

156 FERC ¶ 61,070
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

West Valley Power, LLC

Docket No. EC16-112-000

ORDER AUTHORIZING DISPOSITION
OF JURISDICTIONAL FACILITIES

(Issued July 28, 2016)

1. On April 29, 2016, as amended on June 3, 2016, West Valley Power, LLC (West Valley) filed an application pursuant to section 203(a)(1) of the Federal Power Act (FPA)¹ requesting authorization for a transaction whereby West Valley will sell the generation and transmission assets, and certain associated contracts, permits, and operating records of the West Valley Facility to Utah Municipal Power Agency (Utah Municipal) (Proposed Transaction).
2. We have reviewed the Proposed Transaction under the Commission's Merger Policy Statement.² As discussed below, we authorize the Proposed Transaction as consistent with the public interest.

¹ 16 U.S.C. § 824b (2012).

² See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996) (1996 Merger Policy Statement), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997); see also *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement) *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008). 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 No. 642-A, 94 FERC ¶ 61,289 (2001). See also *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200

(continued ...)

I. Background**A. Description of Parties****1. West Valley**

3. West Valley states that it owns the West Valley Facility, as well as interconnection facilities necessary to connect the West Valley Facility to the transmission grid. The West Valley Facility consists of five natural-gas fired simple cycle units with a nominal capacity of 189 megawatts (MW), located in West Valley City, Utah, within the PacifiCorp East (PACE) balancing authority area. West Valley states that it is an exempt wholesale generator and has been authorized by the Commission to sell energy, capacity and ancillary services at market-based rates.³

4. West Valley states that it is a wholly owned subsidiary of West Valley Power Holdings, LLC, which in turn is an indirect, wholly owned subsidiary of Wayzata Opportunities Fund III, L.P. (Opportunities Fund III). West Valley states that Opportunities Fund III is a private investment vehicle in which no single member owns more than a 10 percent equity interest and in which all such investment interests are passive and non-voting. Wayzata Investment Partners LLC (Wayzata) is the manager of Opportunities Fund III. Wayzata is an investment management firm focusing on the acquisition of controlling interests in selected businesses through investments in distressed debt or directly acquiring assets in selected industries, including the energy sector. Wayzata serves as investment manager to several affiliated private equity funds.⁴

2. Utah Municipal

5. West Valley states that Utah Municipal is a political subdivision of the State of Utah organized and existing under the laws of the State of Utah and that each of Utah Municipal's member municipal electric systems is physically interconnected with PacifiCorp's transmission system. According to West Valley, Utah Municipal and each of its member systems are transmission dependent utilities on the PacifiCorp transmission system. West Valley asserts that Utah Municipal is also dependent on PacifiCorp's

(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).

³ Application at 2 (citing *CER Generation II, LLC*, Docket No. ER08-860-000 (May 27, 2008) (delegated letter order)).

⁴ *Id.* at 3.

transmission system for the delivery of the allocation of power and energy that Utah Municipal receives on behalf of its members from the Western Area Power Administration. West Valley states that Utah Municipal owns a 3.75 percent undivided ownership interest in Bonanza Unit 1, a 458 MW base load coal-fired generating facility operated by Deseret Generation & Transmission Co-operative, Inc. located in Uintah County, Utah. Utah Municipal also owns a 1.875 percent undivided ownership interest in common facilities at the Bonanza site and holds a contract that expires in 2025 for an additional 3.5 percent of the output of Bonanza Unit 1. Through a capacity purchase agreement with member municipality Provo, Utah Municipal also controls a 6.25 percent undivided ownership interest in PacifiCorp's Hunter Unit 1, a 446 MW base load coal-fired generating facility located in Emery County, Utah.⁵

B. Description of the Proposed Transaction

6. West Valley states that, pursuant to an asset purchase agreement between West Valley and Utah Municipal, West Valley will sell the generation and transmission assets, and certain associated contracts, permits and operating records of the West Valley Facility. Following consummation of the Proposed Transaction, West Valley states that it will execute a tolling agreement with Utah Municipal for a portion of the West Valley Facility capacity (Toll). West Valley states that it therefore intends to maintain its market-based rate authority for as long as the Toll remains in effect. However, West Valley states that it will relinquish its EWG status following the closing of the Proposed Transaction because it will no longer own or operate a generation facility. In addition, West Valley states that Utah Municipal will use the portion of the West Valley Facility that is not subject to the Toll primarily to provide wholesale power to its member municipalities.⁶

7. On May 25, 2016, Commission staff issued a data request seeking more information regarding the effect of the Proposed Transaction on competition and regulation.

