

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Drift Sand Wind Project, LLC

Docket No. EC16-186-000

ORDER AUTHORIZING ACQUISITION OF
JURISDICTIONAL FACILITIES

(Issued November 15, 2016)

On September 22, 2016, Drift Sand Wind Project, LLC (Drift Sand) filed an application (Application) pursuant to section 203(a)(1)(A) of the Federal Power Act (FPA)¹ seeking authorization for the disposition of jurisdictional facilities resulting from the acquisition by Bankers Commercial Corporation (Bankers) and one or more unidentified investors (Unidentified Investors and collectively with Bankers, the Class B Equity Investors) of non-controlling, passive equity interests in Drift Sand, which will own certain jurisdictional assets at the time of the consummation of the transaction (Proposed Transaction). According to Drift Sand, the jurisdictional facilities affected by the Proposed Transaction consist of a market-based rate tariff for which Drift Sand has filed an application,² limited and discrete interconnection facilities, a power purchase agreement, and associated books and records.

Drift Sand states that, although the Proposed Transaction may not require authorization under section 203(a)(1) of the FPA, it nevertheless asks the Commission to authorize the Proposed Transaction. This order authorizes the Proposed Transaction without making any determination of jurisdiction.³

Drift Sand states that it is an exempt wholesale generator (EWG) and owns a 108.8 megawatt (MW) wind-powered project (Drift Sand Project) currently under development and located in Grady, Oklahoma, within the Southwest Power Pool (SPP) market. Drift Sand expects the Drift Sand Project to begin testing in late Fall 2016 and expects to commence commercial operation in November 2016 and will interconnect with the transmission system owned by AEP Oklahoma Transmission (AEP) within the SPP market. Drift Sand is committed to sell the full output of the Drift Sand Project under a 25-year power purchase agreement with a non-affiliate, Arkansas Electric

¹ 16 U.S.C. § 824b (2012).

² Market-based rate authorization was granted by order issued in Docket No. ER16-2293-000 on October 20, 2016.

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

Cooperative Corporation (AECC). Drift Sand will own no transmission facilities other than limited interconnection facilities needed to connect the Drift Sand Project with the SPP transmission system.

Drift Sand states that Bankers' function is to invest in physical assets throughout the United States. Bankers is a wholly owned, non-bank subsidiary of MUFG Americas Holdings Corporation (MUAH), a bank holding company that is headquartered in San Francisco, California. MUAH also owns MUFG Union Bank, N.A. (MUB), which provides financial services to consumers. The ultimate parent of Bankers, MUAH, and MUB is Mitsubishi UFJ Financial Group, Inc. (MUFG), a publicly-traded corporation, organized under the laws of Japan. MUFG has multiple subsidiaries, and, with the exception of passive, non-controlling ownership of beneficial interests in assets under lease financing arrangements, passive tax equity investments, and other limited circumstances, neither Bankers, MUAH, MUB, nor any of their affiliates, directly or indirectly own or control any electric generation facilities in the SPP market or in the United States. In addition, neither Bankers, MUAH, MUB:

- a. directly or indirectly own or control any electric transmission facilities in the United States;
- b. engage in wholesale sales of electric energy in the United States;
- c. hold electric transmission rights or natural gas transportation rights in the United States;
- d. directly or indirectly own or control a franchised utility; or
- e. directly or indirectly own any physical natural gas transportation facilities or own or control other physical inputs to electric generation or transmission in the United States.

Drift Sand states that Bankers may seek additional Unidentified Investors to participate in the Proposed Transaction as tax equity investors either at the closing of the Proposed Transaction or for up to one year following the closing date of the Proposed Transaction. Drift Sand states that the identity of such potential investors currently is not known, and, if no other investors participate, Bankers will acquire 100 percent of the non-controlling, passive Class B Membership Interests in Drift Sand. Drift Sand represents that, to the extent that any Unidentified Investors participate in the Proposed Transaction, such investors will satisfy the following criteria to ensure that the Proposed Transaction has no adverse effect on competition, rates, or regulation, and does not raise any cross-subsidization concerns.

