

144 FERC ¶ 61,139
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Dominion Energy Brayton Point, LLC
Kincaid Generation, L.L.C.
Elwood Energy LLC

Docket No. EC13-82-000

ORDER AUTHORIZING DISPOSITION OF
JURISDICTIONAL FACILITIES

(Issued August 20, 2013)

1. On March 21, 2013, Dominion Energy Brayton Point, LLC (Brayton Point), Kincaid Generation, L.L.C. (Kincaid) and Elwood Energy LLC (Elwood) (together, Applicants) filed an application in the above-captioned proceeding (Application) pursuant to section 203(a)(1)(A) of the Federal Power Act (FPA)¹ and Part 33 of the Commission's regulations² requesting authorization for the disposition of jurisdictional facilities. Applicants request authorization for a transaction in which indirect subsidiaries of Energy Capital Partners II, LLC (ECP II) would purchase from Dominion Energy, Inc. (Dominion) direct and/or indirect ownership interests in the following: (1) Brayton Point, which operates an electric generating facility located in the ISO New England Inc. (ISO-NE) market; (2) Kincaid, which operates an electric generating facility located in the PJM Interconnection, L.L.C. (PJM) market; and (3) Elwood, which also operates an electric generating facility located in the PJM market (collectively, Proposed Transaction).³

¹ 16 U.S.C. § 824b (2006).

² 18 C.F.R. Pt. 33 (2013).

³ Applicants state that, to the extent that authorization of the Proposed Transaction pursuant to section 203(a)(2) may be required by any upstream owner of the entities acquiring the ownership interests in Brayton Point, Kincaid, and Elwood, the blanket authorization set forth in 18 C.F.R. § 33.1(c)(8) would apply. Application at 2 n.3.

2. As discussed below, we authorize the Proposed Transaction as consistent with the public interest.

I. Background

A. Description of the Parties

1. Applicants and Their Current Owners

a. Brayton Point

3. Applicants state that Brayton Point, a Virginia limited liability company, owns and operates an approximately 1,544 MW generating facility consisting of three coal-fired units, one gas/oil-fired steam unit and four small diesel-fired units located in Somerset, Massachusetts (Brayton Point Facility). The Brayton Point Facility includes the equipment necessary for the generation of power for sale at wholesale and limited interconnection facilities necessary to interconnect with the transmission system controlled by ISO-NE. Brayton Point is an exempt wholesale generator (EWG)⁴ and is authorized to make wholesale sales of electric capacity, energy and ancillary services at market-based rates.⁵ Applicants state that Brayton Point is a direct, wholly-owned subsidiary of Dominion.

b. Kincaid

4. Applicants state that Kincaid, a Virginia limited liability company, owns an approximately 1,158 MW generating facility, consisting of two coal-fired units located in Kincaid, Illinois (Kincaid Facility). The Kincaid Facility includes the equipment necessary for the generation of power for sale at wholesale and the limited interconnection facilities necessary to interconnect with the transmission system controlled by PJM. Kincaid is an EWG⁶ and is authorized to make wholesale sales of electric capacity, energy and ancillary services at market-based rates.⁷ Applicants state

⁴ *Dominion Energy Brayton Point, LLC*, 109 FERC ¶ 62,240 (2004) (granting EWG status).

⁵ *Dominion Energy New England, Inc.*, 109 FERC ¶ 61,262 (2004) (granting market-based rate authority).

⁶ *Kincaid Generation, L.L.C.*, 79 FERC ¶ 62,123 (1997) (granting EWG status).

⁷ *Kincaid Generation, L.L.C.*, 78 FERC ¶ 61,082 (1997) (granting market-based rate authority).

that Dominion Kincaid, Inc. (Dominion Kincaid) directly owns 99 percent of the ownership interests in Kincaid. Dominion Kincaid is a direct, wholly-owned subsidiary of Dominion, and Dominion directly owns the remaining 1 percent interest in Kincaid.

c. Elwood

5. Applicants state that Elwood, a Delaware limited liability company, owns an approximately 1,424 MW electric generating facility consisting of nine natural gas-fired gas turbine units in Elwood, Illinois (Elwood Facility). The Elwood Facility includes the equipment necessary for the generation of power for sale at wholesale and the limited interconnection facilities necessary to interconnect with the transmission system controlled by PJM. The output of four of the nine units, approximately 600 MW, is fully committed to Constellation Energy Commodities Group, Inc. pursuant to two long-term power purchase agreements. The first long-term power purchase agreement for Units 5 and 6 of the Elwood Facility expires in 2016, and the second long-term power purchase agreement for Units 7 and 8 expires in 2017. Elwood is an EWG⁸ and is authorized to make wholesale sales of electric capacity, energy and ancillary services at market-based rates.⁹

