

129 FERC ¶ 61,011
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Cascade Investment, L.L.C.
Otter Tail Power Company

Docket Nos. EC09-78-000
EC09-78-001

ORDER AUTHORIZING ACQUISITION OF SECURITIES

(Issued October 2, 2009)

1. Cascade Investment, L.L.C. (Cascade) and Otter Tail Power Company (Otter Tail Power) (since July 1, 2009, a wholly-owned subsidiary of Otter Tail Corporation) (jointly, Applicants) request authorization under section 203 of the Federal Power Act (FPA) for the acquisition and disposition of jurisdictional facilities.¹ As further described below, Cascade currently owns approximately 9.6 percent of the outstanding common shares of Otter Tail Corporation and seeks authorization to increase its holdings to nearly 20 percent of those shares.
2. The Commission has reviewed the application under the Commission's Merger Policy Statement.² As discussed below, we will authorize the proposed transaction under section 203(a)(2).

¹ 16 U.S.C. § 824b (2006).

² *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 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); *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement), *order on clarification*, 122 FERC ¶ 61,157 (2008); *Transactions Subject to FPA section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A,

(continued...)

I. Background

A. Description of the Parties

3. Cascade is a privately-held company that holds investments in a broad range of industries. It is a holding company through its indirect ownership interests in Optim Energy, LLC (Optim Energy), which owns two generating facilities, as well as associated interconnection facilities and a power marketing affiliate.³ Optim Energy is also building a third generation facility. Cascade states that none of Optim Energy's generation facilities, which are all located in Texas, overlap with Otter Tail Power's generation in Midwest Independent Transmission System Operator, Inc. (Midwest ISO).⁴

4. Cascade also holds 8.1 percent of the outstanding common stock of PNM Resources, Inc (PNM Resources). PNM Resources and its subsidiaries own generating plants in New Mexico and own or lease transmission lines interconnected with other utilities in New Mexico, Texas, Arizona, Colorado and Utah, provide retail electric service in New Mexico, and engage in the wholesale marketing of electricity. Cascade states that none of PNM Resources' activities occur in the Midwest ISO, and that Cascade does not have the ability to exercise operational management or control of PNM Resources or any of its subsidiaries, with the exception of Optim Energy, discussed above.

5. Finally, Cascade owns 9.6 percent of the outstanding common stock of Otter Tail Corporation. Cascade also holds a debt interest in Otter Tail Corporation consisting of a \$50 million principal amount senior note due November 30, 2017 (Cascade Note). The Cascade Note is attached as an exhibit to an agreement entered into by Cascade and Otter Tail Corporation (Note Purchase Agreement). The private placement transaction closed,

FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

³ *Notice of Succession, Optim Energy Marketing, LLC*, FERC Docket No. ER09-746, April 1, 2009; *FERC Letter Order of July 16, 2007*, FERC Docket No. ER07-965.

⁴ Applicants state that one of Optim Energy's plants is a qualifying facility, one sells its output into the Electric Reliability Council of Texas, which sales are not subject to the Commission's jurisdiction, and the third will be an exempt wholesale generator.

and the note was issued on December 14, 2007.⁵ Applicants state that the Note Purchase Agreement contains standard covenants and other terms that do not convey operational management or control. Applicants represent that the Cascade Note is not convertible into an equity interest and does not provide Cascade with any equity-related voting rights. Applicants further state that while the obligations of Otter Tail Corporation under the Note Purchase Agreement and the Cascade Note continue to be guaranteed by certain other subsidiaries of Otter Tail Corporation, as a result of the holding company reorganization such obligations are not guaranteed by Otter Tail Power. Applicants contend that the Cascade Note is unsecured and does not encumber Otter Tail Power's assets, and from the standpoint of section 203(a)(2), the debt is structured in such a way that it is subject to the blanket authorization in 18 C.F.R. § 33.1(c)(2)(i) as an interest that does not convey control.⁶

6. Otter Tail Corporation recently formed as a holding company⁷ and is the parent entity, with two principal first-tier subsidiaries: Otter Tail Power, which owns and operates the utility assets, and Varistar, which holds the non-utility business subsidiaries.⁸ Otter Tail Corporation is publicly held and its shares are listed for trading on the NASDAQ stock exchange.⁹

7. Otter Tail Power operates an electric utility business in Minnesota, North Dakota, and South Dakota. Otter Tail Power owns 5,300 miles of transmission facilities in Midwest ISO, including 48 miles of 345 kV lines, 405 miles of 230 kV lines, 799 miles

⁵ In connection with the holding company reorganization that occurred on July 1, 2009, the rights and obligations under the Note Purchase Agreement and the Cascade Note were transferred from Otter Tail Power to Otter Tail Corporation. *See* Cascade Investment, L.L.C., July 2, 2009 Letter at Attachment 1, amendment to Note Purchase Agreement.