Drift Sand states that the Unidentified Investors and their affiliates may own or control electric generation facilities in the SPP market. However, any overlap between

the operations of Unidentified Investors and their affiliates in the SPP market and the operations of Drift Sand, Bankers, and their affiliates in the SPP market will be *de minimis* such that any overlap between the operations of the Unidentified Investors and their affiliates in the SPP market and the operations of Drift Sand, Bankers, and their affiliates in the SPP market will represent no more than two percent of the installed capacity in the relevant market. Therefore, upon closing of the Proposed Transaction or upon the closing of a separate transaction within one year of the closing date of the Proposed Transaction, Drift Sand, Bankers, Unidentified Investors, and their respective affiliates will lack horizontal market power in the relevant market. Drift Sand further commits that:

- (i) Unidentified 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 generating facilities to the transmission grid, facilities for which the Commission has granted a waiver of the requirements 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;
- (ii) Unidentified Investors and their affiliates also will not own or control any essential inputs to electric products or electric generation in the SPP relevant market; and
- (iii) none of the Unidentified Investors or any of their affiliates will be a public utility with a franchised electric service territory in the United States.

Drift Sand states that it will inform the Commission of the identities of Unidentified Investors, and if any Unidentified Investor acquire non-controlling, passive Class B Membership Interests from Bankers at a later date, a separate notice of consummation will be filed for each such disposition and acquisition. Furthermore, in any such notice of consummation, Drift Sand will inform the Commission of the percentage of the Class B Membership Interests acquired by any Unidentified Investor, and Drift Sand will confirm that any Unidentified Investor meets the required criteria. In addition, to the extent that an Unidentified Investor does not satisfy each of the criteria representations, Drift Sand commits to filing a separate FPA section 203 application for Commission authorization for such Unidentified Investor to participate in the Proposed Transaction.

The members of Drift Sand are EFS Renewables Holdings, LLC (EFS), which owns 65 percent of the Class A Membership Interests and Enel Kansas, LLC (Enel Kansas), which owns 35 percent of the Class A Membership Interests and is the managing member of Drift Sand with the sole authority to manage Drift Sand's day to day operations. According to Drift Sand, the Class A Membership Interests owned by EFS, which is a wholly owned, indirect subsidiary of General Electric Company (GE),

represent a passive investment that conveys only limited consent rights necessary to protect EFS's investment in Drift Sand. Enel Kansas is a wholly owned subsidiary of Enel Green Power North America, Inc. (Enel NA), which is a wholly owned subsidiary of Enel Green Power International BV (Enel BV), a company organized under the laws of the Netherlands. Enel BV is a wholly owned subsidiary of Enel S.p.A., an Italian joint-stock company.

GE, through its subsidiaries, is a passive owner and an investor in a number of generating facilities in the United States. Drift Sand states that, while GE affiliates have non-passive interests in generating facilities in the United States, affiliates of GE do not control any generating facilities within the SPP market. Additionally, neither GE nor any of its affiliates is a public utility that has a franchised electric service territory in the United States.

With respect to the Proposed Transaction, just prior to closing, EFS and Enel Kansas will contribute their respective Class A Membership Interests in Drift Sand to Drift Sand Holdings, LLC (Drift Sand Holdings). At the closing of the Proposed Transaction, Bankers, possibly including one or more Unidentified Investors, will make capital contributions to Drift Sand in exchange for 100 percent of the non-controlling passive Class B Membership Interests in Drift Sand. Drift Sand Holdings will hold all the non-passive Class A Membership Interests in Drift Sand after the closing of the Proposed Transaction.

The Drift Sand closing will be implemented pursuant to an Equity Capital Contribution Agreement (ECCA) entered into by and between Enel Kansas, EFS and Bankers. The Unidentified Investors may participate in the Proposed Transaction through an assignment of rights and obligations under the ECCA, or pursuant to a purchase agreement with Bankers, to be negotiated and executed at a later time, in which one or more Unidentified Investors may acquire a portion of Bankers' non-controlling, passive Class B Membership Interests in Drift Sand. In such event and, subject to the provisions of the ECCA and the operating agreement of Drift Sand, the Class B Equity Investors will receive certain tax benefits and cash distributions, and rights to cash upon liquidation. The Class B Equity Investors will have only limited rights with respect to the actions of Drift Sand, which will include only consent rights necessary for the Class B Equity Investors to protect their economic investment interest. The Class B Equity Investors will not, by virtue of the Proposed Transaction or their Class B Membership Interests, have the ability to manage either Drift Sand or the Drift Sand Project.