6. Applicants state that currently Dominion indirectly holds 50 percent of the ownership interests in Elwood through its ownership interests in Dominion Elwood, Inc. (Dominion Elwood). Prior to the closing of the Proposed Transaction: (1) Dominion Elwood will transfer to a new wholly-owned subsidiary, Dominion Elwood Holdings, LLC (Elwood Holdings), 49.5 percent of the ownership interests in Elwood; and (2) Dominion Elwood will retain the remaining 0.5 percent of its ownership interests in Elwood.¹⁰

⁸ *Elwood Energy, LLC*, 86 FERC ¶ 62,176 (1999) (granting EWG status); *see also Elwood Energy, LLC*, 97 FERC ¶ 62,062 (2001) (granting redetermination of EWG status following a corporate reorganization).

⁹ *Rockingham Power, L.L.C.*, 86 FERC ¶ 61,337 (1999) (granting market-based rate authority); *see also Elwood Energy, LLC*, Docket No. ER01-2763-000 (Letter Order issued Sept. 18, 2001) (accepting amendments to Elwood's market-based rate tariff following a corporate reorganization).

¹⁰ J-Power Elwood, LLC (J-Power Elwood), a wholly-owned subsidiary of J-Power USA Generation, L.P. (J-Power USA), directly owns the remaining 50 percent ownership interest in Elwood. J-Power USA is directly held by J-Power USA Investment and John Hancock Life Insurance, each of which owns 50 percent of J-Power USA. J-Power USA Investment is a direct, wholly-owned subsidiary of J-Power USA Development, which in turn is a wholly-owned subsidiary of J-Power North American

(continued...)

d. Dominion

7. Applicants state that Dominion, a Virginia corporation and wholly-owned subsidiary of Dominion Resources, Inc., owns various subsidiaries that are engaged in non-utility power production in the Northeast, Mid-Atlantic, and Midwest regions.

2. Brayton Point Holdings, LLC (Brayton Holdings), Tomcat Power LLC (Tomcat), and their Upstream Owners

a. Brayton Holdings

8. Applicants state that Brayton Holdings is a Delaware limited liability company that is directly held by four affiliated investment funds: (1) Energy Capital Partners II, LP (ECP II LP), a limited partnership organized under the laws of the State of Delaware; (2) Energy Capital Partners II-A, LP (ECP II-A), a limited partnership organized under the laws of the State of Delaware; (3) Energy Capital Partners II-B (Brayton Point IP), LP (ECP II-B Brayton Point), a limited partnership organized under the laws of the State of Delaware; and (4) Energy Capital Partners II-C (Brayton Point IP), LP (ECP II-C Brayton Point), a limited partnership organized under the laws of the State of Delaware (collectively, the Brayton Holdings Partnerships).

b. Tomcat

9. Applicants state that Tomcat is a Delaware limited liability company and direct, wholly-owned subsidiary of Tomcat Intermediate Holdings, LLC, which in turn is a direct, wholly-owned subsidiary of Tomcat Power Holdings, LLC (Tomcat Holdings). Tomcat Holdings is directly held by four affiliated investment funds: (1) ECP II LP; (2) ECP II-A; (3) Energy Capital Partners II-B (Tomcat IP), LP (ECP II-B Tomcat), a limited partnership organized under the laws of the State of Delaware; and (4) Energy Capital Partners II-C (Tomcat IP), LP (ECP II-C Tomcat), a limited partnership organized under the laws of the State of Delaware (collectively, the Tomcat Partnerships, and together with the Brayton Holdings Partnerships, the Partnerships).

c. Upstream Owners of the Partnerships

10. Applicants state that the Partnerships are directly or indirectly wholly-owned by: (1) Energy Capital Partners GP II, LP (ECP GP II), a limited partnership organized under the laws of the State of Delaware, as general partner; and (2) various passive limited partner investors (the Passive Partnership Investors). ECP GP II, in turn, is directly

Holdings. John Hancock Life Insurance is a direct, wholly-owned subsidiary of Manulife Financial Corporation. *See* Application at 6.

owned by: (1) ECP II, a limited liability company organized under the laws of the State of Delaware, as general partner; and (2) various passive limited partner investors (Passive ECP GP II Investors).¹¹

