

145 FERC ¶ 61,098
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.

Seneca Generation, LLC
Lake Lynn Generation, LLC
All Dams Generation, LLC
PE Hydro Generation, LLC
FirstEnergy Service Company

Docket No. EC13-143-000

ORDER AUTHORIZING DISPOSITION AND
ACQUISITION OF JURISDICTIONAL FACILITIES

(Issued November 1, 2013)

1. On September 4, 2013, Applicants¹ filed an application requesting Commission authorization under sections 203(a)(1)(A) and (B) of the Federal Power Act (FPA)² for the acquisition and disposition of jurisdictional facilities and, under section 203(a)(1)(D) of the FPA,³ for the acquisition of existing generation facilities (Joint Application). Specifically, the FirstEnergy Sellers will transfer to the LS Purchasers certain Commission-licensed hydroelectric generation facilities (Facilities) with an aggregate generating capacity of approximately 526 megawatts (MW)

¹ Applicants are the LS Purchasers and the FirstEnergy Sellers. The LS Purchasers are Seneca Generation, LLC (Seneca Generation), Lake Lynn Generation, LLC (Lake Lynn Generation), All Dams Generation, LLC (All Dams Generation) and PE Hydro Generation, LLC (PE Hydro Generation). The FirstEnergy Sellers are FirstEnergy Service Company (FE Service), a wholly-owned subsidiary of FirstEnergy Corp. (FirstEnergy), on behalf of FirstEnergy's indirect subsidiaries Allegheny Energy Supply Company, LLC (AE Supply), FirstEnergy Generation, LLC (FE Gen) and Green Valley Hydro, LLC (Green Valley).

² 16 U.S.C. §§ 824b(a)(1)(A), 824b(a)(1)(B) (2012).

³ 16 U.S.C. § 824b(a)(1)(D) (2012). Applicants state that the LS Purchasers are not currently "public utilities," as defined in section 201(e) of the FPA, 16 U.S.C. § 824(e) (2012), but will become public utilities upon acceptance of their applications for market-based rate authorization. Joint Application at 2 & n.3. *See infra* footnotes 5, 6, 34, 40, 42 and 44.

(Proposed Transaction). In addition to the transfer of the Facilities, the affected jurisdictional facilities include interconnection facilities, rate schedules, certain contracts, and other relevant assets. The Commission has reviewed the Joint Application under the Commission's Merger Policy Statement.⁴ As discussed below, we will authorize the Proposed Transaction as consistent with the public interest.

I. Background

A. Applicants' Description of the Parties

1. LS Purchasers

2. Applicants state that each of the LS Purchasers is an indirect wholly-owned subsidiary of LS Power Development, LLC (LSP Development), a developer, owner and operator of independent power projects. The LS Purchasers were created to acquire the Facilities. The Facilities are all located within the control area of the PJM Interconnection L.L.C. (PJM). They are the 451 MW Seneca Pumped Storage Station (Project No. 2280) (Seneca Project); the 52 MW Lake Lynn Hydroelectric Station (Project No. 2459) (Lake Lynn Station); the Allegheny Lock and Dam Unit Nos. 5 & 6 (Project Nos. 3671 and No. 3494, respectively) (Allegheny 5 & 6) with a combined capacity of 14 MW; the 2.4 MW Millville Project (Project No. 2343); the Dam Nos. 4 and 5 Hydro Stations (Project Nos. 2516 and 2517, respectively) (Dams No. 4 & 5) with a combined capacity of 2.9 MW; the Luray and Newport Projects (jointly licensed as Project No. 2425) with a combined capacity of approximately 2.4 MW; and the Shenandoah and Warren Projects (Project Nos. 2509 and 2391, respectively) with a combined capacity of 1.7 MW.

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*, 72 Fed. Reg. 42,277 (Aug. 2, 2007), 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).

