

145 FERC ¶ 62,031
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Red Oak Power, LLC

Docket No. EC13-146-000

ORDER AUTHORIZING DISPOSITION
OF JURISDICTIONAL FACILITIES

(Issued October 11, 2013)

On September 13, 2013, Red Oak Power, LLC (Red Oak or Applicant) filed an application pursuant to section 203 (a)(1)(A) of the Federal Power Act (FPA)¹ requesting Commission authorization for the disposition of jurisdictional facilities resulting from the transfer of 100 percent of the ownership interests in Red Oak Power Holdings, LLC (Red Oak Holdings), which indirectly owns 100 percent of the ownership interests in Red Oak, to Cogentrix Red Oak Holdings, LLC (Cogentrix or Purchaser)² (Proposed Transaction). The jurisdictional facilities associated with the Proposed Transaction consist of Red Oak's market-base rate tariff, associated books, records, related agreements, and limited interconnection facilities.

Red Oak is a Delaware limited liability company that owns an approximately 776 megawatt (MW) combined cycle, natural gas-fired generating facility and related interconnection facilities located in the Borough of Sayreville, Middlesex County, New Jersey (Facility), within the PJM Interconnection, L.L.C. (PJM) balancing authority area (BAA). The Facility is located in the PJM-East submarket. Red Oak is an exempt wholesale generator (EWG) and is authorized to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates. The Facility's entire output is committed to TAQA Gen-X LLC (TAQA) through a long-term tolling agreement set to expire in 2022.

Red Oak is directly and wholly-owned by Red Oak Intermediate Holdings, LLC, a Delaware limited liability company, which in turn, is directly and wholly-owned by Red Oak Holdings, a Delaware limited liability company. Red Oak Holdings' interests are

¹ 16 U.S.C. § 824b (2000), as amended by the Energy Policy Act of 2005, Pub. L. No.109-58, § 1289, 119 Stat. 594 (2005).

² Applicant states that Purchaser is not a holding company within the meaning of FPA section 203(a)(2); thus, Purchaser does not require approval under FPA section 203(a)(2).

held directly by four affiliated investment funds: (i) Energy Capital Partners II-A, LP, (ii) Energy Capital Partners II, LP; (iii) Energy Capital Partners II-B (Red Oak IP), LP; and (iv) Energy Capital Partners II-C (Red Oak IP), LP. (collectively, the Red Oak Partnerships). The Red Oak Partnerships are directly or indirectly wholly-owned by: (i) Energy Capital Partners GP II, LP (ECP GP II), as general partner; and (ii) various passive limited partner investors. ECP GP II, in turn, is directly owned by: (i) Energy Capital Partners II, LLC (ECP II), as general partner; and (ii) various passive limited partner investors. ECP II is owned by five individual persons: Douglas W. Kimmelman and his estate planning vehicle; Thomas K. Lane and his estate planning vehicle; Andrew D. Singer; Peter Labbat; and Tyler Reeder.

Cogentrix, a Delaware limited liability company, is a wholly-owned subsidiary of Cogentrix Power Holdings IV, LLC (Cogentrix Power), which is a wholly-owned subsidiary of Carlyle Infrastructure Partners Power III, L.P. (Carlyle IPP III). Carlyle IPP III is controlled by its general partner, Carlyle Infrastructure General Partner, L.P. (CIGP). Carlyle IPP III has several passive limited partners (collectively, the Carlyle Funds) all of which are investment fund vehicles sponsored and managed by The Carlyle Group, L.P. (The Carlyle Group), a global alternative investment management firm. The limited partners of the Carlyle Funds also are passive investors. The general partner of CIGP is TG Group Infrastructure, L.L.C., whose managing member is TC Group Sub, L.P. (TC Group Sub). The general partner of TC Group Sub is TC Group, L.L.C., whose managing member is Carlyle Holdings I L.P. (Holdings I LP). The general partner of Holdings I LP is Carlyle Holdings I GP Inc., a direct subsidiary of The Carlyle Group.

The Carlyle Group holds passive, non-controlling interests in two investment funds that invest in energy-related companies: Riverstone/Carlyle Global Energy and Power Fund, IV, L.P. and Riverstone/Carlyle Renewable and Alternative Energy Fund II, L.P. (together, the R/C Funds). The general structure of these funds is that day-to-day control lies with an upstream general partner that is a wholly-owned subsidiary of Riverstone Holdings, LLC (Riverstone), the sponsor of the funds, while The Carlyle Group and Riverstone each indirectly hold an upstream limited partnership interest in the funds to share the carried interest generated by the funds. According to Red Oak, The Carlyle Group does not exert any day-to-day authority over the R/C Funds, possesses only limited voting rights that do not affect the ability of the R/C Funds to conduct business, and is not principally in the business of producing, selling, or transmitting electric power.

The Carlyle Group is a sponsor of other funds in which it shares control with Riverstone: the Carlyle/Riverstone Global Energy and Power Fund I and Carlyle/Riverstone Renewable Energy Partners, L.P. However, neither of these additional funds owns any interests in companies that own electric generation, transmission, or distribution assets in the United States.

Red Oak states that Cogentrix is not affiliated with any electric generating, transmission, or distribution facilities in PJM-East submarket, which, according to Red Oak is the relevant market for the Proposed Transaction. Red Oak states that through its affiliation with The Carlyle Group, Cogentrix is affiliated with two electric generating facilities in the PJM BAA: (1) Portsmouth Genco, LLC (Portsmouth), and (2) James River Genco, LLC (James River).

