

131 FERC ¶ 61,098
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

NSTAR
Advanced Energy Systems, Inc.
MATEP LLC
Medical Area Total Energy Plant, Inc.
New MATEP, Inc.

Docket No. EC10-32-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued May 4, 2010)

1. On December 29, 2009, NSTAR and its subsidiary Advanced Energy Systems, Inc. (Advanced Energy), MATEP Area Total Energy Plant, Inc. (MATEP Inc.), MATEP LLC, and New MATEP, Inc. (New MATEP) (collectively, Applicants) filed a request for authorization under section 203(a)(1)(A) of the Federal Power Act (FPA),¹ for a transaction that results in the transfer of jurisdictional facilities from Advanced Energy to Mayflower Energy Holdings LLC (Mayflower) (Proposed Transaction).
2. The Commission has reviewed the Proposed Transaction under the Merger Policy Statement.² As discussed below, we will authorize the Proposed Transaction as consistent with the public interest.

¹ 16 U.S.C. § 824b (2006).

² See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997); see also *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007).

I. Background

A. Description of the Parties

1. Sellers

3. NSTAR is a holding company that through its subsidiaries, NSTAR Electric Company and NSTAR Gas Company, transmits and distributes electricity and natural gas in Massachusetts. NSTAR is considered a single-state holding company. NSTAR Electric, Advanced Energy's largest affiliate, is the product of an internal reorganization in which the former Cambridge Electric Light Company, Commonwealth Electric Company, and Canal Electric Company were merged and became part of the former Boston Edison Company. Boston Edison Company changed its name to NSTAR Electric. NSTAR Electric owns transmission and distribution facilities located in eastern Massachusetts, including Metropolitan Boston, covering 590 square miles encompassing the City of Boston and 39 surrounding cities and towns, and 1,100 square miles in 40 communities in southeastern Massachusetts. In addition, NSTAR Electric owns a 14.47 percent equity ownership share of New England Hydro-Transmission Electric Company and New England Hydro-Transmission Corporation. NSTAR's transmission facilities are operated and controlled by ISO New England (ISO-NE).

4. Applicants state that NSTAR Electric does not own any generation assets but does have several remaining contractual entitlements to generation capacity that were entered into by Boston Edison Company, Cambridge Electric Light Company, and Commonwealth Electric Company. NSTAR sells these contractual entitlements into the ISO-NE market and credits back 100 percent of the revenue to NSTAR Electric's distribution customers.

5. Applicants state that Massachusetts is a "retail choice" state and that all of the consumers within the NSTAR Electric service area have the right to purchase power from other suppliers.³ Applicants further state that NSTAR has a provider of last resort service responsibility; however, NSTAR does not directly fulfill this responsibility. Instead, NSTAR Electric negotiates with suppliers and assigns the right to serve these customers to those suppliers. Therefore, Applicants state that NSTAR's sole responsibility is to procure and deliver the power of third-party suppliers to serve retail and wholesale customers located on NSTAR Electric's transmission and distribution facilities.

6. Advanced Energy serves as the holding company of MATEP Inc. and owns 100 percent of the common stock of MATEP Inc., which in turn owns 100 percent of the

³ Application at 8 (citing MGL Chapter 164 § 1A(a) (The General Laws of Massachusetts)).

common stock of MATEP LLC. Applicants state that Advanced Energy's sole function is that of an intermediate holding company within the NSTAR holding company system. Additionally, since MATEP Inc. is an electric utility company within the meaning of Public Utility Holding Company Act of 2005 (PUHCA 2005),⁴ Advanced Energy is also a holding company within the meaning of PUHCA 2005. MATEP Inc. owns a generation facility consisting of six diesel generators, two steam turbines, and two combustion turbines, with a total capacity rating of 87.8 megawatts (MW) in the City of Boston's Longwood Medical Area (MATEP Facility). Applicants state that MATEP Inc. provides the output of the MATEP Facility to its wholly-owned subsidiary MATEP LLC through wholesale power contracts under MATEP Inc.'s market-based rate tariff. MATEP LLC in turn uses the power to supply a number of the nearby hospitals and medical institutions under contractual arrangements (Restated Contracts) that extend through 2021. Applicants further state that MATEP LLC may sell excess capacity not needed to serve retail customers in ISO-NE markets. MATEP LLC uses the by-product steam from MATEP Inc.'s electric generation operations as the principal source of steam for steam heating service and uses MATEP Inc.'s chiller facilities to provide chilled water service to several area hospitals and medical institutions.⁵ MATEP Inc. and MATEP LLC have each been authorized by the Commission to sell power at market-based rates.⁶

