

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suede G. Kelly.

Kandiyohi Power Cooperative

Docket No. EC04-95-000

ORDER AUTHORIZING ACQUISITION OF JURISDICTIONAL FACILITIES

(Issued June 21, 2004)

1. On April 8, 2004, Kandiyohi Power Cooperative (Kandiyohi) filed an application pursuant to section 203 of the Federal Power Act (FPA)<sup>1</sup> requesting the Commission to issue a “no action” order with respect to the 1998 acquisition from United Power Association (UPA)<sup>2</sup> of several substations used for jurisdictional services without prior Commission authorization. We will deny the request for a “no action” order with respect to the 1998 acquisition and will authorize the acquisition as discussed below. The Commission has reviewed the 1998 transaction under the Commission’s Merger Policy Statement<sup>3</sup> and will authorize it on a going forward basis, since it was and is consistent with the public interest. As discussed below, we take such violations seriously, and we

---

<sup>1</sup> 16 U.S.C. § 824b (2000).

<sup>2</sup> Kandiyohi also submitted a promissory note given to UPA (predecessor to Great River Energy) and a request for Commission authorization or “no action” under section 204 of the FPA. That filing, which was assigned Docket No. ES04-24-000, will be addressed by a separate Commission order. Kandiyohi became subject to the Commission’s jurisdiction on May 21, 1998, after it retired its Rural Utilities Services debt.

<sup>3</sup> See Inquiry Concerning the Commission’s Merger Policy Under the Federal Power Act: Policy Statement, Order No. 592, 61 Fed. Reg. 68,595 (1996); FERC Stats. & Regs. & 31,044 (1996), reconsideration denied, Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC & 61,321 (1997) (Merger Policy Statement); see also Revised Filing Requirements Under Part 33 of the Commission’s Regulations, Order No. 642, 65 Fed. Reg. 70,983 (2000), FERC Stats. & Regs., Regulations Preambles July 1996-Dec. 2000 & 31,111 (2000), order on reh=g, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC & 61,289 (2001).

expect public utilities that are planning transactions that may be jurisdictional to come to the Commission for guidance, before consummating the questionable transactions. We conclude that the 1998 acquisition did not have an adverse effect on competition, rates, or regulation and was consistent with public interest. Our findings are discussed below.

## **Background**

2. Kandiyohi is an electric cooperative operating in Willmar, Minnesota. It purchases all of its power and energy from Great River Energy and Western Area Power Administration. Kandiyohi sells power at retail to its members and has jurisdictional agreements on file with the Commission for wholesale sales to the City of Kandiyohi, Minnesota (City) and to the State of Minnesota (State).

3. In 1998, Kandiyohi purchased from UPA seven distribution substations, which Kandiyohi uses, in part, to receive energy for wholesale sales. Kandiyohi failed to obtain prior Commission approval for this transaction as required by sections 203 and 204 of the FPA.

4. Notice of the filing was published in the Federal Register, 69 Fed. Reg. 25,074 (2004) with comments, protests, or interventions due on or before May 7, 2004. No comments, interventions or protests were received.

## **Discussion**

### **A. Failure to File Before Transactions**

5. The application provided several explanations as to why Kandiyohi did not seek approval from the Commission under section 203. These are: (1) when Kandiyohi acquired the substations (ten days after it became subject to the Commission's jurisdiction), Kandiyohi was unaware that the transaction was subject to the Commission's jurisdiction; (2) Kandiyohi did not believe that the transaction was subject to the requirements of section 203; and (3) Kandiyohi's failure to make the required filing was simply an oversight by Kandiyohi's small staff, which at the time of the acquisition, had been subject to the Commission's jurisdiction as a public utility for only 10 days and that did not properly understand its obligations under the FPA.

6. Section 203 requires prior Commission approval for a sale, lease, or other disposition, or a direct or indirect merger or consolidation "by any means whatsoever," by a public utility of the whole or any part of "facilities subject to the jurisdiction of the Commission..."<sup>4</sup> The requirement to obtain the Commission's approval depends on

---

<sup>4</sup> This applies if the facilities have a value greater than \$50,000.

whether the facilities are subject to the jurisdiction of the Commission and whether the transaction directly or indirectly would result in a change of control of the facilities.

7. Section 201 (b)(1) describes the activities that are subject to the jurisdiction of the Commission: "... the transmission of electric energy in interstate commerce and ... the sale of electric energy at wholesale in interstate commerce." The section further describes the facilities that are jurisdictional: "The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy,..."<sup>5</sup> with certain exceptions not relevant here. Being that the Commission had jurisdiction over Kandiyohi as of May 21, 1998, Kandiyohi should have filed its 1998 acquisition from UPA with the Commission.