3. To that end, Seneca Generation was formed to acquire, own, and operate the Seneca Project and associated assets.⁵ Lake Lynn Generation was formed to acquire, own, and operate the Lake Lynn Station, and associated assets. All Dams Generation was formed to acquire, own, and operate Allegheny 5 & 6, and associated assets. PE Hydro Generation was formed to acquire, own, and operate the Millville Project, the Dam Nos. 4 & 5, the Shenandoah Project, the Warren Project, the Luray Project and the Newport Project, including associated assets.⁶

4. In addition, Applicants state that, within the PJM control area, LSP Development and its affiliates own or control entities that own or control generating facilities that have a combined total capacity of approximately 2,920 MW.⁷

2. FE Service

5. Applicants state that FE Service is a wholly-owned subsidiary of FirstEnergy, an Ohio-based diversified energy company. FE Gen, AE Supply and Green Valley are authorized to sell power at market-based rates, and are indirect wholly-owned subsidiaries of FirstEnergy. FE Gen owns the Seneca Project; AE Supply owns the Lake Lynn Station, Allegheny 5 & 6, Dam Nos. 4 & 5, and the Millville Project; and Green Valley owns the Shenandoah, Warren, Luray and Newport Projects. None of the FirstEnergy Sellers is a franchised public utility with captive customers, nor do any of them own or control transmission or distribution facilities other than limited interconnection facilities.

⁵ The Seneca Project, Project No. 2280, is also referred to as the Kinzua Pumped Storage Project. FE Gen is currently the licensee of Project No. 2280, but a filing for approval to transfer the license to Seneca Generation is pending in Project No. 2280-017. *See* FE Gen's September 18, 2013 Notice of Application for Transfer of Licenses, and Soliciting Comments and Motions to Intervene.

⁶ On September 4, 2013, requests for market-based rate authorization were filed by Seneca Generation in Docket No. ER13-2316-000, Lake Lynn Generation in Docket No. ER13-2317-000, All Dams Generation in Docket No. ER13-2318-000 and PE Hydro Generation in Docket No. ER13-2319-000. Also, on October 10, 2013, notices of self-certification of Exempt Wholesale Generator Status were filed by Seneca Generation in Docket No. EG14-5-000, Lake Lynn Generation in Docket No. EG14-6-000, All Dams Generation in Docket No. EG14-7-000 and PE Hydro Generation in Docket No. EG14-4-000.

⁷ Applicants state that another affiliate of LSP Development, West Deptford Energy, LLC, is developing a 748 MW natural gas-fired electric generating facility in West Deptford, New Jersey. This facility is not expected to achieve commercial operation until mid-2014.

B. Proposed Transaction

6. According to Applicants, LS Purchasers will purchase the Facilities and the associated assets from the FirstEnergy Sellers. Specifically, Seneca Generation will purchase from FE Gen the Seneca Project and associated interconnection facilities (including the portion of FE Gen's annual revenue requirement for black start service associated with the Seneca Project); Lake Lynn Generation will purchase from AE Supply the Lake Lynn Station and associated interconnection facilities (including the portion of AE Supply's revenue requirements for black start service and reactive supply and voltage control from generation or other sources service associated with the Lake Lynn Station); All Dams Generation will purchase from AE Supply Allegheny 5 & 6 and associated interconnection facilities; PE Hydro will purchase from AE Supply Dam No. 4, Dam No. 5, and the Millville Project, and associated interconnection facilities; and PE Hydro will purchase from Green Valley the Shenandoah Project, the Warren Project, the Luray Project, the Newport Project, and associated interconnection facilities.

7. Applicants state that, in addition, the FirstEnergy Sellers will assign to the LS Purchasers their interests in certain contracts and rate schedules related to the operation of the Facilities. According to Applicants, jurisdictional contracts to be assigned include the following: (1) the non-exclusive use agreements, as described above; (2) a Facilities Agreement-Kinzua Project, dated October 21, 1966, between The Cleveland Electric Illuminating Company (Cleveland Electric) and Penelec; (3) a Partial Assignment Assumption and Consent Agreement, dated October 30, 1998, by and among Penelec and FE Acquisition Corp. and Cleveland Electric; and (4) an Affirmation of Assignment and Consent to Assignment, dated July 1, 2013, among Penelec and Cleveland Electric and FE Gen. In addition, Applicants state that the FirstEnergy Sellers will assign to the LS Purchasers those rights and obligations arising from capacity commitments associated with the Facilities made in PJM's Reliability Pricing Model auctions for 2013/2014, 2014/2015 and 2015/2016.

II. Notice of Filing and Responsive Pleadings

8. Notice of the Joint Application was published in the *Federal Register*, 78 Fed. Reg. 55,693 (2013), with interventions and comments or protests due on or before September 25, 2013. On September 5, 2013, the Pennsylvania Public Utility Commission (Pennsylvania Commission) filed a notice of intervention. On September 25, 2013, the Seneca Nation of Indians (Seneca Nation) filed a timely motion to intervene and comments.