11. Applicants state that ECP II is owned and managed by the following five persons: Douglas W. Kimmelman and his estate planning vehicle; Thomas K. Lane and his estate planning vehicle; Andrew W. Singer; Tyler Reeder; and Peter Labbat (collectively, the ECP II Managers). Mr. Kimmelman and his estate planning vehicle, Mr. Labbat, Mr. Lane and his estate planning vehicle, and Mr. Singer and his estate planning vehicle also hold the ownership interests in Energy Capital Partners (ECP I). Applicants state that ECP II indirectly controls the following public utilities, all of which are authorized to make wholesale sales of electric capacity, energy and ancillary services at market-based rates: Broad River Energy LLC (Broad River); Dighton Power, LLC (Dighton); EquiPower Resources Management, LLC (EquiPower Resources); Lake Road Generating Company, L.P. (Lake Road); Liberty Electric Power, LLC (Liberty Electric); MASSPOWER; Milford Power Company (Milford Power); and Red Oak Power, LLC (Red Oak).

12. Applicants state that Broad River is a Delaware limited liability company that operates an approximately 847 MW dual-fuel fired (natural gas/low sulfur distillate fuel) simple-cycle electric generating facility located in Cherokee County, South Carolina, within the Duke Energy Carolinas, LLC (Duke) balancing authority area. Applicants state that Dighton is a Delaware limited liability company that owns and operates an approximately 140 MW natural gas-fired electric generating facility and related interconnection facilities located in Dighton, Massachusetts, within the ISO-NE market.

13. Applicants state that EquiPower Resources is a Delaware limited liability company that is engaged as a power marketer in energy management and marketing activities throughout the United States. Applicants state that EquiPower Resources does

¹¹ Applicants state that neither the Passive Partnership Investors nor the Passive ECP GP II Investors have any rights to make decisions with respect to running the business portfolios of the Partnerships or ECP GP II or participate in the day-to-day operation of their investments, including the day-to-day operations of Brayton Holdings or Tomcat. Applicants further state that the Passive Partnership Investors and the Passive ECP GP II Investors hold separate classes of securities in the Partnerships and ECP GP II, respectively, which confer limited veto/consent rights necessary to protect their economic investments. According to Applicants, these limited veto/consent rights are described in detail in a July 15, 2010 filing by EquiPower Resources Corp. in Docket No. ER10-1089, which was subsequently accepted by letter order issued on August 27, 2010. *Id.* at 7 n.16 (citing *EquiPower Resources Management, LLC*, Docket No. ER10-1089 (Letter order issued Aug. 27, 2010)).

not own, operate or control any generating or transmission facilities. Applicants state that Lake Road is a Delaware limited partnership that owns and operates an approximately 750 MW natural gas-fired, combined cycle electric generating facility and related interconnection facilities located near Killingly, Connecticut, within the ISO-NE market.

14. Applicants state that Liberty Electric is a Delaware limited liability company that owns and operates an approximately 541 MW combined cycle, natural gas-fired generating facility and related interconnection facilities located at the Borough of Eddystone, Delaware County, Pennsylvania, within the PJM-East submarket of the PJM market.

15. Applicants state that MASSPOWER is a Massachusetts general partnership that owns and operates an approximately 255.6 MW gas- and oil-fired, combined-cycle electric generating facility located in Indian Orchard, Massachusetts, within the ISO-NE market.

16. Applicants state that Milford Power is a Delaware limited liability company that owns and operates an approximately 507 MW gas- and oil-fired combined-cycle generating facility located in Milford, Connecticut, within the southwest Connecticut submarket of the ISO-NE market. Applicants state that Red Oak is a Delaware limited liability company that owns an approximately 776 MW combined-cycle, natural gas-fired generating facility and related interconnection facilities located in Sayreville, Middlesex County, New Jersey, within the PJM market.

17. Additionally, Applicants state that ECP I, through various entities not included in the Partnerships described above, has an indirect ownership interest in Empire Generating Co., LLC (Empire). Empire is a New York limited liability company that owns and operates an approximately 672 MW electric generating facility and related interconnection facilities in the City of Rensselaer and the towns of East Greenbush and North Greenbush, New York, located in the New York Independent System Operator, Inc. (NYISO) market. Applicants state that ECP I also owns, through various entities not included in the Partnerships described above, ECP Energy I, LLC (ECP Energy I). Applicants state that ECP Energy I is a power marketer that does not own, operate or control any generation or transmission facilities.

