

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Calpine Fox LLC
Fox Energy Company LLC

Docket No. EC06-133-000

ORDER AUTHORIZING DISPOSITION AND ACQUISITION OF
JURISDICTIONAL FACILITIES AND ACQUISITION OF GENERATING FACILITY

(Issued September 21, 2006)

1. On June 15, 2006, Calpine Fox LLC (Calpine Fox) and Fox Energy Company LLC (Fox Energy) (collectively, Applicants) filed an application under section 203 of the Federal Power Act (FPA)¹ requesting Commission authorization for a disposition of jurisdictional facilities. Applicants' proposed transaction includes: (1) the sale and transfer of control to Fox Energy of Calpine Fox's leasehold interest in Fox Energy Center, a 600 megawatt (MW) generating facility and associated transmission interconnection facilities in Wisconsin (the Facility); (2) termination of the Lease Agreement (Lease) between Applicants; and (3) the transfer of Calpine Fox's rate schedule for supplying reactive supply and voltage control from generation sources (Reactive Power Tariff) to Fox Energy. The Commission has reviewed the proposed transaction under the Merger Policy Statement² and orders implementing EPAct 2005's

¹ 16 U.S.C. § 824b (2000), *amended by* Energy Policy Act of 2005 (EPAct 2005), Pub. L. No. 109-58, § 1289, 119 Stat. 594 (2005).

² *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. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001).

amendments to section 203.³ We will authorize the transaction, as we find that it will not have an adverse effect on competition, rates, or regulation and thus is 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.⁴

I. Background

A. Description of the Parties

2. Calpine Fox is an indirect, wholly-owned subsidiary of Calpine Corporation (Calpine). Calpine is an independent power company engaged in the development, acquisition, ownership, and operation of power generation facilities and the sale of electric power and energy in the United States and other countries.

3. Fox Energy is an indirect, wholly-owned subsidiary of General Electric Company (General Electric).⁵ General Electric holds passive ownership in or leases electric generation facilities. It typically holds title to a facility for financial benefit, and leases it to another entity that makes or manages the sale of power or transmission service associated with the facility. Apart from its indirect interest in the Facility, General Electric holds no interests in generating facilities in the Midwest Independent Transmission System Operator, Inc.'s (the Midwest ISO's) region.

4. Calpine Fox currently leases the Facility from Fox Energy under the Lease. The Facility is interconnected with the transmission system owned by American Transmission Company LLC (ATC), which has transferred control over its system to the Midwest ISO. Calpine Fox has market-based rate authority and sells power from the Facility to

³ 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), FERC Stats. & Regs. ¶ 31,225 (2006).

⁴ Applicants did not request approval for the acquisition of the generating facility under section 203(a)(1)(D). However, to the extent the Commission has jurisdiction over this aspect of the transaction, the Commission is also approving the acquisition of the generating facility.

⁵ Fox Energy recently filed an amendment to its market-based rate schedule and a notice of change of status in Docket No. ER03-983-002 reflecting the proposed transfer of control of the Facility. The Commission will act on this filing by separate order.

Wisconsin Public Service Corporation (WPSC) under a long-term tolling agreement (Tolling Agreement).⁶

5. On December 20, 2005, Calpine and certain of its affiliated entities, not including Calpine Fox, filed for bankruptcy under Chapter 11 of the Bankruptcy Code.⁷ The Bankruptcy Court designated the Facility as ineligible to receive proceeds from the debtor-in-possession financing of Calpine and the entities that filed bankruptcy with it. Additionally, there have been defaults under the Lease. Accordingly, Applicants agreed to terminate the Lease under an agreement that provides for all of the equipment and other rights possessed or used by Calpine Fox to be returned to Fox Energy.

B. The Proposed Transaction

6. The proposed transaction will permit: (1) Fox Energy's purchase of Calpine Fox's leasehold interest in the Facility, including interconnection facilities; (2) termination of the Lease between Fox Energy and Calpine Fox; and (3) the transfer to Fox Energy of operational control over certain of Calpine Fox's assets under the Lease, including the Facility and the Reactive Power Tariff.