2. Buyers

7. Mayflower is an indirect subsidiary of Veolia Energy North America Holdings, Inc. (Veolia) and Morgan Stanley Infrastructure Inc. (Morgan Stanley Infrastructure) (collectively, Buyers).⁷ Veolia controls 10 percent of the interests in Mayflower and Morgan Stanley Infrastructure controls the remaining 90 percent. Veolia is wholly-owned by Veolia Environnement North America Operations, Inc., which in turn is wholly-owned, directly and indirectly, by Veolia Environnement S.A, a French company that specializes in water cycle management, waste management, public transportation, and energy services. Applicants state that Veolia and its affiliates do not own or control any generation, transmission, or distribution facilities in ISO-NE.

⁴ 42 U.S.C. § 1654 (2005).

⁵ Applicants also submitted an Application for Approval of Qualifying Facilities (QF) Status under Docket No. QF83-334-001.

⁶ *Advanced Energy Systems, Inc.*, 83 FERC ¶ 61,044 (1998), *MATEP, LLC*, unpublished letter order issued in Docket No. ER06-1143-000 (August 11, 2006).

⁷ Buyers are not Applicants and approval under section 203(a)(2) of the FPA is specifically not requested.

8. Morgan Stanley Infrastructure is an affiliate of Morgan Stanley & Company Incorporated (Morgan Stanley & Co.), an investment adviser registered with the Securities and Exchange Commission. Applicants state that in ISO-NE, Morgan Stanley & Co. holds an interest of approximately 4.3 percent in Milford Holdings LLC, which owns a 544 MW oil and gas-fired, combined-cycle generating facility located in Milford, Connecticut. Morgan Stanley & Co. is wholly owned by Morgan Stanley, a Financial Holding Company as defined under the Bank Holding Company Act.⁸ Applicants further state that Morgan Stanley is affiliated with the following power marketers with market-based rate authority: Morgan Stanley Capital Group Inc.; Power Contract Finance, L.L.C.; Power Contract Finance II, Inc.; Utility Contract Funding II, LLC; and MS Solar Solutions Corporation. Additionally, Morgan Stanley is affiliated with Third Planet Windpower, LLC, a wind energy project that holds lease options on land throughout the United States for potential use in the development of wind energy projects, none of which is currently operational or is located in ISO-NE. Applicants state that other than the indirect minority ownership interest in the Milford facility, neither Morgan Stanley Infrastructure nor any of its affiliates owns or controls any generation, transmission, or distribution facilities in ISO-NE.

B. Proposed Transaction

9. Applicants state that the Proposed Transaction is the sale of the last electric generating unit indirectly owned by Advanced Energy's parent, NSTAR. Applicants state that NSTAR decided several years ago to withdraw from the electric generation business and focus its electric business on transmission and distribution. Applicants state that the Proposed Transaction will occur following an internal reorganization. The reorganization will take place in two steps. First, MATEP Inc. will be merged into New MATEP, which is to be established at the time of the merger. New MATEP will then succeed to MATEP Inc.'s rights and responsibilities. Second, New MATEP will distribute its common equity ownership in MATEP LLC to Advanced Energy. Therefore, Advanced Energy, which was the indirect owner of MATEP LLC, and the direct owner of MATEP Inc., will become the direct owner of both.

10. Prior to the completion of the Proposed Transaction, Buyers, through one or more direct or indirect subsidiary entities, will form a new entity, MATEP LP. Buyers will then purchase from Advanced Energy and Advanced Energy will deliver to Buyers all of Advanced Energy's equity interest in MATEP LLC. At the completion of the transaction, New MATEP will be merged into MATEP LP, which will be the surviving entity.

