

134 FERC ¶ 61,093
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Icahn Partners LP	Docket Nos. EC11-22-000
High River Limited Partnership	EC11-22-001
Icahn Partners Master Fund III LP	
Icahn Partners Master Fund II LP	
Icahn Partners Master Fund LP	
Icahn Enterprises L.P.	
Dynegy Inc.	
Casco Bay Energy Company, LLC	
Dynegy Danskammer, L.L.C.	
Dynegy Kendall Energy, LLC	
Dynegy Marketing and Trade, LLC	
Dynegy Midwest Generation, Inc.	
Dynegy Morro Bay, LLC	
Dynegy Moss Landing, LLC	
Dynegy Oakland, LLC	
Dynegy Power Marketing, Inc.	
Dynegy Roseton, L.L.C.	
Dynegy South Bay LLC	
Ontelaunee Power Operating Company, LLC	
Sithe/Independence Power Partners, L.P.	

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued February 10, 2011)

1. On November 22, 2010, as amended on December 21, 2010,¹ Dynegy Inc. (Dynegy) and its subsidiaries that are public utilities (Dynegy Public Utilities)²

¹ The November 22, 2010 filing is referred to here as the Application. The December 21, 2010 amendment was filed following Dynegy's agreement to be acquired by entities affiliated with Icahn Partners LP and is referred to here as the Amended Application.

² The Dynegy Public Utilities include: Casco Bay Energy Company, LLC (Casco Bay); Dynegy Danskammer, L.L.C. (Dynegy Danskammer); Dynegy Kendall

(continued...)

(collectively, Dynegy Applicants), together with Icahn Partners LP, Icahn Partners Master Fund LP, Icahn Partners Master Fund II LP, Icahn Partners Master Fund III LP, Icahn Enterprises LP, and High River Limited Partnership (collectively, Icahn Entities, and, together with the Dynegy Applicants, the Applicants) filed an application under section 203(a)(1) of the Federal Power Act (FPA)³ requesting Commission authorization for the Icahn Entities to acquire the outstanding voting securities in Dynegy (Proposed Transaction). The jurisdictional facilities involved in the Proposed Transaction consist of market-based rate schedules and related contracts, agreements, and interconnecting transmission facilities owned, operated or controlled by the Dynegy Applicants.

2. The Commission has reviewed the Proposed Transaction under the Merger Policy Statement.⁴ As discussed below, we will authorize the Proposed Transaction as consistent with the public interest.

Energy, LLC (Dynegy Kendall); Dynegy Marketing and Trade, LLC (Dynegy Marketing and Trade); Dynegy Midwest Generation, Inc. (Dynegy Midwest Generation); Dynegy Morro Bay, LLC (Dynegy Morro Bay); Dynegy Moss Landing, LLC (Dynegy Moss Landing); Dynegy Oakland, LLC (Dynegy Oakland); Dynegy Power Marketing, Inc. (Dynegy Power Marketing); Dynegy Roseton, L.L.C. (Dynegy Roseton); Dynegy South Bay, LLC (Dynegy South Bay); Ontelaunee Power Operating Company, LLC (Ontelaunee Power); and Sithe/Independence Power Partners, L.P. (Sithe/Independence).

³ 16 U.S.C. § 824b (2006). In the initial Application, the Icahn Entities requested authorization under section 203(a)(2), at such time as the Icahn Entities may become a holding company, to acquire Dynegy's outstanding voting securities, if the Commission determined that such approval is necessary. Application at 1 and 8 n.5. However, in the Amended Application filed on December 21, Applicants have clarified that the Proposed Transaction does not require approval under section 203(a)(2). Amended Application at 2 n.6.

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), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). See also *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement). 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).

I. Background

A. Description of the Parties

1. Icahn Entities

3. The Icahn Entities, based in New York, New York, are investment funds. Icahn Partners LP, Icahn Partners Master Fund LP, Icahn Partners Master Fund II LP and Icahn Partners Master Fund II LP are engaged in seven primary business segments: Investment Management, Automotive, Railcar, Food Packaging, Metals, Real Estate, and Home Fashion. Carl Icahn is the controlling investor in the Icahn Entities. All other investors in the Icahn Entities are limited partners with non-controlling interests. IEH Merger Sub LLC (IEH LLC) is a wholly-owned subsidiary of Icahn Enterprises Holdings L.P., which is a subsidiary of Icahn Enterprises L.P.⁵ IEH LLC is the sole owner of IEP Merger Sub Inc. (Merger Sub). As explained below, both IEH LLC and Merger Sub are parties to the Proposed Transaction.

