

154 FERC ¶ 61,015
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Upstate New York Power Producers, Inc.
Cayuga Operating Company, LLC
Somerset Operating Company, LLC

Docket No. EC15-214-000

ORDER AUTHORIZING DISPOSITION
OF JURISDICTIONAL FACILITIES

(Issued January 13, 2016)

1. On September 25, 2015, pursuant to section 203(a)(1) of the Federal Power Act (FPA)¹ and part 33 of the Commission's regulations,² Upstate New York Power Producers, Inc. (Upstate New York Power), Cayuga Operating Co., LLC (Cayuga), and Somerset Operating Co., LLC (Somerset) (collectively, Applicants) requested Commission authorization for a transaction (Proposed Transaction) in which Riesling Power LLC (Riesling) will acquire from Upstate New York Power all of Upstate New York Power's ownership interests in both Cayuga and Somerset.³ As discussed below, we have reviewed the Proposed Transaction under the Commission's Merger Policy Statement⁴ and authorize the Proposed Transaction under FPA section 203 as consistent with the public interest.

¹ 16 U.S.C. § 824b(a)(1) (2012).

² 18 C.F.R. pt. 33 (2015).

³ Application for Authorization under Section 203 of the Federal Power Act, Docket No. EC15-214-000 (Sept. 25, 2015) (Application).

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)

(continued ...)

I. Background

A. Description of Applicants and Buyer

2. Applicants state that Upstate New York Power wholly owns two limited liability companies, Cayuga and Somerset, which own and operate the Cayuga Facility and Somerset Facility, respectively. The Cayuga Facility is a 312 megawatt (MW) coal-fired generation plant located in Lansing, New York. The Somerset Facility is a 668 MW coal-fired generation plant located in Somerset, New York. Both facilities are situated within the New York Independent System Operator, Inc. (NYISO) market. Thus, the relevant market for the Proposed Transaction is NYISO.⁵ Applicants state that Cayuga and Somerset are exempt wholesale generators with market-based rate authority.

3. Riesling is a wholly owned subsidiary of Bicent Power LLC (Bicent Power). Bicent Power currently owns 100 percent of five public utilities that own and operate electric generating facilities in Colorado, California, Montana, and Massachusetts, as follows: (1) BIV Power Generation Co., L.L.C., which owns and operates a 123 MW gas-fired generating facility located near Brush, Colorado; (2) Colorado Power Partners, which owns and operates a 55 MW gas-fired generating facility and a 24 MW gas-fired generating facility located near Brush, Colorado; (3) Rocky Mountain Power, LLC, which owns and operates a 115.7 MW electric generation facility located in Hardin, Montana; (4) San Joaquin Cogen, LLC, which owns and operates a 48 MW electric generation facility located in Lathrop, California; and (5) Tanner Street Generation, LLC, which owns and operates a 85 MW dual fuel combined cycle electric power plant located in Lowell, Massachusetts. Applicants state that all of these companies have been authorized by the Commission to make wholesale sales of energy, capacity, and ancillary services at market-based rates.⁶

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

⁵ Application at 4-6.

⁶ *Id.* at 7-8.

4. According to Applicants, investment funds managed or advised by GSO Capital Partners LP (GSO) currently hold an approximately 97 percent equity ownership interest in Bicent Power. GSO represents the credit-oriented business of The Blackstone Group L.P., a global alternative asset manager.⁷ In addition to the Bicent Power companies identified above, Applicants state that GSO is also affiliated with generation facilities located in the market administered by the Electric Reliability Council of Texas, Inc. Applicants further state that GSO is currently not affiliated with any generation capacity in the NYISO balancing authority area. GSO is also affiliated with two wholesale power marketers, neither of which owns or controls any electric generation or transmission facilities or inputs to electricity products or electric power production.⁸

5. Applicants state that, other than limited interconnection facilities necessary to connect individual generating facilities to the grid, GSO is not currently affiliated with any electric transmission facilities in the United States. However, Applicants state that GSO is affiliated with Champlain Hudson Power Express, Inc. (Champlain Hudson), which is developing a proposed 1,000 MW, 336-mile, 300 to 320 kV transmission line (Champlain Hudson Project) that will originate at the Canada-United States border and terminate in New York City and will be under the operational control of NYISO. Applicants state that the Commission has authorized Champlain Hudson to charge negotiated rates for the sale of transmission capacity on the Champlain Hudson Project but that Champlain Hudson has not yet filed a rate schedule.⁹

6. In addition, Applicants state that GSO is affiliated with Champlain VT, LLC, d/b/a TDI New England (TDI New England), which is developing a proposed 1,000 MW, 154-mile, 300 to 320 kV underground and submarine merchant transmission line (New England Project) that will originate at the Canada-United States border and terminate in Cavendish, Vermont, and will be under the operational control of ISO New England Inc. (ISO New England). Applicants state that the Commission has authorized TDI New England to charge negotiated rates for the sale of transmission capacity on the New England Project but that TDI New England has not yet filed a rate schedule.¹⁰

⁷ *Id.* at 8-9.