⁸ 12 U.S.C. § 1841 (1956).

II. Notice of Filings and Responsive Pleadings

11. Notice of the application was published in the *Federal Register*, 75 Fed. Reg. 1766 (2010), with interventions and protests due on or before January 19, 2010. Harvard Medical Collaborative, Inc. (Harvard Medical) and the Massachusetts Attorney General filed timely motions to intervene, protest, and a request for hearing. On February 1, 2010, Applicants filed an answer to the protests. On February 9, 2010, Harvard Medical filed an answer to the Applicants' answer. On February 12, 2010, Applicants filed a motion to reject Harvard Medical's answer filed on February 9, 2010. On March 17, 2010, Applicants filed supplemental information to their Exhibit L with documentation showing that the Federal Trade Commission, Department of Justice, and the Boston Redevelopment Authority have approved the transaction. On March 22, 2010, Harvard Medical filed a response to Applicants' supplemental information. Additionally, on January 27, 2010, U.S. Congressman Michael Capuano, 8th District Massachusetts, sent a letter to the Commission expressing support for the Commission to consider the application under a standard pace rather than on an expedited basis.

III. Discussion

A. Procedural Issues

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁹ the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,¹⁰ prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept all answers because they have provided information that assisted us in our decision-making process.

B. Standard of Review

13. Section 203(a)(4) 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.¹¹ 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

⁹ 18 C.F.R. § 385.214 (2009).

¹⁰ 18 C.F.R. § 385.213(a)(2) (2009).

¹¹ See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.”¹² 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.

C. Analysis Under Section 203

1. Effect on Competition

a. Applicants’ Analysis

14. Applicants assert that the Proposed Transaction will have no adverse effect on competition and will not increase horizontal or vertical market power in any market. Applicants state that the MATEP Facility’s aggregate gross capacity is 87.8 MW, which, according to Applicants, is a small share of the total ISO-NE weather-normalized 2009 summer peak of 27,460 MW. Further, Applicants state that Buyers and their affiliates currently do not own any generating capacity in New England, except for a 4.3 percent interest in Milford Holdings LLC. Applicants state that except to a *de minimis* extent, Applicants do not conduct business in the same geographic market as the Buyers and, therefore, do not require a horizontal competitive analysis screen.¹³

15. Applicants state that the Proposed Transaction does not include the sale of transmission or distribution facilities. They further state that transmission in New England is under the control of ISO-NE rather than Applicants or their affiliate, NSTAR Electric. Additionally, Applicants state that neither the Applicants nor the Buyers control any inputs to electric power production, such as intrastate gas transportation, sites for generation capacity development, sources of coal supplies, and the transportation of coal supplies in the ISO-NE market. Applicants state that the Proposed Transaction will not result in a combination of generating facilities and inputs to generation in the New England market, nor will it cause the elimination of generating or transmission resources available to serve customers in the New England market.¹⁴ Therefore, Applicants assert that the Proposed Transaction does not have any effect on vertical market power.

¹² 16 U.S.C. § 824b(a)(4) (2006).

¹³ Application at 14.

¹⁴ *Id.* at 14-15.

b. Protest

16. The Massachusetts Attorney General states that the Commission must determine whether a merger will harm competition in the retail markets.¹⁵ The Massachusetts Attorney General asserts that Applicants have failed to provide any information detailing whether there is sufficient transmission and distribution capacity to allow Harvard Medical “retail choice” or MATEP LLC access to ISO-NE markets, in the event that the retail sales agreements are terminated. The Massachusetts Attorney General therefore asserts that if the Restated Contracts for MATEP LLC are not renewed, Harvard Medical will have no access to competitive power supplies, and MATEP LLC will have no access to the ISO-NE power markets. Further, the Massachusetts Attorney General states that in order for Applicants to meet their burden of proof, NSTAR must commit to supplying services to both MATEP LLC and Harvard Medical at a reasonable cost.¹⁶

