

143 FERC ¶ 61,216
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

LS Power Development, LLC
Luminus Management, LLC

Docket No. EC08-67-000

ORDER GRANTING SUSPENSION OF REPORTING REQUIREMENT

(Issued June 6, 2013)

1. On February 3, 2012, LS Power Development, LLC (LS Power) and Luminus Management, LLC (Luminus Management) (collectively, Applicants) filed a request for clarification or, in the alternative, suspension of quarterly reporting obligations pursuant to an order issued November 5, 2008.¹ In the November 5 Order, the Commission granted authorization, under section 203(a)(1) of the Federal Power Act (FPA),² for Applicants to acquire up to 20 percent of the common stock of TransAlta Corporation (TransAlta) (Proposed Transaction). In this order, we grant Applicants' request for suspension of the quarterly reporting obligations that were imposed in the November 5 Order.

I. Background

2. In the November 5 Order, the Commission authorized the Proposed Transaction, finding it to be consistent with the public interest. Because the Proposed Transaction would result in a disposition of up to 20 percent of the common stock of TransAlta, and could therefore result in a change in control of a public utility, the Commission asserted jurisdiction over the Proposed Transaction under FPA section 203(a)(1).

3. Based on the facts presented in Applicants' request for authorization, the Commission concluded that the Proposed Transaction would not adversely affect

¹ *LS Power Development, LLC*, 125 FERC ¶ 61,146 (2008) (November 5 Order).

² 16 U.S.C. § 824b (2006).

competition in terms of horizontal market power.³ In addition, the Commission found that the Proposed Transaction did not raise any vertical market power concerns, would not have an adverse effect on rates, and would not have an adverse effect on federal or state regulation. Moreover, based on the facts presented, the Commission found that the Proposed Transaction would not result in cross-subsidization, or the pledge or encumbrance of utility assets for the benefit of an associate company.

4. The November 5 Order required Applicants to file with the Commission, for informational purposes, within 45 days of the end of each calendar quarter, a quarterly report of holdings by both LS Power and Luminus Management of the outstanding shares of TransAlta stated in terms of the number of the shares held at the end of the quarter and as a percentage of the outstanding shares.⁴

II. Request for Suspension of Quarterly Reporting Obligation

5. Applicants state that since the issuance of the November 5 Order, they have submitted quarterly reports to the Commission, despite the fact that they and their affiliates, collectively, have never owned 10 percent or more of the outstanding shares of TransAlta, such that separate approval should be required under section 203 of the FPA. Applicants note that the Commission has adopted a rebuttable presumption that a transfer of less than 10 percent of a public utility's securities does not constitute a transfer of control over jurisdictional facilities requiring approval under section 203(a)(1)(A) or section 203(a)(1)(B). In order to reduce the administrative burden of preparing the quarterly reports, Applicants request that the Commission clarify that the quarterly reporting obligation set forth in the November 5 Order does not apply until they and their affiliates collectively hold 10 percent or more of TransAlta's voting securities.

6. In the event the Commission declines to provide the requested clarification, Applicants request that the Commission suspend the applicability of the quarterly reporting obligation set forth in the November 5 Order until such time as they and their affiliates collectively acquire 10 percent or more of TransAlta's outstanding voting securities. Applicants assert that they and their affiliates have not, to date, acquired 10 percent or more of TransAlta's outstanding securities and have therefore not yet utilized the authorization granted in the November 5 Order.

³ November 5 Order, 125 FERC ¶ 61,146 at P 42.

⁴ November 5, Order, 125 FERC ¶ 61,146 at P 44.

III. Discussion

7. Because the disposition or acquisition of 10 percent or more of the voting interests of a public utility could result in a change of control of the public utility,⁵ the Commission asserted jurisdiction over the Proposed Transaction under FPA section 203(a)(1). The Proposed Transaction authorized under the November 5 Order involved levels of up to 20 percent of the common stock of TransAlta, and the Commission required Applicants to file quarterly reports listing Applicants' holdings of TransAlta shares.

8. Applicants assert that they and their affiliates have not, to date, acquired 10 percent or more of TransAlta's outstanding securities. Specifically, the quarterly reports submitted to the Commission from the time of issuance of the November 5 Order until February 2012 reflect that the highest percentage of shares outstanding that Applicants held in TransAlta was 9.4 percent -- below the 10 percent rebuttable presumption threshold. Since February 2012, Applicants' quarterly reports reflect a decrease in the percentage of shares outstanding that Applicants held in TransAlta to 1.9 percent, 1.0 percent, 0.6 percent, 0.8 percent, 0.3 percent, and 0.5 percent, respectively.

9. Applicants have not acquired 10 percent or more of TransAlta, and in fact, their holdings of TransAlta's outstanding shares have shown a significant decline in the last year. Therefore, based on the facts here, we suspend the reporting requirement until such time as Applicants hold 10 percent or more of TransAlta's outstanding shares. As of the most recent quarterly report, Applicants are below this level and therefore, as of the date of issuance of this order, Applicants are not required to file with the Commission, for informational purposes, a quarterly report listing their holdings of the outstanding shares of TransAlta. This suspension shall continue in effect until such time as it is either rescinded or modified by the Commission or Applicants' holdings of common stock in TransAlta exceed 10 percent. In this regard, we accept Applicants commitment that,

⁵ The Commission's general policy creates a rebuttable presumption that "a transfer of *less than 10 percent* of a public utility's holdings is not a transfer of control if: (1) [a]fter the transaction, the acquirer and its affiliates and associate companies, directly or indirectly, in aggregate will own less than 10 percent of such public utility; and (2) the facts and circumstances do not indicate that such companies would be able to directly or indirectly exercise a controlling influence over the management or policies of the public utility....Further, if holding companies or other acquirers believe that facts and circumstances prevent them from exercising control even if they own 10 percent or more of a public utility, they may seek to make such a demonstration to the Commission." *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253, at P 57 (2007) (emphasis added), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008).

upon Applicants and their affiliates collectively acquiring 10 percent or more of TransAlta's outstanding voting securities, they will resume submitting quarterly reports of their holdings of TransAlta pursuant to the November 5 Order.

The Commission orders:

Applicants' request for suspension of the quarterly reporting obligation imposed in the November 5 Order is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.