

157 FERC ¶ 61,183
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, and Colette D. Honorable.

Entergy Nuclear FitzPatrick, LLC
Exelon Generation Company, LLC

Docket No. EC16-169-000

ORDER AUTHORIZING PROPOSED TRANSACTION

(Issued December 7, 2016)

1. On August 19, 2016, pursuant to section 203(a)(1) of the Federal Power Act (FPA)¹ and Part 33 of the Commission's regulations,² Entergy Nuclear FitzPatrick, LLC (Entergy FitzPatrick) and Exelon Generation Company, LLC (Exelon Generation) (together, Applicants) submitted an application requesting Commission authorization for a transaction in which Entergy FitzPatrick will sell, and Exelon Generation will purchase, the James A. FitzPatrick Nuclear Power Plant located in New York (FitzPatrick Facility), associated interconnection facilities, and certain other assets related to the FitzPatrick Facility (together, the FitzPatrick Facility and its associated assets are referred to as the FitzPatrick Assets) (Proposed Transaction).³

¹ 16 U.S.C. § 824b(a)(1) (2012).

² 18 C.F.R. pt. 33 (2016).

³ Joint Application for Authorization Under Section 203 of the Federal Power Act, Request for Expedited Action, and Request for Confidential Treatment, Docket No. EC16-169-000 (Aug. 19, 2016) (Application).

2. We have reviewed the Proposed Transaction under the Commission's Merger Policy Statement.⁴ As discussed below, we authorize the Proposed Transaction as consistent with the public interest.

I. Background

A. Description of Applicants

1. Entergy FitzPatrick

3. Applicants state that Entergy FitzPatrick is a limited liability company and an Exempt Wholesale Generator that has been granted market-based rate authority by the Commission. Entergy FitzPatrick is the owner of the FitzPatrick Facility, which is located within the balancing authority area operated by the New York Independent System Operator, Inc. (NYISO) and has a generating capacity of approximately 837 megawatts (MW) (summer rating). Entergy FitzPatrick and its affiliates own and operate approximately 2,892 MW of generating capacity located in New York.⁵ According to Applicants, Entergy FitzPatrick is a wholly owned, indirect subsidiary of Entergy Corporation (Entergy), a holding company that owns, directly and indirectly, traditional franchised public utilities that provide retail and wholesale services.

2. Exelon Generation

4. Applicants state that Exelon Generation is a wholly owned subsidiary of Exelon Corporation (Exelon), a publicly traded holding company within the meaning of the Public Utility Holding Company Act of 2005 (PUHCA 2005).⁶ Exelon Generation and its subsidiaries operate generation facilities in a number of organized markets across the country, and Constellation, an Exelon Generation business unit, is a marketer of electricity,

⁴ See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996) (Merger Policy Statement), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997); see also *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008). See also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). See also *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

⁵ Application at 5-6.

⁶ 42 U.S.C. § 16451 *et seq.* (2012).

natural gas, and related products in wholesale and retail markets. Exelon Generation serves as a supplier of energy to, among others, utilities and municipalities to meet their native load obligations. The Commission has granted Exelon Generation market-based rate authority.⁷

5. Applicants note that Exelon Generation's affiliates own or control approximately 2,300 MW of generation in NYISO, including the following:

