

145 FERC ¶ 61,212  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Osage Wind, LLC

Docket No. EC13-142-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued December 16, 2013)

1. On August 29, 2013, Osage Wind, LLC (Applicant) filed an application under section 203(a)(1)(A) of the Federal Power Act (FPA)<sup>1</sup> requesting authorization for a transaction pursuant to which Wind Capital Group, LLC (Wind Capital) agrees to sell, and TradeWind Energy, Inc. (TradeWind) agrees to purchase, 100 percent of the ownership interests in Applicant (Proposed Transaction). The Commission has reviewed the application under the Commission's Merger Policy Statement.<sup>2</sup> As discussed below, we will authorize the Proposed Transaction as consistent with the public interest.

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<sup>1</sup> 16 U.S.C. § 824b(a)(1)(A) (2012).

<sup>2</sup> *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. Osage Wind, LLC

2. Applicant states that it is a Delaware limited liability company that is developing an approximately 152 MW wind generation facility and associated interconnection facilities in Osage County, Oklahoma within the Associated Electric Cooperative, Inc. (Associated Electric) balancing authority area (Osage Wind Facility), the full output of which Applicant has committed to sell to Associated Electric under a long-term contract. Applicant has authorization to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates. It has also filed a Notice of Self-Certification of Exempt Wholesale Generator Status under the Public Utility Holding Company Act of 2005 (PUHCA).<sup>3</sup>

3. Applicant states that it is affiliated with Lost Creek Wind, LLC (Lost Creek) and Post Rock Wind Power Project, LLC (Post Rock). Lost Creek, an exempt wholesale generator with authorization to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates,<sup>4</sup> is a Delaware limited liability company that owns and operates a 150 MW wind generation facility in Dekalb County, Missouri within the Associated Electric balancing authority area. Post Rock, a Delaware limited liability company with Commission authorization to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates,<sup>5</sup> owns and operates a 201 MW wind generation facility in Kansas within the Midwest Energy, Inc. transmission area, which is part of the Westar Energy Inc. balancing authority area. As part of Post Rock's generator interconnection facilities, Post Rock owns and operates a 32-mile, 230 kV lead line from the project substation in Ellsworth County to an interconnection point in Rice County. Post Rock has filed a Notice of Self-Certification of Exempt Wholesale Generator Status and committed the full output of its facility to Westar Energy Inc. under a long-term contract.<sup>6</sup>

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<sup>3</sup> Application at 3.

<sup>4</sup> *Lost Creek Wind*, Docket No. ER09-1196 (Aug. 5, 2009) (delegated letter order).

<sup>5</sup> *Post Rock Wind Power Project, LLC*, 136 FERC ¶ 61,147 (2011).

<sup>6</sup> Application at 4.

## 2. Wind Capital

4. Applicant is a direct, wholly-owned subsidiary of Wind Capital, which is, in turn, a direct, wholly-owned subsidiary of Wind Capital Ventures, L.L.C. (Wind Capital Ventures). NTR US Wind, Inc., an indirect wholly-owned subsidiary of NTR plc, holds 97 percent of the voting interests in Wind Capital Ventures. Applicant states that NTR plc, a public limited company headquartered in Dublin, Ireland and an investor in renewable energy and sustainable waste management businesses in the United States and Ireland, does not directly or indirectly own or control 10 percent or more of the voting equity interests of any generating or transmission facility or any essential resource or input to power production in the United States, with the exceptions of Lost Creek, Post Rock, and Applicant.<sup>7</sup>

## 3. TradeWind

5. TradeWind, a Kansas corporation with its principal place of business in Lenexa, Kansas, specializes in wind and solar project development nationwide. TradeWind does not own or operate any in-service generation or transmission facilities in the United States, but it is currently developing the Mustang Run Wind Project and the Rock Creek Wind Project in the Associated Electric balancing authority area. The Mustang Run Wind Project is a proposed 350 MW wind generation facility located within Osage County, and the Rock Creek Wind Project is a proposed 300 to 400 MW wind generation facility to be located approximately 60 miles north of St. Joseph, Missouri. TradeWind anticipates that it will sell the entire output of these facilities to non-affiliated third parties under long-term agreements.<sup>8</sup>

6. Enel Kansas, LLC owns 19.9 percent of the issued and outstanding stock in TradeWind, and three individual investors, Robert H. Freeman, Geoffrey A. Coventry, and Matthew F. Gilhousen (collectively, the Individual Investors) each own 26.7 percent of the issued and outstanding stock in TradeWind.<sup>9</sup> The principal business of Enel Kansas, LLC's owner, Enel NA, is owning, operating, and developing hydroelectric and renewable energy generation facilities throughout the United States and Canada. Enel NA is a wholly-owned subsidiary of Enel Green Power International BV, a company organized under the laws of the Netherlands, which is, in turn, a wholly-owned subsidiary

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<sup>7</sup> *Id.* at 5.

