

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**Entergy Nuclear FitzPatrick, LLC
Exelon Generation Company, LLC**

Docket No. EC16-169-000

**MOTION FOR LEAVE TO ANSWER AND
ANSWER TO PROTEST**

Pursuant to Rules 212 and 213 of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) regulations,¹ the Applicants² in the above-captioned proceeding hereby submit this Motion for Leave to Answer and Answer to the Protest filed by Public Citizen, Inc. (“Public Citizen”) in this proceeding.³ The Protest was submitted in response to Applicants’ Joint Application For Authorization Under Section Section 203 of the Federal Power Act, Request for Expedited Action and Request for Confidential Treatment.⁴

I. ANSWER TO PROTEST

The arguments raised in the Protest are unrelated to the Commission’s evaluation of the proposed Transaction under FPA Section 203 and should be dismissed as outside the scope of this proceeding.

The contention that the Application, which includes the supporting affidavit by Julie Solomon, lacks completeness because it does not analyze the Zero Emissions Credit or “ZEC”—a recently created credit that will be paid to the FitzPatrick Facility and other

¹ 18 C.F.R. § 385.212 and 385.213 (2016).

² Capitalized terms not defined herein have the same meaning as in the Application.

³ Protest of Public Citizen, Inc., Docket No. EC16-169-000 (filed Oct. 11, 2016) (“Protest”).

⁴ Applicants filed their Application with the Commission on August 19, 2016.

eligible generation facilities located in New York—is unavailing and outside the scope of the Commission’s review of the proposed Transaction.⁵ The further contention that the ZEC will “significantly distort” the New York Independent System Operator Inc.’s (“NYISO”) energy and capacity markets,⁶ or “may” conflict with “elements” the NYISO tariff, likewise is unavailing and outside the scope of the Commission’s review of the proposed Transaction.⁷ The issues regarding the ZEC program raised in the Protest are misplaced in this proceeding to consider the proposed Transaction under Section 203.⁸

The Commission has consistently confined the scope of review under Section 203 to whether the proposed transaction is consistent with the public interest and will not result in cross-subsidization concerns.⁹ To determine whether a transaction is consistent with the public interest, the Commission examines the following factors: (1) the effect on competition, (2) the effect on rates, and (3) the effect on regulation.¹⁰ The Commission has

⁵ The ZEC is a credit designed to recognize the environmental value of the zero-emission electric energy produced by certain nuclear generating facilities in New York, and the need for zero-emission electric energy in order to achieve New York’s goals under its Clean Energy Standard. Following an opportunity for public comment, the New York Public Service Commission (“NYPSC”) issued an order on August 1, 2016 approving the establishment of a ZEC payment program. *See* New York Public Service Commission, Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Order Adopting a Clean Energy Standard (issued Aug. 1, 2016). Public Citizen is a participant in the NYPSC proceeding in Case 15-E-0302. *See* Comments of Public Citizen, Inc. in Case 15-E-0302 (July 22, 2016).

⁶ Protest at 2.

⁷ *Id.*

⁸ Indeed, Public Citizen concludes its Protest by asserting that the Commission should address “the true intent of the design of the ZEC, and whether it is consistent with FERC’s rules and regulations.” Protest at 8.

⁹ 18 U.S.C. § 824b(a)(4) (providing that the Commission shall approve a proposed transaction if it finds that the 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”); 18 C.F.R. § 2.26.

¹⁰ *See Inquiry Concerning the Commission’s Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 77 FERC ¶ 61,263, at P 3 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997).

routinely dismissed issues raised by parties in proceedings that extend beyond this scope of review.¹¹

The Application and Ms. Solomon’s affidavit fully address the factors listed above and contain the analyses required under the Commission’s regulations to establish that the Transaction is consistent with the public interest. The issues raised in the Protest about the ZEC program bear no relationship to these factors as they relate to the proposed Transaction, and no separate analysis of the ZEC is necessary, much less required, under the Commission’s regulations and precedent.¹² Moreover, Public Citizen’s assertions regarding the potential impact of the ZEC on NYISO’s energy and capacity markets are at best speculative and not supported by evidence.¹³ Public Citizen will not be deprived of the opportunity to address issues with the ZEC program in other proceedings or forums if the Commission, consistent with its precedents, denies the Protest here.