8. On June 3, 2016, West Valley filed a response (Response) to the data request.

II. Notice of Filing and Responsive Pleadings

9. Notice of the Application was published in the *Federal Register*, 81 Fed. Reg. 28,057 (2016), with interventions and protests due on or before May 20, 2016.

⁵ *Id.* at 3-4.

⁶ *Id.* at 4.

10. Utah Municipal filed a timely motion to intervene.

11. Notice of the Response was published in the *Federal Register*, 81 Fed. Reg. 38,165 (2016), with interventions and protests due on or before June 13, 2016. None was filed.

III. Discussion

A. Procedural Matter

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁷ the timely, unopposed motion to intervene serves to make Utah Municipal a party to this proceeding.

B. Substantive Matters

1. Standard of Review under FPA Section 203

13. FPA section 203(a)(4) requires the Commission to approve dispositions, consolidations, acquisitions, or changes in control if the Commission determines that the proposed transaction will be consistent with the public interest.⁸ The Commission's analysis of whether a transaction 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.⁹ FPA section 203(a)(4) 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."¹⁰ The Commission's regulations establish verification and informational requirements for entities that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.¹¹

⁷ 18 C.F.R. § 385.214 (2015).

⁸ 16 U.S.C. § 824b(a)(4).

⁹ 1996 Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

¹⁰ 16 U.S.C. § 824b(a)(4).

¹¹ 18 C.F.R. § 33.2(j).

2. Analysis of the Proposed Transaction**a. Effect on Horizontal Competition****i. Applicant's Analysis**

14. West Valley states that the Proposed Transaction will have no adverse effect on horizontal competition. West Valley asserts that the Proposed Transaction will have a *de minimis* effect on horizontal competition in the PACE balancing authority area. West Valley notes that the installed capacity in the PACE balancing authority area is 9,696 MW and that transfer of the 180 MW West Valley Facility will have only a small effect on market structure.¹²

ii. Commission Determination

15. In analyzing whether a transaction will adversely affect competition, the Commission examines the effects on concentration in the generation markets and whether the transaction otherwise creates the incentive and ability to engage in behavior harmful to competition, such as withholding of generation.¹³

16. Based on Applicant's representations, we find that the Proposed Transaction will not have an adverse effect on horizontal competition. As explained by West Valley in its Response, Utah Municipal owns or is contractually entitled to approximately 304 MW, which represents 3 percent of total installed capacity in the PACE balancing authority area. After consummation of the Proposed Transaction, Utah Municipal's share of installed capacity in the PACE balancing authority area will increase to approximately 5 percent. We agree that this change in concentration is not sufficient to create an adverse effect on horizontal competition.

b. Effect on Vertical Competition**i. Applicant's Analysis**

17. West Valley states that it is not merging facilities with Utah Municipal and that the Proposed Transaction does not involve any entity obtaining ownership or control over inputs to electricity products.

¹² Response at 2.

¹³ *Nevada Power Co.*, 149 FERC ¶ 61,079, at P 28 (2014).

ii. Commission Determination

18. In analyzing whether a proposed transaction presents vertical market power concerns, the Commission considers the vertical combination of upstream inputs, such as transmission or natural gas, with downstream generating capacity. As the Commission has previously found, transactions that combine electric generation assets with inputs to generating power (such as natural gas, transmission, or fuel) can harm competition if the transaction increases an entity's ability or incentive to exercise vertical market power in wholesale electricity markets. For example, by denying rival entities access to inputs or by raising their input costs, an entity created by a transaction could impede entry of new competitors or inhibit existing competitors' ability to undercut an attempted price increase in the downstream wholesale electricity market.¹⁴

19. Based on Applicant's representations, we find that the Proposed Transaction will not have an adverse effect on vertical competition. As West Valley points out, it is not merging facilities with Utah Municipal and the Proposed Transaction does not involve any entity obtaining ownership or control over one or more entities that provide inputs to electricity products.

c. Effect on Rates

i. Applicant's Analysis

20. West Valley asserts that the Proposed Transaction will have no adverse effect on rates. West Valley states that the Commission's primary concern in addressing the effect on rates is the "protection of wholesale ratepayers and transmission customers."¹⁵ West Valley states that the rates Utah Municipal charges are not subject to the jurisdiction of the Commission because Utah Municipal is a non-jurisdictional entity, therefore the Commission's concerns over jurisdictional rates are inapplicable.

ii. Commission Determination

21. Based on Applicant's representations, we find that the Proposed Transaction will not have an adverse effect on rates. We note that no wholesale customers will be

¹⁴ *Upstate New York Power Producers Inc.*, 154 FERC ¶ 61,015, at P 15 (2016); *Exelon Corp.*, 138 FERC ¶ 61,167, at P 112 (2012).