⁶ Cascade Investment, L.L.C., July 24, 2009 Response to July 2, 2009, Request for Additional Information and Amendment to Application at 8-9 (Response).

⁷ At the time of the initial application, Otter Tail Corporation had received Commission authorization to restructure by forming a holding company, *Otter Tail Corp.*, 124 FERC ¶ 62,130 (2008), but had not yet restructured. The restructuring occurred on July 1, 2009. *Otter Tail Corp.*, Notice, Docket No. EC08-97-000 (filed July 8, 2009).

⁸ Otter Tail Corporation has two additional first-tier subsidiaries: Otter Tail Assurance Limited, an insurance company, and Otter Tail Energy Services Company.

⁹ Cascade Investment, L.L.C., May 7, 2009 Application at 5 (Application).

of 115 kV lines, and 4,039 miles of lower voltage lines. In 2001, Otter Tail Power transferred functional control of its 100 kV and above transmission facilities to Midwest ISO.¹⁰ Also, Otter Tail Power has approximately 824 MW of generating capacity, 163 MW of which is uncommitted and the remainder of which is committed to serve native load and operating reserves in Midwest ISO.¹¹ Otter Tail Power is authorized to sell power at market-based rates.

B. Description of the Transaction

8. Cascade seeks to acquire additional common stock of Otter Tail Corporation, so that its total holdings will be less than 20 percent of Otter Tail Corporation's outstanding shares. Cascade states that "it will make these acquisitions over time on an arms' length basis from third parties through open market purchases, block transactions, privately negotiated transactions or otherwise."¹²

9. In connection with the proposed transaction, Cascade and Otter Tail Corporation have entered into a Standstill Agreement.¹³ Applicants state that the Standstill Agreement establishes significant barriers to Cascade's ability to control Otter Tail Corporation or Otter Tail Power. According to Applicants, the Standstill Agreement limits Cascade's holdings to less than 20 percent of Otter Tail Corporation's outstanding voting securities and provides that Cascade will not seek to circumvent this limitation by barring Cascade from forming or joining a group with unaffiliated third parties with respect to any voting securities of Otter Tail Corporation, depositing any Otter Tail Corporation voting securities into a voting trust or subjecting such securities to a voting agreement or similar arrangement, or becoming a participant in any solicitation of proxies or seeking to influence any person with respect to the voting of any voting securities of Otter Tail Corporation.¹⁴

¹⁰ *Otter Tail Power Co.*, 97 FERC ¶ 61,226 (2001), *reh'g denied*, 98 FERC ¶ 61,112 (2002).

¹¹ *Otter Tail Power Co.*, Updated Market Power Analysis, Docket No. ER00-3080-005, Exhibits 3 and 6 (filed Dec. 31, 2008).

¹² Application at 9-10.

¹³ Application at Exhibit I; Cascade Investment, L.L.C., July 2, 2009 Letter at Attachment 2, new Standstill Agreement.

¹⁴ Response at 12.

10. The Standstill Agreement provides that it will be terminated on the earliest to occur of the following events: (i) termination by mutual written agreement of Otter Tail Corporation and Cascade; (ii) one year after Cascade has provided written notice to Otter Tail Corporation of termination of the agreement, which notice may be delivered by Cascade at any time after May 1, 2012; (iii) upon written notice by Cascade to Otter Tail Corporation, any time after a third party commences a tender offer for at least 50 percent of the outstanding shares of Otter Tail Corporation, publicly announces the commencement of a proxy contest for Otter Tail Corporation, or enters into a definitive agreement with Otter Tail Corporation contemplating acquisition by any manner of at least 50 percent of the outstanding voting securities of Otter Tail Corporation; or (iv) upon written notice by Cascade to Otter Tail Corporation, any time after Cascade acquires 10 percent or more, but then disposes and holds less than 10 percent, of Otter Tail Corporation's voting securities.