- **Nine Mile Point Nuclear Station, LLC (Nine Mile).** Nine Mile is an indirect, wholly owned subsidiary of Constellation Energy Nuclear Group, LLC (Constellation Nuclear), a joint venture between Exelon and EDF, Inc. Nine Mile owns portions of a nuclear generation facility with multiple generating units located in NYISO. Specifically, Nine Mile owns 100 percent of an approximately 637 MW unit, and an 82 percent share of an approximately 1,287 MW unit.⁸ The Commission has granted Nine Mile market-based rate authority, and Applicants represent that Nine Mile sells all of the energy produced by its nuclear generation facility to Exelon Generation and EDF Trading North America, LLC (EDF Trading) under long-term firm agreements that remain in effect through the complete and permanent cessation of power generation by the facility. Each of Exelon Generation and EDF Trading receives approximately 50 percent of the energy output of Nine Mile's nuclear generation facility under its respective agreement.
- **R.E. Ginna Nuclear Power Plant, LLC (Ginna).** Ginna is an indirect, wholly owned subsidiary of Constellation Nuclear and owns an approximately 582 MW nuclear generation facility (Ginna Facility) located in NYISO. The Commission has granted Ginna market-based rate authority and Ginna has entered into a Reliability and Support Services Agreement (RSS Agreement) with Rochester Gas and Electric Corporation that ends on March 31, 2017. Pursuant to the terms of the RSS Agreement, the electric energy and capacity from the Ginna Facility must be offered into the NYISO market. Applicants state that, following the expiration of the agreement, Ginna will sell all of the energy produced by the facility to Exelon Generation and EDF Trading under long-term firm agreements that will remain in effect through the complete and permanent cessation of power generation by the Ginna Facility. Each of Exelon Generation and EDF Trading will receive approximately 50 percent of the energy output of the Ginna Facility under its respective agreement.

⁷ Application at 6.

⁸ Applicants note that the Long Island Power Authority owns the remaining 18 percent of this unit. *Id.* at 7.

B. Description of the Proposed Transaction

6. Applicants explain that, pursuant to the terms of the Asset Purchase Agreement executed by Applicants, Entergy FitzPatrick will sell, and Exelon Generation will purchase, the FitzPatrick Assets. Following consummation of the Proposed Transaction, Exelon Generation will wholly own and operate the FitzPatrick Assets, including the FitzPatrick Facility, and will sell capacity, energy and ancillary services from the FitzPatrick Facility to wholesale customers under its existing market-based rate authority.

7. Applicants represent that, if the Proposed Transaction is not consummated, “Entergy FitzPatrick expects to proceed with its plans to close the [FitzPatrick Facility] in early 2017 or, if the [FitzPatrick Facility] has been refueled, at a later date.”⁹ As part of the terms of the Proposed Transaction, the parties have agreed that Exelon Generation will incur certain net costs and liabilities associated with the re-fueling and operation of the FitzPatrick Facility prior to the Proposed Transaction being consummated, or, if the FitzPatrick Facility is refueled but the Proposed Transaction is not consummated, until a later date when the FitzPatrick Facility is retired.¹⁰

II. Notice of Filing and Responsive Pleadings

8. Notice of the Application was published in the *Federal Register*, 81 Fed. Reg. 59,205 (2016), with interventions and protests due on or before October 3, 2016.¹¹ The comment date was subsequently extended to October 10, 2016.¹²

9. Public Citizen, Inc. filed a motion to intervene and a protest of the Proposed Transaction.¹³ Applicants filed an answer to Public Citizen’s protest. Public Citizen filed a reply to Applicants’ answer.

10. The Oswego County Legislature filed its resolution in support of the Proposed Transaction.

⁹ *Id.* at 8.

¹⁰ *Id.* at 8-9.

¹¹ Public Citizen filed a motion to extend the comment period, and Applicants submitted an answer stating that they did not object to Public Citizen’s request to extend the comment deadline.

¹² Notice of Extension of Time, Docket No. EC16-169-000 (Sept. 19, 2016).

¹³ Public Citizen, Inc., Protest of Public Citizen, Inc., Docket No. EC16-169-000 (Oct. 11, 2016) (Public Citizen Protest).

11. The New York Public Service Commission (New York Commission) filed a notice of intervention.
12. Representative John Katko, 24th District, New York, submitted comments on the Application, urging the Commission to act on the Application as soon as practicable.
13. On November 22, 2016, Applicants submitted, in compliance with the Commission's regulations,¹⁴ a copy of the New York Commission's order approving the Proposed Transaction.