II. Notice, Interventions, and Protests

7. Notice of the filing was published in the *Federal Register*, 71 Fed. Reg. 38,392 (2006), with comments, protests, or interventions due on or before July 6, 2006.

8. ATC filed a timely motion to intervene and comment raising no issues. WPSC filed an untimely motion for leave to intervene, protest, and comment. Wisconsin Electric Power Company (WEPCo) filed an untimely motion to intervene. Applicants filed an answer to WPSC's protest. WPSC filed a response to Applicants' Answer. Applicants then filed another answer and WPSC responded. Applicants also filed another response.

⁶ The Tolling Agreement provides for WPSC to purchase approximately 500 MW of capacity and associated tolling services through 2015. WPSC has access to fuel and desires to have such fuel tolled into energy. Thus, WPSC is responsible for fuel supply to the Facility for its portion of contracted generation, and is granted the right to dispatch delivered energy from all but a small portion of the Facility. Tolling Agreement Section 4.01(b)(i).

⁷ The bankruptcy proceeding was filed in the United States Bankruptcy Court for the Southern District of New York (Bankruptcy Court).

III. Discussion

A. Procedural Matters

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁸ the timely, unopposed motion to intervene serves to make ATC a party to this proceeding. We will also accept WPSC's and WEPCo's untimely motions to intervene, given their interest in this proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay.

10. Additionally, Rule 213(a)(2) of the Commission's Rules of Practice and Procedure⁹ prohibits an answer to a protest and an answer to an answer unless otherwise ordered by the decisional authority. We will accept Applicants' Answer to WPSC's protest and WPSC's response to Applicants' Answer, because they have provided information that assisted us in our decision-making process. However, we are not persuaded to accept Applicants' and WPSC's further answers to each other's pleadings and will, therefore, reject them.

B. Standard of Review

11. Section 203(a) of the FPA, as amended by EAct 2005, provides that:

After notice and opportunity for hearing, the Commission shall approve the proposed disposition, consolidation, acquisition, or change in control, if it finds that the proposed transaction will be consistent with the public interest, and 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

12. 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.¹¹ In addition, the Commission determines whether the transaction will result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an

⁸ 18 C.F.R. § 385.214 (2006).

⁹ 18 C.F.R. § 385.213(a)(2) (2006).

¹⁰ 16 U.S.C. § 824b(a)(4) (2000).

¹¹ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

associate company.¹² As discussed below, we will approve the proposed transaction because it meets these statutory standards.

1. **Effect on Competition**

a. **Horizontal Market Power Analysis**

13. Applicants state that except for the Facility, Fox Energy and its affiliates do not provide electric service or own or control any generating facilities in the Midwest ISO, which they contend is the relevant market region.¹³ Applicants state that, as a result, concentration will not be increased in any relevant market.

14. We agree and find that the proposed transaction will not have an adverse effect on competition in terms of horizontal market power. We note that no party argues otherwise.

b. **Vertical Market Power Analysis: Combination of Transmission, Natural Gas, and Electric Assets**

15. Applicants state that except for the Southern Star Central Pipeline, the interests of an affiliate in gas and oil wells in Ohio and the Facility's limited transmission interconnection facilities, Fox Energy and its affiliates do not own or control transmission or inputs to the production of electric energy in the Midwest ISO region.¹⁴ Applicants state that the pipeline must offer open access services on a non-discriminatory basis. They conclude that the proposed transaction does not present vertical market power concerns.

16. Based on the facts as presented in the application, we find that the combination of transmission or natural gas assets and electric generation assets resulting from the proposed transaction does not raise vertical market power concerns. We note that no party argues otherwise.

c. **Vertical Market Power Analysis: Combination of Generator Support Services and Electric Generation Assets**

17. Based on the foregoing analysis of potential vertical market power issues involving natural gas or transmission assets, Applicants concluded that there was no need to file a

¹² Order No. 669, FERC Stats. & Regs. ¶ 31,200 at P 164.

¹³ Application at 15.

