

132 FERC ¶ 62,032

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Public Service Company of Colorado  
Calpine Development Holdings, Inc.  
Riverside Energy Center, LLC  
Blue Spruce Energy Center, LLC  
Rocky Mountain Energy Center, LLC

Docket No. EC10-71-000

ORDER AUTHORIZING DISPOSITION AND ACQUISITION  
OF JURISDICTIONAL FACILITIES

(Issued July 12, 2010)

On May 18, 2010, as supplemented on June 29, 2010, Public Service Company of Colorado (PSC of Colorado), Calpine Development Holdings, Inc. (Calpine Development), Riverside Energy Center, LLC (Riverside), Blue Spruce Energy Center, LLC (Blue Spruce), and Rocky Mountain Energy Center, LLC (Rocky Mountain) (collectively, Applicants) filed an application pursuant to section 203 of the Federal Power Act (FPA)<sup>1</sup> requesting authorization for a proposed transaction in which (1) Calpine Development will sell and PSC of Colorado will acquire 100 percent of the limited liability interests of Blue Spruce, which owns and operates a 310 megawatt (MW) natural gas simple cycle peaking facility located in Aurora, Colorado (Blue Spruce Facility), (2) Riverside will sell and PSC of Colorado will acquire 100 percent of the limited liability company interests of Rocky Mountain, which owns and operates a 652 MW<sup>2</sup> natural gas combined cycle facility located in Kennesburg Colorado (Rocky Mountain Facility, and together with the Blue Spruce Facility, Facilities), and (3) Blue Spruce and Rocky Mountain will be merged into PSC of Colorado, and PSC of Colorado will acquire all of Blue Spruce's and Rocky Mountain's rights and assets and will assume all of Blue Spruce's and Rocky Mountain's liabilities and other obligations. The jurisdictional facilities involved in the proposed transaction include the associated interconnection facilities and books and records of the Facilities.

PSC of Colorado is a public utility which is wholly owned by Xcel Energy Inc. (Xcel Energy). PSC of Colorado is a vertically integrated electric utility serving portions

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<sup>1</sup> 16 U.S.C. § 824b (2006).

<sup>2</sup> 652 MW is the nominal winter capacity.

of Colorado, including the Denver metropolitan area. PSC of Colorado provides electric utility services to approximately 1.4 million electric customers. PSC of Colorado also provides natural gas retail sales and intrastate natural gas transportation services as a local distribution company to approximately 1.3 million natural gas customers. PSC of Colorado operates a Balancing Area Authority certified by the North American Electric Reliability Corporation and is a member of the Western Electricity Coordinating Council. PSC of Colorado provides access to its transmission system pursuant to the Xcel Energy Operating Companies' Joint Open Access Transmission Tariff (Xcel Joint OATT) and certain grandfathered agreements. All wholesale requirements electric sales are provided by PSC of Colorado at regulated, cost-based rates on file with the Commission. PSC of Colorado has market-based rate authority in directly interconnected first-tier balancing authority areas and sells electric power at cost-based rates in and at the border of its own control area.

Calpine Development is an indirect wholly-owned subsidiary of Calpine Corporation (Calpine). Calpine Development holds 100 percent of the limited liability company interests of Blue Spruce. Blue Spruce owns and operates the Blue Spruce Facility. Blue Spruce is an exempt wholesale generator (EWG) and is authorized to make wholesale sales at market-based rates. PSC of Colorado presently purchases the Blue Spruce Facility's output pursuant to a long-term tolling agreement that, *inter alia*, gives PSC of Colorado full rights to dispatch the Blue Spruce Facility.

Riverside is an indirect wholly-owned subsidiary of Calpine. Riverside is an EWG and is authorized to make wholesale sales at market-based rates. Riverside holds 100 percent of the limited liability company interests of Rocky Mountain. Rocky Mountain owns and operates the Rocky Mountain Facility. Rocky Mountain is an EWG and is authorized to make wholesale sales at market-based rates. PSC of Colorado presently purchases the Rocky Mountain Facility's output pursuant to a long-term tolling agreement that, *inter alia*, gives PSC of Colorado full rights to dispatch the Rocky Mountain Facility.

The proposed transaction will be implemented in accordance with a Purchase and Sales Agreement (PSA), dated April 2, 2010, by and between the Applicants. Pursuant to the PSA, PSC of Colorado will acquire 100 percent of the limited liability company interests of Blue Spruce and of Rocky Mountain from Calpine Development and Riverside, respectively. Immediately upon closing of this acquisition, Blue Spruce and Rocky Mountain will be merged into PSC of Colorado. PSC of Colorado will be the surviving entity of each of these mergers and Blue Spruce and Rocky Mountain will each cease to exist as of the effective date of their merger into PSC of Colorado. Pursuant to the PSA, the tolling agreements between PSC of Colorado and each of Blue Spruce and Rocky Mountain will be terminated effective of the closing of the proposed transaction. The market-based rate tariffs of Blue Spruce and of Rocky Mountain will also be terminated.