<sup>8</sup> *Id.*

<sup>9</sup> Applicant states that none of the Individual Investors owns or operates, directly or indirectly, any electric generation, transmission, or distribution facilities in the United States. It further states that, except through TradeWind, the Individual Investors have no involvement in the energy industry.

of Enel Green Power S.p.A., an Italian joint-stock company. Enel Green Power S.p.A. is a majority-owned subsidiary of Enel S.p.A., which is also an Italian joint-stock company. The facilities that are directly or indirectly owned and operated by Enel NA in multiple U.S. markets are either qualifying facilities under the Public Utility Regulatory Policies Act of 1978 or eligible facilities of exempt wholesale generators under PUHCA. Applicant states that neither Enel NA nor its affiliates owns or controls any generating facilities in the Associated Electric balancing authority area or any transmission facilities in the United States, except for the limited interconnection facilities necessary to interconnect a generating facility to the grid. Enel NA and its affiliates own or control sites for new generation capacity development in various markets, including, indirectly, the sites for the development of the Mustang Run Wind Project and the Rock Creek Wind Project. Neither Enel NA nor its affiliates owns or controls any other inputs to electric power production in a relevant market.<sup>10</sup>

## **B. Description of the Proposed Transaction**

7. Pursuant to the Membership Interest Purchase Agreement that governs the Proposed Transaction, TradeWind will purchase, and Wind Capital will sell, 100 percent of the membership interests in Applicant, and Applicant will become a wholly-owned subsidiary of TradeWind. The jurisdictional facilities owned, operated or controlled by Applicant consist of Applicant's market-based rate tariff, associated books, records and accounts and related agreements and limited interconnection facilities required to interconnect the Osage Wind Facility to the transmission system.<sup>11</sup>

## **II. Notice of Filing and Responsive Pleadings**

8. Notice of the application was published in the *Federal Register*, 78 Fed. Reg. 55,247 (2013), with interventions and comments due on or before September 19, 2013. Associated Electric filed a timely motion to intervene. The Osage Nation, a federally-recognized Native American tribe based mainly in Osage County, Oklahoma, filed a timely motion to intervene and protest, as supplemented on September 24, 2013. On October 2, 2013, Applicant filed an answer to the protest.

## **III. Discussion**

### **A. Procedural Issues**

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the timely unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

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<sup>10</sup> Application at 6.

<sup>11</sup> *Id.* at 15.

10. 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 unless otherwise ordered by the decisional authority. We will accept Applicant's answer 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 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.<sup>12</sup> 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."<sup>13</sup> 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.<sup>14</sup>

**C. Analysis under Section 203**

**1. Effect on Competition**

**a. Applicant's Analysis**

12. Applicant requests that the Commission authorize the Proposed Transaction without requiring the filing of a horizontal competitive screen analysis, as set forth in Appendix A of the Merger Policy Statement. Applicant asserts that the Commission's regulations do not require such an analysis if the applicant affirmatively "demonstrates that the merging entities do not currently conduct business in the same geographic markets or that the extent of the business transactions in the same geographic markets is *de minimis*."<sup>15</sup> To support its claim that it meets the *de minimis* standard, Applicant states that it has committed the Osage Wind Facility's entire output to Associated Electric under a long-term agreement. Thus, Applicant reasons that the Proposed Transaction will not result in a change in market concentration in the Associated Electric market, as the

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<sup>12</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

<sup>13</sup> 16 U.S.C. § 824b(a)(4) (2012).

<sup>14</sup> 18 C.F.R. § 33.2(j) (2013).

<sup>15</sup> Application at 8 (citing 18 C.F.R. § 33.3(a)(2)(i) (2013)).

Osage Wind Facility's output would not be attributable to TradeWind in any horizontal market power analysis.<sup>16</sup>

13. Applicant further states that the Proposed Transaction does not raise any vertical market power issues. Applicant asserts that neither TradeWind nor its affiliates owns or controls any transmission facilities in the Associated Electric market, nor 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 the Associated Electric market.<sup>17</sup>

**b. Commission Determination**

14. In analyzing whether a transaction will adversely affect competition, the Commission first examines the transaction's effects on concentration in generation markets or whether the transaction otherwise creates an incentive to engage in behavior harmful to competition, such as withholding generation. Second, the Commission considers the vertical combination of upstream inputs, such as transmission or natural gas, with downstream generating capacity.