2. Dynegy and the Dynegy Public Utilities

4. Dynegy is a Delaware corporation. Through several subsidiaries, Dynegy produces and sells electric energy, capacity, and ancillary services in the United States.⁶ Dynegy's baseload, intermediate, and peaking power plants generate approximately 12,500 megawatts (MW) of capacity. Dynegy's common stock is currently publicly traded.

5. Casco Bay, a Delaware limited liability company, is an indirect, wholly-owned subsidiary of Dynegy. Casco Bay is an exempt wholesale generator (EWG) that owns and operates the Maine Independence Station, a 490 MW generating facility located in Veazie, Maine. The Maine Independence Station is interconnected with ISO New England Inc.

6. Dynegy Danskammer, a Delaware limited liability company, is an indirect, wholly-owned subsidiary of Dynegy. Dynegy Danskammer is an EWG that leases and operates and has the right to the output from the Danskammer Generating Station, a 497 MW facility located in Orange, New York. The Danskammer Generating Station is interconnected with New York Independent System Operator, Inc. (NYISO). Dynegy

⁵ Icahn Enterprises L.P. is a publicly traded company that, like the other Icahn Entities, is under the control of Carl Icahn.

⁶ In addition to the Dynegy Public Utilities described below, Dynegy also wholly-owns or partially owns interests in three qualifying facilities: Allegheny Hydro No. 8; Allegheny Hydro No. 9; and Nevada Cogen.

Danskammer is authorized to sell energy, capacity, and certain ancillary services at market-based rates.

7. Dynegy Kendall, a Delaware limited liability company, is an indirect wholly-owned subsidiary of Dynegy. Dynegy Kendall is an EWG that owns and operates the Kendall County Generation Facility, a 140 MW facility located in Kendall, Illinois. The Kendall County Generation Facility is interconnected with PJM Interconnection, L.L.C. (PJM). Dynegy Kendall is authorized to sell energy, capacity, and certain ancillary services at market-based rates. It also has a rate schedule for cost-based reactive power compensation.

8. Dynegy Marketing and Trade, a Delaware limited liability company, is an indirect wholly-owned subsidiary of Dynegy. Dynegy Marketing and Trade is a power marketer that currently controls a 285 MW unit in PJM owned by its affiliate, Dynegy Kendall, under a long-term capacity and energy purchase agreement. Dynegy Marketing and Trade is authorized to sell energy, capacity, and certain ancillary services at market-based rates.

9. Dynegy Midwest Generation, an Illinois corporation, is an indirect wholly-owned subsidiary of Dynegy. Dynegy Midwest Generation is an EWG that owns and operates seven generating facilities with total capacity of approximately 3,750 MW located throughout Illinois which are interconnected with the Midwest Independent Transmission System Operator, Inc. Dynegy Midwest Generation, Inc. is authorized to sell energy, capacity, and certain ancillary services at market-based rates. It also has a rate schedule for cost-based reactive power compensation and a cost-based rate agreement with Illinois Power Company d/b/a/ Ameren IP to provide black start service.

10. Dynegy Morro Bay, a Delaware limited liability company, is an indirect wholly-owned subsidiary of Dynegy. Dynegy Morro Bay is an EWG that owns and operates the Morro Bay Power Plant, a 999 MW facility located in Morro Bay, California. The Morro Bay Facility is interconnected with the California Independent System Operator Corporation (CAISO). Dynegy Morro Bay is authorized to sell energy, capacity, and certain ancillary services at market-based rates.

11. Dynegy Moss Landing, a Delaware limited liability company, is an indirect wholly-owned subsidiary of Dynegy. Dynegy Moss Landing is an EWG that owns and operates the Moss Landing Power Plant, a 2,529 MW facility located in Monterey County, California. The Moss Landing Facility is interconnected with CAISO. Dynegy Moss Landing is authorized to sell energy, capacity, and certain ancillary services at market-based rates.