18. Applicants state that, other than as described above, none of the ECP II Managers owns or controls, directly or indirectly, 10 percent or more of the voting equity interests in any electric generation facility, electric transmission facility or any essential resource or input to power production in the United States. In addition, Applicants state that none of the ECP II managers holds any officer or director position with any energy-related entity other than through ECP I or ECP II.

B. Description of the Proposed Transaction

19. As set forth in the Purchase and Sale Agreement and the Assignment Agreement, Dominion will sell to Brayton Holdings and Brayton Holdings will purchase from Dominion 100 percent of Dominion's ownership interests in Brayton Point. Pursuant to the terms of the Purchase and Sale Agreement and the Assignment Agreement, Dominion will also sell to Tomcat and Tomcat will purchase from Dominion 100 percent of Dominion's ownership interests in Kincaid and its 50 percent ownership interest in Elwood.

20. Under the agreements, Tomcat will acquire 100 percent of the ownership interests in Dominion Kincaid, which directly owns 99 percent of Kincaid, as well as the remaining 1 percent ownership interest in Kincaid that is held directly by Dominion.

21. With respect to Elwood, at the initial closing, Tomcat will acquire the 49.5 percent ownership interest in Elwood held by Elwood Holdings, and will retain an option to acquire the remaining 0.5 percent ownership interest in Elwood owned by Dominion Elwood that may be exercised during the period starting one year and 10 days after the initial closing and ending one year and 76 days after the initial closing. In addition, while Tomcat will not acquire Dominion Elwood at the initial closing, as part of the Proposed Transaction, Tomcat will have the option to acquire Dominion Elwood, including its 0.5 percent ownership interest in Elwood, during the option period described above if certain conditions are not met pursuant to sections 8.3 and 8.4 of the Purchase and Sale Agreement.

22. As a result of the Proposed Transaction, Brayton Point will become a direct, wholly-owned subsidiary of Brayton Holdings, and Kincaid will become a wholly-owned subsidiary of Tomcat. Subject to the exercise of the option described above, Tomcat will own a 50 percent interest in Elwood, with J-Power Elwood continuing to hold the remaining 50 percent ownership interest. According to Applicants, as a result of the Proposed Transaction, Applicants will cease to be affiliated with Dominion and Dominion's other affiliates.

II. Notice of Filing and Responsive Pleadings

23. Notice of the Application was published in the *Federal Register*, 78 Fed. Reg. 20,903 (2013), with interventions or comments due by May 20, 2013. Conservation Law Foundation (Conservation Law) filed a timely motion to intervene and comment

(Protest). Utility Workers Union of America filed a motion to intervene out-of-time.¹² On May 22, 2013, Applicants filed a motion for leave to answer and answer (Answer).

III. Discussion

A. Procedural Issues

24. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), Conservation Law's timely, unopposed motion to intervene serves to make it a party to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2013), the Commission will grant Utility Workers Union of America's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

25. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept Applicants' Answer because it has provided information that assisted us in our decision-making process.

B. Standard of Review Under Section 203

26. Section 203(a)(4) of the FPA requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest.¹³ 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.¹⁴ Section 203(a)(4) also requires the

¹² On June 12, 2013, the Utility Workers Union of America filed a request to intervene in this proceeding and, on June 23, 2013, it filed a motion to intervene out-of-time.

¹³ 16 U.S.C. § 824b(a)(4) (2006).

¹⁴ *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044, at 30,111 (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.

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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.”¹⁵ The Commission’s 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.¹⁶

C. Analysis Under Section 203

1. Effect on Horizontal Competition

a. Applicants’ Analysis

27. Applicants argue that the Proposed Transaction will have no adverse impact on horizontal competition in ISO-NE (where the Brayton Point Facility is located) or in PJM (where the Kincaid and Elwood Facilities are located). In the ISO-NE market, Applicants state that affiliates of ECP II currently own 1,640 MW of generation, while Dominion is affiliated with 4,092 MW of generation, inclusive of the Brayton Point Facility. Applicants submit that because Dominion is affiliated with more generation in ISO-NE than is Brayton Holdings, the effect of the Proposed Transaction is to reduce market concentration in ISO-NE, and therefore the Proposed Transaction has no adverse impact on horizontal competition in this market.¹⁷ Applicants add that there is no horizontal effect in any relevant submarket in ISO-NE because the Brayton Point Facility is not located in a submarket in ISO-NE that the Commission has historically analyzed (that is, Connecticut and Southwest Connecticut), nor in the Northeast Massachusetts/Boston (NEMA/Boston) zone.¹⁸

28. Applicants performed an Appendix A analysis, also referred to as a Delivered Price Test (DPT) or Competitive Analysis Screen, to analyze Economic Capacity in ISO-NE, consistent with the Commission’s regulations and its reliance on Economic

& 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).