⁸ *Id.* at 9.

⁹ *Id.*

¹⁰ *Id.* at 10.

B. Description of Proposed Transaction

7. The Proposed Transaction involves the purchase by Riesling of 100 percent of Upstate New York Power's equity ownership interests in Cayuga and Somerset. Applicants state that the Commission-jurisdictional assets involved in the Proposed Transaction are the electric interconnection facilities associated with the electric generation facilities owned by Cayuga and Somerset, the respective market-based rate tariffs of Cayuga and Somerset, and related Commission-jurisdictional contracts, books, and records.¹¹

II. Notice of Filing and Responsive Pleadings

8. Notice of the Application was published in the *Federal Register*, 80 Fed. Reg. 59,760 (2015), with interventions and protests due on or before October 16, 2015. Sierra Club filed a protest on October 16, 2015.¹² Applicants filed an answer to Sierra Club's protest on October 23, 2015.

III. Discussion

A. Procedural Matters

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure¹³ prohibits an answer to a protest 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. Substantive Matters

1. FPA Section 203 Standard of Review

10. FPA section 203(a)(4) requires the Commission to approve proposed dispositions, consolidations, acquisitions, or changes in control if the Commission determines that the

¹¹ *Id.* at 10-11.

¹² Sierra Club is not a party to the proceeding because it did not file a motion to intervene. 18 C.F.R. § 385.211(a)(2) (2015) ("The filing of a protest does not make the protestant a party to the proceeding. The protestant must intervene under Rule 214 to become a party.").

¹³ *Id.* § 385.213(a)(2).

proposed transaction will be consistent with the public interest.¹⁴ The Commission's analysis of whether a proposed transaction is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.¹⁵ FPA section 203(a)(4) also requires the Commission to find that the proposed transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."¹⁶ The Commission's regulations establish verification and informational requirements for entities that seek a determination that a proposed transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.¹⁷

2. Analysis of the Proposed Transaction

a. Effect on Horizontal Competition

i. Applicants' Analysis

11. Applicants state that the Proposed Transaction is consistent with the public interest and will have no adverse effect on competition, rates, or regulation. With respect to horizontal market power, Applicants state that the Proposed Transaction raises no concerns because Riesling and its affiliates do not currently have any interests in or control over generation capacity in the NYISO market. Applicants thus assert that the Proposed Transaction will not result in any new combination of electric assets that could have an impact on the competitive situation in the NYISO market.¹⁸

¹⁴ 16 U.S.C. § 824b(a)(4). Approval of the Proposed Transaction is also required by other regulatory agencies pursuant to their respective statutory authority before the Proposed Transaction may be consummated. *See* Application Section VI.I. Our findings under FPA section 203 do not affect those agencies' evaluation of the Proposed Transaction pursuant to their respective statutory authority.

¹⁵ 1996 Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

¹⁶ 16 U.S.C. § 824b(a)(4).

¹⁷ 18 C.F.R. § 33.2(j).

¹⁸ Application at 12-13.

ii. Commission Determination

12. In analyzing whether a proposed transaction will adversely affect competition, the Commission examines the effects on concentration in the generation markets and whether the proposed transaction otherwise creates the incentive and ability to engage in behavior harmful to competition, such as withholding of generation.¹⁹

13. We find that the Proposed Transaction will not have an adverse effect on horizontal competition. Because Riesling and its affiliates do not currently have any interests in or control over electric generation capacity in the NYISO market, where Cayuga and Somerset are interconnected, there will be no change in Riesling's market concentration in any relevant geographic market as a result of the Proposed Transaction.