III. Discussion

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹⁵ the notice of intervention and timely, unopposed motion to intervene serve to make the entities that filed them parties to this proceeding.
15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,¹⁶ prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept Applicants' and Public Citizen's answers because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

1. Standard of Review under FPA Section 203

16. FPA section 203(a)(4) requires the Commission to approve proposed dispositions, consolidations, acquisitions, or changes in control if the Commission determines that the proposed transaction will be consistent with the public interest.¹⁷ The Commission's

¹⁴ 18 C.F.R. § 33.2(i) (2016).

¹⁵ 18 C.F.R. § 385.214 (2016).

¹⁶ 18 C.F.R. § 385.213(a)(2) (2016).

¹⁷ 16 U.S.C. § 824b(a)(4) (2012). Approval of the Proposed Transaction is also required by other regulatory agencies pursuant to their respective statutory authorities before the Proposed Transaction may be consummated. *See* Application, Exhibit L: Other Required Regulatory Approvals. Our findings under FPA section 203 do not affect those agencies' evaluation of the Proposed Transaction pursuant to their respective statutory authorities.

analysis of whether a proposed 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.¹⁸ FPA section 203(a)(4) also requires the Commission to find that the proposed transaction “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.”¹⁹ The Commission’s regulations establish verification and informational requirements for entities that seek a determination that a proposed transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.²⁰

2. Analysis of the Proposed Transaction

a. Effect on Horizontal Competition

i. Applicants’ Analysis

17. Applicants performed a Delivered Price Test, also referred to as an Appendix A analysis or Competitive Screen Analysis,²¹ to analyze the impacts of the Proposed

¹⁸ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

¹⁹ 16 U.S.C. § 824b(a)(4).

²⁰ 18 C.F.R. § 33.2(j) (2016).

²¹ The Delivered Price Test determines the pre- and post-transaction market shares from which the change in market concentration, or the change in the Herfindahl-Hirschman Index (HHI), due to a proposed transaction can be derived. The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are considered to be unconcentrated; markets in which the HHI is greater than or equal to 1,000 but less than 1,800 points are considered to be moderately concentrated; markets in which the HHI is greater than or equal to 1,800 points are considered to be highly concentrated. In the Merger Policy Statement, the Commission adopted the 1992 Federal Trade Commission (FTC)/Department of Justice (DOJ) Horizontal Merger Guidelines, which state that in a horizontal merger, an increase of more than 50 HHI points in a highly concentrated market or an increase of 100 HHI points in a moderately concentrated market fails its screen and warrants further review. Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,129; *see also Analysis of Horizontal Market Power under the Federal Power Act*,

(continued ...)

Transaction on horizontal competition. Applicants explain that they analyzed the NYISO market, where the FitzPatrick Facility is located, as the relevant geographic market. According to Applicants, their analysis shows that there are no screen failures created by the Proposed Transaction, either in the base case or in any price sensitivity analysis, and that the transaction deconcentrates an already unconcentrated market.

18. Based on an installed capacity of approximately 39,000 MW in NYISO, Applicants state that approximately 5.9 percent of the installed capacity in NYISO will be attributed to Exelon Generation following consummation of the Proposed Transaction. Applicants explain, however, that while Exelon Generation's market share of installed capacity will increase as a result of the Proposed Transaction, from 3.7 percent to 5.9 percent,²² Entergy FitzPatrick's market share of installed capacity will decrease from 7.5 percent to 5.3 percent. Applicants state that, as a result, the HHI change for installed capacity in the NYISO market is negative seven points, which indicates that the Proposed Transaction will deconcentrate the NYISO market for installed capacity. Applicants attribute this result to the fact that Entergy FitzPatrick's affiliated market share and its contribution to the market concentration level are reduced by more than Exelon Generation's market share and its contribution to the market concentration level are increased.²³

19. Applicants' Delivered Price Test evaluates the effect of the Proposed Transaction on market concentration under the Economic Capacity and Available Economic Capacity measures.²⁴ Applicants state that the results of those analyses are not materially different from the installed capacity results: under the Economic Capacity measure, the HHI changes are almost all negative or well below the Commission's thresholds; under the Available Economic Capacity measure, the HHI changes are also almost all negative or

138 FERC ¶ 61,109 (2012) (affirming the Commission's use of the thresholds adopted in the Merger Policy Statement).

²² Applicants represent that, after adjusting for their long-term contracts, Exelon Generation is currently affiliated with approximately 1,428 MW of generation capacity located within NYISO. Application at 11.