The proposed transaction is part of a portfolio recommended by the Colorado Public Utilities Commission (CPUC), following an extensive notice-and-comment process and requests for proposals, as the least cost way for PSC of Colorado to satisfy its firm capacity and energy needs. The proposed transaction will be subject to further CPUC review in formal hearings to ensure ratepayer protection.

Applicants argue that the proposed transaction is consistent with the public interest and will not result in any prohibited cross-subsidization. Applicants argue that the proposed transaction does not raise horizontal market power concerns because the proposed transaction results in a change of ownership of the Facilities but not a change in control. According to the Applicants, PSC of Colorado currently controls the dispatch of the Facilities pursuant to long-term agreements that give PSC of Colorado sole control over the Facilities' commitment and dispatch. PSC of Colorado's tolling agreements expire in April 2013 and April 2014 with Blue Spruce and Rocky Mountain, respectively.

Applicants argue that the proposed transaction does not raise any vertical market power concerns because it does not result in the acquisition of upstream assets or inputs into electrical generation that would affect PSC of Colorado's ability or incentive to erect barriers to entry by new suppliers. Neither Blue Spruce nor Rocky Mountain own or control any transmission facilities other than interconnection facilities, and Blue Spruce and Rocky Mountain own only those limited natural gas transportation facilities associated with their existing interconnections to Colorado Interstate Gas Company's interstate pipeline necessary to provide the fuel for the Facilities. Applicants also state that PSC of Colorado operates its transmission system pursuant to a Commission approved Xcel Joint OATT. Further, they argue that, while PSC of Colorado provides retail gas services, its facilities pose no barriers to entry because a major interstate pipeline that is not owned or controlled by PSC of Colorado serves the geographic region in which the Facilities are located. They also state that the proposed transaction will not result in the consolidation of any new generating plant sites in the relevant market that would allow PSC of Colorado or its affiliates to raise barriers to entry by competing generators.

Applicants argue that the proposed transaction will have no adverse effect on rates. With respect to transmission rates, Applicants argue that the proposed transaction will have no adverse effect because neither Blue Spruce nor Rocky Mountain provide transmission service or have transmission customers while PSC of Colorado's transmission service will continue to be provided under the Xcel Joint OATT. Applicants also argue that the proposed transaction will have no adverse effect on long-term requirements customers, which are certain cooperatives, two municipalities, and an investor-owned utility within PSC of Colorado's control area. These customers' service is provided through cost-based agreements which do not enable PSC of Colorado to pass through costs related to the proposed transaction. Applicants state that any future change

in the rates of these agreements would require an FPA section 205 filing upon which customers and other interested parties would have an opportunity to protest and which would require the Commission to determine if the proposed rate was just and reasonable.

Applicants argue that the proposed transaction will not diminish or impair state or federal regulation and will not result in a regulatory gap at the federal level or the state level. Applicants state that the proposed transaction is subject to review and approval by the CPUC which is full authorized to evaluate the effect of the proposed transaction on state regulation. They also state that each of the Xcel Energy Operating Companies, which includes PSC of Colorado, has previously committed to adhere to the Commission's policies on pricing of non-power goods and services between affiliates. Applicants claim that PSC of Colorado's wholesale and transmission operations and its retail operations will continue to be subject to regulation by the Commission and the CPUC, respectively, to the same extent following the proposed transaction as they are today.<sup>3</sup>

Applicants state that the proposed transaction will not result in any prohibited cross-subsidization or pledge or encumbrance of utility assets. Applicants state the CPUC has administered the proceedings that led to the proposed transaction, and will review and approve the proposed transaction prior to its consummation. Applicants argue that the requirements of Exhibit M are satisfied by the fact that the proposed transaction will be reviewed by a state commission to prevent inappropriate cross-subsidization.<sup>4</sup> In addition, Applicants verify that based on facts and circumstances known to the Applicants or that are reasonably foreseeable, the proposed transaction will not result in, at the time of the proposed transaction or in the future, cross-subsidization of a non-utility associate company or pledge or encumbrance of utility 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, including: (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) the issuance of any securities by a traditional public

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<sup>3</sup> Applicants also note that, while Blue Spruce and Rocky Mountain are currently subject to Commission jurisdiction, all of the jurisdictional facilities will be transferred to PSC of Colorado pursuant to the proposed transaction and each entity's market-based rate tariff will be terminated along with the two jurisdictional tolling agreements with PSC of Colorado.

