

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

FR Kingfisher Holdings LLC
FR Kingfisher Holdings II LLC
MidAmerican Wind Tax Equity Holdings, LLC

Docket No. EC15-124-000

ORDER AUTHORIZING ACQUISITION OF
JURISDICTIONAL FACILITIES

(Issued July 22, 2015)

On April 16, 2015, FR Kingfisher Holdings LLC (FR Kingfisher), FR Kingfisher Holdings II LLC (FR Kingfisher II) (together, FR Applicants), and MidAmerican Wind Tax Equity Holdings, LLC (MidAmerican Wind Tax Equity)(together with FR Applicants, Applicants) filed an application (Application) pursuant to section 203(a)(1) of the Federal Power Act (FPA)¹ requesting Commission authorization for the acquisition by MidAmerican Wind Tax Equity of passive Class A tax equity interests in FR Kingfisher II . According to Applicants, FR Kingfisher II owns 100 percent of the membership interests in Kingfisher Wind, LLC (Kingfisher Wind) and will issue to MidAmerican Wind Tax Equity the Class A membership interests in Kingfisher II in exchange for MidAmerican Wind Tax Equity's contribution of funds for the construction of a generating facility that will be located in Oklahoma and owned, and operated by Kingfisher Wind (Transaction). According to Applicants, the jurisdictional facilities affected by the Transaction are the undivided interest in the Shared Facilities², as described below, and Kingfisher Wind's market-based rate tariff.³ Although Applicants state that the Transaction may not require Commission authorization under FPA section 203, they nevertheless ask the Commission to authorize the Application. This order authorizes the Transaction without making any determination of jurisdiction.⁴

Applicants state that Kingfisher Wind is a Delaware limited liability company and

¹ 16 U.S.C. § 824b (2012).

² Applicants do not request authorization under section 203 of the FPA to transfer an interest in the Shared Facilities and this order does not grant such an authorization.

³ Market-Based Rate Authorization was granted in *Kingfisher Wind, LLC*, 151 FERC ¶ 61,276 (2015).

⁴ See *Ocean State Power*, 47 FERC ¶ 61,321 (1989).

a wholly owned subsidiary of FR Kingfisher II. Kingfisher Wind is constructing, and will own and operate, a 298 megawatt (MW) wind generating facility (Kingfisher Wind Facility) located in Canadian and Kingfisher Counties, Oklahoma, within the Southwest Power Pool, Inc. (SPP) market. Applicants state that the SPP market is the relevant geographic market for the Transaction. Applicants further state that the Kingfisher Wind Facility is expected to begin generating test power during the third quarter of 2015 and is expected to start commercial operation during the fourth quarter of 2015.

Applicants state that, pursuant to an option and asset purchase agreement (Option Agreement), Kingfisher Wind has an option to acquire an undivided 30 percent interest as a tenant in common in an existing 25-mile, 345 kilovolt (kV) generator tie-line, related equipment, and facilities that interconnect the Kingfisher Wind Facility with Oklahoma Gas and Electric Company's (OG&E) 345 kV Cimarron substation (Shared Facilities). Applicants state that the generator tie-line has been energized and, in accordance with the Option Agreement, Kingfisher Wind has exercised its option to acquire an interest in the Shared Facilities. According to Applicants, upon closing on the exercise of its option, Kingfisher Wind will be entitled to use its pro-rata share of the capacity of the Shared Facilities pursuant to a Co-Tenancy and Shared Facilities Agreement that has been accepted for filing by the Commission.⁵

Applicants state that MidAmerican Wind Tax Equity's obligation to close on the Transaction and fund construction of the Kingfisher Wind Facility is subject to a number of conditions (Funding Conditions), including the requirements that Kingfisher Wind acquires the 30 percent undivided interest in the Shared Facilities pursuant to the Option Agreement and obtains market-based rate authorization from the Commission.