c. Applicants’ Response

17. Applicants respond that NSTAR Electric has wheeling obligations under the ISO-NE Tariff and under Massachusetts Department of Public Utilities regulations to deliver electric power from third-parties to serve Harvard Medical’s load. Applicants also state that the Proposed Transaction does not affect NSTAR Electric’s existing wholesale distribution service agreements or the contractually scheduled renegotiation of those agreements.¹⁷ Further, Applicants argue that the sale of the MATEP Facility will increase Harvard Medical’s bargaining power in scheduled negotiations since ownership of the MATEP Facility will vest in an entity that has no corporate affiliation with NSTAR, which owns the transmission and distribution facilities needed for the delivery to Harvard Medical of power from sources other than the MATEP Facility.¹⁸

d. Commission Determination

18. With regard to the Massachusetts Attorney General raising retail rate issues as part of its comments on the dispositions effect on competition, as an initial matter, we note that retail rates are not typically addressed by this Commission and are usually

¹⁵ Massachusetts Attorney General Protest at 7 (citing *American Electric Power Co.*, 85 FERC ¶ 61,201, at 61,820 (1998)).

¹⁶ Massachusetts Attorney General Protest at 7.

¹⁷ Applicants’ Answer at 3-4.

¹⁸ *Id.* at 4.

addressed by the relevant state commission.¹⁹ In any event, based on the facts presented, we agree that the Proposed Transaction does not raise any horizontal or vertical market power concerns. The extent of overlapping business transactions between Applicants and any affiliate of the Buyers within the ISO-NE footprint is *de minimis*. Applicants also represent that the entities entering into the Proposed Transaction currently do not provide inputs to electricity products and electricity products in the same geographic market. Applicants state that they have obligations under the ISO-NE Tariff and under the Massachusetts Department of Public Utilities' regulations to deliver electric power from third-parties to serve Harvard Medical's load. Based on the facts before us, the proposed transaction does not provide Applicants with the ability to erect barriers to entry by other suppliers. Therefore, we find that the Proposed Transaction will not result in the Applicants' ability to exert horizontal or vertical market power in wholesale power markets.

19. In the Merger Policy Statement, the Commission stated that "in cases where a state commission asks us to address the merger's effect on retail markets because it lacks adequate authority under state law, we will do so."²⁰ However, the Massachusetts Department of Public Utilities has not requested that the Commission address the effect of the Proposed Transaction on retail markets. In any event, we note that Applicants represent that the Proposed Transaction does not impact Harvard Medical's existing Restated Contracts for service for the MATEP Facility which will remain in effect until 2021.

2. Effect on Rates

a. Applicants' Analysis

20. Applicants assert that the Proposed Transaction will have no effect on wholesale rates. Applicants state that both MATEP Inc. and MATEP LLC sell power at wholesale under market-based rates and have no cost-based wholesale customers. Applicants also state that when created, New MATEP will also sell power at wholesale under market-based rates. Applicants note that the Proposed Transaction will not modify or abridge, in any way, any contract between MATEP LLC and any MATEP LLC customer.²¹

¹⁹ See *National Grid plc*, 117 FERC ¶ 61,080, at P 54 (2006).

²⁰ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 53.

²¹ Application at 16.

b. Protest

21. Harvard Medical contends that the MATEP Facility supplies approximately 75 MW and the NSTAR electric distribution system currently has the capacity to provide 75 MW of electric service to the Longwood Medical Area. Harvard Medical states that electric demand in the Longwood Medical Area is expected to reach 195 MW after 2020. Harvard Medical asserts that MATEP LLC, knowing the significant cost of the electric infrastructure upgrades that are necessary to enable Harvard Medical to obtain electricity from the local electric system at competitive market-based rates, could seek to charge Harvard Medical above-market rates for supplies of electricity from the MATEP Facility when the long-term Restated Contracts between Harvard Medical and the MATEP LLC are renegotiated in 2013 because the timing and cost-allocation for the construction of these upgrades has not been determined. Harvard Medical states that an acknowledgement and agreement by NSTAR Electric that it would construct the improvements that are necessary to serve the load that is currently served by the MATEP Facility in the absence of the MATEP Facility, and that it would not seek to impose the cost of those upgrades on Harvard Medical, would minimize the potential that Harvard Medical might be required to pay above-market rates for electricity after the expiration of the Restated Contracts.²²