²³ *Id.* at 11-12.

²⁴ Each supplier's Economic Capacity is the amount of capacity that could compete in the relevant market given market prices, running costs, and transmission availability. Available Economic Capacity is based on the same factors but subtracts the supplier's native load obligation from its capacity and adjusts transmission availability accordingly.

well below the Commission's thresholds.²⁵ Applicants note that the results of the price sensitivity analyses, in which prices were increased and decreased by ten percent, are not "materially different."²⁶

20. Applicants also state that their analysis shows that the Proposed Transaction does not raise any concerns with respect to NYISO's capacity or ancillary services markets. With respect to the NYISO capacity market, Applicants state that the Proposed Transaction results in a seven percent market share for Exelon Generation and its affiliates (up from 4.9 percent) and a two point increase in HHI. With respect to the NYISO ancillary services market, Applicants explain that the NYISO market monitor has recognized that the market is oversupplied. In addition, Applicants state that because the Proposed Transaction "involves 'like' generation (i.e. combining Exelon Generation's existing NYISO nuclear plants with a reduction in the nuclear generation owned by Entergy affiliates), one would expect little effect on market shares," and that nuclear generation is "not well suited" for the supply of certain ancillary services.²⁷ Applicants conclude that these facts, in conjunction with the oversupply of ancillary services, leads to the conclusion that the Proposed Transaction does not raise concerns with respect to the NYISO ancillary services markets.

ii. Protest

21. Public Citizen protests the Proposed Transaction, arguing that the Application is incomplete because it fails to incorporate any analysis of the state of New York's Zero Emission Credit program (ZEC Program).²⁸ According to Public Citizen, the ZEC Program, which will apply to the FitzPatrick Facility, will distort the NYISO energy and capacity markets and alter the economics of Exelon Generation's operations in NYISO,

²⁵ For the Economic Capacity measure, the HHI changes range from -9 to 2 in the base case; for the Available Economic Capacity measure, the HHI changes range from -26 to 15 in the base case. Application at 13.

²⁶ *Id.* at 13.

²⁷ *Id.*, Exhibit J: Affidavit of Julie R. Solomon at 21 (Solomon Affidavit).

²⁸ The ZEC Program is part of the New York Public Service Commission's recently issued Clean Energy Standard. Under the ZEC Program, the New York State Energy Research & Development Authority will offer qualifying nuclear facilities, including the FitzPatrick Facility, a multi-year contract for the purchase of Zero Emissions Credits on a Megawatt-hour basis. *See Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Case 15-E-0302 (New York Public Service Commission Aug. 1, 2016).

including the economics of the FitzPatrick Facility. Public Citizen also claims that the structure of the ZEC Program may conflict with elements of the NYISO's Commission-approved tariff, in particular the Commission's mandate for incentives through the NYISO installed capacity market.²⁹

22. Public Citizen requests that the Commission consider the Application incomplete, require Applicants to perform a market power analysis that incorporates the full market impact of the ZEC Program, and examine, as part of this docket, whether the ZEC Program conforms to the Commission's rules and regulations.³⁰

iii. Answer

23. Applicants argue that the issues raised by Public Citizen 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. According to Applicants, the Commission has confined the scope of review under FPA section 203 to whether a transaction is consistent with the public interest, which the Commission evaluates by analyzing the effect of a proposed transaction on competition, rates, and regulation, and whether a transaction will result in cross-subsidization concerns. Applicants claim that the issues raised by Public Citizen do not relate to any of the factors examined by the Commission under its FPA section 203 analysis, and that the Application fully addresses the factors required by the Commission and contains the analyses required by the Commission's regulations.³¹ Therefore, Applicants request that the Commission deny Public Citizen's protest as beyond the scope of this proceeding and authorize the Proposed Transaction.³²

