

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Suedeen G. Kelly, Marc Spitzer,  
and Jon Wellingshoff.

RockGen OL-1, LLC  
RockGen OL-2, LLC  
RockGen OL-3, LLC  
RockGen OL-4, LLC  
RockGen Energy, LLC

Docket No. EC06-128-000

ORDER AUTHORIZING DISPOSITION OF  
JURISDICTIONAL FACILITIES

(Issued August 7, 2006)

**I. Introduction**

1. On May 26, 2006, RockGen OL-1, LLC, RockGen OL-2, LLC, RockGen OL-3, LLC, RockGen OL-4, LLC (Interest Holders) and RockGen Energy, LLC (RockGen) (collectively, Applicants) filed an application under section 203 of the Federal Power Act (FPA)<sup>1</sup> requesting Commission authorization to transfer a 475 megawatt (MW) simple-cycle, dual-fuel generating facility and associated transmission facilities (Facility) from RockGen to the Interest Holders.<sup>2</sup> The request is made in connection with a potential rejection under section 365 of the United States Bankruptcy Code<sup>3</sup> of four leases

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<sup>1</sup> 16 U.S.C. § 824b (2000), as amended by the Energy Policy Act of 2005 (EPAct 2005), Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982-93 (2005).

<sup>2</sup> Interest Holders also submitted, under section 205 of the FPA, an application for market-based rate authorization. That application was accepted for filing in Docket Nos. ER06-1036-000, ER06-1037-000, ER06-1050-000, and ER06-1095-000, effective subject to the outcome of the instant proceeding. *RockGen OL-1, LLC*, Docket Nos. ER06-1036-000 *et al.*, (June 28, 2006) (unpublished letter order).

<sup>3</sup> 11 U.S.C. § 365 (2000). On December 20, 2005, Calpine Corporation (Calpine) and certain of its affiliated entities, including RockGen, initiated a proceeding under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. In the Chapter 11 proceeding, RockGen advised the  
(continued...)

(Leases) under which RockGen leases from the Interest Holders and controls the Facility. The proposed transaction also includes the transfer of an Emergency Redispatch Rate Schedule and a Reactive Power Rate Schedule.

2. The Commission has reviewed the proposed transaction under the Commission's Merger Policy Statement.<sup>4</sup> We will authorize the transaction, as we find that it will not have an adverse effect on competition, rates or regulation and is thus consistent with the public interest, and that it 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.

## II. Background

### A. Description of the Parties

3. Each of the Interest Holders is a Delaware limited liability company that holds legal title to an undivided ownership interest in the Facility as a passive owner-lessor

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Interest Holders that it would likely suspend making rent payments under the Leases and that the Leases could be subject to rejection under section 365 of the Bankruptcy Code. Section 365 provides that, subject to the court's approval, a trustee may assume or reject any executory contract or unexpired lease of a debtor. *See* 11 U.S.C. §365(a) (2000). Applicants have been negotiating to reach an agreement under which, if the Leases were rejected, control of the Facility would be returned to the Interest Holders, subject to approval of the Commission and the Bankruptcy Court and subject to the satisfaction of other conditions.

<sup>4</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); *see also Transactions Subject to Federal Power Act Section 203*, Order No. 669, 71 Fed. Reg. 1348 (2006), FERC Stats. & Regs. ¶ 31,200 (2006), *order on reh'g*, Order No. 669-A, 71 Fed. Reg. 28,422 (2006), FERC Stats. & Regs. ¶ 31,214 (2006), *order on reh'g*, Order No. 669-B, 71 Fed. Reg. 42,579 (July 27, 2006) (to be codified at 18 C.F.R. pt. 33).

under four Participation Agreements. Under the Participation Agreements, RockGen sold its undivided interests in the Facility to the Interest Holders, which in turn leased their undivided interests in the Facility back to RockGen for a term of approximately 30 years.

4. RockGen, a subsidiary of Calpine, is authorized by the Commission to sell electric energy, capacity and ancillary services at market-based rates. RockGen also has on file with the Commission cost-based rate schedules for emergency dispatch service and for sales of reactive power. Calpine engages, through various subsidiaries, in the development, financing, acquisition, ownership and operation of power generation facilities and the sale of electric power and energy.

