

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Jericho Rise Wind Farm LLC
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Docket No. EC16-181-

ORDER AUTHORIZING DISPOSITION
OF JURISDICTIONAL FACILITIES

(Issued October 14, 2016)

On September 13, 2016, Jericho Rise Wind Farm LLC (Jericho Wind, or Applicant) filed an application under section 203(a)(1) of the Federal Power Act (FPA)¹ requesting authorization for the disposition of jurisdictional facilities from a tax equity transaction (Proposed Transaction) that involves the sale of certain indirect non-managing membership interests in Applicant to BAL Investment & Advisory, Inc. (BAL Investment) or an affiliate thereof, The Bank of New York Mellon (BNY Mellon) or an affiliate thereof, and potentially one or more unidentified investors (Unidentified Investors and, together with BAL Investment and BNY Mellon, Investors). Applicant states that the jurisdictional facilities that may be affected by the Proposed Transaction consist of Applicant's market-based rate tariff and any related agreements, various books and records, and the interconnection equipment associated with the Facility.

Jericho Wind states that it is a Delaware limited liability company that is constructing and will own and operate an approximately 77.7 megawatt (MW) wind-powered electric generation facility located in Franklin County, New York (Facility). Applicant anticipates that the Facility will achieve commercial operation in November 2016. The Facility will be interconnected to the transmission system owned by the New York Power Authority and operated by New York Independent System Operator, Inc. (NYISO). The NYISO market is, according to Jericho Wind, the relevant market.

Jericho Wind states that it is an exempt wholesale generator (EWG) under the Public Utility Holding Company Act of 2005 (PUHCA) to which the Commission has granted market-based rate authority.

Applicant currently is a wholly-owned, direct subsidiary of EDP Renewables North America LLC (EDP Renewables). In addition to Applicant, EDP Renewables is affiliated with the following entities located in the NYISO market: Flat Rock Windpower LLC (Flat Rock I), an EWG that owns and operates a 231 MW generation facility; Flat Rock Windpower II, LLC (Flat Rock II), an EWG that owns and operates a 91 MW generation facility; Madison Windpower LLC (Madison), the owner and operator of an 11.55 MW generation

¹ 16 U.S.C. § 824b (2012).

facility; and Marble River LLC (Marble River), an EWG that owns and operates a 215 MW generation facility.

EDP Renewables is a wholly owned, direct subsidiary of EDP Renováveis, S.A. (EDP Renováveis). Applicant states that approximately 22.5 percent of the issued share capital of EDP Renováveis is publicly traded among investors, none of which have a 10 percent or greater voting interest in EDP Renováveis. EDP-Energias de Portugal, S.A. (EDP Portugal) owns the remaining approximately 77.5 percent share capital of EDP Renováveis, through EDP Portugal's Spanish branch, EDP – Energias de Portugal, Sociedad Anónima, Sucursal en España. Capital Group Companies, Inc. has reported to EDP Portugal that several mutual funds managed by Capital Research and Management Company or its affiliates hold 10 percent or more of EDP Portugal's outstanding ordinary shares.

According to Applicant, China Three Gorges Corporation (China Three Gorges) indirectly owns a 21.35 percent equity interest in EDP Portugal. As a result, China Three Gorges indirectly owns interests in Applicant.

According to Applicant, none of EDP Renewables, China Three Gorges, or any of their affiliates own or control any transmission facilities that are used for the transmission of electricity in interstate commerce in the United States, other than the limited interconnection facilities required to connect individual generating facilities to the transmission grid. None of EDP Renewables, China Three Gorges, or any of their affiliates owns or controls any inputs to electricity products or electric power production in the United States, including fuel supplies or fuel delivery systems. Neither EDP Renewables nor China Three Gorges is affiliated with any public utility with a franchised electric service territory in the United States.