### **B. Consistency with Public Interest**

8. Section 203 (a) of the FPA provides that the Commission must approve an acquisition of facilities if it finds that the acquisition "will be consistent with the public interest." The Commission's analysis of whether an acquisition is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation. As discussed below, we find that the transaction here was consistent with the public interest.

9. Kandiyohi states that any enforcement action against it or requirement would serve no statutory purpose and would simply impose additional transactional expenses and potentially higher interest costs which its member-owners would be required to pay, either as customers or as owners. Kandiyohi argues that the acquisition of the substations were within the public interest. Kandiyohi states that it regrets this oversight and assures the Commission of its continued observation of the applicable requirements of section 203.

10. As a general matter, the circumstances that would affect our analysis of the effect of section 203 transactions could change, depending on the timing of the transaction, and possibly lead to different findings regarding the effect on rates and regulation and competition. However, in the circumstances of this application, the Commission does not believe, based on facts as asserted in the application and our understanding of the market conditions at the time of the acquisition, that the analysis of the competitive, rate or regulatory effects would be materially different over the course of the period covered by the transactions. Therefore, we will analyze the transactions under present day circumstances.

---

<sup>5</sup> Section 201(b)(1) FPA; 16 U.S.C. 824 § 201 (2000).

## **1. Effect on Competition**

11. Kandiyohi states that the transfer of control over these facilities did not adversely affect competition because it did not result in any change in market power. The assets concerned are merely distribution substations over which service is provided to its members and wholesale customers. According to the application, neither Kandiyohi nor UPA obtained an increased generation market share as a result of the transfer. The application states that before the transfer, the substations were used by UPA to deliver energy to Kandiyohi and that Kandiyohi has continued to use the facilities in the same manner after the transaction.

12. Based on the statements in the application, we conclude the transaction did not result in any meaningful change in market shares or concentration levels for Kandiyohi or UPA. The facilities involved in the proposed transaction continued to be used by Kandiyohi in the same manner after the transaction. Further, no party claims that the proposed transaction adversely affected competition. Therefore, we find that the proposed transaction will not adversely affect competition.

## **2. Effect on Rates**

13. The application states that Kandiyohi's rates for its wholesale contracts are cost-based rates. Kandiyohi explains that the acquisition of the substations did not adversely affect the rates paid by its customers, that the rates paid by its customers remained unchanged after the transaction. Kandiyohi states that there is nothing in the transaction that would affect wholesale power or transmission rates. We agree with Kandiyohi that the transaction did not adversely affect rates.

## **3. Effect on Regulation**

14. As explained in the Merger Policy Statement and Order No. 642, the Commission's primary concern with the effect on regulation of a proposed merger involves possible changes in the Commission's jurisdiction when a registered holding company is formed, thus invoking the jurisdiction of the Securities and Exchange Commission. Kandiyohi states that it has been and will remain subject to the Commission's jurisdiction in the same manner as it was regulated before the acquisition. We find that federal regulation would not be impaired, and we further note that no party alleges that federal regulation would be impaired by the transactions.

15. We also note that no state has indicated that it lacks jurisdiction to consider the transaction's effects on retail rates, nor has any state asked us to do so. Thus, we are satisfied that the transaction had no effect on regulation, either of the Commission, or any state regulatory authority.

16. For these reasons, and because no party argues to the contrary, we conclude that the proposed transaction will not adversely affect regulation.

**C. Conclusion**

17. We find that the June 1998 transaction resulted in an acquisition of jurisdictional facility. Kandiyohi did not timely obtain Commission authorization for this transaction. We note that section 203 of the FPA requires Commission approval of such acquisitions before they are implemented. Implementing such acquisitions without prior Commission approval is directly contrary to statutory requirements. Among other things, non-compliance may require the Commission to impose remedies as a term or condition of its approval under section 203, in addition to the obvious risk to the public utility that an acquisition implemented without prior authorization may be voidable in court by any affected party.<sup>6</sup>

The Commission orders:

(A) The transfer of jurisdictional assets involved in the June 1998 transaction is authorized as of the date of this order and upon the terms and conditions and for the purposes set forth in the application.

(B) 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.

(C) 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.

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

By the Commission

( S E A L )

Magalie R. Salas,  
Secretary.

---

<sup>6</sup> PDI Stoneman, Inc., 104 FERC ¶ 61,270 (2003) at P 25.