

120 FERC ¶ 61,174  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Gexa Energy L.L.C.  
FPL Energy, LLC

Docket No. EC07-109-000

ORDER AUTHORIZING DISPOSITION AND  
ACQUISITION OF JURISDICTIONAL FACILITIES

(Issued August 21, 2007)

1. On June 20, 2007, Gexa Energy L.L.C. (Gexa) and FPL Energy, LLC (FPLE) (collectively, Applicants) filed an application under section 203 of the Federal Power Act (FPA)<sup>1</sup> requesting authorization for the indirect transfer of Gexa's jurisdictional assets to FPLE (Transaction). The Transaction closed in 2005. FPLE purchased all the equity of Gexa's parent company, Gexa Corporation (Gexa Corp.). The jurisdictional assets involved in the Transaction are Gexa's market-based rate tariff and related books and records.<sup>2</sup>

**I. Background**

2. Gexa is a power marketer selling to retail end-users of electricity in Maine and Massachusetts. Since June 2005, Gexa's load has ranged from 2 megawatts (MW) to 17 MW. In order to meet its retail load obligations, Gexa buys power both through contracts with third parties and through its affiliate FPL Energy Power Marketing, Inc.

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<sup>1</sup> 16 U.S.C. § 824b (2000), as amended by Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594 (2005).

<sup>2</sup> Applicants state that FPLE's FERC Counsel only became aware of the jurisdictional assets around February 3, 2006, approximately eight months after the Transaction had closed on June 17, 2005. Shortly thereafter, FPLE self-reported the matter to the Commission's Office of Enforcement. Concurrent with this order, the Commission is issuing an order in Docket No. IN07-31-000 approving a Stipulation and Consent Agreement that provides for Gexa to pay a civil penalty for, among other things, failing to file a timely request for section 203 authorization.

In order to balance its purchases with its retail obligations, Gexa has sold power at wholesale in the day-ahead and hour-ahead markets operated by ISO New England, Inc. (ISO-NE). It was granted market-based rate authorization on May 18, 2005.<sup>3</sup> Gexa does not own any generating facilities. Gexa has purchased 2 MW of capacity and the associated energy under long-term power purchase agreements (PPAs) with Calpine Energy Services, L.P. Before the Transaction, Gexa was a direct, wholly-owned subsidiary of Gexa Corp. Following the Transaction, Gexa is a direct, wholly-owned subsidiary of Gexa Energy Holdings, LLC (Gexa Holdings), which is a wholly-owned subsidiary of FPLE.

3. At the time the Transaction closed, Gexa Corp., then the parent holding company of Gexa, was certified as a Retail Electric Provider by the Public Utility Commission of Texas and operated in the Electricity Reliability Council of Texas (ERCOT) control area. According to the Applicants, Gexa Corp.'s power purchases and sales were solely within ERCOT and outside of Commission jurisdiction.

4. FPLE is an indirect, wholly-owned subsidiary of FPL Group, Inc. (FPL Group), a holding company. Through its subsidiaries, FPLE indirectly owns and operates over 70 generation facilities, seven of which are located in ISO-NE, with approximately 2,800 MW of capacity. FPLE does not own any transmission facilities other than interconnection facilities needed to connect FPLE's generating facilities to the transmission grid. FPL Group also owns and operates Florida Power & Light Company (FPL), a franchised electric utility that provides wholesale and retail electric service to customers in the state of Florida. A division of FPL owns a single transmission asset in ISO-NE, the Seabrook Substation.

5. Under an agreement, dated March 28, 2005, among Gexa Corp., FPL Group, WPRM Acquisition Subsidiary, Inc. and FRM Holdings, LLC, the Transaction merged Gexa Corp. and Gexa into FPLE, and replaced Gexa Corp. with the newly-created Gexa Holdings as the direct parent of Gexa. The Transaction closed on June 17, 2005. Applicants request that the Commission use its discretion to grant approval of the Transaction on a going-forward basis without imposing any terms or conditions.

6. Applicants argue that the Transaction is consistent with the public interest. They state that the Transaction raises no horizontal market power concerns. Applicants argue that the only geographic market in which Applicants have jurisdictional assets and overlapping operations is in ISO-NE, where Gexa's 2 MW capacity through long-term

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<sup>3</sup> *Gexa Energy, LLC*, Docket No. ER05-714-000, *et al.* (unpublished letter order issued May 18, 2005).

contracts<sup>4</sup> is equivalent to only 0.006 percent of the capacity in ISO-NE. Applicants argue that the increase in market share that results from combining the Gexa interests with FPLE's approximately 9 percent of capacity in ISO-NE is *de minimis*. They argue that the change in the generation market concentration level, as measured by the Herfindahl-Hirschman Index, is negligible and is well below the thresholds of competitive concern established by the Commission.<sup>5</sup>

7. Applicants also state that the Transaction raises no vertical market power concerns. Gexa does not own or control any transmission assets or natural gas transportation assets. FPLE does not own or control any natural gas transportation assets in ISO-NE, while its only transmission assets in ISO-NE are the limited interconnection facilities needed to connect its generation facilities to the grid. Specifically, the only transmission asset in ISO-NE owned by an FPLE affiliate is the Seabrook Substation. That affiliate has a Local Network Service Tariff on file with the Commission, and the regional transmission facilities associated with the Seabrook Substation are under the operational control of ISO-NE and subject to the ISO-NE's open access transmission tariff. Applicants further argue that the Transaction does not enable them to erect barriers to entry by other suppliers. In addition, the Applicants state that they do not have control over sites for new capacity development in ISO-NE or own any fuel transportation assets in ISO-NE. Finally, Applicants state that substantial new generation has been developed and is planned for development in ISO-NE.