Applicants state that FR Kingfisher and FR Kingfisher II are indirect subsidiaries of First Reserve Energy Infrastructure Fund II, L.P. (FREIF). FR Kingfisher II is wholly owned by FR Kingfisher, which is wholly owned by FR Kingfisher Co., which, in turn, is wholly owned by FR Kingfisher Parent LLC, which is a subsidiary of FREIF. FREIF is controlled by its general partner, First Reserve Energy Infrastructure GP II, L.P. (FREI GP II), which, in turn, is controlled by its general partner, First Reserve Energy Infrastructure GP II Limited (FREI GP II Limited). Applicants further state that FREIF, FREIF GP II and FREI GP II Limited are controlled directly and indirectly by senior officers of First Reserve, a global private equity firm focused on the energy industry.

Applicants further state that all of the affiliates of FR Kingfisher and FR Kingfisher II that own generation in the United States are exempt wholesale generators (EWGs) or qualifying facilities (QFs). Within the SPP market, these affiliates include Lea Power Partners, LLC (Lea Power), which owns and operates the 674 MW Hobbs Generating Station, and Borger Energy Associates, L.P., which owns and operates the 243.9 MW Blackhawk Power Station. According to Applicants, all of the electric output

⁵ See *Canadian Hills Wind, LLC*, 143 FERC ¶ 61,261 (2013).

produced by the Hobbs Generating Station and by the Blackhawk Power Station is sold to Southwestern Public Service Company under long-term contracts. Additionally, Applicants state that none of FR Kingfisher, FR Kingfisher II, or any of their affiliates currently own or control any electric transmission or distribution facilities in the United States, aside from the limited equipment necessary to connect individual generating facilities to the transmission grid. Applicants add that Crestwood Midstream Partners, LP, an affiliate of the FR Applicants, owns gathering pipelines located in a number of geographic regions, including some located in or near the SPP market, but that they do not have the ability to exercise vertical market power or to erect barriers to entry that raise vertical market power concerns.

Applicants state that MidAmerican Wind Tax Equity is an indirect, wholly owned subsidiary of BHE Wind, LLC (BHE Wind), a Delaware limited liability company, which, in turn, is an indirect wholly owned subsidiary of BHE Renewables, LLC (BHE Renewables), a Delaware limited liability company. BHE Renewables is a direct, wholly owned subsidiary of Berkshire Hathaway Energy Company (BHE), an Iowa Corporation. Applicants further state that BHE is a holding company that owns subsidiaries involved in energy businesses and is itself a subsidiary of Berkshire Hathaway Inc. Applicants add that BHE owns four traditional franchise public utilities, none of which is located within SPP: MidAmerican Energy Company, Nevada Power Company, PacifiCorp, and Sierra Pacific Power Company.

Applicants state that MidAmerican Wind Tax Equity and its affiliates do not own or control any electric generation assets in the SPP market, nor do they own any transmission assets or inputs to the production of electricity in the SPP market, with the exception of Prairie Wind Transmission, LLC (Prairie Wind) in which BHE Transmission, LLC, a wholly owned subsidiary of BHE, indirectly holds a 25 percent interest. Prairie Wind is a stand-alone transmission company that owns and operates a 108-mile, double-circuit, extra-high voltage 345 kV transmission line (Prairie Wind Project) linking Westar's 345 kV substation near Wichita, Kansas, to a new 345-kV substation northeast of Medicine Lodge, Kansas and then south to the Kansas/Oklahoma border, where it will connect to a transmission line being constructed by OG&E. Applicants add that the Prairie Wind Project went into service in November, 2014, is under the operational control of SPP and provides transmission service under the rates, terms, and conditions set forth in SPP's Open Access Transmission Tariff (SPP OATT).

Under the Transaction, MidAmerican Wind Tax Equity will acquire passive Class A tax equity interests in FR Kingfisher II in exchange for providing a funding contribution towards the construction of the Kingfisher Wind Facility. According to Applicants, on the date when all the Funding Conditions have been satisfied (Funding Date), FR Kingfisher, which currently owns 100 percent of the membership interests in FR Kingfisher II, will cause FR Kingfisher II to issue to MidAmerican Wind Tax Equity 100 percent of the passive Class A tax equity interests and FR Kingfisher's membership interests in FR Kingfisher II will be designated as Class B Interests, *i.e.*, the managing

interests. Simultaneously on the Funding Date, FR Kingfisher and MidAmerican Tax Equity will each make the required capital contributions to fund construction of the Kingfisher Wind Facility.