12. Dynegy Oakland, a Delaware limited liability company, is an indirect wholly-owned subsidiary of Dynegy. Dynegy Oakland is an EWG that owns and operates the Oakland Power Plant, a 165 MW facility located in Oakland, California. The Oakland Power Plant is interconnected with CAISO. Dynegy Moss Landing is authorized to sell energy, capacity, and certain ancillary services at market-based rates. In addition,

Dynegy Oakland is also subject to a cost-based reliability must-run (RMR) agreement with CAISO.

13. Dynegy Power Marketing, a Texas corporation, is an indirect wholly-owned subsidiary of Dynegy. Dynegy Power Marketing, Inc. is a power marketer that owns 100 percent of the membership interests in Dynegy Marketing and Trade. Dynegy Power Marketing, Inc. is authorized to sell energy, capacity, and certain ancillary services at market-based rates.

14. Dynegy Roseton, a Delaware limited liability company, is an indirect wholly-owned subsidiary of Dynegy. Dynegy Roseton is an EWG that leases, operates, and has the right to the output from the Roseton Generating Station, a 1,213 MW generating facility located in Orange, New York. The Roseton Generating Station is interconnected with NYISO. Dynegy Roseton is authorized to sell energy, capacity, and certain ancillary services at market-based rates.

15. Dynegy South Bay, a Delaware limited liability company, is an indirect wholly-owned subsidiary of Dynegy. Dynegy South Bay is an EWG that owns and operates the South Bay Power Plant, a 707 MW facility located in Chula Vista, California. The South Bay Power Plant is interconnected with CAISO. Dynegy South Bay is authorized to sell energy, capacity, and certain ancillary services at market-based rates. Dynegy South Bay is also subject to a cost-based RMR agreement with CAISO.

16. Ontelaunee Power, a Delaware limited liability company, is an indirect wholly-owned subsidiary of Dynegy. Ontelaunee Power is an EWG that owns and operates the Ontelaunee Energy Center, a 516 MW facility located in Ontelaunee, Pennsylvania. The Ontelaunee Energy Center is interconnected with PJM. Ontelaunee Power is authorized to sell energy, capacity, and certain ancillary services at market-based rates. Ontelaunee Power has a rate schedule on file with the Commission for cost-based reactive power compensation.

17. Sithe/Independence, a Delaware limited partnership, is an indirect wholly-owned subsidiary of Dynegy. Sithe/Independence is an EWG that owns and operates the Sithe/Independence Station, a 982 MW facility located in Oswego, New York. The Sithe/Independence Station is interconnected with NYISO. Sithe/Independence is authorized to sell energy, capacity, and certain ancillary services at market-based rates.

B. Description of the Proposed Transaction

18. On December 15, 2010, Dynegy entered into an Agreement and Plan of Merger (Merger Agreement) with IEH LLC and IEP Merger Sub. Under the Merger Agreement, IEH LLC will commence a tender offer to purchase all of the outstanding shares of common stock in Dynegy that it and its affiliates do not already own no later than December 22, 2010. Following closing of the tender offer and subject to the receipt of necessary regulatory approvals, IEH LLC will contribute any and all shares of Dynegy owned by IEH LLC to IEP Merger Sub, and IEP Merger Sub will be merged with and

into Dynegy, with Dynegy as the surviving company and a wholly-owned subsidiary of IEH LLC. Under the terms of the Merger Agreement, Dynegy stockholders will receive \$5.50 in cash for each outstanding share of Dynegy common stock they own.

II. Notice of Filing and Responsive Pleadings

19. Notice of the Application was published in the *Federal Register*, 75 Fed. Reg. 74,707 (2010), with interventions and protests due on or before December 14, 2010. Notice of the Amended Application was published in the *Federal Register*, 76 Fed. Reg. 354 (2011), with interventions and protests due on or before January 11, 2011. Mr. Ankur Ahuja, who states that he is a shareholder in Dynegy, filed a timely motion to intervene and protest in response to the Amended Application.⁷ On January 13, 2011, Applicants filed an answer (Applicants' January Answer). On January 28, 2011, Mr. Ahuja filed an answer. On February 1, 2011, Applicants filed an answer to Mr. Ahuja's answer (Applicants' February Answer).