22. The Massachusetts Attorney General asserts that NSTAR has not met its burden of showing that in future 205 filings customers have been held harmless.²³ The Massachusetts Attorney General argues that NSTAR has not shown that the physical configuration of the transmission and distribution system would allow Harvard Medical to exercise retail choice. Further, the Massachusetts Attorney General asserts that NSTAR has not demonstrated that wholesale distribution service provided to the new owners of MATEP LLC will be upon the same terms and conditions as that provided by NSTAR Electric to other unaffiliated retail or transmission customers. The Massachusetts Attorney General also states that NSTAR has not addressed whether the new owners of MATEP Inc. will operate the MATEP Facility in such a manner that maintains reliability within the area.

c. Applicants' Response

23. Applicants respond that the sale of the MATEP Facility does not change the *status quo* with respect to Harvard Medical's service from the plant. Applicants further state that Harvard Medical's rights will be the same for the remaining term of the Restated Contracts, which govern the Harvard Medical's service rights through

²² Harvard Medical's Protest at 14.

²³ *Id.* at n.16.

September 30, 2021. Applicants also point out that the Restated Contracts will expire in September 2021, whether or not the MATEP Facility is sold. Applicants state that Harvard Medical's harm from the transaction is speculative. Finally, Applicants contend that after September 2021, if Harvard Medical chooses to buy all its electric power from the grid and power from the MATEP Facility was sold to third parties, the physical flows of power would follow the laws of physics without the Proposed Transaction having an effect on either the power transactions or the power flows.

d. Commission Determination

24. The Massachusetts Attorney General asserts that Applicants have not met their burden with respect to the effect on rates because, according to the Attorney General, Applicants are obligated to hold customers harmless in future section 205 rate cases from any rate increase. The Attorney General overstates the requirement. Applicants must only demonstrate that costs related to the transaction are not passed on to wholesale cost-based ratepayers unless and until certain conditions are met.²⁴ The Commission looks for assurances from public utilities that they hold customers harmless from these transaction-related costs, to the extent they are not exceeded by cost savings arising from the transaction, for a significant period of time following the merger,²⁵ not an indefinite period of time. Applicants state that both MATEP Inc. and MATEP LLC sell power at wholesale under market-based rates and have no cost-based wholesale customers. Applicants also state that when created, New MATEP will also sell power at wholesale under market-based rates. Applicants further state that the Proposed Transaction will not modify or abridge, in any way, any contract between MATEP LLC and any MATEP LLC customer. Therefore, we find that the Proposed Transaction will not have an adverse effect on wholesale rates.

25. Harvard Medical expresses concern that MATEP LLC, could seek to charge Harvard Medical above-market rates for supplies of electricity from the MATEP Facility when the long-term Restated Contracts between Harvard Medical and the MATEP LLC are renegotiated in 2013 because the timing and cost-allocation for the construction of these upgrades has not been determined. Harvard Medical seeks an acknowledgement and agreement by NSTAR Electric that it would construct the improvements that are necessary to serve the load that is currently served by the MATEP Facility in the absence of the MATEP Facility, and that it would not seek to impose the cost of those upgrades on Harvard Medical.

²⁴ See *Duquesne Light Holdings*, 117 FERC ¶ 61,326 (2006), *WPS Resources Corp. and Peoples Energy Corp.*, 117 FERC ¶ 61,335 (2006), *National Grid plc*, 117 FERC ¶ 61,080 (2006).

²⁵ See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 42.