9. On October 4, 2013, Applicants filed a motion to respond and response to the comments of Seneca Nation (Response).

III. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁸ the notice of intervention and timely, unopposed motion to intervene serve to make the Pennsylvania Commission and Seneca Nation parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure⁹ prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Applicants' Response because it has provided information that assisted us in our decision-making process.

B. Standard of Review Under Section 203

11. 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. The Commission's analysis of whether a 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.¹⁰ Section 203(a)(4) 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."¹¹ The Commission's regulations establish verification and informational requirements for entities that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.¹²

⁸ 18 C.F.R. § 385.214 (2013).

⁹ 18 C.F.R. § 385.213(a)(2) (2013).

¹⁰ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

¹¹ 16 U.S.C. § 824b(a)(4) (2012).

¹² 18 C.F.R. § 33.2(j) (2013).

C. Analysis Under Section 203

1. Effect on Horizontal Competition

a. Applicants' Analysis

12. Applicants state that the Proposed Transaction will have no adverse effect on horizontal competition in the PJM control area, the relevant market for the Facilities.¹³ Applicants state that after consummation of the Proposed Transaction, the LS Purchasers and their affiliates will own or control approximately 3,724 MW of generation in PJM, which represents roughly 2.1 percent of the approximately 174,956 MW of installed capacity in the PJM market. Applicants argue that this share represents a *de minimis* amount of capacity, and thus does not raise any horizontal market power concerns in PJM. Further, Applicants note that because the market share of FirstEnergy and its affiliates is larger than that of the LS Purchasers and their affiliates, the Herfindahl-Hirschman Index (HHI) change is slightly negative (-6).¹⁴ Thus, the transaction-related reduction in market share attributed to the FirstEnergy Sellers and their affiliates more than offsets the increase in market share attributed to the LS Purchasers, and the Proposed Transaction will have a slightly deconcentrating effect on installed capacity in the PJM market. Applicants state that FirstEnergy and its affiliates currently control approximately 20,099 MW of capacity in the PJM market, which represents roughly 11.5 percent of PJM's installed capacity. They state that after the Proposed Transaction is consummated, FirstEnergy and its affiliates will

¹³ Joint Application at Attachment 1, Solomon Aff. at 2-3.

¹⁴ Joint Application at 17; Solomon Aff. at 9. Applicants performed an Appendix A analysis, also referred to as a Delivered Price Test or Competitive Analysis Screen, to determine the pre- and post-transaction market shares from which the market concentration or HHI change 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; 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*, 138 FERC ¶ 61,109 (2012) (affirming the Commission's use of the thresholds adopted in the Merger Policy Statement).

control approximately 19,573 MW of capacity in the PJM market, which represents a market share of 11.2 percent.¹⁵

13. Applicants add that there is no horizontal market power effect in any relevant submarket in PJM. Applicants assert that the relevant geographic submarkets in PJM recognized by the Commission are PJM East, 5004/5005 and AP South. Applicants state that the Facilities subject to the Proposed Transaction are not located in any of these relevant submarkets, with one “truly minor” exception.¹⁶

b. Commission Determination

14. We find that the Proposed Transaction does not raise horizontal market power concerns. Applicants have demonstrated that the Proposed Transaction will have a *de minimis* impact on the amount of generation held by the LS Purchasers and their affiliated companies within the relevant market, PJM. Further, Applicants have shown that the Proposed Transaction will actually decrease market concentration in the PJM market because the market share of FirstEnergy and its affiliates is larger than that of the LS Purchasers and their affiliates, thus the HHI change is slightly negative.¹⁷ We note that no party raised horizontal market power issues in this proceeding.

2. Effect on Vertical Competition

a. Applicants’ Analysis

15. Applicants state that the Proposed Transaction does not raise any competitive concerns with regard to vertical market power. They explain that the LS Purchasers and their affiliates do not own or control any operational jurisdictional electric transmission facilities and, with the exception of facilities used to interconnect the relevant generating facilities to the transmission grid, none are being transferred as part of the Proposed Transaction.¹⁸ Applicants add that neither LS Purchasers nor any

¹⁵ Joint Application at 17.

