

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Northern Iowa Windpower II LLC

Docket No. EC04-126-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued January 25, 2005)

I. Introduction

1. On June 29, 2004, as amended June 30, 2004 and October 5, 2004, Northern Iowa Windpower II LLC (Northern Iowa) filed an application pursuant to section 203 of the Federal Power Act (FPA)¹ requesting Commission authorization for changes in the upstream ownership resulting from a partial transfer of indirect membership interests to one or more additional investors of equity capital.² Specifically, Northern Iowa requests authorization for two previous transactions occurring February 25, 2003 (the February 2003 transaction) and June 18, 2004 (the June 2004 transaction) in which Stephen F. Dryden (Dryden), Chestnut Capital LLC (Chestnut) and Booner Capital LLC (Booner) acquired ownership interests of Northern Iowa, if such authorization should have been obtained under section 203.³ The jurisdictional facilities involved in the transactions are paper facilities.⁴

¹ 16 U.S.C. § 824b (2000).

² Northern Iowa also submitted, under section 205 of the FPA, a notice of a change in status that will result from the consummation of the proposed transactions. That application, which was assigned Docket No. ER02-2085-002, will be addressed by a separate Commission order.

³ The original filing also requested approval for a future transaction, but Northern Iowa amended its application to withdraw that aspect of the filing.

⁴ The generating project is expected to begin commercial operation in the winter of 2005. Applicant states that the facilities subject to this application are rate tariffs and schedules, wholesale power sales agreements, and books and records associated with the assets that are necessary to make wholesale sales of electricity.

2. The Commission has reviewed the February 2003 and June 2004 transactions under the Commission's Merger Policy Statement⁵ and will authorize them on a going forward basis, since they will not have an adverse effect on competition, rates, or regulation and are consistent with the public interest. We find that the February 2003 and June 2004 transactions were dispositions of jurisdictional facilities that required prior approval under section 203. As discussed below, we take such violations seriously, and we expect public utilities that are planning transactions that may be jurisdictional to come to the Commission for guidance, before consummating the questionable transactions. Our findings are discussed below.

II. Background

A. Description of the Parties

3. Northern Iowa, a Delaware limited liability company, is a special purpose entity created to develop, own and operate a 110.6 megawatt (MW) wind-powered electric generating project in Worth County, Iowa. Northern Iowa is a wholly-owned subsidiary of Midwest Renewable Energy Projects LLC (MRE Projects), which in turn is wholly owned by MREC Partners LLC (MREC Partners),⁶ a Delaware limited liability company. Northern Iowa is a power marketer authorized by the Commission to sell energy and capacity at market-based rates.

B. The 2003 and 2004 Transactions

4. Prior to the February 2003 transaction, Northern Iowa was wholly owned by MREC, which in turn was owned by Dryden 80 percent and Atlantic Renewable Energy Corporation (Atlantic) 20 percent. The February 2003 transaction resulted in Atlantic transferring all of its interests in MREC to Dryden. After consummation of the February

⁵ 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) (Merger Filing Requirements).

⁶ Midwest Renewable Energy Corporation (MREC) currently owns 77 percent of the membership interests in MREC Partners, and 11.5 percent of the membership interests are owned each by Chestnut and Booner.

2003 transaction, MRE Projects became the direct owner of Northern Iowa. MRE Projects was owned by MREC Partners, and MREC Partners in turn was owned by MREC. Accordingly, Dryden acquired 100 percent of the indirect interest in Northern Iowa.

5. The June 2004 transaction resulted in Dryden transferring an 11.5 percent ownership interest in Northern Iowa to Booner and Chestnut. MREC transferred a 23 percent indirect membership interest in Northern Iowa to Chestnut and Booner as equity investors through an intermediate subsidiary, MREC Partners, under an investment agreement among MREC, MREC Partners, Chestnut, and Booner, and others.⁷

III. Notice of Filing

6. Notice of the filing was published in the *Federal Register*, 69 Fed. Reg. 42,715 (2004), with comments, protests, or interventions due on or before July 22, 2004. None were filed.