11. Applicants suggest that the Commission could condition its approval on Cascade's agreement not to exercise its right to cause the Standstill Agreement to terminate pursuant to clause (i) or clause (ii), as described above, without first seeking approval from the Commission to do so, provided that Cascade could retain the right to terminate the Standstill Agreement pursuant to clause (iii) or clause (iv), as described above, without first seeking such approval from the Commission. In the event of termination under clause (iii) or clause (iv), Cascade would commit not to act in concert with other shareholders to exert control over Otter Tail Corporation or Otter Tail Power or to obtain a seat on their boards of directors.¹⁵

12. Cascade further asserts that Otter Tail Power will continue operational management and control of its operations and facilities. Cascade states that it will not assert control over Otter Tail Corporation or Otter Tail Power and makes certain commitments to ensure that it will not have the ability to exercise control.¹⁶ First, Cascade will not seek to exercise control over Otter Tail Corporation or Otter Tail Power and will continue to be able to represent that it has not acquired the securities of Otter Tail Corporation with any purpose of, or with the effect of, changing or influencing the control of Otter Tail Corporation or Otter Tail Power, or in connection with or as a participant in any transaction having that purpose or effect. Second, Cascade will not seek representation on the board of directors of Otter Tail Corporation or Otter Tail Power and will not hold any seat on the board of directors of Otter Tail Corporation or Otter Tail Power. Third, Cascade will not seek to set or influence the price at which power is sold from Otter Tail Power's generating facilities, or how and when power

¹⁵ Response at 11 n.20.

¹⁶ Response at 12.

generated by the facilities will be sold. Finally, Cascade will provide the Commission copies of any Schedule 13D or Schedule 13G (or any amendments thereto), at the same time and on the same basis, as filed with the SEC in connection with its investments in Otter Tail Corporation. Cascade further states that it will abide by these commitments should Cascade's investment in Otter Tail Corporation exceed 10 percent, and would remain in effect until such time, if any, that Cascade reduced its investment to below 10 percent.

13. Applicants state that in January 2009, Cascade stopped reporting its investment in Otter Tail Corporation using Schedule 13G, and began to report using Schedule 13D,¹⁷ but that Cascade's investment remains passive in nature.¹⁸ They state that Cascade made the change to Schedule 13D out of an abundance of caution, in light of discussions with Otter Tail Corporation management concerning: (1) the potential impact of Otter Tail Corporation's reorganization on the debt that Cascade holds in Otter Tail Corporation; and (2) certain technical approvals and filings that would be required if Cascade increased its investment in Otter Tail Corporation to 10 percent or more.

14. Applicants argue that filing the Schedule 13D does not mean that Cascade's investment no longer satisfies the Schedule 13G criterion that the holding is "not with the purpose nor with the effect of changing or influencing the control of the issuer." In its initial Schedule 13D filing Cascade stated:

The Reporting Persons have been investors in [Otter Tail Corporation] since 2000 in the ordinary course of their business. The Reporting Persons previously reported their beneficial ownership of the Common Stock of [Otter Tail

¹⁷ Section 13(d) of the Securities Exchange Act of 1934 and the rules and regulations of the Securities and Exchange Commission (SEC) require any person to make an informational filing with the SEC on Schedule 13D within 10 days after such person acquires beneficial ownership of more than 5 percent of any class of voting equity securities of a company that is registered under section 12 of the 1934 Act. Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq.* (2000); 17 C.F.R. § 240.13d-1, *et seq.* However, a person who would otherwise be obligated to file a statement on Schedule 13D may instead file an abbreviated statement on Schedule 13G if such person has acquired such securities in the ordinary course of business and not with the purpose of, or with the effect of, changing or influencing control over the issuer of the securities. The filing of a Schedule 13D, on the other hand, would indicate that the filing person may intend to take a more activist role in the management of the affairs of the issuer.

¹⁸ Response at 6 -7.