III. Discussion

A. Procedural Issues

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the timely, unopposed motion to intervene serves to make Mr. Ahuja a party to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers because they have provided information that assisted us in our decision-making process.

B. Standard of Review Under Section 203

21. Section 203(a)(1) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest. The Commission's analysis of whether a transaction will be 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.⁸ Section 203 also requires the Commission to find that the 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."⁹ The Commission's

⁷ Dynegy filed a timely motion to intervene in response to the Application, but joined the Icahn Entities as Applicants as a result of the Amended Application.

⁸ See Merger Policy Statement, FERC Stats. & Regs. at 30,111.

⁹ 16 U.S.C. § 824b(a)(4) (2006).

regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.¹⁰

C. Analysis Under Section 203

1. Effect on Competition – Horizontal and Vertical Market Power

a. Applicants’ Analysis

22. Applicants argue that the Proposed Transaction will have no effect on competition. Applicants state that, other than securities currently held by the Icahn Entities in Dynegy, neither the Icahn Entities, nor any entity that Carl Icahn controls, owns any public utilities, electric utilities, transmitting utilities, electric utility companies, generating or distribution facilities, natural gas transmission facilities in any market, or any interest in any assets or businesses that are jurisdictional.¹¹ Applicants also state that neither they nor any entity that Applicants control currently owns or controls any operational electric transmission facilities, except for facilities used to interconnect generating facilities with the transmission grid, or inputs to electricity production in any relevant market that would allow them to erect barriers to entry to new generation in any relevant market. Applicants assert that under these circumstances, there is no opportunity for horizontal overlap between electric facilities in individual markets, nor the ability or incentive for the Icahn Entities to exercise vertical market power in any electric wholesale market.

b. Protest

23. Mr. Ahuja states that he is concerned that Dynegy does not address, in the Amended Application, two material issues that may impact competition. First, Mr. Ahuja states that the Amended Application fails to provide any clarification or modification to the statement in the Application that Icahn’s current interests in energy-related businesses are below a 5 percent equity stake. In this connection, Mr. Ahuja asserts that Mr. Icahn filed a Schedule 13D with the Securities and Exchange Commission (SEC) on December 7, 2010 that discloses that Mr. Icahn owns approximately 38.6 million shares of Chesapeake Energy Corporation (Chesapeake Energy).¹² According to Mr. Ahuja, the

¹⁰ 18 C.F.R. § 33.2(j) (2010).

¹¹ Applicants state that the Icahn Entities and other entities that Carl Icahn controls may, from time to time, invest in energy-related businesses, and that all such interests are well below the 10 percent threshold under which control is presumed not to be conferred for purposes of analysis under section 203 of the FPA. Amended Application at 5 n.10.

¹² Mr. Ahuja Protest at 4. Mr. Ahuja states that the Schedule 13D filing states that “The Reporting Persons [i.e., Mr Icahn] have had and intend to seek to continue to have

Schedule 13D filing suggests that the Applicants' representations in footnote four of the Application are incorrect, in that Mr. Icahn's ownership in Chesapeake Energy is not a passive ownership interest. Mr. Ahuja argues that the inconsistencies between the representations made by Mr. Icahn and the Schedule 13D filing warrant further review and analysis by the Commission. In particular, Mr. Ahuja contends that the Commission should analyze the potential impact of the Proposed Transaction on competition given the nexus between natural gas output and prices and the value of Dynegy's generation assets.