¹⁵ Application at 7 (quoting *New England Power Co., LLC*, 82 FERC ¶ 61,179, at ¶ 61,659 (1998)).

adversely affected by the Proposed Transaction. Furthermore, there is no evidence that any transmission customers will be affected by the Proposed Transaction.

d. Effect on Regulation

i. Applicant's Analysis

22. West Valley asserts that the Proposed Transaction will have no adverse effect on federal or state regulation. West Valley states that the West Valley Facility has never been subject to regulation by any state commission and that although the Proposed Transaction will result in removal of the West Valley Facility from regulation under the FPA, this event should not be construed as an adverse effect on regulation.

23. West Valley further explains that Utah Municipal has six member municipal utilities and is governed by a Board of Directors comprised of an elected official of each member municipality. West Valley states that the rates charged by Utah Municipal to its members must be approved by its Board of Directors. West Valley further states that sales of energy, capacity and ancillary services from the portion of the West Valley Facility controlled by West Valley pursuant to the Toll will remain subject to the Commission's jurisdiction.¹⁶

ii. Commission Determination

24. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap.¹⁷ As to whether a proposed transaction will have an effect on state regulation, the Commission explained in the Merger Policy Statement that it ordinarily will not set the issue of the effect of a proposed transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the proposed transaction. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission may set the issue for hearing and it will address such circumstances on a case-by-case basis.¹⁸ Based on Applicant's representations, we find no evidence that either state or federal regulation will be impaired by the Proposed Transaction.

¹⁶ *Id.* at n.19.

¹⁷ 1996 Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

¹⁸ *Id.*

25. First, although the Commission will no longer have jurisdiction over certain interconnection facilities, we do not find this event to be adverse in these circumstances. We note that the Commission will maintain jurisdiction over sales by West Valley pursuant to the Toll.¹⁹ Second, we note that the West Valley Facility has never been subject to regulation by any state commission; therefore the Proposed Transaction will have no effect, adverse or otherwise, on state regulation. Finally, we note that no party alleges that regulation, state or federal, would be impaired by the Proposed Transaction, and no state commission has requested that the Commission address the issue of the effect on state regulation.²⁰ For these reasons, we find that the Proposed Transaction will not have an adverse effect on regulation.

e. Cross-Subsidization

i. Applicant's Analysis

26. West Valley asserts 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: (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 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 service agreements subject to review under sections 205 and 206²¹ of the FPA.²²

¹⁹ See *Cinergy Servs. Inc.*, 108 FERC ¶ 61,250, at P 14 (2004) (finding that there is no adverse effect on regulation where the Commission retains jurisdiction over the facility to the extent it engages in wholesale sales.).

²⁰ See *ITC Holdings Corp.*, 121 FERC ¶ 61,229, at P 134 (2007) (finding that the transaction will not have an adverse effect on state regulation where the state board had approved the transaction and had not filed a protest in the proceeding).

²¹ 16 U.S.C. § 824e.

ii. **Commission Determination**

27. Based on West Valley's representations, we find that the Proposed Transaction will not result in the cross-subsidization of a non-utility associate company by a utility company, or in a pledge or encumbrance of utility assets for the benefit of an associate company. We note that no party has argued otherwise.

3. **Other Considerations**

28. Information and/or systems connected to the bulk power system involved in this transaction may be subject to reliability and cybersecurity standards approved by the Commission pursuant to FPA section 215.²³ 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 American Electric Reliability Corporation or the relevant regional entity may audit compliance with reliability and cybersecurity standards.

29. 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. In addition, applicants subject to the Public Utility Holding Company Act of 2005 (PUHCA 2005)²⁴ are subject to the record-keeping and books and records requirements of PUHCA 2005.

30. 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.²⁵ To

²² Application at Exh. M.

²³ 16 U.S.C. § 824o.

²⁴ Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1261 *et seq.*, 119 Stat. 594 (2005).

²⁵ *Reporting Requirement for Changes in Status for Public Utilities with Market-*

the extent that the foregoing authorization 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.

The Commission orders:

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

(B) West Valley 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.

(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 the Commission.

(D) 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.

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

(F) West Valley shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction.

(G) West Valley shall notify the Commission within 10 days of the date on which the Proposed Transaction is consummated.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Based Rate Authority, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005). *See* 18 C.F.R. § 35.42 (2015).