Corporation] in a statement on Schedule 13G, initially filed on April 28, 2000 and amended on February 9, 2001, February 13, 2003, February 17, 2004, February 14, 2005 and February 14, 2006. The Reporting Persons are filing this Schedule 13D in lieu of filing additional amendments to such Schedule 13G. Neither the filing of this Schedule 13D nor anything contained herein shall be deemed an admission that the Reporting Persons are (1) required to file this Schedule 13D pursuant to Rule 13d-1(e) or subject to the restrictions contained therein or (2) no longer eligible to file a Schedule 13G with respect to the Issuer pursuant to Rule 13d-1(c).¹⁹

15. Moreover, Applicants contend that, for the Commission's purposes, a key benefit of Cascade's Schedule 13D filing is that, under applicable SEC rules, any material change in the information previously disclosed on its Schedule 13D would require Cascade to promptly amend its Schedule 13D disclosing such change to the SEC. This includes any material change in Cascade's ownership position in Otter Tail Corporation equity securities (an acquisition or disposition of securities in an amount equal to one percent or more of the class being deemed material for this purpose) and any material change in Cascade's plans or proposals with respect to the items referred to in Item 4 of Schedule 13D, which includes, among other things, any Cascade plans or proposals with respect to (i) acquisitions or dispositions of Otter Tail Corporation securities, (ii) extraordinary corporate transactions involving Otter Tail Corporation and its subsidiaries, (iii) sales or transfers of material Otter Tail Corporation assets, and (iv) changes in the board of directors or management of Otter Tail Corporation. Cascade would timely provide the Commission with a copy of any such amendments. Thus, Applicants argue, the Schedule 13D serves a useful notice function for the Commission, potentially providing significantly greater information concerning Cascade's investment in Otter Tail Corporation than would be the case if Cascade reported its equity ownership on a short-form Schedule 13G.

II. Notice of Filing and Responsive Pleadings

16. Notice of Applicants' filing was published in the *Federal Register*, 74 Fed. Reg. 23,687 (2009), with interventions and protests due on or before May 28, 2009. None was filed.

¹⁹ Response at 7, citing Otter Tail Corp., Schedule 13D, filed with the SEC January 21, 2009.

17. Cascade provided supplemental information on June 18, June 26, and July 2, 2009. On July 2, 2009, Commission staff notified Applicants that their application was deficient and requested additional information. Applicants submitted their Response on July 24, 2009. Notice of the Response was published in the *Federal Register*, 74 Fed. Reg. 39,312 (2009), with interventions and protests due on or before August 7, 2009. None was filed.

III. Discussion

A. Section 203(a)(1)

18. Applicants state that Cascade will not exercise control over Otter Tail Corporation or Otter Tail Power as a consequence of the proposed transaction, as a result of the commitments described in further detail below. However, Applicants state that if the Commission determines that authorization under section 203(a)(1) is required, Otter Tail Power joins in the application and seeks such authorization.²⁰

19. The Commission has stated that transactions that do not transfer control of a public utility or jurisdictional facilities do not fall within the “or otherwise dispose” language of section 203(a)(1)(A) and thus do not require approval under that section.²¹

20. We first consider Cascade’s commitments to not assert control over Otter Tail Corporation or Otter Tail Power. We will accept Cascade’s commitments and representations regarding the Cascade Note, Note Purchase Agreement, and Standstill Agreement, as the following conditions to our approval of the proposed transaction:

- a. Cascade will not exercise control over Otter Tail Corporation or Otter Tail Power.
- b. Cascade will continue to be able to represent that it has not acquired the securities of Otter Tail Corporation with any purpose of, or with the effect of, changing or influencing the control of Otter Tail Corporation or Otter

²⁰ Application at 2. We note that Applicants later argued that Otter Tail Power need not seek authorization under section 203(a)(1) because Cascade plans to acquire the Otter Tail Corporation securities in secondary market transactions. Response at 5. Because we find that there is no transfer of control, and therefore there is no disposition under section 203(a)(1), we decline to address Applicants’ arguments regarding acquisition of securities in secondary market transactions.

²¹ Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 37.

Tail Power, or in connection with or as a participant in any transaction having that purpose or effect.

- c. Cascade will not seek representation nor hold any seat on the board of directors of Otter Tail Corporation or Otter Tail Power.
- d. Cascade will not seek to set or influence the price at which power is sold from Otter Tail Power's generating facilities, or how and when power generated by the facilities will be sold.
- e. Cascade will provide the Commission copies of any Schedule 13D or Schedule 13G (or any amendments thereto), at the same time and on the same basis, as filed with the SEC in connection with its investments in Otter Tail Corporation.²²
- f. Cascade will neither acquire 20 percent or more of the common shares of Otter Tail Corporation nor seek to circumvent this limitation by forming or joining a group with unaffiliated third parties with respect to any voting securities of Otter Tail Corporation. Further, Cascade will not deposit any Otter Tail Corporation voting securities into a voting trust or subject such securities to a voting agreement or similar arrangement. Additionally, Cascade will not become a participant in any solicitation of proxies or seek to influence any person with respect to the voting of any voting securities of Otter Tail Corporation.
- g. Cascade will not terminate, without prior Commission authorization, the Standstill Agreement under the following provisions: (i) termination by