¹⁶ *Id.* at Attachment 1, Solomon Aff. at 4-5 & n.7 (noting that the 0.9 MW capacity of the Shenandoah facility being acquired by PE Hydro Generation, which is located in the AP South submarket, represents a trivial market share in that market (about 0.001 percent)).

¹⁷ *Id.*, Solomon Aff. at 9.

¹⁸ *Id.*, Solomon Aff. at 5.

of their affiliates own or control other upstream inputs to electricity production nor do they have dominant control over generating sites within PJM.¹⁹

b. Commission Determination

16. Based on Applicants' representations, we find that the Proposed Transaction does not raise any vertical market power concerns because it does not involve the transfer of any transmission facilities other than limited and discrete interconnection facilities. Nor do LS Purchasers or their affiliates own or control other upstream inputs to electricity production or have dominant control over generating sites within PJM. We note that no party raised vertical market power issues in this proceeding.

3. Effect on Rates

a. Applicants' Analysis

17. Applicants state that the Proposed Transaction will not have an adverse effect on wholesale ratepayers and transmission customers because sales of electric energy, capacity and ancillary services (other than reactive power and black-start service) from the Facilities are currently made at market-based rates and, after consummation of the Proposed Transaction, will continue to be made at market-based rates.²⁰ Applicants add that the only cost-based sales from the Facilities are sales of reactive power and black start service to PJM, and that there is nothing in Schedule 2 to the PJM Tariff, Schedule 6A to the PJM Tariff, or the reactive power and black start revenue requirements that would allow the LS Purchasers to pass costs associated with the Proposed Transaction through to captive ratepayers.²¹

b. Commission Determination

18. Based on Applicants' representations, we find that the Proposed Transaction will not adversely affect wholesale requirements or transmission rates. We emphasize at the outset that our analysis of rate effects under section 203 of the FPA differs from the analysis of whether rates are just and reasonable under section 205 of the FPA. Our focus here is on the effect that the Proposed Transaction will have on jurisdictional rates, whether that effect is adverse, and whether any adverse effect will

¹⁹ *Id.* at 18; Solomon Aff. at 6.

²⁰ *Id.* at 19 & n.52.

²¹ *Id.* at 19.

be offset or mitigated by benefits that are likely to result from the Proposed Transaction.²²

19. With regard to wholesale rates, Applicants will continue to make all of their wholesale sales of electric energy and capacity at market-based rates.²³ Based on Applicants' representations, we find the Proposed Transaction will not adversely impact wholesale customers' rates for energy and capacity.

20. With regard to the effect of the Proposed Transaction on transmission rates, we note that there are no transmission customers whose rates could be adversely impacted by the Proposed Transaction. We also note that no party argued that the Proposed Transaction would have an adverse effect on rates.

4. Effect on Regulation

a. Applicants' Analysis

21. Applicants state that the Proposed Transaction will not diminish the regulatory authority of the Commission or any state commission, create a regulatory gap, or shift regulatory authority between the Commission and any state commission. Applicants state that after consummation of the Proposed Transaction, Applicants and the Facilities will continue to be regulated by the Commission and the relevant state commission to the same degree as prior to the Proposed Transaction.²⁴

b. Commission Determination

22. 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.²⁵ Based

²² See, e.g., Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044, at 30,123 (noting that an increase in rates "can be consistent with the public interest if there are counterveiling benefits that derive from the transaction"); see also *ITC Midwest LLC*, 133 FERC ¶ 61,169, at P 24 (2010); *ALLETE, Inc.*, 129 FERC ¶ 61,174, at P 19 (2009); *Startrans IO, L.L.C.*, 122 FERC ¶ 61,307, at PP 25-28 (2008); *ITC Holdings Corp.*, 121 FERC ¶ 61,229, at PP 120-28 (2008).

²³ *NorAm Energy Servs., Inc.*, 80 FERC ¶ 61,120, at 61,382-83 (1997). See also *So. Cal. Edison Co. Morongo Trans. LLC*, 144 FERC ¶ 61,178, at P 23 (2013) (finding no adverse impact on rates for market-based rates); and *Dominion Energy Brayton Point*, 144 FERC ¶ 61,139, at P 41 (2013) (same).

²⁴ *Id.*

²⁵ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

on Applicants' representations, we find that neither state nor federal regulation will be impaired by the Proposed Transaction. Specifically, 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 Applicants after consummation of the Proposed Transaction.