IV. Discussion

7. Northern Iowa requests retroactive approval for the February 2003 and June 2004 transactions, both of which already have been consummated. Northern Iowa states that it inadvertently failed to request prior authorization because it was not aware such authorization was necessary for a partial change in equity ownership when the facility has yet to be constructed and has yet to begin to sell power under its tariff. Northern Iowa commits to secure approval in a timely manner as may be needed in the future. It states that it filed for Commission authorization as quickly as possible after learning of its errors.

8. Section 203 of the FPA requires *prior* Commission approval for a sale, lease, or other disposition, or a direct or indirect merger or consolidation by a public utility of the whole or any part of “facilities subject to the jurisdiction of the Commission...”⁸ The requirement to obtain the Commission’s approval depends on 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. Here, the transfer of indirect membership interests in Northern Iowa, the owner of a generating project, to Dryden, Chestnut and Booner resulted in an indirect change in control over jurisdictional facilities. Section 203 clearly requires prior approval. However, in this circumstance,

⁷ Upon the closing of the June 2004 transaction, MREC Partners had three members: Chestnut (11.5 percent), Booner (11.5 percent) and MREC (77 percent).

⁸ This applies if the facilities have a value greater than \$50,000.

where it has been demonstrated that the holdings of the membership interests are consistent with the public interest, and given that failure to request prior approval was inadvertent, the Commission, in its discretion, will prospectively approve the resulting ownership existing as of the date of this order.

A. Consistency with Public Interest

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.” 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. As discussed below, we find that the resulting ownership here is consistent with the public interest.

1. Effect on Competition

10. Northern Iowa asserts that the transactions did not adversely affect competition because they did not result in the merger of two or more utilities, and did not decrease the number of competitors in the market. Northern Iowa also states that the transactions did not change the number of competitors in the market or the market shares of any competitor. It states that Booner and Chestnut are not Commission-jurisdictional public utilities and do not have any interest, other than minority or *de minimis* interests, in other energy facilities.⁹ Further, no party claims that the proposed transactions adversely affected competition. We find that the proposed transactions will not adversely affect competition.

2. Effect on Rates

11. The application indicates that Northern Iowa has no captive customers whose rates could be affected by the transactions. Moreover, Northern Iowa states that the wholesale sales rates are market-based. We agree with Northern Iowa that the transactions will not adversely affect rates.

3. Effect on Regulation

12. As explained in the Merger Policy Statement and the Merger Filing Requirements, the Commission’s primary concern with the effect on regulation of a proposed transaction involves possible changes in the Commission’s jurisdiction when a registered holding company is formed, thus invoking the jurisdiction of the Securities and Exchange

⁹ We note that Dryden was already an 80 percent owner prior to the first transaction, which occurred in February of 2003.

Commission. Northern Iowa states that it has and will remain subject to the Commission's jurisdiction in the same manner as it was regulated before the transactions. 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. Northern Iowa also states that state regulatory authority is not impaired.

B. Conclusion

13. Northern Iowa did not timely obtain Commission authorization for these transactions. We note that section 203 of the FPA requires Commission approval of such dispositions before they are implemented. Implementing such dispositions without prior Commission approval is directly contrary to statutory requirements. We take non-compliance with section 203 requirements very seriously and expect public utilities to do the same. To remedy non-compliance, the Commission may, among other things, impose a term or condition on its approval of a disposition under section 203. In addition, a public utility that implements a disposition without the Commission's prior authorization faces the obvious risk that an affected party may seek to void that disposition in court. Further, while the Commission does not have civil penalty authority, we note that Northern Iowa's failure to obtain prior Commission approval for these transactions is the type of violation for which the imposition of a penalty would be appropriate.

The Commission orders:

- (A) The ownership existing as of the date of this order is hereby approved.
- (B) Applicant's request for retroactive approval is hereby denied.
- (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.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.