b. Effect on Vertical Competition**i. Applicants' Analysis**

14. Regarding vertical market power, Applicants state that the Proposed Transaction does not raise any concern. Applicants state that the Proposed Transaction does not involve transmission facilities, except for limited interconnection facilities. Applicants also state that the Champlain Hudson Project, which will not be completed until 2019, will be under the operational control of NYISO, and that the New England Project, which will not be placed in service until 2019, will be under the operational control of ISO New England. In addition, Applicants note that, following consummation of the Proposed Transaction, Riesling will acquire from Upstate New York Power Somerset Railroad Corp., which owns or leases railroad cars used to deliver coal to the Somerset Facility. Applicants state that Somerset Railroad Corp. will not provide such service to any electric generation facility other than Somerset Facility. Applicants state that this limited ownership and leasing of railroad cars will not provide Riesling with the ability to erect barriers to entry into any generation markets. Applicants assert that neither Riesling nor any of its affiliates owns or controls any other essential inputs to electric power production located in the NYISO market.²⁰

ii. Commission Determination

15. As the Commission has previously found, transactions that combine electric generation assets with inputs to generating power (such as natural gas, transmission, or

¹⁹ *Nev. Power Corp.*, 149 FERC ¶ 61,079, at P 28 (2014).

²⁰ Application at 13-14.

fuel) can harm competition if the transaction increases an entity's ability or incentive to exercise vertical market power in wholesale electricity markets. For example, by denying rival entities access to inputs or by raising their input costs, an entity created by a transaction could impede entry of new competitors or inhibit existing competitors' ability to undercut an attempted price increase in the downstream wholesale electricity market.²¹

16. We find that the Proposed Transaction will not have an adverse effect on vertical competition. As Applicants point out, Cayuga and Somerset only own limited interconnection facilities and the Proposed Transaction does not involve any new combination of transmission or gas assets in the NYISO market. The Champlain Hudson Project and New England Project, when complete, will both require a Commission-approved open access transmission tariff and will be under the operational control of NYISO and ISO New England, respectively. We agree with Applicants that ownership of Somerset Railroad Corp. is limited in size and scope and thus could not be used to impose barriers to entry of competing suppliers. We find no evidence that Somerset Railroad Corp.'s railroad cars, which are exclusively used to ship coal to the Somerset Facility, could be used to erect a barrier to entry of competitors.²²

c. Effect on Rates

i. Applicants' Analysis

17. With respect to rates, Applicants state that the Proposed Transaction will not have an adverse effect on rates because all sales of power from the Cayuga Facility and the Somerset Facility will continue to be made at market-based rates.²³

ii. Sierra Club Protest

18. Sierra Club states that the Proposed Transaction has the potential to adversely affect rates to the extent that Riesling intends to seek out-of-market payments, recoverable from New York electric ratepayers, to support the continued operation or repowering of the Cayuga or Somerset Facilities. Sierra Club states that the Cayuga Facility currently operates subject to a Reliability Support Services Agreement in effect through June 30, 2017, the costs of which are passed on to New York State Gas & Electric Corp. (NYSEG) ratepayers in accordance with filings made with the New York

²¹ *Exelon Corp.*, 138 FERC ¶ 61,167, at P 112 (2012).

²² *See, e.g., PPL Corp.*, 149 FERC ¶ 61,260, at P 113 (2014).

²³ Application at 14-15.

Public Service Commission (New York Commission). Sierra Club explains that, in addition, Cayuga recently submitted a proposal to the New York Commission for NYSEG ratepayers to expend \$145.5 million over 10 years to subsidize the addition of natural gas co-firing capability at the Cayuga Facility. With respect to the Somerset Facility, Sierra Club notes that it has seen a consistent and continued drop in operational capacity in recent years. Sierra Club requests that the Commission require Riesling to disclose whether it intends to seek ratepayer support to add natural gas co-firing capabilities to or repower the Cayuga Facility, and whether it intends to seek out-of-market support in any form for the continued operation or repower of the Somerset Facility.²⁴

iii. Applicants' Answer

19. Applicants state that the requests made by Sierra Club are beyond the scope of this proceeding. According to Applicants, the Proposed Transaction involves only a change in the upstream ownership of Cayuga and Somerset, and no change to the way in which either Cayuga or Somerset will make sales of electric energy at wholesale or to the rates that Cayuga or Somerset will charge to customers. Applicants explain that, as a result, the Proposed Transaction will have no effect on wholesale rates, and neither Cayuga nor Somerset has any ability to pass on to any captive customers any costs associated with the Proposed Transaction. Moreover, Applicants note that Commission review of potential effects of the Proposed Transaction on wholesale rates does not extend to review of separate matters before the New York Commission, as evidenced by the lack of precedent cited by Sierra Club.²⁵

iv. Commission Determination

20. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on rates. We note that the Proposed Transaction does not involve the transfer of transmission facilities that are part of the bulk transmission system and that Cayuga and Somerset sell at market-based rates.²⁶ Moreover, we agree with

²⁴ Sierra Club Protest at 2.

²⁵ Applicants' Answer at 1-2.