¹⁴ *Id.*

vertical competitive analysis in order to meet the Commission's filing requirements set forth in section 33.4 of the Commission's regulations. However, WPSC contends that Applicants failed to demonstrate that the transaction will not enhance their vertical market power, given General Electric's role as a supplier of technical generator support services for generating capacity in the Midwest ISO. WPSC is concerned about the knowledge that General Electric gains, or is in a position to gain, as a provider of generator support services to both affiliated and non-affiliated operating generators.¹⁵ This knowledge includes technical details, maintenance schedules, and management systems at competing generators. As an example, WPSC suggests that through General Electric's knowledge of the maintenance schedules of competing generators, Fox Energy would be able to manipulate the market to profit in the sale of peaking power. WPSC argues that, to fully ascertain the potential for this type of behavior, the Commission must require Applicants to meet the section 33.4 filing requirements by filing an analysis of market concentration in both upstream markets for generator support services and downstream delivered electric energy markets.¹⁶

18. Applicants claim in their Answer that both the downstream electric market and the upstream market for supplying generation equipment and support services are competitive. They say that General Electric accounts for only a *de minimis* share (from less than one percent to seven percent, depending on the service) of operating services for generation in the Midwest ISO. Additionally, Applicants claim that the proposed transaction actually involves a *de minimis* amount of capacity because WPSC has (and will maintain after the transaction) the right under the Tolling Agreement to nearly all of the Facility's capacity.

19. WPSC notes that the Tolling Agreement allows Fox Energy to sell all available energy whenever WPSC has not requested dispatch of the Facility and also gives Fox Energy at all times scheduling, bidding, and dispatch authority for the Facility. Thus, WPSC suggests that General Electric and Fox could benefit financially far more from an exercise of vertical market power than is implied in Applicants' Answer.¹⁷ WPSC further suggests that General Electric could benefit from its upstream vertical market power and high downstream electric prices charged by counterparties to its contracts for generator support services, either through direct profit-sharing contracts or through the assurances

¹⁵ In its subsequent August 2 response to Applicants' Answer, WPSC briefly alludes to a concern that General Electric's supply of replacement parts to the generators for which it supplies maintenance services affords it leverage to influence other suppliers' generation costs. WPSC Response to Applicants' Answer at 7.

¹⁶ WPSC Protest at 6.

¹⁷ WPSC Response to Applicants' Answer at 4-5.

that high prices would provide that lessee operators (in sale leaseback arrangements) would meet their financial obligations to General Electric.¹⁸

20. Addressing WPSC's argument regarding the sharing of information between General Electric affiliates and Fox Energy, Applicants state that General Electric's contracts for support services prohibit the unauthorized sharing or use of commercially sensitive information with third parties and that this protects against the potential abuses alleged by WPSC. However, WPSC argues that confidentiality agreements are not sufficient safeguards against the misuse of information.

21. We note that vertical market power concerns usually are raised regarding the combination of downstream electric generating capacity with upstream control of electric transmission assets or fuel delivery systems. This case differs in that the vertical market power control issue involves a parent company that provides maintenance and technical services for competing generators. The concern is that this parent company will use its position in the upstream market for generator support services to adversely affect competition or the competitive process in the downstream delivered energy markets.

22. The Commission has found that in order for a transaction to create or enhance vertical market power, both the upstream and downstream markets must be highly concentrated and the merger must increase the merged firm's ability and/or incentive to exercise vertical market power.¹⁹ In this case, we find that no vertical market power concerns exist because based on the information provided in the Application and subsequent pleadings, the transaction will not increase the ability or incentive to exercise vertical market power.

23. Our review of the Tolling Agreement indicates that WPSC has the right to dispatch all but a small portion of the Facility at full load during each rolling twelve month period of the delivery term.²⁰ Although Calpine Fox (or, after the proposed transaction, Fox Energy) has the right to dispatch the Facility when WPSC is not exercising this right, WPSC has the right to interrupt sales by Calpine Fox (or Fox Energy) to a third party customer and require Calpine Fox (or Fox Energy) to commence the delivery of energy associated with the contract to WPSC on an hour-ahead basis.²¹ Based on the Tolling Agreement, we conclude that WPSC effectively controls the dispatch of output from the Facility.