¹⁵ 16 U.S.C. § 824b(a)(4).

¹⁶ 18 C.F.R. § 33.2(j) (2013).

¹⁷ Application, Attachment 1, Solomon Affidavit at 2-3.

¹⁸ *Id.*, Attachment 1, Solomon Affidavit at 4-5.

Capacity in restructured markets.¹⁹ Applicants tested for market power using Economic Capacity over 10 separate time periods, encompassing the summer (June – August 2012), winter (January, February, and December 2012) and shoulder (March – May, September – November 2012) periods. Applicants analyzed peak and non-peak hours during those periods. Applicants' analysis shows that, after completion of the Proposed Transaction, the ISO-NE market for Economic Capacity is unconcentrated, with Herfindahl-Hirschman Index (HHI) values ranging from 432 to 483.²⁰ Applicants add that the HHI changes resulting from the Proposed Transaction range from minus eight to minus 31 points.

29. Applicants also conducted two price-sensitivity analyses. The sensitivity analyses employed the standard adjustment of increasing and decreasing market prices for Economic Capacity by 10 percent each. Applicants' analysis shows that the Proposed Transaction continues to pass the Commission's screens for Economic Capacity for all time periods studied.²¹

¹⁹ *Id.* at 17-18. Applicants state that the Commission's screening test also provides for an analysis of Available Economic Capacity; however, in recent years the Commission has given more weight to Available Economic Capacity in non-restructured markets (i.e., where traditional suppliers maintain load-serving responsibility), and, conversely, more weight to the results of Economic Capacity analyses in substantially restructured markets. *Id.* at 18 n.16 (citing *Nevada Power Co.*, 113 FERC ¶ 61,265, at P 15 (2005)).

²⁰ 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; and markets in which the HHI is greater than or equal to 1,800 points are considered to be highly concentrated. 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, Order Reaffirming Commission Policy and Terminating Proceeding*, 138 FERC ¶ 61,109 (2012) (affirming the Commission's use of the thresholds adopted in the Merger Policy Statement).

²¹ Application, Attachment 1, Solomon Affidavit at 16.

30. In the PJM market, Applicants state that Dominion is currently affiliated with 23,755 MW of generation, inclusive of the Kincaid and Elwood Facilities, while affiliates of ECP II currently own 1,317 MW of generation. As is the case in ISO-NE, Applicants conclude that the effect of the Proposed Transaction is to reduce market concentration in PJM, and therefore the Proposed Transaction will not have an adverse impact on horizontal competition in PJM.²² Applicants add that there is no horizontal effect in any submarket in PJM because neither the Kincaid Facility nor the Elwood Facility is located in a submarket within PJM that the Commission historically has analyzed.²³

31. Applicants add that ECP II's affiliates' holdings in NYISO, which is a market first-tier to ISO-NE and PJM, do not alter any of the foregoing conclusions. Applicants state that ECP II is affiliated with a 580 MW generating facility located in the NYISO market. Applicants state that this generation represents only 1.5 percent of installed generation in NYISO, and hence would be allocated a very small share of imports into ISO-NE or PJM, thus having a non-material effect on ECP II's market share in those markets.²⁴

b. Protest

32. Conservation Law states that Applicants did not analyze how the Proposed Transaction would affect market concentration within any submarket in ISO-NE.²⁵ Conservation Law asserts that the Commission has historically analyzed the submarket of Connecticut and Southwest Connecticut.²⁶ Conservation Law contends that there is reason to believe that constraints may arise again, not only in that submarket, but potentially in Southeastern Massachusetts (SEMA) as well, where Brayton Point Station is located. Conservation Law states that although ECP II and its affiliates may not have significant market power within the context of ISO-NE as a whole, three of the four facilities already owned by ECP II's affiliates are located either in the SEMA or

²² *Id.*, Attachment 1, Solomon Affidavit at 3-4.

²³ *Id.* at 5 & n.7 (citing *NRG Energy, Inc.*, 141 FERC ¶ 61,207, at PP 66-67 (2012); *Market-Based Rates for Wholesale Sales of Electric Energy Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 (2007); *Exelon Corp.* 138 FERC ¶ 61,167, at P 31 (2012)).

²⁴ *Id.* at 5.

²⁵ Protest at 3 & n.5 (citing Application, Attachment 1, Solomon Affidavit at 1-19).