²⁶ See *Union Elec. Co. d/b/a Ameren UE*, 114 FERC ¶ 61,255, at P 45 (2006) (finding wholesale customers will not be adversely affected where applicant provides wholesale service at market-based rates); *NorAm Energy Servs., Inc.*, 80 FERC ¶ 61,120, at 61,382-83 (1997) (stating that the Commission ratepayer protection concerns do not apply to customers charged market-based rates).

Applicants that the issues raised by Sierra Club are beyond the scope of this proceeding. The Proposed Transaction involves only a change in upstream ownership of Cayuga and Somerset. The Proposed Transaction itself will not result in any change to the way in which either Cayuga or Somerset will make sales of electric energy at wholesale or to the rates that Cayuga or Somerset will charge to customers. The issues raised by Sierra Club relate to matters that are either pending before the New York Commission or future actions that Sierra Club speculates Riesling may take to seek subsidies from New York ratepayers for the continued operation of the two facilities. In this regard, however, the Commission has consistently held that the focus of its analysis of the rate effects of a proposed transaction under section 203 is limited to whether the transaction itself will cause an increase in rates.²⁷ Likewise, the Commission has consistently declined to condition its approval under section 203 on commitments of the parties as to future operational decisions that, allegedly, could have an effect on rates.²⁸

21. Moreover, to the extent that Sierra Club's protest raises issues concerning the possible effects of the Proposed Transaction on New York retail ratepayers, the Commission has held that the examination of a section 203 transaction's rate impact does not concern the proposed transaction's retail rate impacts, unless a state specifically asks the Commission to consider such rate impacts.²⁹ The role of the relevant state commission is, among other things, to consider such effects. No state commission, including the New York Commission, has requested an examination here of retail rate impacts. Therefore, we find that, consistent with Commission precedent, Sierra Club's concerns regarding potential retail rate increases are beyond the scope of this proceeding.³⁰

d. Effect on Regulation

i. Applicants' Analysis

22. With regard to regulation, Applicants state that the Proposed Transaction will not have an adverse effect because the Commission will continue to exercise the same

²⁷ See, e.g., *Silver Merger Sub, Inc.*, 145 FERC ¶ 61,261, at PP 65-67 (2013).

²⁸ See, e.g., *AES Corp.*, 137 FERC ¶ 61,112, at 43 (2011).

²⁹ 1996 Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,128.

³⁰ See *Appalachian Power Co.*, 143 FERC ¶ 61,074, at P 36 (2013); *NSTAR Advanced Energy Sys., Inc.*, 131 FERC ¶ 61,098, at P 26 (2010); *National Grid plc*, 117 FERC ¶ 61,080, at P 54 (2006).

jurisdiction over Cayuga and Somerset as before. Applicants also state that, although they will file before the New York Commission, the Proposed Transaction will have no effect on state regulation.³¹

ii. Commission Determination

23. We find no evidence that either state or federal regulation will be impaired by the Proposed Transaction. The Proposed Transaction will not create a regulatory gap at the federal level, and no state has alleged that it lacks the authority to review the Proposed Transaction or raised concerns about the effect of the merger on state regulation. As to the state level, the Commission explained in the Merger Policy Statement that it ordinarily will not set the issue of the effect of a proposed transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the proposed transaction. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission may set the issue for hearing and it will address such circumstances on a case-by-case basis.³² 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.

e. Cross-Subsidization

i. 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 utility with captive customers and, therefore, falls within one of the safe harbors set forth in the Supplemental Policy Statement. Nevertheless, Applicants have provided an Exhibit M analysis demonstrating that the Proposed Transaction will not result in: (1) any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) any new issuance of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional

³¹ Application at 15.

³² 1996 Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

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.³³

ii. Commission Determination

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

3. Other Considerations

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.³⁴ To the extent that a transaction authorized under FPA section 203 results in a change in status, sellers that have market-based rates are advised that they must comply with the requirements of Order No. 652.

27. Information and/or systems connected to the bulk system involved in this transaction may be subject to reliability and cybersecurity 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 database, and operating systems. If affiliates, personnel or investors are not authorized for access to such information and/or systems connected to the bulk power system, a public utility is obligated to take the appropriate measures to deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, etc., must comply with all applicable reliability and cybersecurity standards.

³³ Application at 15-16; Exhibit M .

³⁴ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

The Commission, North America Electric Reliability Corporation or the relevant regional entity may audit compliance with reliability and cybersecurity 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 of any material change in circumstances that departs from the facts or representations that the Commission relied upon in authorizing the Proposed Transaction within 30 days from the date of any material change in circumstances.

(C) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever not pending or may come before the Commission.

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

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

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

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.