23. In the Merger Policy Statement, the Commission stated that it ordinarily will not set the issue of the effect of a transaction on the 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 stated that it may set the issue for hearing, and that it will address such circumstances on a case-by-case basis.²⁶ We note that no party alleges that regulation would be impaired by the Proposed Transaction, and no state Commission has requested that the Commission address the issue of the effect on state regulation.

5. Cross-Subsidization

a. Applicants' Analysis

24. Applicants state 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 closing or in the future, 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. Specifically, Applicants state that the Proposed Transaction does not involve a franchised public utility with captive customers and 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 (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 service agreements subject to review under sections 205 and 206 of the FPA.

²⁶ *Id.* at 30,125.

b. Commission Determination

25. Based on Applicants' representations, 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.²⁷ The Proposed Transaction does not involve a franchised public utility with captive customers²⁸ and Applicants state that none of them are franchised public utilities with captive customers.²⁹ We note that no party has argued otherwise.

6. Seneca Nation³⁰

a. Comments

26. Seneca Nation is involved in a competitive relicensing proceeding for one of the Facilities, the Seneca Project, which is Project No. 2280. Seneca Nation requests that, if the Commission grants Applicants' requested section 203 authorization, the Commission also clarify that it "is not making any ruling as to whether the hydropower licenses associated with [the Facilities] require the Applicants to maintain their books and records in accordance with the Uniform System of Accounts."³¹

27. Seneca Nation explains that the genesis of its request stems from Applicants' statement in Part V of their Joint Application that "they have not included proposed accounting entries showing the effect of the [Proposed Transaction] because they are not required to maintain their books and records in accordance with the Uniform System of Accounts."³² Seneca Nation states that it takes no position as to the extent of any waivers of 18 C.F.R. Part 101 that have been or will be granted to Applicants under *Part II* of the FPA. The Seneca Nation contends, however, that licensees under *Part I* of the FPA have separate and independent obligations to comply with the

²⁷ See Joint Application at Exh. M.

²⁸ See *id.*

²⁹ See, e.g., *Fore River Development*, 133 FERC ¶ 61,248, at P 38 (2010).

³⁰ Seneca Nation states that it is a sovereign Indian nation whose boundaries are recognized by the United States through treaties and federal law. Seneca Nation Comments at 3.

³¹ *Id.* at 6.

³² *Id.* at 5.

Uniform System of Accounts for the purposes of calculating the actual legitimate original cost of and the net investment in the licensed projects in question.³³

28. Seneca Nation explains that it intends to file a competing license application for Project No. 2280. It states that, if the Commission were to award a new license for that project to the Seneca Nation, rather than to the then-current licensee of Project No. 2280,³⁴ Seneca Nation would have the right under FPA sections 14(a) and 15(A)(1)³⁵ to acquire Project No. 2280 for the amount of the licensee's net investment, provided it does not exceed the project's fair market value.³⁶ Thus, Seneca Nation states that FirstEnergy – and Seneca Generation, if it acquires Project No. 2280 – must establish and maintain the accounts for that project in accordance with the Uniform System of Accounts in order to calculate the payment that would be due in this situation.³⁷

b. Response

29. Applicants state that FirstEnergy continues to maintain the accounting information required under Part I of the FPA, despite having obtained a waiver of the Uniform System of Accounts in 2001.³⁸ Applicants point out that they do not seek Commission approval to modify any of the applicable accounting requirements. They assert that the Proposed Transaction will not impact the accounting treatment of any of the Facilities. They add that they do not oppose Seneca Nation's request, to the extent that it is relevant to the analysis of their Joint Application.

30. Additionally, Applicants note that Seneca Nation expressly does not oppose the Proposed Transaction and Seneca Nation does not assert that the Proposed Transaction will have an adverse effect on competition, rates, regulation or other factors the Commission traditionally considers in evaluating applications under section 203.

³³ *Id.* at 5 & n.7.

³⁴ As noted above, while FE Gen is currently the licensee of Project No. 2280, a filing for approval to transfer the license to Seneca Generation is pending in Project No. 2280-017. *See supra* n.5.

³⁵ 16 U.S.C. §§ 807, 808 (2012).

³⁶ Seneca Nation Comments at 6.

³⁷ *Id.* at 6 & n.9.