According to Applicant, BAL Advisory is an indirect, wholly owned subsidiary of Bank of America Corporation (Bank of America). Bank of America is a bank holding company and a financial holding company. Applicant states that BAL Advisory and Bank of America do not directly own or control any electric generating or transmission assets or generation output. According to Applicant, none of BAL Advisory or its affiliates have indirect ownership interests in any electric transmission facilities other than limited interconnection facilities. Applicant asserts that BAL Advisory is affiliated with entities that own interests in electric generation facilities in various markets across the United States, but none of these energy affiliates own or control 10 percent or more of the voting securities in any generating facilities located in the NYISO market. Applicant adds that none of BAL Advisory or its affiliates own or control inputs to electric generation located in the NYISO market, or are affiliated with a traditional franchised public utility with captive customers. According to Applicant, within the NYISO market, BAL Advisory or its affiliates hold passive, non-managing, direct or indirect tax equity interests in Flat Rock I, Flat Rock II, and Madison, each of which is an affiliate of EDP Renewables, as described above.

Applicant states that BNY Mellon is a bank, chartered in the state of New York. BNY Mellon is a wholly owned subsidiary of The Bank of New York Mellon

Corporation. According to Applicant, BNY Mellon does not directly own or control any electric generating or transmission assets or generation output in the United States.

Applicant submits that none of BNY Mellon or its affiliates own or control any electric transmission or interstate natural gas pipeline facilities. Further, BNY Mellon does not control and is not affiliated with any entity that controls any essential inputs to generation in the relevant market, including any intrastate pipeline or natural gas storage facilities.

According to Applicant, BAL Investment and BNY Mellon may seek additional tax equity investors to participate in the Proposed Transaction (Unidentified Investors). Applicant does not currently know the identity of such potential investors. Applicant 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.

Applicant states that Unidentified Investors and their affiliates may own or control electric generation facilities in the NYISO market. However, any overlap between the operations of Unidentified Investors and their affiliates in the NYISO market and the operations of Applicant, BALIA, BNY Mellon, and their affiliates in the NYISO market will be de minimis. Specifically, the combined generation market share of Unidentified Investors and their affiliates together with Applicant, BAL Investment, BNY Mellon, and their respective affiliates in the NYISO market will not exceed 2.0 percent of the total installed capacity. Therefore, Applicant submits that, upon closing of the Proposed Transaction, Applicant, BAL Investment, BNY Mellon, Unidentified Investors, and their respective affiliates will lack horizontal market power in the relevant market.

Additionally, Applicant states that 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 individual generating facilities to the transmission grid, facilities for which the Commission has granted a waiver of the requirement to file an open access transmission tariff (OATT) or that qualify for a blanket OATT waiver. Unidentified Investors and their affiliates also will not own or control any essential inputs to electricity products or electric generation in the relevant markets. Further, Applicant attests that none of the Unidentified Investors or their affiliates will be a public utility with a franchised electric service territory in the United States.

Applicant will inform the Commission of the identities of any Unidentified Investors at the time Applicant provides the Commission with notice of consummation of the Proposed Transaction. Applicant also will confirm compliance by each Unidentified Investor with the criteria set forth above. Applicant states that if no Unidentified Investors participate in the Proposed Transaction, BAL Investment and BNY Mellon will together acquire 100 percent of the non-managing membership interests in Vento XV.

Applicant states that, prior to the closing of the Proposed Transaction, EDP Renewables will contribute 100 percent of its direct membership interests in Applicant to 2016 Vento XV, LLC (Vento XV), and EDP Renewables will then contribute 100 percent of its direct membership interests in Vento XV to EDPR Wind Ventures XV, LLC (Ventures XV). Following this internal corporate reorganization, Applicant will be a wholly owned, direct subsidiary of Vento XV, which will be a direct, wholly owned subsidiary of Ventures XV, which will be a wholly owned, direct subsidiary of EDP Renewables.

According to Applicant, Vento XV will have two classes of membership interests, Class A managing membership interests and Class B non-managing membership interests. Pursuant to the Proposed Transaction, Ventures XV will cause Vento XV to issue all of the Class B non-managing membership interests in Vento XV to Investors in exchange for capital contributions by Investors to Vento XV. As a result of the Proposed Transaction, Investors will hold 100 percent of the Class B interests in Vento XV. Ventures XV will retain 100 percent of the Class A managing membership interests in Vento XV. Applicant states EDP Renewables, through Ventures XV, will retain day-today control over Applicant and its jurisdictional activities.

