

125 FERC ¶ 61,246
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Fortis Energy Marketing & Trading GP
Locust Ridge Wind Farm, LLC

Docket No. EC09-16-000

ORDER AUTHORIZING DISPOSITION
OF JURISDICTIONAL FACILITIES

(Issued December 1, 2008)

1. Fortis Energy Marketing & Trading GP (Fortis Energy Marketing) and the Class A Membership Interests¹ in Locust Ridge Wind Farm, LLC (Locust Ridge) (collectively, Applicants) filed an application under section 203 of the Federal Power Act (FPA)² requesting that the Commission grant all approvals necessary for three phases of a transaction (collectively, Proposed Transaction)³ intended to prevent the failure of Fortis Bank S.A./N.V (Fortis). Applicants request Commission authorization of the first two phases of the Proposed Transaction, which have already been accomplished. In addition, Applicants request Commission authorization of the third phase, in which the French bank BNP Paribas will acquire 74.94 percent ownership of Fortis, which is expected to close on December 4, 2008. The jurisdictional facilities consist of Fortis Energy

¹ Fortis (USA) Financial Markets LLC (Fortis Financial) holds 100 percent of the Class A Membership Interests in Locust Ridge. According to Applicants, Fortis Financial is entitled to cash allocations, production tax credits, and accelerated U.S. federal income tax depreciations. As the Class A member, Fortis Financial has only limited decisional-rights in the management of Locust Ridge that are necessary for the preservation of its investment. Applicants explain that the application is made only with respect to the Class A Members of Locust Ridge, and does not purport to speak for the other shareholders or members.

² 16 U.S.C. § 824b (2006).

³ Applicants state that the Proposed Transaction requires Commission approval under section 203 because it involves an indirect change in control over Fortis Energy Marketing's jurisdictional facilities.

Marketing's market-based rates tariff, wholesale power contracts, and related books and records, as well as Locust Ridge's market-based rate tariff and related contracts, book and records. Applicants request expedited treatment, with approval granted on or before December 1, 2008.

2. The Commission has reviewed the application under the Commission's Merger Policy Statement.⁴ As discussed below, we will authorize the three phased-transactions of the Proposed Transaction under FPA section 203(a)(1). We find that the Proposed Transaction is consistent with the public interest. We remind applicants that when they seek an authorization under FPA section 203, they must specify the subsections of section 203 under which they are seeking authorization.

I. Background

A. Description of the Parties

3. Applicants state that Fortis is the largest bank in Belgium and operates more than 1,600 branches worldwide. Fortis's relationship to the Applicants will not change as a result of the Proposed Transaction. Before the Proposed Transaction, Fortis was an indirect, 99.93 percent owned subsidiary of Fortis S.A./N/V., an international financial services provider engaged, through subsidiaries, in banking and insurance around the world. Applicants state that Fortis subsidiaries do not own any generating or transmission facilities in the United States, except that some subsidiaries own passive interests in wind farms that do not confer any control over generation.⁵

4. In 2005, the Commission granted Fortis Energy Marketing market-based rate authority under the name Cinergy Marketing & Trading.⁶ Fortis Energy Marketing's

⁴ See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). See also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order 642-A, 94 FERC ¶ 61,289 (2001); *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006); *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement).

⁵ Application at 4.

⁶ See *Cincinnati Gas & Elec. Co.*, 113 FERC ¶ 61,197 (2005). At that time, Cinergy Marketing & Trading, LP was a subsidiary of Cinergy Corporation.

trading activity has been limited to paper facilities that do not confer control over or rights to dictate the level at which any generating facility is operated or the price at which the output from any facility is offered.

5. Locust Ridge, a Pennsylvania limited liability company, is the owner of the 26 megawatt (MW) Locust Ridge Wind Farm in Pennsylvania. Applicants state that Locust Ridge has self-certified as a qualifying small power production facility. Locust Ridge has also been granted market-based rate authorization.⁷ As previously noted, Fortis Financial holds 100 percent of the Class A membership interests in Locust Ridge, and Iberdrola Renewable Energies (USA), Ltd. (Iberdrola USA) holds 100 percent of the Class B membership interests and is the managing member. Fortis Financial is a Delaware limited liability company and a wholly-owned subsidiary of Fortis Capital, a wholly-owned subsidiary of Fortis. Fortis Financial also owns an interest in three wind farms in the Electric Reliability Council of Texas (ERCOT). Applicants say that because those wind farms are in ERCOT, Commission approval is not required for an indirect change in control over these facilities in this case.

6. The Kingdom of Belgium has participated in the Proposed Transaction through its wholly-owned state company, Société Fédéral de Participations et d'Investissement (Société Fédéral). Applicants state that, based on their search of the Commission's eLibrary records, it does not appear that the Kingdom of Belgium or Société Fédéral owns any direct or indirect interests in any jurisdictional entities other than the Applicants.