Portsmouth is a Delaware limited liability company that owns and operates a 114.8 MW electric generation facility (Portsmouth Facility) located in Portsmouth, Virginia. The Portsmouth Facility is interconnected to the transmission system owned by Dominion Virginia Power (Dominion) and operated by PJM. Portsmouth is an EWG and is authorized to sell energy, capacity, and ancillary services at market-based rates. Portsmouth sells the full net electrical output of its facility to Northern Virginia Electric Cooperative (NOVEC) pursuant to a long-term power purchase agreement.

James River is a Delaware limited liability company that owns and operates a 114.8 MW electric generation facility (James River Facility) located in Hopewell, Virginia. The James River Facility is a qualifying facility and is interconnected to the transmission system owned by Dominion and operated by PJM. James River is an EWG and is authorized to sell energy, capacity, and ancillary services at market-based rates. The James River Facility has a steam host that consumes the steam equivalent of approximately 26 MW of the facility's electrical output. According to Red Oak, James River sells the remaining net electrical output from its facility (approximately 89 MW) to NOVEC pursuant to a long-term power purchase agreement.

Red Oak states that neither Cogentrix nor any of its affiliates currently owns or controls any electric transmission or distribution facilities in the United States, except for limited interconnection facilities required to connect individual generating facilities to the transmission grid. Red Oak states that Cogentrix is not affiliated with any franchised public utility.

Red Oak states that through its affiliation with The Carlyle Group, Cogentrix is affiliated with entities that own or control inputs to electric power production. The Carlyle Group is a sponsor of Carlyle/Riverstone Renewable Energy Infrastructure Fund I, L.P. (Renew Fund I), Carlyle/Riverstone Global Energy and Power Fund II, L.P. (Fund II), and Carlyle/Riverstone Global Energy and Power Fund III, L.P. (Fund III), in which The Carlyle Group shares control with Riverstone. According to Red Oak, through interests in Renew Fund I, Fund II, and Fund III, The Carlyle Group is affiliated with entities that own or control coal reserves, intrastate natural gas transportation, storage, or distribution facilities, and other potential inputs to electric power production. Through The Carlyle Group, Cogentrix is affiliated with Keyrock Energy LLC (Keyrock), which owns or controls two natural gas gathering pipelines, one of which is located in the PJM BAA. Through The Carlyle Group, Cogentrix is also affiliated with Genesee &

Wyoming Inc. (G&W), which own rail cars used for transporting coal for third parties and owns and operates railroads that provide open-opportunity short-line and freight transportation service throughout the United States.

Pursuant to an Acquisition Agreement, Cogentrix will acquire 100 percent of the ownership interests in Red Oak Holdings and, indirectly, 100 percent of the ownership interests in Red Oak. The Red Oak Partnerships and Red Oak Power Management will not retain any direct or indirect interests in Red Oak following the completion of the Proposed Transaction.

Applicant states that the Proposed Transaction will not have an adverse effect on competition, rates, and regulation, and will not result in any cross-subsidization concerns. The application states that the Proposed Transaction will not have an adverse effect on competition because Cogentrix is not affiliated with any electric generating, transmission, or distribution facilities in the relevant market, which is the PJM-East submarket of the PJM BAA. Applicant states that Cogentrix is affiliated with two electric generating facilities in the PJM BAA: (1) the James River Facility (114.8 MW), and (2) the Portsmouth Facility (114.8 MW). Applicant states that the entire electrical output of the James River Facility and the Portsmouth Facility is committed to unaffiliated third parties under long-term agreements. Therefore, Applicant states that the Proposed Transaction will not have an impact on competition in the relevant market.

Applicant states that the Transaction does not raise any vertical market power concerns. Applicant states that neither Cogentrix nor any of its affiliates owns or controls electric transmission facilities in the United States, other than the limited facilities necessary to interconnect individual generating units to the transmission grid. Applicant states that Cogentrix is affiliated with Keyrock, which owns or controls two natural gas gathering pipelines, one of which is located in the PJM BAA. Cogentrix also is affiliated with G&W, which owns rail cars used for transporting coal for third parties and owns and operate railroads that provide open-opportunity short-line and freight transportation service throughout the United States, including in PJM. Applicant states that with the exception of Cogentrix's affiliation with Keyrock and G&W, neither Cogentrix nor any of its affiliates owns or control any other inputs located within the PJM BAA. Therefore, Applicant asserts that the Proposed Transaction will have no adverse effect on vertical market power in the PJM BAA or the PJM-East submarket.

Applicant states that the Proposed Transaction will not have an adverse effect on rates. Applicant states that Red Oak will continue to sell power at market-based rates. Applicant states that the Proposed Transaction will have no impact on the rates under the long-term agreement with TAQA pursuant to which Red Oak sells all of its output. The Proposed Transaction does not involve transmission rates or transmission customers. Accordingly, the Proposed Transaction will have no adverse effect on wholesale ratepayers or transmission customer.

Applicant states that the Proposed Transaction will not affect the manner or extent to which the Commission, any state, or any other federal agency may regulate Red Oak and its affiliates. The extent to which Red Oak and its affiliates are subject to the jurisdiction of the Commission will not change as a result of the Proposed Transaction.

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 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 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 September 16, 2013, with comments, protests or interventions due on or before October 4, 2013. TAQA filed a timely motion to intervene. 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.³ 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, 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;

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).

- (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 Proposed 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