Applicant states that the Class B members of Vento XV will have consent rights prior to the Flip Date (as will be defined in the limited liability company agreement of Vento XV) only for certain major decisions that could affect their return on their investment, including but not limited to: the sale, lease, or disposition of any significant assets; the incurrence of significant indebtedness; participation by Vento XV or Applicant in any business or activity not within their purpose or a change in such purpose; mergers or sales involving Vento XV or Applicant; the settlement of significant litigation; or the cancellation, suspension, or termination of any material contract. Investors, as the Class B members of Vento XV, also will have consent rights after the Flip Date for a limited number of major decisions.

According to Applicant, Ventures XV will be the managing member of Vento XV through its direct ownership of 100 percent of the Class A interests in Vento XV. Applicant submits that, at times, EDP Renewables, through Ventures XV, will retain day-to-day control of Applicant. Investors are entitled only to certain cash and tax benefits as holders of the Class B interests in Vento XV and will not participate in the day-to-day management of Vento XV or Applicant.

Applicant states that the Proposed Transaction is consistent with the public interest because it will not have an adverse effect on competition, rates, or regulation and will not result in cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company.

According to Applicant, the Proposed Transaction will have no adverse impact on horizontal competition, because Investors will acquire only non-managing interests in Vento XV and will not acquire any day-to-day control over Applicant as a result of the Proposed Transaction. Therefore, Applicant states

that the Proposed Transaction will not result in any new affiliation between Applicant and Investors, and thus will have no impact on horizontal competition.

However, even assuming that the Proposed Transaction results in an affiliation between Applicant and Investors, Applicant states that the combined market share of Applicant, BAL Investment, BNY Mellon, any Unidentified Investors, and their respective affiliates following the Proposed Transaction will not exceed two percent of the installed capacity in the NYISO market, which, according to Jericho Wind, is a *de minimis* amount.

Applicant states that the Proposed Transaction will have no adverse impact on vertical competition. Applicant submits that the Proposed Transaction does not involve any transmission facilities, other than the limited interconnection equipment necessary to connect the Facility to the grid, or any essential inputs to electricity products or electric power production. Further, none of Applicant, Investors, or any of their affiliates own or control any electric transmission facilities in the United States, other than limited interconnection facilities necessary to connect individual generating facilities to the grid, facilities for which the Commission has granted a waiver of the requirement to file an OATT or that qualify for the blanket OATT waiver, or transmission facilities that are subject to a Commission-accepted OATT. In addition, none of Applicant, Investors, or any of their affiliates own or control any essential inputs to electricity products or electric power production. Therefore, Applicant submits that the Proposed Transaction will have no adverse effect on vertical market power.

According to Applicant, the Proposed Transaction will have no adverse impact on rates. Applicant will sell the entire output of the Facility at wholesale pursuant to its market-based rate authority. Further, the Proposed Transaction does not involve transmission rates or transmission customers. Accordingly, Applicant submits that the Proposed Transaction will have no adverse effect on wholesale ratepayers or transmission customers.

Applicant states that the Proposed Transaction will not affect the manner or extent to which the Commission, any state, or any other federal agency regulates Applicant, Investors, or any of their affiliates. The extent to which Applicant, Investors, and any of their affiliates is subject to the jurisdiction of the Commission (or any other regulatory agency or office) will not change as a result of the Proposed Transaction.

According to Applicant, the Proposed Transaction falls within one of the “safe harbors” established by the Commission for which detailed explanation and evidentiary support to demonstrate a lack of cross-subsidization is not required. Specifically, Applicant states that the Proposed Transaction falls within the “safe harbor” for transactions that do not involve a franchised public utility with captive customers.

Applicant verifies that, based on facts and circumstances known to it or that are reasonably foreseeable, the Proposed Transaction will not result in, at the time of the Proposed Transaction or in the future, any cross-subsidization of

a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company, including: (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 service agreements subject to review under sections 205 and 206 of the FPA.

The filing was noticed on September 14, 2016, with comments, protests, or interventions due on or before October 4, 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, 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.² To the extent that a transaction authorized under FPA section

² *Reporting Requirement for Changes in Status for Public Utilities with*

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 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) Applicant 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;
- (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 Applicants' 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) Applicant shall make any appropriate filings under section 205 of the FPA, as necessary, to implement 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 (2016). This order constitutes final agency action. Requests for rehearing by the

Market-Based Rate Authority, Order No. 652, FERC Stats. & Regs. ¶¶ 31,175, order on reh'g, 111 FERC ¶¶ 61,413 (2005).

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