Applicants respectfully request that the Commission deny the Protest as beyond the scope of this proceeding. Consistent with their request in the Application for prompt Commission action, the Applicants respectfully request the Commission to authorize the Transaction as consistent with the public interest or before November 17, 2016.

¹¹ See, e.g., *Fortis Inc., et al.*, 156 FERC ¶ 61,219 (2016); *Fla. Power & Light*, 145 FERC ¶ 61,018 at PP 46-48 (2013); *Dominion Energy Brayton Point*, 144 FERC ¶ 61,139 (2013); *Am. Elec. Power Svcs. Corp.* 113 FERC ¶ 61,163 (2005).

¹² See, e.g., *PowerMinn 9090, LLC, et al.*, 151 FERC ¶ 61,111, at P 52 (2015) (finding that a protest about tax credits raised issues outside the scope of FERC’s analysis of the proposed transaction under FPA section 203 because it did not relate to the effects of the Proposed Transaction on competition, rates, regulation or a prohibited cross-subsidization in energy markets); *LenderCo, et al.*, 110 FERC ¶ 61,044, at P 21 (2005) (“The Commission will not condition its section 203 approval in this proceeding on matters that should be addressed in another proceeding or forum.”); *Great Plains Energy Inc.*, 121 FERC ¶ 61,069 at P 50 (2007) (declining to condition section 203 approval “on matters that should be addressed in another proceeding or forum”); *Energy E. Corp.*, 121 FERC ¶ 61,236 at P 38 (2007) (finding that the Commission does not normally consider potential environmental effects of proposed transactions under section 203 of the FPA, noting that such issues are the purview of other regulatory authorities).

¹³ See *Dynegy Inc., et al.*, 150 FERC ¶ 61,231, at P 67 (2016).

II. MOTION FOR LEAVE TO ANSWER

Although answers filed in response to protests generally are not permitted by the Commission's rules,¹⁴ the Commission has permitted answers when they clarify issues in dispute, provide information to assist in the Commission's decision-making process, or ensure that the record is complete and accurate.¹⁵ Applicants request that the Commission grant this Motion for Leave to Answer and Answer because it clarifies issues relevant to this proceeding, and will ensure that the record in this proceeding is complete and accurate.

III. CONCLUSION

As demonstrated in the Application, the Transaction is consistent with the public interest as analyzed under the standards promulgated in the Commission's Merger Policy Statement, Part 33 of the Commission's regulations, and Commission precedent. Applicants respectfully request the Commission grant leave to answer the Protest, deny the Protest's requested relief, and approve the Transaction under Section 203 of the Federal Power Act on or before November 17, 2016.

¹⁴ 18 C.F.R. § 385.213(a)(2).

¹⁵ *Fortis Inc., et al.*, 156 FERC ¶ 61,219, at P 33 (2016) (accepting an answer because it "provided information that assisted us in our decision-making process"); *Mich. Elec. Transmission Co.*, 106 FERC ¶ 61,064, at P 3 (2004) (accepting an answer because "it provides information that clarifies the issues and aids us in the decisional process."); *Duke Energy Oakland, LLC*, 102 FERC ¶ 61,093, at P 10 (2003) (finding good cause to accept an otherwise impermissible answer because the answer assisted the Commission in understanding and resolving the issues involved in the proceeding); *Carolina Power & Light Co.*, 97 FERC ¶ 61,048, at 61,278 (2001) (finding good cause to waive Rule 213 when the pleading helped to ensure a complete and accurate record).

Respectfully submitted,

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Dated: October 19, 2016

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service lists compiled by the Secretary in these proceedings.

Dated at Washington, D.C., this 19th day of October, 2016.

/s/ Christopher J. Polito

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