<sup>4</sup> *FPA Section 203 Supplemental Policy Statement*, 72 Fed. Reg. 42,277 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253, at P 18 (2007), *on clarification & reconsideration*, 122 FERC ¶ 61,157 (2008).

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 pledge or encumbrance of any assets of any 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 companies 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.

PSC of Colorado provides pro forma accounting entries reflecting its current assessment of the manner in which the transaction will be recorded for accounting purposes. PSC of Colorado's accounting entries record its acquisition of Blue Spruce and Rocky Mountain as an investment in a subsidiary using Account 123.1, Investment in Subsidiaries Companies. However, PSC of Colorado did not provide accounting entries reflecting the subsequent merger of the Blue Spruce and Rocky Mountain into its operations. This merger results in PSC of Colorado acquiring the assets and assuming liabilities associated with the acquired companies. Pursuant to the Commission's accounting requirements, PSC of Colorado must file accounting entries, within six months of consummation of the transaction, reflecting the acquisition of electric plant assets on its books in accordance with Electric Plant Instruction (EPI) No. 2, Electric Plant to be Recorded at Cost, EPI No. 5, Electric Plant Purchased or Sold, and the text of Account 102, Electric Plant Purchased or Sold.<sup>5</sup>

PSC of Colorado states that its agreements with wholesale customers provide for service at stated, cost-based rates and do not enable the pass-through of transaction-related costs.<sup>6</sup> Although PSC of Colorado did not provide its accounting for any merger related transaction costs, these costs should be recorded in Account 426.5, Other Deductions. The Commission has previously found that transaction costs are considered non-operating in nature and should be recorded in Account 426.5, Other Deductions.<sup>7</sup> Account 426.5 includes miscellaneous expense items which are non-operating in nature.<sup>8</sup>

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<sup>5</sup> 18 C.F.R. Part 101 (2009).

<sup>6</sup> See Application at 11-12.

<sup>7</sup> See e.g., *Midwest Power Systems, Inc. and Iowa-Illinois Gas and Electric Company*, 71 FERC 61,386 (1995), and *NSTAR Electric and Gas Corporation*, Docket No. AC07-183-000 (August 9, 2007) (unpublished letter order).

<sup>8</sup> The Commission's accounting regulations provide for the classification of non-operating expenses in Accounts 426.1 through 426.5. The Note to the Special

This filing was noticed on May 20, 2010. Comments, protests or interventions were due on or before June 8, 2010. None was received. Notices of intervention and unopposed timely filed motions to intervene are granted pursuant to the operation of Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214). Any opposed or untimely filed motion to intervene is governed by the provisions of Rule 214.

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 this 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 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, 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.<sup>9</sup> The foregoing authorization may result in a change in status. Accordingly, Applicants are advised to make a change in status filing as required by Order No. 652, if necessary.

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Instructions of these accounts states, "The classification of expenses as non-operating and their inclusion in these accounts is for accounting purposes. It does not preclude Commission consideration of proof to the contrary for ratemaking or other purposes."

<sup>9</sup> *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).

Applicants are reminded that when they submit an application seeking authorization under section 203 of the FPA, they must specify the subsection(s) of section 203 under which they are seeking authorization.

After consideration, it is concluded that the proposed transaction is consistent with the public interest, subject to the following conditions:

- (1) The proposed transaction is authorized upon the terms and conditions 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 determinations of cost, or any other matter whatsoever now pending or which may become 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 proposed 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 shall be made;
- (6) Applicants shall make the appropriate filings under section 205 of the FPA, as necessary, to implement the proposed transaction;
- (7) Applicants must inform the Commission of any change in circumstances that would reflect a departure from the facts the Commission relied upon in authorizing the proposed transaction;
- (8) PSC of Colorado shall account for the transaction in accordance with Electric Plant Instruction Nos. 2, Electric Plant to be Recorded at Cost, and 5, Electric Plant Purchased or Sold, and Account 102, Electric Plant Purchased or Sold, of the Uniform System of Accounts. PSC of Colorado shall submit its final accounting entries within six months of the date that the transaction is consummated, and the accounting submission shall provide all the accounting entries and amounts related to the transaction along with narrative explanations describing the basis for the entries.

- (9) Applicants shall notify the Commission within 10 days of the date that the disposition of jurisdictional facilities under the proposed transaction has been consummated.

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. 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.

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



Document Content(s)

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