²⁶ *Id.* at 3 & n.6 (citing *NRG Energy, Inc.*, 141 FERC ¶ 61,207 at P 71).

Connecticut areas. Therefore, Conservation Law submits that the Applicants should provide further information on the Proposed Transaction's impacts in the submarkets of SEMA and Connecticut.²⁷

c. Applicants' Answer

33. With respect to the Connecticut submarkets, Applicants state that “no aspect of the [Proposed] Transaction involves the Connecticut Import interface or Southwest Connecticut submarkets,” nor does Conservation Law identify any such relationship.²⁸ Therefore, Applicants argue that an analysis of the Proposed Transaction in these submarkets is not warranted, and the Commission should reject Conservation Law's assertion that Applicants should have considered these Connecticut submarkets.²⁹

34. With respect to SEMA, Applicants argue that: (1) Conservation Law has not provided any evidence indicating there is a binding constraint in SEMA; and (2) contrary evidence suggests there is no constraint that would prevent competing supply from reaching customers in SEMA. In this regard, Applicants cite cases in which the Commission found that “any proposal to use an alternative geographic market must include a demonstration regarding whether there are frequently binding transmission constraints during historical seasonal peaks and at other competitively significant times that prevent competing supply from reaching customers within the proposed alternative geographic market.”³⁰ Applicants state that Conservation Law has not provided any demonstration whether frequently binding constraints would prevent competing supply from reaching customers within the proposed alternative geographic market, SEMA. Applicants argue that Conservation Law's argument that SEMA should be treated as a separate submarket therefore fails.

35. Furthermore, Applicants state that the ISO-NE Internal Market Monitor's most recent Annual Markets Report shows that SEMA actually has lower real-time and day-ahead prices on an average annual basis than both ISO-NE as a whole and the Connecticut submarkets. Applicants argue that this evidence suggests that there is no such constraint that would prevent competing supply from reaching customers in

²⁷ *Id.* at 4-5.

²⁸ Answer at 2.

²⁹ *Id.*

³⁰ *Id.* at 3 (quoting *Exelon Corp.*, 138 FERC ¶ 61,167 at P 32).

SEMA.³¹ Additionally, Applicants state that the 2012 Annual Markets Report also shows negative congestion on an average annual basis in SEMA. They assert that this evidence also demonstrates that no such constraints are likely to exist.³² Applicants maintain that the SEMA region of ISO-NE does not possess the characteristics that the Commission has found to support considering a geographic region as a separate submarket, and Conservation Law's arguments should be rejected.³³

d. Commission Determination

36. We find that the combination of generation resulting from this Proposed Transaction will not affect horizontal competition. There is no evidence in the record that demonstrates that the Proposed Transaction will increase market concentration in the two relevant markets – the ISO-NE and PJM markets, where the facilities subject to the Proposed Transaction are located. Indeed, there is evidence that the transaction could result in a decrease in market concentration because the sellers own more generation in the relevant markets than the buyers.

37. Furthermore, we find it unnecessary to consider the effect of the Proposed Transaction on the Connecticut submarkets as none of the facilities subject to the Proposed Transaction are located in those submarkets. We also decline Conservation Law's request to consider SEMA as a relevant submarket for purposes of our evaluation of the Proposed Transaction. Commission precedent requires that "any proposal to use an alternative geographic market must include a demonstration regarding whether there are frequently binding transmission constraints during historical seasonal peaks and at other competitively significant times that prevent competing supply from reaching customers within the proposed alternative geographic market."³⁴ Conservation Law has

³¹ *Id.* (citing 2012 Annual Markets Report at Table 2-1 and Table 3-1, ISO New England Inc. Internal Market Monitor (May 15, 2013), *available at* http://www.iso-ne.com/markets/mkt_anlys_rpts/annl_mke_rpts/2012/amr12_final_051513.pdf (2012 Report)).

³² *Id.* at 3-4 (citing 2012 Report at Table 4-18).

³³ *Id.* at 4.

³⁴ *Exelon Corp.*, 138 FERC ¶ 61,167 at P 32 & n.29. *See also Central Vermont Pub. Serv. Corp.*, 138 FERC ¶ 61,161, at P 29 (2012); *FirstEnergy Corp.*, 133 FERC ¶ 61,222, at P 52 (2010); *Exelon Corp.*, 127 FERC ¶ 61,161, at P 86 (2009); *AEP Power Marketing, Inc.*, 124 FERC ¶ 61,274, at PP 24-25 (2008) (citing Order No. 697, FERC

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not made this demonstration and there is no record evidence in this proceeding of frequently binding transmission constraints that create prices in SEMA that diverge from prices in the rest of ISO-NE.