Applicants state that the Transaction is consistent with the public interest and will not adversely affect competition, rates or regulation, and will not raise any cross-subsidization issues. With respect to competition, Applicants state that, since only passive, non-managing Class A tax equity membership interests are being transferred, and, because, the non-passive, managing Class B Interests remain in FR Kingfisher, there is no change in control over Kingfisher Wind, the public utility. In addition, Applicants assert that even if the Class A units were managing securities, MidAmerican Wind Tax Equity and its affiliates do not own or control any generation within SPP; thus, the Transaction will not result in an overlap of generation within the relevant market. Therefore, according to Applicants, the Transaction does not raise any horizontal market power concerns and a horizontal competitive analysis screen is not required.

According to the Application, none of Applicants or their affiliates own or control any transmission facilities in SPP, other than the limited interconnection facilities required to interconnect their facilities to the transmission grid, with the exception of Prairie Wind. Applicants state that Prairie Wind has turned over operational control of the Prairie Wind Project to SPP, and service on this facility is provided under the SPP OATT. Applicants explain that although affiliates of the FR Applicants and MidAmerican Wind Tax Equity own certain inputs to electricity production, the Transaction does not involve any inputs to electricity production that would allow Applicants to erect barriers to entry to new generation. Therefore, according to Applicants, the Transaction raises no vertical market power concerns.

With respect to the effect on rates, Applicants state that wholesale energy, capacity, and ancillary services sales by Kingfisher Wind will be made at market-based rates, and the Transaction will have no effect on the rates for such sales. In addition, Applicants add that none of the Applicants is a traditional utility with captive retail or wholesale customers or provides unbundled transmission service. According to Applicants, the Transaction will have no adverse effect on wholesale sales customers or transmission customers.

With respect to regulation, Applicants state that the Transaction will not diminish the regulatory authority of the Commission or any state commission, create a regulatory gap, or shift regulatory authority between the Commission and any state commission. Applicants further state that, upon consummation of the Transaction, Kingfisher Wind will continue to be regulated by the Commission and the Oklahoma Corporation Commission to the same degree as prior to the Transaction. Thus, according to Applicants, the Transaction will have no adverse effect on the effectiveness of federal or state regulation.

Applicants state 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. Applicants assert that the Transaction qualifies for the safe harbor for transactions that do not involve a franchised public utility with captive customers. Additionally, Applicants represent that, based on facts and circumstances known to Applicant or that are reasonably foreseeable that the Transaction will not result in, at the time of the transaction or in the future: (1) any 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) any 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) 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 contracts 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 April 17, 2015, with comments, protests or interventions due on or before May 7, 2015. None was filed.

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 system involved in this 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 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 the 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.⁶ The foregoing authorization may result in a change in status. Accordingly, applicants that have market-based rates 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.

After consideration, it is concluded that the Transaction is consistent with the public interest and is hereby authorized, subject to the following conditions:

- (1) The Transaction is authorized upon the terms and conditions described in this Order 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;
- (4) The Commission retains authority under sections 203(b) and 309 of the FPA, to issue supplemental orders as appropriate;
- (5) If the Transaction results in changes in the status or the upstream ownership of Applicants' affiliated Qualifying Facilities, if any, an appropriate filing for recertification pursuant to 18 C.F.R. § 292.207 (2014) shall be made;
- (6) Applicants shall make appropriate filings under section 205 of the FPA, as necessary, to implement the Transaction;
- (7) Applicants 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 Transaction within 30 days of the date of the material change in circumstances; and
- (8) Applicants shall notify the Commission within 10 days of the date that the Transaction has been consummated.

⁶ *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).

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 (2014). 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 (2014).

Steve P. Rodgers, Director
Division of Electric Power
Regulation - West