¹⁸ *Id.* at 6-7.

¹⁹ Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,910.

²⁰ Tolling Agreement section 5.02(f).

²¹ *Id.* section 4.01(d)(ii).

24. Based on these circumstances, Fox Energy will gain, as a result of the proposed transaction, operational control of over 11 MW of combined-cycle capacity and approximately 50 MW of duct-fired steam turbine capacity. Applicants assert that the 50 MW duct-fired steam turbine capacity is rarely economic. The total of 61 MW represents one percent of all gas-fired capacity within Wisconsin, and less than 0.3 percent of all gas-fired capacity in the Midwest ISO region.²² As a result, it is unlikely, even if Fox Energy were able to modify its pricing strategy for its limited output based on knowledge acquired from General Electric about competing generators, that such knowledge would enable it to manipulate or affect market prices generally. We note that section 33.4(a)(2)(i) of the Commission's regulations does not require the filing of a full-fledged vertical competitive analysis if "the extent of the business transactions in the same geographical market is *de minimis*."

25. WPSC has also suggested that the transaction increases the incentive of General Electric to exercise vertical market power to reap the benefits of higher electric prices in two other respects. First, it asserts that General Electric would benefit from higher electric prices because of its profit-sharing contracts with counterparties for generator support services. Second, it claims that higher electric prices would provide more assurance that lessee operators of plants passively owned by General Electric would be able to meet their financial obligations under the lease. The Commission disagrees that the transaction would materially increase General Electric's incentive in the manner suggested by WPSC. Any incentive General Electric has to exert market power to gain in these ways would already exist without the transaction, and the acquisition of 61 MW of generating capacity will not materially increase that incentive.

26. We also note that Fox Energy acknowledges that General Electric's contracts for support services prohibit information sharing with third parties. Therefore, before violating this prohibition, General Electric and Fox Energy would have to measure the potential for enhanced profits for Fox Energy against the risk of General Electric affiliates losing sales under their service contracts if the transfer of information was detected. The *de minimis* extent of Fox Energy's potential sales makes this course of action unlikely. In any case, the Commission interprets such third parties to include Fox Energy, and we expect General Electric to abide by these provisions.

27. Based on the circumstances of this Application, the Commission finds that the *de minimis* extent of Fox Energy's potential sales in the Midwest ISO region is not likely to provide an increased incentive for General Electric and Fox Energy to exercise any

²² Based on Platts POWERdat and POWERmap. Also, based on data provided by WPSC, the 61 MW that Fox Energy would acquire represents less than 0.2 percent of the Midwest ISO's 31,000 MW of peaking unit generation capacity. WPSC Response to Applicants' Answer at 7.

vertical market power they may have. We also find that Applicants were not required to file a vertical competitive analysis pursuant to section 33.4 of the Commission's regulations.

28. We further note that in connection with its request that Applicants be directed to provide a vertical market power analysis pursuant to section 33.4 of the Commission's regulations, WPSC argues that General Electric must identify each power plant in the Midwest ISO market that it owns though an affiliated operator-lessee.²³ WPSC also contends, in its response to Applicants' answer to its protest, that Fox Energy and General Electric have not fully disclosed their ownership of generating plants both within and outside of the Midwest ISO. It points to several plants located outside of the Midwest ISO footprint and to the Hennepin plant in Minnesota owned by a General Electric affiliate within the Midwest ISO footprint in which, according to publicly available information, General Electric has ownership interests. It states that Fox Energy and General Electric should be required to explain the criteria used to include some, but exclude other General Electric generators from the Application.²⁴

29. We note that the Hennepin plant, identified by WPSC as being located in the Midwest ISO, is no longer owned by General Electric.²⁵ We also conclude that the other plants identified by WPSC, located in Massachusetts, Louisiana, New York and Oregon, do not present potential competitive issues within the Midwest ISO. The Commission finds that the Application adequately complies with the Commission's filing requirements.