iv. Reply

24. Public Citizen reiterates its claim that the Commission must examine the ZEC Program in considering the effect of the Proposed Transaction on competition. Citing statements by Applicants before the Nuclear Regulatory Commission explaining that the ZEC Program significantly changes the economics of the FitzPatrick Facility, Public Citizen concludes that the program is not only within the scope of the Commission's review of the Proposed Transaction, but a central factor in determining whether it is

²⁹ Public Citizen Protest at 2.

³⁰ *Id.* at 3.

³¹ Entergy Nuclear FitzPatrick, LLC, Motion for Leave to Answer and Answer to Protest at 1-3, Docket No. EC16-169-000 (filed Oct. 19, 2016).

³² *Id.* at 3.

consistent with the public interest. Public Citizen also faults Applicants for omitting from their analysis a letter of credit guaranteeing a payment of \$35 million from the New York Power Authority to Entergy FitzPatrick if certain conditions of the Proposed Transaction are not met (Letter of Credit).³³ Public Citizen states that the text of the Letter of Credit is currently not available to the public, but that the Commission should request that Applicants add the letter to the record in this proceeding given that it involves the New York Power Authority, a party that is central to the coordination and payment of the ZEC, and the Proposed Transaction.

v. Commission Determination

25. In analyzing whether a proposed transaction will adversely affect horizontal competition, the Commission examines the effects on concentration in the generation markets and whether the proposed transaction otherwise creates the incentive and ability to engage in behavior harmful to competition, such as withholding of generation.³⁴

26. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on horizontal competition. As noted above, Applicants' analysis of the Proposed Transaction demonstrates that Exelon Generation's market share will increase, from 3.7 percent to 5.9 percent, but that Entergy FitzPatrick's market share will decrease, from 7.5 percent to 5.3 percent. In addition, the HHI changes resulting from the Proposed Transaction are within the applicable thresholds, or in some cases negative, which indicates that the Proposed Transaction will have a slight deconcentrating effect on the NYISO market. As Applicants explain, this result is due to the fact that Entergy FitzPatrick's affiliated market share and its contribution to the market concentration level are reduced by more than Exelon Generation's market share and its contribution to the market share level are increased. The results of Applicants' analyses under the Economic Capacity and Available Economic Capacity measures, including their price sensitivity analyses, also demonstrate that the Proposed Transaction will not have an adverse effect on competition because the NYISO market will remain unconcentrated.

27. We will dismiss Public Citizen's protest of the Proposed Transaction because the issues Public Citizen raises concern the ZEC Program rather than the effects of the Proposed Transaction on competition, rates, regulation or cross-subsidization. Under FPA section 203, the Commission must approve a proposed transaction where it finds that the proposed transaction will be consistent with the public interest and will not result in cross-

³³ Public Citizen, Inc., Reply of Public Citizen, Inc. at 2, Docket No. EC16-169-000 (filed Oct. 20, 2016).

³⁴ *Nev. Power Corp.*, 149 FERC ¶ 61,079, at P 28 (2014).

subsidization.³⁵ In evaluating a proposed transaction, the Commission focuses on whether the *transaction* will have an adverse impact on competition, rates, or regulation, or whether it will result in cross-subsidization, to determine if the transaction is consistent with the public interest.³⁶ Public Citizen, however, focuses on the potential effects of the ZEC Program on the NYISO market rather than the effects of the Proposed Transaction. Accordingly, Public Citizen's concerns are not relevant to the Commission's analysis of the Proposed Transaction under FPA section 203 and we find that they are not properly raised in this proceeding. As the Commission has found, issues unrelated to the Commission's consideration of a proposed transaction under FPA section 203 should be addressed in other proceedings or forums.³⁷ Moreover, Applicants have demonstrated that the Proposed Transaction will not have an adverse impact on competition, and Public Citizen has not demonstrated otherwise or adequately supported the claim that the Application remains incomplete.