### **B. The Proposed Transaction**

5. Applicants state that the proposed transaction may be effectuated either through rejection of the Leases with mutual agreement between RockGen and the Interest Holders as to the terms under which control of the Facility is to be transferred to the Interest Holders, or through rejection without such a mutual agreement. If there is mutual agreement, the Interest Holders would enter into an agreement with RockGen providing for a transition of control over the Facility. The Interest Holders state that they anticipate entering into a service agreement for operation, asset management and power marketing services with a party that has already received market-based rate authority from the Commission and is a Market Participant under the rules of the Midwest Independent Transmission System Operator, Inc. (MISO).<sup>5</sup>

### **III. Notice and Responsive Pleadings**

6. Notice of the filing was published in the *Federal Register*, 71 Fed. Reg. 35,643 (2006), with comments, protests, or interventions due on or before June 23, 2006. The Public Service Commission of Wisconsin filed a timely notice of intervention. Alliant Energy Corporation Services, Inc., on its own behalf and on behalf of Interstate Power and Light Company and Wisconsin Power and Light Company, filed a timely motion to intervene. American Transmission Company LLC (ATC) filed a timely motion to intervene and protest. On July 10, 2006, Applicants filed an answer to ATC's protest.

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<sup>5</sup> No regulatory approvals are being sought as part of this application relating to the service agreement for operation, asset management and power marketing services.

#### **IV. Discussion**

##### **A. Procedural Matters**

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the notice of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

8. Rule 213(a)(2) of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Applicants' answer because it has provided information that has assisted us in our decision-making process.

##### **B. Standard of Review**

9. Section 203(a) of the FPA provides that the Commission must approve a disposition of facilities if it finds that the disposition "will be consistent with the public interest."<sup>6</sup> The Commission's analysis of whether a disposition 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.<sup>7</sup> In addition, EPAct 2005 amended section 203 to specifically require that the Commission also determine that the disposition 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.<sup>8</sup> As discussed below, we will approve the proposed disposition of jurisdictional facilities because it meets these statutory standards.

##### **1. Effect on Competition**

10. Applicants state that the proposed transaction will have no adverse effect on competition. Applicants note that the amount of installed generation acquired by the Interest Holders is .34 percent of the total generating capacity in MISO, the relevant market region. Applicants state that the only interest in electric generation facilities in the MISO region held by persons affiliated with the Interest Holders is a non-controlling

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<sup>6</sup> 16 U.S.C. § 824b (2000).

<sup>7</sup> See *supra* note 4.

<sup>8</sup> EPAct 2005 § 1289, 119 Stat. 982-83, to be codified at 16 U.S.C. § 824b(a)(4).

interest in a 560 MW facility whose output is fully committed under a long-term contract. Applicants also state that the Interest Holders' post-transaction share of generating capacity in MISO will be *de minimis*. In addition, Applicants state that neither the Interest Holders nor any of their affiliates own or control any electric transmission facilities in the relevant market, or control any entities that provide inputs to electricity production in the relevant market. As a result, they have no power to erect barriers to entry to new generation in such market. Applicants conclude that the proposed transaction thus does not raise horizontal or vertical market power concerns.

11. We agree with Applicants' analysis of the horizontal and vertical market power effects of the proposed transaction. We note further that no party in this proceeding claims that the proposed transaction will have an adverse effect on competition. Accordingly, we find that the proposed transaction will not adversely affect competition.

## **2. Effect on Rates**

12. Applicants state that the proposed transaction will not have an adverse effect on rates because RockGen has no retail customers and makes some of its wholesale sales at market-based rates. Applicants also assert that the proposed transaction will not alter the rates, terms or conditions of service under the Emergency Redispatch Rate Schedule or the Reactive Power Rate Schedule provision for reactive power at cost-based rates. Applicants note that none of the Interest Holders currently has any captive customers whose rates could be affected by the proposed transaction.

13. As noted in the Commission's Merger Policy Statement,<sup>9</sup> the Commission primarily examines a transaction's effect on rates in order to protect wholesale power and transmission service customers. We note that nothing in the application indicates that rates to customers will increase as a result of the proposed transaction, and no customer argues otherwise. For this reason, we are satisfied that the proposed transaction will not adversely affect rates.

