related costs have been offset by transaction-related savings in order to recover those transaction-related costs and comply with its hold harmless commitment. Those savings must be realized prior to, or concurrent with, any authorized recovery of transaction-related costs, and cannot be based on estimates or projections of future savings, but must be based on a demonstration of actual transaction-related savings realized by jurisdictional customers.⁵ The Commission will consider rates not to be “just and reasonable” if they include recovery of costs subject to a hold harmless commitment made in connection with an FPA section 203 application and if applicants fail to show offsetting savings due to the transaction.⁶

The Commission will be able to monitor Applicant’s hold harmless commitment under its authority under section 301(c) of the FPA⁷ and the books and records provision of the Public Utility Holding Company Act of 2005.⁸ Moreover, the commitment is fully enforceable based on the Commission’s authority under section 203 of the FPA.

Applicants state that the Proposed Transaction will have no adverse effect on regulation. Applicants state that following the Proposed Transaction the Commission will no longer regulate Peak View as it will cease to exist, however the Commission will continue to regulate Black Hills Colorado as an FPA public utility and the jurisdictional assets owned by Black Hills Colorado including the Peak View jurisdictional assets. Applicants state that the Proposed Transaction will not have an adverse effect on state regulation with respect to Peak View because Peak View does not have any retail customers and is not subject to jurisdiction by any state public utility commission. Applicants state that the Colorado Public Utilities Commission will continue to regulate Black Hills Colorado and its retail rate authority will not be changed as a result of the Proposed Transaction.

Applicants explain that they must satisfy the following four factors to demonstrate that the Proposed Transaction will not result in cross-subsidization at the time of the Proposed Transaction or in the future: (a) any transfers of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional

⁵ See *Audit Report of National Grid, USA*, Docket No. FA09-10-000 (Feb. 11, 2011) at 55; see also *Ameren Corp.*, 140 FERC ¶ 61,034, at PP 36-37 (2012).

⁶ *Exelon Corp.*, 149 FERC ¶ 61,148 at P 107.

⁷ 16 U.S.C. § 825(c) (2012).

⁸ 42 U.S.C. § 16452 (2012).

transmission facilities, and an associate company; (b) any new issuances of securities by traditional public utility associate companies that has captive customers or that own or provide transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (c) new pledges or encumbrances 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 (d) 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.⁹

Applicants explain specifically that the Proposed Transaction does not threaten any existing customer with cross-subsidization. Prior to the consummation of the Proposed Transaction, the only customer that will have purchased power from the Peak View Facility is Black Hills Colorado. Such sales have been made pursuant to Peak View's market-based rate tariff on file with the Commission. Peak View is not a traditional utility nor does it have captive customers. Applicants state that Black Hills Colorado does not have any cost-based power sales customers, and the Proposed Transaction will not affect the rates charged by Black Hills to its transmission customers. Applicants explain that the transfer by Invenergy Wind Development Colorado, LLC of the ownership interests in Peak View to Black Hills Colorado is not a sale of facilities to an associate company. Applicants state that no new securities will be issued by Black Hills Colorado for the benefit of an associates company in connection with the Proposed Transaction either at the time of the Proposed Transaction or in the future. Applicants state that Black Hills Colorado will not enter into any new pledge or encumbrance for the benefit of an associate company in connection with the Proposed Transaction either at the time if the Proposed Transaction or in the future. Finally, Applicants state that the Proposed Transaction will not result in any new affiliate contract between a non-utility associate company with wholesale or retail customers served under coast-based regulation.¹⁰

The original filing was noticed on September 29, 2016. Comments, protests or interventions were due on or before October 17, 2016. None were filed.

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,

⁹ See Applicant's Exh. M.

¹⁰ See Applicant's Exh. M.

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.¹¹ 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 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 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;

¹¹ *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).

- (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 upstream ownership of Applicant's 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 Transaction;
- (8) Applicants shall notify the Commission within 10 days of the date that the Proposed Transaction has been consummated; and

- (9) Black Hills Colorado shall submit their final accounting entries within six months of the date that the Proposed Transaction is consummated, and the accounting submission shall provide all the 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 (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