b. Effect on Vertical Competition

i. Applicants' Analysis

28. According to Applicants, the Proposed Transaction does not raise vertical market power concerns. First, Applicants note that the Proposed Transaction does not involve any transmission facilities, only those limited and discrete facilities necessary to interconnect the FitzPatrick Facility to the transmission grid. Second, Applicants state that neither Exelon Generation nor its affiliates owns or controls any inputs to electric power production. Third, Applicants note that Exelon Generation and its affiliates with market-based rate authority have affirmatively represented to the Commission that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.³⁸

³⁵ 16 U.S.C. § 824b(a)(4) (2012).

³⁶ *See supra* P 15.

³⁷ *See, e.g., NRG Energy, Inc.*, 141 FERC ¶ 61,207, at P 89 (2012) (“...issues that are not related to our analysis under FPA section 203 can be resolved in another, more appropriate forum and will not be addressed here.”). *See also Osage Wind, LLC*, 145 FERC ¶ 61,212, at P 25 (2013) (dismissing issues as outside the scope of an FPA section 203 proceeding where irrelevant to the Commission's analysis under FPA section 203); *Verso Bucksport LLC*, 150 FERC ¶ 61,017, at P 26 (2015) (dismissing issues as outside the scope of the Commission's FPA section 203 analysis where they did not relate to the effect of a proposed transaction on competition).

³⁸ Application at 14-15.

ii. Commission Determination

29. In analyzing whether a proposed transaction presents vertical market power concerns, the Commission considers the vertical combination of upstream inputs, such as transmission or natural gas, with downstream generating capacity. As the Commission has previously found, transactions that combine electric generation assets with inputs to generating power (such as natural gas, transmission, or fuel) can harm competition if the transaction increases an entity's ability or incentive to exercise vertical market power in wholesale electricity markets. For example, by denying rival entities access to inputs or by raising their input costs, an entity created by a transaction could impede entry of new competitors or inhibit existing competitors' ability to undercut an attempted price increase in the downstream wholesale electricity market.³⁹

30. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on vertical competition. As Applicants note, the Proposed Transaction only involves those limited and discrete transmission facilities necessary to interconnect the FitzPatrick Facility to the transmission grid. In addition, neither Exelon Generation nor its affiliates owns or controls any inputs to electric power production. Accordingly, we find that the Proposed Transaction will not have an adverse effect on vertical competition.

c. Effect on Rates

i. Applicants' Analysis

31. Applicants argue that the Proposed Transaction will not have an adverse effect on rates. Applicants state that they do not have captive wholesale requirements customers and that, to the extent that Applicants or their affiliates make retail sales, the Proposed Transaction will not modify or abridge any contract with retail customers. Applicants also note that the Proposed Transaction does not involve transmission rates or transmission customers. Applicants state that their wholesale rates for energy and capacity are market-based, not cost-based, and that sales from the FitzPatrick Facility will continue to be made at market-based rates. For these reasons, Applicants conclude that the Proposed Transaction will not result in any adverse effects on wholesale ratepayers or transmission customers.⁴⁰

³⁹ *Upstate N.Y. Power Producers, Inc.*, 154 FERC ¶ 61,015, at P 15 (2016); *Exelon Corp.*, 138 FERC ¶ 61,167, at P 112 (2012).