## **3. Effect on Regulation**

14. Applicants state that the Commission will continue to exercise the same jurisdiction over sales from the Facility by the Interest Holders after the proposed transaction is consummated as it has previously exercised over RockGen; no facilities will be removed from the Commission's jurisdiction. Applicants also state that no retail sales are made from the Facility, that the transaction will have no effect on state commission regulation and that it is not subject to state commission approval.

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<sup>9</sup> *Merger Policy Statement*, FERC Stats. & Regs. ¶ 31,044 at 30,126.

15. We find that neither state nor federal regulation would be impaired. We note that no party alleges that regulation would be impaired by the proposed transaction.

#### **4. Cross-subsidization**

16. Applicants state that the proposed transaction will not result in the cross-subsidization of a non-utility associate company or in the pledge or encumbrance of utility assets for the benefit of an associate company. As required by Order No. 669,<sup>10</sup> Applicants confirm that the transaction will not result in: (1) 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) 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) new pledges or encumbrances 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.

17. We find that Applicants have provided adequate assurance that the transaction will not result in cross-subsidization.

#### **C. Protest and Answer**

18. ATC protests the transfer of ownership and the corresponding obligation to operate the facilities to Interest Holders until appropriate arrangements are made for the continued interconnection of the Facility to ATC's transmission system. According to ATC, the RockGen Facility is interconnected to ATC's transmission system under an interconnection agreement that sets out the parties' duties, obligations and rights. ATC

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<sup>10</sup> *Transactions Subject to FPA Section 203*, Order No. 669, 71 Fed. Reg. 1,348 (Jan. 6, 2006), FERC Stats. & Regs. ¶ 31,200 (2006). Because Applicants submitted their application prior to the effective dates of Order No. 669-A and Order No. 669-B, respectively, Order Nos. 669-A and 669-B are not applicable to the application.

asserts that Applicants do not indicate how the Interest Holders are to be bound by the terms of the interconnection agreement or whether the interconnection agreement is to be terminated, transferred or otherwise modified. ATC argues that the transfer of the Facility without recognition of the existing interconnection agreement is not in the public interest, since safe and reliable operation of the transmission system requires effective communication and coordination. In addition, ATC asserts that it is not in the public interest to transfer jurisdictional facilities to the control of an unnamed entity (*i.e.*, a third-party the Interest Holders hire to operate the Facility) that is not governed by the requirements of an interconnection agreement previously approved by the Commission.

19. ATC notes that the interconnection agreement permits RockGen to sell, assign or transfer the facilities or its rights, duties and obligations under the interconnection agreement for financing purposes, as long as ATC is notified of such conveyance and the assignee agrees, in writing, to be bound by the interconnection agreement. ATC states that it was not notified that the facilities were transferred to the Interest Holders, nor has it received any indication in writing from the Interest Holders that they agree to be bound by the terms, conditions and limitations of the interconnection agreement.

20. ATC asks that the Commission condition any approval of the transaction on RockGen assigning the interconnection agreement to the Interest Holders. It also asks that the transfer be conditioned on the Interest Holders acknowledging in writing that they, and any operator acting on their behalf, are bound by the terms, conditions and limitations of the interconnection agreement.

21. In response to ATC's protest, Applicants first assert that ATC's arguments are not germane to the Commission's section 203 analysis. Applicants then state that the Interest Holders commit that arrangements will be made for interconnection of the Facility before the transaction, and affirm that neither the Interest Holders nor their employees, agents or contractors will operate the Facility without a valid and effective interconnection agreement. We find this sufficient to address ATC's concerns.

The Commission orders:

(1) The proposed disposition of jurisdictional facilities is hereby approved, as discussed in the body of this order.

(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 determinations of costs, 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) Applicants shall make appropriate filings under section 205 of the FPA, as necessary, to implement the transaction.

(6) Applicants shall notify the Commission within 10 days of the date that the disposition of the jurisdictional facilities has been consummated.

By the Commission. Commissioner Moeller not participating.

( S E A L )

Magalie R. Salas,  
Secretary.