³⁸ Response at 2-3 & n.10 (citing *FirstEnergy Generation Corp.*, 94 FERC ¶ 61,177 (2001)).

c. **Commission Determination**

31. The section 203 authorization in this proceeding does not prejudice the Commission's determination in the license transfer proceeding or the competitive relicensing proceedings involving the Seneca Project.³⁹ The authorization in this proceeding is made under section 203 of the FPA, and is not an authorization for the licensee to transfer the Facilities until authorization is also received pursuant to section 8 of the FPA.⁴⁰

32. In response to Seneca Nation, the licensee shall determine the net investment amounts of its Facilities in accordance with the terms and conditions of its licenses at the time of conveyance of the Facilities. Moreover, all licensees shall maintain amortization reserves, accounting information and records as required by their license terms and conditions and as required by Commission rules.⁴¹ We note that Applicants

³⁹ See Project No. 2280-013 (license application proceeding) and Project No. 2280-017 (license transfer proceeding). Seneca Nation states that its competing license application for Project No. 2280 will be filed in Project No. 13889. Seneca Nation Comments at 5. See *SUEZ Energy North America, Inc.*, 125 FERC ¶ 61,188, at P 46 (2008) (stating that issues related to hydroelectric relicensing proceedings are wholly separate from, and unrelated to, the Commission's section 203 analysis). See also *Portland General Electric Co.*, 93 FERC ¶ 61,184, at 61,606 (2000); *New England Power Co.*, 82 FERC ¶ 61,179, at n.2, *reh'g denied*, 83 FERC ¶ 61,275, at n.20 (1998) (addressing FPA section 203 applications and stating that the Commission will address license transfer applications in a separate order).

⁴⁰ Section 8 of the FPA, 16 U.S.C. § 801 (2012), provides that the voluntary transfer of any license can only be made with the written approval of the Commission. The project can be operated while the transfer proceeding is ongoing, but the licensee remains the current licensee until the Commission approves the transfer and whatever conditions it imposes are satisfied. On September 4, 2013, FE Gen (in Docket No. P-2280-017), AE Supply (in Docket Nos. P-2343-084, P-2459-245, P-2516-057, P-2517-036, P-3494-091, and P-3676-086) and Green Valley (in Docket Nos. P-2391-046, P-2425-052, and P-2509-046) filed applications to transfer the licenses for the projects at issue. The transfer proceedings are pending and not affected by this order.

⁴¹ 18 C.F.R. Part 101 (2013), General Instruction No. 16, *Separate Accounts or Records for Each Licensed Project*, and 18 C.F.R. §§ 125.1 – 125.3 (2013). See also *Trafalgar Power, Inc.*, 87 FERC ¶ 61,207, at 61,798 (1999) (noting that “all licensees are required to comply with the requirements of the Uniform System of Accounts to the extent necessary to carry out their responsibilities under [s]ections 4(b), 10(d) and 14 of the FPA”).

state that FE Gen has continued to maintain the accounting information required under Part I of the FPA.⁴²

7. Other Considerations

33. Order No. 652⁴³ 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. To the extent that the foregoing authorization results in a change in status, Applicants are advised that they must comply with the requirements of Order No. 652. In addition, LS Purchasers shall make any appropriate filings under section 205 of the FPA to implement the Proposed Transaction.⁴⁴

34. 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 section 215 of the FPA. 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 cyber security standards. The Commission, North American Electric Reliability Corporation or the relevant regional entity may audit compliance with reliability and cyber security standards.

⁴² Response at 2-3. Concurrently with this order, we address Seneca Nation's accounting concern in an order on Seneca Generation's request for market-based rate authority in Docket No. ER13-2316-000. *See Seneca Generation, L.L.C.*, 145 FERC ¶ 61,096 (2013).

⁴³ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005). *See* 18 C.F.R. § 35.42 (2013).

⁴⁴ On September 4, 2013, in Docket No. ER13-2316, Seneca Generation filed an application for market-based rate authorization under section 205 of the FPA.

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 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.

(G) Applicants shall submit their final accounting entries supporting the net investment in project Facilities transferred within six months of the date that the Proposed Transaction is consummated. The accounting submissions shall provide all the accounting entries and amounts related to the transfers along with narrative explanations describing the basis for the entries.

(H) 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)

Kimberly D. Bose,
Secretary.