7. BNP Paribas, directly and indirectly through its subsidiaries, provides a wide range of banking, securities, advisory and other financial services to its customers in Europe, Asia and North America. Applicants state that neither BNP Paribas, nor any of its subsidiaries or affiliates, own or control power generation or transmission, or sell power in the United States. From time to time, BNP Paribas and its subsidiaries and affiliates hold investments, on their own accounts and on behalf of their customers, in companies engaged in energy-related activities in the United States and in funds that invest in such companies. Applicants state that the holdings of BNP Paribas and its subsidiaries and affiliates are less than 5 percent of the outstanding voting securities of such companies and funds.

⁷ See *Locust Ridge Wind Farm, LLC*, Docket No. ER07-195-000 (Dec. 12, 2006) (unpublished letter order).

B. Description of the Proposed Transaction

8. In the first phase of the Proposed Transaction, completed on or about October 3, 2008, the Kingdom of Belgium acted on an emergency basis through Société Fédéral to acquire a 49.93 percent interest in Fortis.

9. In the second phase of the Proposed Transaction, completed on or about October 10, 2008, Société Fédéral acquired substantially all of the remainder of Fortis, and presently owns 99.93 percent of its stock.

10. In the third phase of the Proposed Transaction, BNP Paribas will acquire 74.94 percent ownership of Fortis from Société Fédéral in two steps. In the first step, which will occur on or about December 4, 2008, Société Fédéral will contribute in kind to BNP Paribas 263,586,083 voting shares of Fortis, representing 54.55 percent of the capital and voting rights of Fortis, and thereby reduce its ownership interest in Fortis to 45.38 percent. In consideration for this contribution, Société Fédéral will receive 88,255,294 newly issued shares of BNP Paribas, representing upon completion of the capital increase, 8.82 percent in the capital of BNP Paribas. The Kingdom of Belgium's ownership of such shares of BNP Paribas will be subject to a lock-up period of two years. The application notes that this step is not subject to approval by BNP Paribas shareholders.

11. In the second step of the third phase, which will occur on or about December 31, 2008, Société Fédéral will contribute in kind to BNP Paribas 98,529,695 shares of Fortis, representing 20.39 percent of the capital of Fortis, and reduce its ownership interest in Fortis to 25 percent plus one share. In consideration for this contribution, Société Fédéral will receive 32,982,760 newly issued shares of BNP Paribas (i.e., Société Fédéral will hold in the aggregate 121,218,054 shares of BNP Paribas – approximately 11.6 percent of the voting shares of BNP Paribas – following the completion of this step). In addition, the Kingdom of Belgium through Société Fédéral will have two director representatives on the board of directors of BNP Paribas (each of whom will be nominated under the direction of the Belgian Minister of Finance). This second step is subject to approval by BNP Paribas shareholders. At the same time, the Grand Duchy of Luxembourg will contribute a portion of its interest in voting shares of Fortis Banque Luxembourg, an affiliate of Fortis, to BNP Paribas in exchange for 1.1 percent of the voting shares of BNP Paribas.

II. Notice of Filing

12. Notice of the filing was published in the *Federal Register*, 73 Fed. Reg. 69,627 (2008), with comments, protests, or interventions due on or before November 20, 2008. None were filed.

III. Discussion

A. Standard of Review Under Section 203

13. FPA section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest. Under the Commission's regulations, its analysis of whether a transaction will be consistent with the public interest generally involves considering three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.⁸ Section 203 also requires the Commission to find that the 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, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."⁹ The Commission's regulations establish verification and informational requirements for applicants that seek determinations that a transaction will not result in inappropriate cross-subsidization or an inappropriate pledge or encumbrance of utility assets.¹⁰

B. Analysis under Section 203

1. Effect on Competition

14. Applicants state that the Proposed Transaction is consistent with the public interest and will have no adverse effect on competition. They state that they do not own or control any interests in generation or transmission facilities in the United States. In addition, to the best of Applicants' knowledge, the Kingdom of Belgium, BNP Paribas, and their affiliates also do not own or control any generation or transmission facilities, or inputs to generation, in the United States. Applicants conclude that the Proposed Transaction cannot create or enhance the ability or incentive of the Applicants or their affiliates to exercise market power and does not raise horizontal or vertical market power issues.

15. Based on Applicants' analysis, we find that the Proposed Transaction will not adversely affect competition.

⁸ See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

⁹ 16 U.S.C. § 824b(a)(4) (2006).

¹⁰ 18 C.F.R. § 33.2(j) (2008).

2. Effect on Rates

16. Applicants state that their transactions are all at market-based rates that will not be affected by the Proposed Transaction.

17. The Commission has found that, where electricity is sold only under market-based rates, the transaction is unlikely to have an adverse impact on rates.¹¹ We note that nothing in the application indicates that rates to customers will increase as a result of the Proposed Transaction, and no party argues otherwise. For these reasons, we find that the Proposed Transaction will not have an adverse effect on rates. However, we do note that Order No. 652 requires that sellers with market-based rate authorization 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.¹² The foregoing authorization may result in a change in status. Accordingly, Applicants 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 transaction.