24. Mr. Ahuja also argues that the Commission should consider whether the Proposed Transaction will impact Dynegy's presence in the wholesale market, and in turn, how competition in the wholesale market may be impacted. Mr. Ahuja states that Dynegy's management has made representations over the past several months that Dynegy is in an extremely weak financial position,¹³ which has adversely impacted Dynegy's ability to engage in wholesale energy transactions. Mr. Ahuja contends that Applicants should address whether the Proposed Transaction will aggravate or ameliorate Dynegy's financial circumstances and how such circumstances may impact competition in wholesale energy markets.

c. Applicants' January Answer

25. In their answer, Applicants state that neither of the issues presented by Mr. Ahuja is relevant to the Commission's competitive analysis. Applicants reiterate that the Proposed Transaction raises neither horizontal nor vertical competition issues. In support, Applicants state that at no time have the Icahn Entities owned a controlling interest in Chesapeake Energy.¹⁴ Applicants assert that the Schedule 13D filing with the SEC states that, in aggregate, the Icahn Entities own approximately 5.8 percent of

Chesapeake Energy's outstanding voting securities.¹⁵ Applicants state that the Icahn Entities' equity interest is still below the 10 percent threshold for presuming a lack of control of, control by, or affiliation with the Icahn Entities under the Commission's

conversations with the Issuer's [i.e., Chesapeake Energy's] management to discuss the business and operations of the Issuer and the maximization of shareholder value." *Id.*

¹³ *Id.* at 4-5. In support, Mr. Ahuja cites several statements made during presentations to investors in support of the Blackstone acquisition of Dynegy. *Id.*

¹⁴ Applicants' January Answer at 2.

¹⁵ *Id.* at 4 (citing Chesapeake Energy Corporation, Schedule 13D Filing (Dec. 17, 2010), *available at* <http://www.sec.gov/Archives/edgar/data/895126/000092847510000096/chksch13d121710.txt>).

regulations.¹⁶ Moreover, Applicants argue that even if the Icahn Entities were deemed to be in control of, or an affiliate of, Chesapeake Energy, there would still be no horizontal or vertical overlaps between the Dynegy Applicants and the Icahn Entities. In support, Applicants state that Chesapeake Energy is a natural gas producer and marketer in a competitive market that does not own or control any electric generation or transmission facilities or inputs to electric power production, and further, that Dynegy and Chesapeake Energy are not competitors in any Commission-jurisdictional market.¹⁷

26. Applicants also argue that Mr. Ahuja's contentions that Applicants must address purported adverse competitive effects of Dynegy's statements regarding its financial condition are without merit. Applicants state that Mr. Ahuja does not cite any Commission regulation or precedent in support of his contentions, and that the Commission's regulations in part 33¹⁸ do not require applicants to address the financial impacts of a proposed transaction in the competition analysis. However, Applicants assert that the Proposed Transaction will substantially improve the Dynegy Applicants' financial position and ability to participate in wholesale energy markets and access to financing.¹⁹

d. Mr. Ahuja's Answer

27. In his answer, Mr. Ahuja argues that the rebuttable presumption of less than 10 percent ownership indicating a lack of control cited by Applicants "is not, standing alone, dispositive of whether an entity has the ability to influence or control decision-making in the context of vertical market power concerns."²⁰ Rather, referring to the Supplemental Policy Statement, he argues that the presumption of an absence of control no longer holds, even if the ownership share is less than 10 percent, if facts and circumstances indicate that the entities acquiring ownership interests "would be able to directly or indirectly exercise a controlling influence over the management or policies of the public utility."²¹ In this regard, Mr. Ahuja asserts that there is substantial evidence that Mr. Icahn not only has the potential to influence Chesapeake Energy's natural gas production decisions, but that Mr. Icahn has influenced Chesapeake Energy's management. Specifically, he cites several reports from investment analysts that he

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 4-5.

¹⁸ 18 C.F.R. Part. 33 (2010).

¹⁹ Applicants' January Answer at 6-7.

²⁰ Ahuja Answer at 5-6.

²¹ *Id.* at 9-10 (quoting Supplemental Policy Statement, 120 FERC ¶ 61,060 at P 57).

asserts draw a connection between Mr. Icahn's increased ownership of Chesapeake Energy and Chesapeake Energy's announcement in January that it intends to trim its production growth for 2011 and 2012 to 25 percent, down from its original plan of 20-40 percent.²²