2. Effect on Vertical Competition

a. Applicants' Analysis

38. Applicants argue that the Proposed Transaction does not raise any vertical market power issues. Applicants submit that none of Brayton Holdings, Tomcat or their affiliates own or control any transmission facilities in ISO-NE or PJM other than those limited transmission facilities necessary to connect their generating facilities to the transmission grid, and the Proposed Transaction involves only the transfer of indirect control over such limited transmission facilities as are necessary to connect Applicants' generating facilities to the transmission grid. Applicants state that, in addition, none of Brayton Holdings, Tomcat or their affiliates has any ownership interest in or control of fuel supplies, fuel delivery systems, other inputs to electricity markets or any new sites for electric generation that could raise barriers to entry in ISO-NE or PJM.³⁵

b. Commission Determination

39. The Commission finds that the Proposed Transaction does not raise any vertical market power concerns. The only transmission facilities involved in the Proposed Transaction are limited interconnection facilities necessary to connect the relevant generating facilities to the transmission grid. Additionally, Applicants state that none of Brayton Holdings, Tomcat or their affiliates has any ownership interest in or control of fuel supplies, fuel delivery systems, other inputs to electricity markets or any new sites for electric generation that could raise barriers to entry in ISO-NE or PJM. We note that no party contends that the Proposed Transaction could adversely affect vertical competition.

3. Effect on Rates

a. Applicants' Analysis

40. Applicants argue that the Proposed Transaction will not have any adverse effect on rates because all sales of electric energy, capacity and ancillary services by Applicants

Stats. & Regs. ¶ 31,252, at P 268 (2007)); *Boralex Livermore Falls LP*, 122 FERC ¶ 61,033, *order on reh'g*, 123 FERC ¶ 61,279, at P 25 (2008).

³⁵ Application at 23.

will continue to be made at market-based rates authorized by the Commission. In addition, Applicants state that none of Applicants, Brayton Holdings, or Tomcat has any transmission customers whose rates could be affected by the Proposed Transaction.³⁶

b. Commission Determination

41. The Commission finds that the Proposed Transaction will not have an adverse effect on rates. All sales of electric energy, capacity and ancillary services by Applicants will continue to be made at market-based rates authorized by the Commission. Further, none of Applicants, Brayton Holdings, or Tomcat has any transmission customers whose rates could be affected by the Proposed Transaction. In addition, none of Applicants, Brayton Holdings, or Tomcat has any transmission customers whose rates could be affected by the Proposed Transaction. We note that no party asserts that the Proposed Transaction will adversely affect rates.

4. Effect on Regulation

a. Applicants' Analysis

42. Applicants maintain that the Proposed Transaction will not diminish the Commission's regulatory authority or create a regulatory gap or shift regulatory authority between the Commission and any state commission. Applicants add that the status of each Applicant as an FPA-jurisdictional public utility will not change as a result of the Proposed Transaction, and the Proposed Transaction will not result in any facilities being removed from the Commission's jurisdiction. Accordingly, Applicants argue that the Proposed Transaction will not have an adverse impact on regulation.³⁷

b. Commission Determination

43. We find no evidence that either state or federal regulation will be impaired by the Proposed Transaction. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap at the federal or state level.³⁸ 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 the Proposed Transaction is consummated. As to the state level, the Commission explained in the Merger Policy Statement that it ordinarily will not set the

³⁶ *Id.* at 24.

³⁷ *Id.*

³⁸ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

issue of the effect of a transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the 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.³⁹ No party alleges that regulation would be impaired by the Proposed Transaction, no state commission intervened in this proceeding, nor has any state commission asked the Commission to address the effect of the Proposed Transaction on state regulation.

5. Cross Subsidization

a. Applicants' Analysis

44. With respect to cross-subsidization, Applicants state that the Proposed Transaction does not involve any franchised public utility with captive customers, that is, wholesale or retail electric energy customers served under cost-based regulation.⁴⁰ Consequently, Applicants maintain that the Proposed Transaction falls within the safe harbor of transactions that do not involve a franchised public utility with captive customers.⁴¹ Nevertheless, Applicants state that, based on facts and circumstances known to them or that are reasonably foreseeable, the Proposed Transaction, at the time of the transaction or in the future, will not result in cross-subsidization of a non-utility associate company or the 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 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) 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 (4) any new affiliate contracts 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,

³⁹ *Id.* at 30,125.

⁴⁰ Application at 25.