²² We note that, under the blanket authorization for holdings of less than 10 percent of the outstanding voting securities of a public utility, 18 C.F.R. § 33.1(c)(2)(ii) (2009), Cascade is currently required to file with the Commission any Form 13F, Schedule 13D, or Schedule 13G filed with the SEC, at the same time and on the same basis, as it is filed with the SEC, 18 C.F.R. § 33.1(c)(4) (2009). It is not clear that Cascade has always abided by that regulation. For example, Cascade filed a Schedule 13D with the SEC on January 21, 2009, filed the first amendment on April 14, 2009, and filed the second amendment on May 1, 2009, but did not submit those filings with the Commission in docket HC09-5. We expect Cascade to abide by its commitment made in this case to remain eligible for the authorization provided herein, and abide by 18 C.F.R. § 33.1(c)(4) (2009) if Cascade shifts to holding less than 10 percent of the outstanding voting securities of Otter Tail Corporation under the blanket authorization under 18 C.F.R. § 33.1(c)(2)(ii) (2009).

mutual written agreement of Otter Tail Corporation and Cascade; (ii) one year after Cascade has provided written notice to Otter Tail Corporation of termination of the agreement, which notice may be delivered by Cascade at any time after May 1, 2012. Cascade may terminate the Standstill Agreement under the following provisions without prior Commission authorization: (iii) upon written notice by Cascade to Otter Tail Corporation, any time after a third party commences a tender offer for at least 50 percent of the outstanding shares of Otter Tail Corporation, publicly announces the commencement of a proxy contest for Otter Tail Corporation, or enters into a definitive agreement with Otter Tail Corporation contemplating acquisition by any manner of at least 50 percent of the outstanding voting securities of Otter Tail Corporation; or (iv) upon written notice by Cascade to Otter Tail Corporation, any time after Cascade acquires 10 percent or more, but then disposes and holds less than 10 percent, of Otter Tail Corporation's voting securities. If Cascade terminates the Standstill Agreement under provisions (iii) or (iv) discussed above, Cascade shall not act in concert with other shareholders to exert control over Otter Tail Corporation or Otter Tail Power or to obtain a seat on their boards of directors.²³

- h. The Cascade Note is not convertible into an equity interest and will not provide Cascade with any equity-related voting rights.²⁴

21. With these conditions, we find that the proposed transaction will not result in Cascade's ability to assert control over Otter Tail Power or Otter Tail Corporation. To monitor Applicants' compliance, we add the following conditions:

- a. Applicants shall notify the Commission of any increase in the amount of Otter Tail Corporation's debt acquired by Cascade, on any event of default by Otter Tail Corporation concerning the debt, notes or note purchase agreements that might lead to a conversion of the loan or notes to additional equity or similar instruments, as well as any material change in the Cascade Note or Note Purchase Agreement.

²³ In the event that the Standstill Agreement is terminated, the conditions contained therein that are also imposed in this order will remain in effect.

²⁴ Response at 8-9.

- b. Cascade shall notify the Commission through an informational filing made in this docket if the Standstill Agreement is terminated under clauses (iii) or (iv), discussed above.
- c. Cascade shall file no later than 45 days after the end of each quarter, a report listing its holdings of the outstanding shares of Otter Tail Corporation, stated in terms of the number of shares held and as a percentage of the outstanding shares.
- d. In the quarterly filing described above, Cascade shall also certify that it is complying with each of the commitments stated above. The report must be verified by a duly authorized corporate official in accordance with the provisions on subscription and verification found in 18 C.F.R. § 385.2005 (2009).

22. Because Cascade will not be able to assert control over the utility assets, and as discussed further below, we find that the transaction will not have an adverse effect on competition, rates, or regulation, and will not result in improper cross-subsidization.