3. Effect on Regulation

18. Applicants state that the Commission will have the same jurisdiction over their sales and their facilities after the Proposed Transaction that it had before. Additionally, Applicants note that no state has had or will have any jurisdiction over their facilities or their sales (except under the Public Utility Regulatory Policies Act in the case of Locust Ridge).¹³

19. We find that neither state nor federal regulation will be impaired by the Proposed Transaction. The Commission's review of a transaction's effect on regulation is focused on ensuring that the transaction does not result in a regulatory gap at the federal level or the state level. We find that the Proposed Transaction will not create a regulatory gap at the federal level, because the Commission will retain its authority over Applicants. We note that no party alleges that regulation would be impaired by the Proposed Transaction,

¹¹ *Union Electric Co. d/b/a AmerenUE*, 114 FERC ¶ 61,255, at P 45 (2006).

¹² *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).

¹³ Application at 11.

and no state commission has requested that the Commission address the issue of the effect on state regulation. Based on the facts presented in the application, we find that the Proposed Transaction will not have an adverse effect on federal or state regulation.

4. Cross-Subsidization

20. Applicants assert that the Proposed Transaction raises no cross-subsidization concerns. They assert that it qualifies for the first “safe harbor” that the Commission adopted in its Supplemental Policy Statement, so a detailed showing regarding cross-subsidization is not required.¹⁴ Specifically, Applicants state that neither of the Applicants has a controlling interest in any franchised public utility with captive customers.

21. Based on Applicants’ representation, we find that the Proposed Transaction will not result in cross-subsidization of a non-utility company or the pledge or encumbrance of utility assets for the benefit of an associate company.

22. 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 unless it has 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. However, the Commission’s jurisdiction does not extend to foreign companies operating outside of U.S. borders. The Commission has acted previously to protect energy customers by requiring access to a foreign parent company’s books and records¹⁵ and the approval of the Proposed Transaction is conditioned on Applicants’ agreement to provide access to *all* books and records within the lawful scope of Section 301(c) of the FPA.

C. Conclusion

23. Applicants request Commission approval of all three phases of the Proposed Transaction. As explained above, the first phase of the Proposed Transaction took place on October 3, 2008, when Société Fédéral acted on an emergency basis to acquire a 49.93 percent interest in Fortis. In the second phase, which occurred on October 10, 2008,

¹⁴ Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253, at P 19 (2007).

¹⁵ See *New England Power Co., et al.*, 87 FERC ¶ 61,287 (1999). See also *Consolidated Water Power Company, et al.*, 91 FERC ¶ 61,275, at 61,931-61,932 (2000); *PacifiCorp*, 87 FERC ¶ 61,288, at 62,152-62,153 (1999).

Société Fédéral acquired substantially all of the remainder of Fortis. Applicants explain that the Proposed Transaction is an emergency plan to prevent the failure of Fortis that would otherwise have occurred as a result of the global financial crisis. Applicants state that before the Proposed Transaction, the value of stock shares in the parent company of Fortis plummeted, and it was clear that Fortis would become insolvent if immediate action was not taken.¹⁶

24. The Commission stands ready to act in processing urgent FPA section 203 filings in response to the current financial market turmoil. As in other recent orders,¹⁷ the Commission will act promptly to provide regulatory certainty to those jurisdictional entities adversely affected by the unprecedented, ongoing market conditions. We recognize that stabilizing the global financial market is a goal consistent with the public interest. In light of the extraordinary circumstances of this Proposed Transaction, the Commission approves the first two phases effective as of the dates of those transactions and approves the third phase effective as of the date of this order.

The Commission orders:

(A) The Proposed Transaction is authorized as discussed in the body of this order.

(B) Applicants must inform the Commission of any change in circumstances that would reflect a departure from the facts the Commission relied upon in granting the application.

(C) 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 this Commission.

(D) The Commission retains the authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(E) 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.

¹⁶ See, e.g., Robin Pagnamenta & Suzy Jagger, *Three Countries Nationalise Fortis as BNP Paribas Pulls Out of Rescue Talks*, TimesOnline, Sept. 29, 2008, http://business.timesonline.co.uk/tol/business/industry_sectors/banking_and_finance/article4842865.ece.

¹⁷ See *Bank of America Corp.*, 125 FERC ¶ 61,181 (2008); *Lehman Bros. Commodity Serv., Inc.*, 125 FERC ¶ 61,122 (2008).

(F) If the Proposed Transaction results in changes in the status or the upstream ownership of Applicants' affiliated qualifying facilities, an appropriate filing for recertification pursuant to 18 C.F.R. § 292.207 (2008) shall be made.

(G) Applicants shall make appropriate filings under section 205 of the FPA, as necessary, to implement the acquisition and disposition.

(H) Applicants shall notify the Commission within 10 days of the date that the Proposed Transaction has been consummated.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.