⁴¹ *Id.* at 25 & n.92 (citing Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 17).

other than non-power goods and service agreements subject to review under sections 205 and 206 of the FPA.⁴²

b. Commission Determination

45. Based on the representations as presented in the Application, 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.

6. Other Matters

a. Protest

46. With respect to the broader inquiry of whether the Proposed Transaction is consistent with the public interest, Conservation Law asks the Commission to require Applicants to provide further information regarding the plans for the future operations at Brayton Point Station. Conservation Law contends that, across the nation, aging, outdated coal- and oil-fired electric generating facilities have been retiring apace, and the trend is no different within the ISO-NE control area. Conservation Law states that the Somerset Station and AES Thames have ceased to operate, and Salem Harbor Station retired two units in December 2011, and will retire the remaining two units in May 2014. Conservation Law adds that Dominion Energy received above-market payments for the operation of Salem Harbor Station as a result of successive de-list bids that were rejected on the basis of reliability concerns prior to the identification of a transmission solution. Conservation Law characterizes the financial picture for Brayton Point Station as being similarly bleak.⁴³

47. Conservation Law points out that in spite of these factors, Applicants have provided no information regarding the plans for future operations at Brayton Point, including whether the new owner expects to continue to participate in the capacity market, seek above market payments, repower the facility, or shut down the existing facility and build new generation at the site. Conservation Law states that ISO-NE has already projected that Brayton Point Station may retire by 2020, and if the new owner plans either to repower or consider building a new natural gas facility, doing so could have a negative impact on system reliability, given current concerns about over-reliance on natural gas. Conservation Law states that the likelihood that the new owner will either seek above market payments or seek to retire is not a mere possibility, but a real danger that must be examined by the Commission prior to the approval of this Proposed

⁴² *Id.* at Exhibit M.

⁴³ Protest at 4.

Transaction. Conservation Law maintains that the Commission has an active and independent duty to guard the public interest, and in this case doing so requires the Commission to understand the plans for future operations at Brayton Point Station.⁴⁴

b. Applicants' Answer

48. Applicants argue that Conservation Law makes broad statements about generating facilities across the United States and in the ISO-NE markets, expressing vague concerns that are beyond the scope of this proceeding.⁴⁵ Applicants contend that the Proposed Transaction “will not diminish the Commission’s regulatory authority over the Applicants, create a regulatory gap or otherwise shift regulatory authority between the Commission and any state commission.”⁴⁶ Applicants state that they will continue to be subject to the Commission’s jurisdiction after consummation of the Proposed Transaction and, if any Applicant were to seek a particular form of rate recovery or retire a generating unit, this action would be subject to the Commission-approved tariff of the independent system operator/regional transmission operator in which the Applicant participates, as well as Commission rules and regulations. They point out that interested parties would be able to participate in any such proceedings in accordance with Commission rules and regulations. Applicants emphasize that the Commission has consistently held that it will not entertain comments on issues outside the scope of a section 203 analysis.⁴⁷ For these reasons, Applicants ask the Commission to reject Conservation Law’s “attempt to hijack this proceeding.”⁴⁸

c. Commission Determination

49. We agree with Applicants that Conservation Law’s assertions concerning future operations of the Brayton Point Facility are speculative and go beyond the scope of this proceeding. Therefore, consistent with precedent, we will not consider these concerns of Conservation Law in the context of this section 203 analysis.⁴⁹

⁴⁴ *Id.* at 4-5.

⁴⁵ Answer at 4-7.

⁴⁶ *Id.* at 4-5.

⁴⁷ *Id.* at 5 & n.13.

⁴⁸ *Id.* at 4.

⁴⁹ See, e.g., *BHE Holdings Inc.*, 133 FERC ¶ 61,231, at P 40 (2010) (finding concerns regarding potential rate increases based on speculative future transaction to be
(continued...)

7. Reliability and Cyber Security Standards

50. 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 215.⁵⁰ 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.

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 authorizing the Proposed Transaction.

(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 cost, or any other matter whatsoever now pending or which may become 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.

beyond the scope of the FPA section 203 proceeding); *Energy East Corp.*, 121 FERC ¶ 61,236, at P 38 (2007) (“[W]e note that the Commission does not ordinarily consider the potential environmental effects of proposed transactions under section 203 of the FPA and that these issues are subject to the purview of other regulatory authorities.”).

⁵⁰ 16 U.S.C. § 824o (2006).

(F) Applicants shall make the 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 that the acquisition and disposition of jurisdiction facilities under the Proposed Transaction has been consummated.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.