28. In light of his assertions of Mr. Icahn's control over Chesapeake Energy and Chesapeake Energy's dominance among domestic natural gas producers, Mr. Ahuja argues that the Commission should require Applicants to submit a vertical competitive analysis that would enable the Commission to determine whether Icahn's ownership of Dynegy and substantial influence over Chesapeake Energy raises vertical market power concerns. He asserts that Icahn and Dynegy could materially benefit if natural gas prices increase as a result of a decision by Chesapeake Energy to restrict its natural gas output.²³ Further, Mr. Ahuja states that the Applicants' citation of a section in part 35 of the Commission's regulations for the proposition that "inputs to electric power production" excludes natural gas is not on point.²⁴ Rather, Mr. Ahuja argues that the relevant term in part 33 of the Commission's regulations is "inputs to electricity products," which he asserts can and should be read more expansively to include natural gas.²⁵ Mr. Ahuja argues that a relationship between influence over natural gas production and ownership of natural gas-fired generation is a relationship that cannot be ignored when assessing the impact of a transaction on consumers.

e. **Applicants' February Answer**

29. In their February Answer, Applicants respond that Chesapeake Energy is a natural gas supplier in a competitive market in which supplies are widely available and, therefore, that there is simply no potential for that natural gas production investment to be employed to benefit affiliated electric generation. Applicants state that the Commission has specifically held that investments in natural gas production do not pose a vertical concern for affiliated generation because "the upstream wellhead market is workably competitive."²⁶ Applicants also assert that Mr. Ahuja's citation to press coverage concerning Mr. Icahn's investment in Chesapeake Energy is not relevant. Regardless, Applicants reiterate that, as a matter of fact, Mr. Icahn does not have a controlling interest in Chesapeake Energy.

²² *Id.* at 8.

²³ *Id.* at 11.

²⁴ *Id.* at 11 n.26 (citing Amended Application at 4 n.9).

²⁵ *Id.* (citing 18 C.F.R. § 33.4(a)(2)(i) (2010)).

²⁶ Applicants' February Answer at 4 (quoting *PG&E Corp.*, 80 FERC ¶ 61,041 (1997) (*PG&E Corp.*); citing *Destec Energy, Inc.*, 79 FERC ¶ 61,373, at 62,573 (1997) (*Destec Energy*)).

f. Commission Determination

30. In analyzing whether a transaction will adversely affect competition, the Commission first examines its effects on horizontal competition in generation markets. Applicants state that the Dynegy Public Utilities and Chesapeake Energy are not competitors in any Commission jurisdictional market, and Mr. Ahuja does not contend otherwise. Based on Applicants' representation, we find that the Proposed Transaction will not have an adverse effect on horizontal competition.

31. Second, the Commission considers, when analyzing vertical competition, the combination of upstream inputs, such as intrastate natural gas pipelines, with downstream generating capacity. The Applicants represent that the Proposed Transaction will not result in any new combinations of upstream inputs to generation and downstream generating capacity. We disagree with Mr. Ahuja's assertion that the Commission should require Applicants to submit a vertical competition analysis because of the Icahn Entities' alleged control over Chesapeake Energy. Although Mr. Ahuja is correct in noting that the relevant consideration in the Commission's vertical competition analysis is whether Applicants will own or control both "inputs to electric products," as defined in part 33 of the Commission's regulations,²⁷ and downstream generation, we disagree that the phrase "inputs to electric products" should be read more broadly to include upstream production of natural gas. According to the information provided by the Applicants, Chesapeake Energy is a natural gas producer and marketer,²⁸ and Mr. Ahuja has not alleged otherwise. In *PG&E Corp.* and *Destec Energy*, the Commission concluded that wellhead gas is not a relevant upstream product that it would consider as part of a vertical market power analysis.²⁹ In reaching its determination in *PG&E Corp.*, the Commission explained that it had "previously recognized that the upstream wellhead market is workably competitive" and therefore would not "provide the merged company with any

²⁷ 18 C.F.R. § 33.4(a)(2)(i) (2010).

²⁸ Applicants' February Answer at 4.

²⁹ See *PG&E Corp.*, 80 FERC at 61,132; see also, *Destec Energy, Inc.*, 79 FERC at ¶ 62,573.

increase in market power.”³⁰ We find, therefore, that the Proposed Transaction will not have an adverse effect on vertical competition.³¹

32. In addition, we reject Mr. Ahuja’s contention that Applicants must address whether their Proposed Transaction will have a detrimental effect on Dynegy’s financial circumstances and adversely impact Dynegy’s ability to participate in wholesale markets. Applicants are correct in noting that our regulations do not require them to address the financial impacts of the Proposed Transaction under section 203 of the FPA.