⁴⁰ Application at 15-16.

ii. Commission Determination

32. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on rates. As Applicants explain, they do not have captive wholesale requirements customers, and the Proposed Transaction does not involve transmission rates or transmission customers. In addition, Applicants represent that their wholesale sales for energy and capacity are market-based, rather than cost-based, and that sales from the FitzPatrick Facility will continue to be made at market-based rates. Accordingly, we find that the Proposed Transaction will not result in any adverse effect on rates.

d. Effect on Regulation

i. Applicants' Analysis

33. Applicants assert that the Proposed Transaction will not have an adverse effect on regulation because the Proposed Transaction will not affect the ability of the Commission, any state, or any other federal agency to regulate any of the Applicants. Applicants represent that the Commission will continue to have the same jurisdiction over them after the Proposed Transaction is consummated as it currently does, and that no facilities will be removed from Commission jurisdiction.⁴¹

ii. Commission Determination

34. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap.⁴² As to whether a proposed transaction will have an effect on state regulation, the Commission explained in the Merger Policy Statement that it ordinarily will not set the issue of the effect of a proposed transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the proposed transaction. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission may set the issue for hearing and it will address such circumstances on a case-by-case basis.⁴³

35. Based on Applicants' representations, we find no evidence that either state or federal regulation will be impaired by the Proposed Transaction. We note also that no party alleges that regulation, state or federal, would be impaired by the Proposed

⁴¹ *Id.* at 16.

⁴² Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

⁴³ *Id.*

Transaction, and no state commission has requested that the Commission address the issue of the effect on state regulation.

e. **Cross-Subsidization**

i. **Applicants' Analysis**

36. Applicants state that the Proposed Transaction will not result in cross-subsidization of a non-utility company by a utility company, or in a pledge or encumbrance of utility assets for the benefit of an associate company. According to Applicants, the Proposed Transaction falls within the scope of the safe harbor established by the Commission for transactions in which no franchised public utility with captive customers is involved in the transaction.⁴⁴

37. Applicants also represent that, based on facts and circumstances known to them 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 the pledge or encumbrance of utility assets for the benefit of an associate company. Specifically, Applicants state that there are no existing pledges and/or encumbrances of the assets of traditional utilities involved in the Proposed Transaction, and verify that the Proposed Transaction will not result in: (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) any new issuance 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) any new pledge or encumbrance 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 (d) 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, other than non-power goods and service agreements subject to review under sections 205⁴⁵ and 206⁴⁶ of the FPA.⁴⁷

⁴⁴ Application at 16.

⁴⁵ 16 U.S.C. § 824d (2012).

⁴⁶ 16 U.S.C. § 824e (2012).

⁴⁷ Application, Exhibit M.

ii. **Commission Determination**

38. Based on Applicants' verifications, we find that the Proposed Transaction will not result in the cross-subsidization of a non-utility associate company by a utility company, or in a pledge or encumbrance of utility assets for the benefit of an associate company. We note that no party has argued otherwise.

3. **Other Considerations**

39. Information and/or systems connected to the bulk power system involved in this transaction may be subject to reliability and cybersecurity standards approved by the Commission pursuant to FPA section 215.⁴⁸ 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, North American Electric Reliability Corporation or the relevant regional entity may audit compliance with reliability and cybersecurity standards.

40. Section 301(c) of the FPA⁴⁹ 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 the Proposed Transaction is based on such examination ability. In addition, applicants subject to PUHCA 2005 are subject to the record-keeping and books and records requirements of PUHCA 2005.

41. 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.⁵⁰ To the extent that a transaction authorized under FPA section 203 results in a change in status, sellers that have market-based rates are advised that they must comply with the requirements of Order No. 652.

⁴⁸ 16 U.S.C. § 824o (2012).

⁴⁹ 16 U.S.C. § 825(c) (2012).

⁵⁰ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005). *See* 18 C.F.R. § 35.42 (2016).

The Commission orders:

(A) The Proposed Transaction is hereby authorized, as discussed in the body of this order.

(B) Applicants must inform the Commission of any material change in circumstances that departs from the facts or representations that the Commission relied upon in authorizing the Proposed Transaction within 30 days from the date of the material change in circumstances.

(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 not pending or 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.

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

(G) Applicants shall notify the Commission within 10 days of the date on which the Proposed Transaction is consummated.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.