23. We note that Cascade has filed a Schedule 13D with the SEC. As discussed above, Cascade represents that its filing of the Schedule 13D does not mean that Cascade's investment no longer satisfies the Schedule 13G criterion that the holding is "not with the purpose nor with the effect of changing or influencing the control of the issuer."²⁵ In combination with other conditions and representations discussed in this order, we conclude that the Schedule 13D filing does not raise concerns that Cascade attempted and may attempt to exercise control over the operation of the public utility assets held by Otter Tail Power. As discussed above, we find that, as conditioned, the proposed transaction will not result in the change in control of a public utility or jurisdictional facilities, or the sale, lease or merger of a public utility or jurisdictional facilities. Therefore, we find that the proposed transaction, as described, does not require approval under section 203(a)(1).

B. Analysis of the Proposed Transaction

1. Standard of Review Under Section 203

24. 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

²⁵ Response at 7.

effect on rates; and (3) the effect on regulation.²⁶ Section 203 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.”²⁷ The Commission’s regulations establish verification and informational requirements for applicants that seek determinations that a transaction will not result in inappropriate cross-subsidization or an inappropriate pledge or encumbrance of utility assets.²⁸

2. Effect on Competition

a. Applicants’ Filing

25. In addition to Cascade’s inability to assert control over Otter Tail Corporation and Otter Tail Power and therefore not being able to adversely affect competition for that reason, Applicants assert that the proposed transaction will have no adverse impact on competition because, other than its current holding in Otter Tail Corporation, Cascade does not own or control any generation or transmission in the Midwest ISO region. Specifically, Applicants assert that Otter Tail Power’s 163 MW of uncommitted capacity is a small fraction of the 11,460 MW of uncommitted supply in the Midwest ISO market, and that Otter Tail Power’s market share ranges from 0.43 to 0.54 percent.²⁹ Moreover, Applicants state that none of Cascade’s current investments of five percent or more, aside from its current holding in Otter Tail Corporation, engage in generation, transmission or other energy-related activities in Midwest ISO. Further, Applicants state that all transmission service over Otter Tail Corporation’s facilities is provided under the terms of Midwest ISO’s tariff and that Otter Tail Corporation does not exercise control over

²⁶ See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

²⁷ 16 U.S.C. § 824b(a)(4) (2006).

²⁸ 18 C.F.R. § 33.2 (2009).

²⁹ Otter Tail Power notes that the analysis did not reflect 108 MW of intermittent wind generation added during 2008 because that generation fell outside of the study period. However, Otter Tail Power also stated that including this generation “would not materially affect” its status. Otter Tail Power Co., Updated Market Power Analysis, Docket No. ER00-3080-005 (filed Dec. 31, 2008). Otter Tail Power filed a Notice of Change in Status to reflect the added 108 MW in the Midwest ISO. Otter Tail Power Co., Notice of Change in Status, Docket No. ER00-3080-004 (filed Dec. 30, 2008). The Commission accepted the notice for filing by letter order on February 3, 2009.

“intrastate natural gas transportation, intrastate natural gas storage or distribution facilities; sites for generation capacity development; and sources of coal supplies and the transportation of coal supplies such as barges and rail cars.”³⁰ Moreover, Applicants state that Cascade does not control transmission facilities in Midwest ISO or any “scarce inputs” to generation.

b. Commission Determination

26. Regarding horizontal market power, Applicants have demonstrated that the effect of combining their operations in the relevant geographic markets is *de minimis*. The merger will not eliminate a competitor or materially increase market concentration in the relevant markets. In addition, as discussed above, Cascade will not have control over Otter Tail Power’s assets. Therefore, we find that the proposed transaction will not adversely affect competition in terms of horizontal market power.

27. As to vertical market power, in transactions combining electric generation assets with inputs to generating power (such as natural gas, transmission, or fuel), competition can be harmed if the transaction increases a firm’s ability or incentive to exercise vertical market power in wholesale electricity markets. Applicants assert that they do not control any inputs to generating power, and all transmission service over Otter Tail Power’s facilities is provided under the terms of Midwest ISO’s tariff. Moreover, Cascade will not have control over Otter Tail Power’s assets. Based on Applicants’ representations, we find that the proposed transaction does not adversely affect vertical competition.

3. Effect on Rates

28. In addition to their arguments that Cascade will not control Otter Tail Corporation or Otter Tail Power, Applicants contend that the proposed transaction will not have an adverse impact on rates because Otter Tail Power’s wholesale sales will continue to be made at market-based rates. Further, Otter Tail Power’s retail sales will continue to be subject to state utility commission regulation. Finally, Otter Tail Power’s transmission will not be affected by the proposed transaction because operational control over Otter Tail Power’s transmission has been transferred to Midwest ISO.