Applicants state that Drift Sand Holdings will directly own all of the non-passive Class A Membership Interests and will be designated as managing member of Drift Sand. Accordingly, Drift Sand Holdings, as managing member of Drift Sand, will have the right to control Drift Sand and Drift Sand Project on a day-to-day basis. Following the Drift Sand closing and any subsequent transfer of non-controlling, passive Class B Membership Interests from Bankers to one or more Unidentified Investors:

1. Drift Sand will continue to have operational control and full ownership of its jurisdictional assets in the SPP market;
2. Drift Sand Holdings will own all of the Class A membership interests in Drift Sand, and as the managing member of Drift Sand will have the right to control Drift Sand; and
3. Class B Equity Investors will own all of the Class B Membership Interests in Drift Sand.

Drift Sand states that the Transaction is consistent with the public interest and will not adversely affect competition, rates or regulation, and will not raise any cross-subsidization issues. With respect to competition, Drift Sand states that the entire output of the Drift Sand Project is committed to a non-affiliated purchaser under a long-term power purchase agreement and the Proposed Transaction will have no effect on the power purchase agreement. In addition, Drift Sand states that it controls no uncommitted capacity within the SPP market, and even if the capacity of Drift Sand and its affiliates were treated as uncommitted, the installed capacity of Drift Sand and its affiliates of 1,181 MWs represents only 0.34 percent of the SPP's 64,000 MWs of total installed capacity, which, according to Drift Sand, is *de minimis*. Furthermore, the Class B Equity Investors' acquisition of the Class B Membership Interests in Drift Sand 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 Drift Sand or the Drift Sand Project as a result of the Proposed Transaction. Therefore, according to Drift Sand, the Proposed Transaction does not raise any horizontal market power concerns.

With respect to vertical market power, none of Drift Sand, the Class B Equity Investors, or any of their affiliates own or control transmission facilities in any market, other than those interconnection facilities necessary to connect the Drift Sand Project to the transmission grid. Additionally, none of Drift Sand, the Class B Equity Investors, or any of their affiliates owns or controls intrastate natural gas transportation, storage, or distribution facilities, sources of coal supplies or equipment for transporting coal supplies. Furthermore, neither Drift Sand, the Class B Equity Investors, nor any of their affiliates own or control any sites in the United States to develop new generation capacity. Therefore, according to Drift Sand, the Proposed Transaction does not raise any vertical market power concerns.

With respect to the effect on rates, Drift Sand states that all sales resulting from the Drift Sand Project will be made at market-based rates, and the Proposed Transaction will not alter the terms and conditions of the power purchase agreement under which Drift Sand will sell the entire output of the Drift Sand Project. Additionally, Drift Sand does not provide transmission service. Therefore, according to Drift Sand, the Proposed Transaction will have no adverse effect on rates.

With respect to regulation, Drift Sand states that its status with the Commission will not change as a result of the Proposed Transaction, and the Proposed Transaction will not affect the extent to which the Commission may regulate Drift Sand. In addition, the Proposed Transaction is not subject to regulation by any state entity. In short, 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. Therefore, according to Drift Sand, the Proposed Transaction will have no adverse effect on either federal or state regulation.

Drift Sand 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. Drift Sand states that the Proposed Transaction qualifies for the safe harbor for transactions that do not involve a franchised public utility with captive customers. Additionally, Drift Sand represents that, based on facts and circumstances known to Drift Sand or that are reasonably foreseeable that the Proposed Transaction will not result in, at the time of the transaction or in the future: (1) any transfers 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 issuances 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 services agreements subject to review under sections 205 and 206 of the FPA.

This filing was noticed on September 23, 2016, with comments, protests or interventions due on or before October 13, 2016. None were filed.

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.

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 the 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.⁴ The foregoing authorization may result in a change in status. Accordingly, applicants that have market-based rates are advised that they must comply with the requirements of Order No. 652. In addition, applicants shall make appropriate filings under section 205 of the FPA, to implement the Proposed 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 described in this Order 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 Drift Sand's affiliated Qualifying Facilities, if any, an

⁴ *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).

appropriate filing for recertification pursuant to 18 C.F.R. § 292.207 (2016) shall be made;

- (6) Drift Sand shall make appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction;
- (7) Drift Sand must inform the Commission of any change in circumstances that would reflect a departure from the facts the Commission relied upon in authorizing the Proposed Transaction; and
- (8) Drift Sand shall notify the Commission within 10 days of the date that the Proposed Transaction 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 (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