2. Effect on Rates

30. Applicants state that the proposed transaction will not have an adverse effect on rates because Calpine Fox sells power generated by the Facility to WPSC under the Tolling Agreement at market-based rates.²⁶ Applicants also note that reactive power is provided under the Commission's standard methodology for establishing rates for the sale of reactive power by non-utility generators not subject to traditional regulation.²⁷ Applicants further state that neither the rate for market-based sales nor the rate for the sale of reactive power would change under the proposed transaction.

²³ WPSC Protest at 9-10.

²⁴ WPSC Response to Applicants' Answer at 3-4.

²⁵ Covanta Hennepin Energy Resource Co., Ltd. P'ship, December 15, 2003 Filing, Docket No. QF86-1038-004, at 2.

²⁶ Application at 15.

²⁷ *Id.* at 15-16 (citing *Am. Elec. Power Serv. Corp.*, 88 FERC ¶ 61,141 (1999)).

31. We agree that rates for the sale of output from the Facility will not increase as a result of the proposed transaction, and no customer argues otherwise. For this reason, we find that the proposed transaction will not have an adverse effect on such rates.

3. Effect on Regulation

32. Applicants state that regulation by the Commission of sales of output from the Facility will not change as a result of the proposed transaction. Applicants say that state regulation will not be affected because they are not now, and after the transaction, still will not be subject to state regulation.²⁸

33. We note that no party alleges that regulation would be impaired by the proposed transaction. Based on the facts presented in the Application, we find that the proposed transaction will not have an adverse effect on federal or state regulation.

4. Cross-Subsidization

34. Applicants assert 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. They state that the transaction does 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.²⁹

35. Based on the facts as presented in the application, we find that the transaction will not result in cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company.

²⁸ *Id.* at 16.

²⁹ *Id.* at Ex. M; *see also* Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 at P 45, 49-51.

C. Transfer of the Tolling Agreement

36. WPSC states that Applicants failed to request section 203 authorization for the transfer of the Tolling Agreement. This agreement was originally between Fox Energy and WPSC and provided for WPSC to purchase capacity and energy from the Facility.³⁰ However, when Fox Energy entered into the Lease with Calpine Fox, as part of the Lease, Fox Energy assigned its rights and obligations under the Tolling Agreement to Calpine Fox for the duration of the Lease.³¹

37. Applicants argue that the application does, in fact, seek section 203 approval for the transfer of Calpine Fox's interest in the Tolling Agreement to Fox Energy.³² They contend that the application provides for the termination of the Lease as part of an agreement whereby all the equipment and other rights possessed or used by Calpine Fox will be returned to Fox Energy and all of Calpine Fox's assets (other than specifically excluded assets) will be sold to Fox Energy. They also assert that the application specifically identified agreements under Calpine Fox's market-based rate schedule including the Tolling Agreement, as jurisdictional facilities. Applicants maintain that WPSC knew that the Tolling Agreement would be assigned to Fox Energy if the Lease were terminated. According to Applicants, the term of the assignment is linked to the term of the Lease, meaning that termination of the Lease automatically results in termination of the assignment. To the extent it was unclear, however, Applicants clarify that they seek section 203 authorization for the transfer of Calpine Fox's interests in the Tolling Agreement to Fox Energy.

38. We find that Applicants' response adequately addresses the concerns raised by WPSC, and, therefore, this order includes section 203 authorization for the transfer of Calpine Fox's interests in the Tolling Agreement to Fox Energy.

The Commission orders:

(A) Applicants' proposed transaction is hereby authorized, as discussed in the body of this order.

(B) 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 costs, or any other matter whatsoever now pending or which may come before the Commission.

³⁰ WPSC Protest at 10.

³¹ *Id.*

³² Applicants' Answer at 22-23.

(C) 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.

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

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

(F) Applicants shall notify the Commission within 10 days of the date that the transaction has been consummated.

By the Commission. Commissioner Moeller not participating.

(S E A L)

Magalie R. Salas,
Secretary.