³⁰ Application at 13 (citing *Otter Tail Power Co.*, Updated Market Power Analysis, Docket No. ER00-3080-005, at 8-10 (filed Dec. 31, 2008)). Otter Tail Power’s updated analysis passed the Commission’s screens for horizontal and vertical market power. *Otter Tail Power Company*, Letter Order, Docket No. ER00-3080-005 (Apr. 9, 2009).

29. The Commission has found that, where electricity is sold only under market-based rates, the transaction is unlikely to have an adverse impact on rates.³¹ Moreover, the Commission does not regulate retail sales.³² Nothing in the application indicates that rates to customers will increase as a result of the proposed transaction. In addition, no customer has argued that its rates would be adversely affected by the proposed transaction. For these reasons, and because Cascade will not be able to exert control over Otter Tail Corporation or Otter Tail Power and thus cannot affect rates or increase the rate base of Otter Tail Power, we find that the proposed transaction will not have an adverse effect on rates.

4. Effect on Regulation

30. Applicants state that the proposed transaction will not affect the manner or extent to which the Commission will regulate Otter Tail Power. Further, Applicants state that retail service offered by Otter Tail Power will continue to be regulated by the Minnesota, North Dakota, and South Dakota Commissions, as it is regulated today.

31. The Commission's review of a transaction's effect on regulation is focused on ensuring that the transaction does not result in a regulatory gap at the federal level or the state level. We find that the proposed transaction will not create a regulatory gap at the federal level, because the Commission will retain its authority over Otter Tail Power. 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. Based on the facts presented in the application, we find that the proposed transaction will not have an adverse effect on federal or state regulation.

5. Cross-Subsidization

32. Applicants state that the transaction will not result in, at the time of the transaction or in the future, cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company because Cascade's proposed investment does not involve the transfer of managerial or operational control of Otter Tail Corporation or Otter Tail Power.³³

³¹ *Union Electric Co. d/b/a AmerenUE*, 114 FERC ¶ 61,255, at P 45 (2006).

³² *National Grid*, 117 FERC ¶ 61,080, at P 54 (2006).

³³ Applicants also state in a letter filed June 18, 2009, that there are no existing pledges or encumbrances of utility assets. 18 C.F.R. § 33.2(j)(1)(i) (2009).

33. Applicants verify that the transaction will not result in: (1) any transfer of facilities between a traditional 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 issuances of securities by a traditional 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 utility associate company that has captive customers, or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) any new affiliate contracts between a non-utility associate company and a traditional 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.

34. Based on the conditions specified above, we find that Cascade will not be able to exercise control over Otter Tail Power in order to effectuate an improper cross-subsidy and 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.

35. Because Cascade will not necessarily acquire Otter Tail Corporation's common stock in one transaction, we will not require the standard notice after consummation of the authorized transaction. Instead, for efficiency, and as discussed in the conditions specified above, we will require Cascade to submit quarterly reports in this docket of its holdings of Otter Tail Corporation's common stock for informational purposes.

The Commission orders:

(A) We hereby grant Cascade authorization under section 203(a)(2) for the acquisition of less than 20 percent of the outstanding common shares of Otter Tail Corporation, subject to conditions, as discussed in the body of this order.

(B) Cascade shall file with the Commission, for informational purposes, within 45 days after the end of each calendar quarter, a report listing its holdings of the outstanding shares of Otter Tail Corporation, stated in terms of the number of the shares held at the end of the quarter, and as a percentage of the outstanding shares of Otter Tail Corporation. Concurrently, Cascade shall file a report certifying that it is in compliance with each of the conditions stated in the body of this order, and such report must be verified by a duly authorized corporate official under 18 C.F.R. § 385.2005 (2009).

(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 this Commission.

(D) Applicants shall inform the Commission within 30 days of any change in circumstances that would reflect a departure from the facts the Commission relied upon in authorizing the transaction.

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

(F) 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.

(G) Applicants shall make appropriate filings under section 205 of the FPA, as necessary, to implement the acquisition and disposition.

(H) Applicants are subject to audit to determine whether they are in compliance with the representations, conditions and requirements based upon which the authorizations are granted and with Commission rules, regulations and policies. In the event of a violation, the Commission may take action within the scope of its oversight and enforcement authority.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.