2. Effect on Rates

a. Applicants’ Analysis

33. Applicants state that the Proposed Transaction will have no effect on rates. Applicants state that the Dynegy Public Utilities have market-based rate authority for their wholesale sales of electric energy, capacity, and ancillary services. Additionally, Applicants state that certain Dynegy Public Utilities make sales under cost-based rate schedules, but none of these rate schedules contains any mechanism that would allow for the pass through of costs associated with the Proposed Transaction.³² Therefore, Applicants assert that the Proposed Transaction will have no effect on rates to wholesale customers served under these cost-based rate schedules.

b. Commission Determination

34. We agree that the Proposed Transaction will not have an adverse effect on rates because Dynegy Public Utilities will continue to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates. Additionally, Applicants state that none of the cost-based rate schedules contains any mechanism that would allow for the pass through of costs associated with the Proposed Transaction. Moreover, as noted below, Applicants state that the Proposed Transaction does not involve a traditional

³⁰ *PG&E Corp.*, 80 FERC at 61,132; *see also, Destec Energy, Inc.*, 79 FERC at ¶ 62,573 ((citing *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, FERC Stats. & Regs. ¶ 30,665, at 31,470 (1985); *Pipeline Service Obligations and Revisions to Regulations Governing Self Implementing Transportation; and Regulation of Natural Gas Pipelines After Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs. ¶ 30,939 at 30,396 (1992)).

³¹ In finding that the Proposed Transaction will not adversely affect competition, it is not necessary that we address whether the Icahn Entities are or are not entitled to the benefit of the rebuttable presumption of no control over Chesapeake Energy.

³² Application at 10; *see also* Amended Application at 5.

public utility that has captive customers. We also note that no party argued that the Proposed Transaction would have an adverse effect on rates.

3. Effect on Regulation

a. Applicants' Analysis

35. Applicants assert that the Proposed Transaction will have no effect on the Commission's ability to regulate wholesale sales or on any state commission's ability to regulate retail sales.

b. Commission Determination

36. Based on the facts presented in the application, the Commission finds that the Proposed Transaction will not adversely affect federal or state regulation. We find that the Proposed Transaction will not create a regulatory gap at the federal level, because the Commission will retain its regulatory authority over the companies after consummation of the Proposed Transaction. We also note that no party alleges that the Proposed Transaction will impair regulation, and no state commission has requested that the Commission address the issue of the effect on state regulation.

4. Cross-Subsidization

a. Applicants' Analysis

37. Applicants contend that the Proposed Transaction will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of assets of a traditional public utility that has captive customers or that owns or provides transmission service over jurisdictional facilities for the benefit of an associate company. Applicants assert that the Proposed Transaction falls within one of the "safe harbors" adopted by the Commission for which detailed explanation and evidentiary support to demonstrate a lack of cross-subsidization is not required.³³ Applicants more specifically state that the Proposed Transaction does not involve a franchised public utility with captive customers. Additionally, Applicants state that, based on the facts and circumstances known to them or that are reasonably foreseeable, the Proposed Transaction will not result in, at the time of the transaction or in the future: (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

³³ Application at 10-11 (citing Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 16).

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 (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, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA.³⁴

b. Commission Determination

38. Because the Proposed Transaction does not involve a franchised public utility with captive customers and Applicants are not, nor are they affiliated with, a franchised utility with captive customers, we find that the Proposed Transaction will not result in cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company.

39. 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 unless it has access to the acquirer'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 ability to examine books and records.

D. Other Considerations

40. Information and/or systems connected to the bulk power system involved in this transaction may be subject to reliability and cyber security 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 databases, 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 cyber security standards. The Commission, North American Electric Reliability Corporation or the relevant regional entity may audit compliance with reliability and cyber security standards.

³⁴ Amended Application at Ex. M.

The Commission orders:

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

(B) Applicants must inform the Commission within 30 days of any material change in circumstances that departs from the facts the Commission relied upon in granting the application.

(C) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

(D) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

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

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.