15. Applicant has shown that the Proposed Transaction will not adversely affect competition. While Applicant acknowledges that, as a result of the Proposed Transaction, TradeWind will acquire an additional generation facility in the Associated Electric balancing authority area, the entire output of the Osage Wind Facility is committed to Associated Electric pursuant to a long-term contract. This commitment effectively removes the Osage Wind Facility's output from TradeWind's control.<sup>18</sup> For this reason, we find that the Proposed Transaction will not have an adverse effect on horizontal competition.<sup>19</sup> Additionally, we find that the Proposed Transaction will not

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 9. While Applicant states that TradeWind owns or controls sites associated with the development of the Mustang Run Wind Project and the Rock Creek Wind Project in the Associated Electric balancing authority area, it is intended that the output of these two projects will be sold to non-affiliated third parties under long-term agreements. *Id.* at 5.

<sup>18</sup> See *Northwestern Corp.*, 117 FERC ¶ 61,100, at P 23 (2006).

<sup>19</sup> See *Startrans IO, L.L.C.*, 122 FERC ¶ 61,307, at P 18 (2008). We note, however, that for purposes of section 33.3(a)(2)(i), the fact that the output of a facility disposed of under FPA section 203(a)(1)(A) is committed under a long-term agreement does not, in and of itself, confirm that the extent of the acquiring and disposing entities' business transactions in the same geographic markets is *de minimis*.

have an adverse effect on vertical competition because it will not result in the combination of generation assets with either transmission facilities or inputs to electricity in the same relevant geographic market. We also note that no party has argued that the Proposed Transaction raises horizontal or vertical market power concerns.

## **2. Effect on Rates**

### **a. Applicant's Analysis**

16. Applicant argues that the Proposed Transaction will not have an adverse effect on wholesale rates because Applicant will continue to make all sales of electric energy, capacity, and ancillary services at market-based rates. Additionally, Applicant states that neither Applicant nor TradeWind has any transmission customers whose rates could be affected by the Proposed Transaction.

### **b. Commission Determination**

17. We find that the Proposed Transaction will not have an adverse effect on rates since Applicant will continue to make all of its sales of electric energy, capacity, and ancillary services at market-based rates as authorized by the Commission.<sup>20</sup> Further, we note that neither Applicant nor TradeWind has any transmission customers whose rates could be affected by the Proposed Transaction because neither owns jurisdictional assets within the Associated Electric balancing authority area except for the generation facilities noted and their associated interconnection facilities. We also note that no party asserts that the Proposed Transaction will adversely affect rates.

## **3. Effect on Regulation**

### **a. Applicant's Analysis**

18. Applicant argues 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. Applicant further states that its status as an FPA-jurisdictional utility will not change as a result of the Proposed Transaction and that the Proposed Transaction will not result in the removal of any facilities from the Commission's jurisdiction.

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<sup>20</sup> *Osage Wind, LLC*, Docket No. ER11-4363-000 (Sept. 27, 2013) (delegated letter order).

**b. Commission Determination**

19. We find that neither state nor 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.<sup>21</sup> 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 Applicant after the Proposed Transaction's closing. In the Merger Policy Statement, the Commission stated that it ordinarily will not set the 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 stated that it may set the issue for hearing, and that it will address such circumstances on a case-by-case basis.<sup>22</sup> 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. Applicant's Analysis**

20. Applicant argues that since the Proposed Transaction does not involve any franchised public utility with captive customers, it falls within one of the Commission's four "safe harbors" and does not require a detailed explanation and evidentiary support to demonstrate a lack of cross-subsidization.

**b. Commission Determination**

21. Based on the facts 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. We note that no party has argued otherwise.

**6. Osage Nation**

**a. Protest**

22. The Osage Nation states that the Osage Wind Facility is located on property that belongs to members of the Osage Nation. The Osage Nation further asserts that the federal government holds the mineral rights under the Osage Wind Facility for the benefit of the Osage Nation and that the Osage Wind Facility will interfere with its ability to

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<sup>21</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

<sup>22</sup> *Id.*, FERC Stats. & Regs. ¶ 31,044 at 30,125.