8. Applicants state that the Transaction will not have an adverse effect on the rates of wholesale customers. They argue that all wholesale sales by Gexa will be at authorized market-based rates that will not be affected by the Transaction. Similarly, Applicants argue that the Transaction will not affect the market-based wholesale rates charged by FPLE and its subsidiaries. In addition, Applicants argue that the Transaction will not affect the rates for wholesale power sales or unbundled transportation services in Florida charged by FPL, nor will the Transaction affect the transmission rates charged for the use of the Seabrook Substation.

9. Applicants state that the Transaction will have no adverse effect on state or federal regulation. Applicants state that Gexa will continue to be a power marketer subject to the

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<sup>4</sup> The two 1 MW PPAs expire in December 2007 and February 2008, respectively. For purposes of this analysis, Applicants have assumed that the full 2 MW of capacity is under long-term contract.

<sup>5</sup> See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 at 30,119 n. 33 (1996), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC ¶ 61,321 (1997) (*Merger Policy Statement*).

jurisdiction of the Commission. In addition, Applicants state that because Gexa has no generating facilities, the Transaction raises no concern regarding the removal of such facilities from state or federal jurisdiction. In addition, as a retail power marketer, Gexa will continue to be subject to the jurisdiction of the States of Maine and Massachusetts. Applicants further state that the Transaction has no effect on state commission regulation and does not require any state commission approval that has not already been received.

10. Applicants state that the Transaction does not raise any cross-subsidization concerns because neither of the Applicants has any captive customers. In addition, Applicants argue that the Transaction has no effect on FPL (the one FPLE affiliate with captive customers) or on FPL's captive customers.

11. Applicants also verify that, based on the facts and circumstances known to them or that are reasonably foreseeable, the proposed transaction will not result in, at the time of the Transaction or in the future: (i) 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; (ii) 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; (iii) 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 (iv) any new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA.

12. Notice of the filing was published in the Federal Register, 72 Fed. Reg. 36,443, with interventions, comments or protests due on or before June 20, 2007. None were received.

## **II. Discussion**

13. Section 203(a) of the FPA provides that the Commission must approve a transaction if it finds that the transaction "will be consistent with the public interest."<sup>6</sup> 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

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<sup>6</sup> 16 U.S.C. § 824b (2000).

effect on rates; and (3) the effect on regulation.<sup>7</sup> In addition, EPAct 2005 amended section 203 to specifically require that the Commission also determine 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>8</sup>

14. On the basis of the representations made by Applicants in their application, we conclude that the Transaction is consistent with the public interest, and it is authorized as of the date of this order.

15. Implementing jurisdictional dispositions of facilities without prior Commission approval is directly contrary to the requirements of section 203.<sup>9</sup> Accordingly, concurrent with this order, the Commission is issuing an Order Approving Stipulation and Consent Agreement that provides for Gexa to pay a civil penalty for, among other things, failing to file a timely request for merger authorization.

16. The authorization set forth in this order is subject to the following conditions:

- (1) The ownership transfer is authorized on a going-forward basis upon the terms and conditions and for the purposes set forth in the application;
- (2) 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;

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<sup>7</sup> See *Merger Policy Statement*; see also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,983 (2000), FERC Stats. & Regs., Regulations Preambles July 1996-Dec. 2000 ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001); see also *Transactions Subject to Federal Power Act Section 203*, Order No. 669, 71 Fed. Reg. 1348 (2006), FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,200 (2006), *order on reh'g*, Order No. 669-A, 71 Fed. Reg. 28,422 (2006), FERC Stats. & Regs. ¶ 31,214 (2006) (*Order No. 669-A*), *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

<sup>8</sup> 16 U.S.C. § 824b (subsequent to the violation in question, the relevant language was superseded by EPAct 2005 § 1289, 119 Stat. 982-83, to be codified at 16 U.S.C. § 824b(a)(4)).

<sup>9</sup> See *Northern Iowa Windpower II LLC*, 110 FERC ¶ 61,059 at P 13 (2005); *Puget Sound Energy, Inc. and Encogen Northwest, L.P.* 110 FERC ¶ 61,161 at P 16 (2005).

- (3) 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;
- (4) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate;
- (5) If the ownership transfer resulted in changes in the status or the upstream ownership of Applicants' affiliated Qualifying Facilities, if any, an appropriate filing for recertification pursuant to 18 C.F.R. § 292.207 shall be made; and
- (6) Applicants shall make appropriate filings under section 205 of the FPA, as necessary, to implement the ownership transfer.

The Commission orders:

As of the date of this order, the transfer of Gexa's assets is authorized, subject to the conditions describe herein.

By the Commission

( S E A L )

Nathaniel J. Davis, Sr.,  
Acting Deputy Secretary.