exploit its sub-surface mineral rights to extract natural gas and oil. The Osage Nation also opposes Applicant's request for a bald eagle take permit from the U.S. Fish and Wildlife Service because the bald eagle is "sacred and symbolic to the Osage people."<sup>23</sup> The Osage Nation also expresses concern that the Osage Wind Facility will affect tribal cultural resources, including over 70 "potential sites of tribal significance," four of which may qualify for registration to the National Register of Historical Places.<sup>24</sup> While acknowledging that its concerns "do not fall squarely within the traditional scope of the issues considered . . . under section 203," the Osage Nation argues that the "Commission cannot act in a vacuum in determining whether the proposed transaction is in the public interest."<sup>25</sup> Moreover, it argues that section 33.2 of the Commission's regulations requires an applicant to disclose "licenses, orders, or other approvals from other regulatory bodies" in connection with the proposed transaction "if there is a transfer of physical property ownership."<sup>26</sup> The Osage Nation reasons that even though the Proposed Transaction only involves an acquisition of an ownership interest in the Applicant, it will affect the Osage Wind Facility site's physical ownership, as "the ultimate ownership of the site . . . will change from Wind Capital Ventures to TradeWind Energy" and "presumably TradeWind Energy will engage in further discussions with the Osage Nation" and the U.S. Fish and Wildlife Service.<sup>27</sup> The Osage Nation asks the Commission to reject the Proposed Transaction in response to the Osage Nation's concerns.

23. In its September 24, 2013 supplemental protest, the Osage Nation states that it has asked the U.S. Army Corps of Engineers (Army Corps) to "take whatever actions are necessary to preclude Wind Capital from commencing construction . . . until [the Osage Wind Facility's] cultural resource impacts are identified and protected, as required by the National Historic Preservation Act and the Army Corps' regulations."<sup>28</sup> The Osage Nation asks the Commission to deny the Proposed Transaction to allow time for the U.S. Fish and Wildlife Service and the Army Corps to complete their permit processes and to determine the mitigation measures necessary for the Osage Wind Facility to co-exist with the Osage Nation's tribal lands. If the Commission approves the Proposed Transaction, the Osage Nation requests that the Commission condition its approval on a commitment

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<sup>23</sup> Osage Nation September 19, 2013 Protest at 3.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 4.

<sup>26</sup> *Id.* (citing 18 C.F.R. § 33.2(h), (i) (2013)).

<sup>27</sup> *Id.*

<sup>28</sup> Osage Nation September 24, 2013 Protest at 8.

by TradeWind “to resolve the Osage Wind Facility’s impacts” on the Osage Nation’s sub-surface minerals rights, concerns regarding bald eagle protection, and concerns regarding cultural resource damage.<sup>29</sup>

**b. Applicant’s Answer**

24. Applicant asks the Commission to reject the Osage Nation’s supplemental protest as untimely.<sup>30</sup> It also argues that the issues that the Osage Nation raises fall outside the scope of the Commission’s section 203 analysis and asks the Commission to reject the Osage Nation’s “inaccurate attempt” to recast the Proposed Transaction’s nature.<sup>31</sup> On this point, Applicant states that the generation site will “continue to be owned by the six private landowners who have leased the land to [Applicant],” and that the Osage Nation is wrong to state that TradeWind would be the entity with the U.S. Fish and Wildlife Service permit obligations. Additionally, Applicant asks the Commission to reject the Osage Nation’s claims that Applicant failed to disclose required permits, as there are no licenses, orders, or other approvals required from other bodies in connection with the Proposed Transaction.<sup>32</sup> Applicant also states that Commission should disregard the misrepresented facts in the protests.<sup>33</sup>

**c. Commission Determination**

25. We find that the issues raised by the Osage Nation are outside the scope of this proceeding because they are not relevant to our analysis under FPA section 203. This proceeding is not the appropriate forum in which to address the Osage Nation’s concerns that are currently pending before the U.S. Fish and Wildlife Service and the Army Corps. As the Commission explained in the Merger Policy Statement, we will not consider

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<sup>29</sup> *Id.* at 10.

<sup>30</sup> Applicant Answer at 3-4.

<sup>31</sup> *Id.* at 8-9

<sup>32</sup> *Id.* at 9-11.

<sup>33</sup> *Id.* at 12-15.

matters that are unrelated to the transaction and analysis performed by the Commission under section 203 of the FPA.<sup>34</sup>

**7. Other Issues**

**a. Change in Status**

26. Order No. 652 requires that sellers with market-based rate authority timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.<sup>35</sup> To the extent that the foregoing authorization results in a change in status, Applicant is advised that it must comply with the requirements of Order No. 652. In addition, Applicant shall make any appropriate filings under section 205 of the FPA to implement the Proposed Transaction.

**b. Reliability and Cyber Security Standards**

27. Information and/or systems connected to the bulk power system involved in the Proposed 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, the North American Electric Reliability Corporation or the relevant Regional Entity may audit compliance with reliability and cyber security standards.

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<sup>34</sup> *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044, at 30,127 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997); *see also FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007); *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).

<sup>35</sup> *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8253 (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).

The Commission orders:

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

(B) Applicant must inform the Commission within 30 days of any material change in circumstances that departs from the facts that 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) Applicant shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction.

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

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.