26. To the extent that Harvard Medical's concerns relate to retail rate issues, we note that retail rates are not addressed by this Commission, but instead are addressed by the relevant state commission.²⁶ However, we note that Applicants state that the Proposed Transaction does not alter the existing sales in place through September 2021 and will not cause any customer to incur additional costs through any wholesale cost-based rate schedules. Additionally, any negotiation to take place between MATEP LLC and Harvard Medical will take place regardless of the transfer of the MATEP Facility. Further, Harvard Medical merely presumes harm in the absence of the ability to purchase power from the MATEP Facility, however provides no evidence that the Proposed Transaction will limit its ability to purchase power from the MATEP Facility or that the productive capacity of the MATEP Facility will be withheld from the market. The possibility that the Proposed Transaction may have an adverse effect on rates is, therefore, speculative and not supported by the evidence. In addition, while Harvard Medical asserts that the 2020 projected load growth in the Longwood Medical Area in Boston exceeds current capacity, it has not shown how any projected shortfall will occur as a result of the Proposed Transaction.

3. Effect on Regulation

a. Applicants' Analysis

27. Applicants assert that the Proposed Transaction will not affect the ability of the Commission to regulate any of the Applicants with respect to their Commission-jurisdictional activities. Applicants also state that the Proposed Transaction will not have any effect on retail regulation.²⁷

b. Commission Determination

28. 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.²⁸ Based on the facts presented in the applications, the Commission finds that the Proposed Transaction will not adversely affect federal or state regulation. We note that no party alleges that regulation would be impaired by the Proposed Transfers, and no state commission has requested that the Commission address the issue of the effect on state regulation.

²⁶ See *National Grid plc*, 117 FERC ¶ 61,080, at P 54.

²⁷ Application at 16.

²⁸ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

4. Cross-Subsidization

a. Applicants' Analysis

29. FPA section 203(a)(4) requires that the Commission find that a transaction will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company, unless that cross-subsidization, pledge or encumbrance will be consistent with the public interest. In Order Nos. 669, 669-A, and 669-B, the Commission established specific filing requirements requiring applicants to demonstrate that this requirement is met. This information is to be included in Exhibit M of applications.

30. Applicants assert that based on facts and circumstances known or that are reasonably foreseeable, the Proposed Transaction will not result in, at the time of the Proposed Transfers 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. Applicants state that the Proposed Transaction will not result in, at the time of the transaction or in the future: (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 issuances of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; and (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 services agreements subject to review under section 205 and 206 of the FPA.²⁹

31. Applicants also inform the Commission that the Proposed Transaction falls within two of the Commission's safe harbors. Applicants state that the Proposed Transaction does not involve a franchised public utility with captive customers. Applicants also state that the Proposed Transaction only involves non-affiliated parties.³⁰

²⁹ Application at Exhibit M.

³⁰ *Id.* at 17.

b. Protest

32. Harvard Medical argues that Applicants are incorrect in their assertion that the Proposed Transaction does not involve captive customers or result in the potential for inappropriate cross-subsidization. According to Harvard Medical, NSTAR avoided construction of substantial improvements because it did not upgrade NSTAR Electric's system and instead invested capital in enhancing and expanding the MATEP Facility. As a result, Harvard Medical asserts that, through its purchase of a substantial portion of the output from the MATEP Facility, it has defrayed a major portion of the cost for the enhancement and expansion of the MATEP Facility, which now serves Harvard Medical. Harvard Medical further contends that it will be a captive customer of MATEP LLC because it will not be able to access alternative electric supplies until the NSTAR electric system is upgraded. Additionally, Harvard Medical argues that the sale of the MATEP Facility, for a gain, could result in cross-subsidization if NSTAR distributes the profits from the sale directly to its shareholders and burdens Harvard Medical with the costs of upgrading NSTAR Electric's electric system.

33. Harvard Medical states that NSTAR Electric's distribution system currently has the capacity to provide a total of approximately 75 MW of electric service to the Longwood Medical Area, however, the electric demand of the institutions is 67 MW.³¹ Therefore, Harvard Medical argues that in the event that it ceased to obtain utility services from the MATEP Facility upon the expiration of the Restated Contracts, Harvard Medical would need to obtain approximately 75 MW of electric capacity from the NSTAR Electric system to replace the capacity that is currently provided by the MATEP Facility. Harvard Medical states that based on a 2006 study, conducted by the regional planning entity in conjunction with the service provider, the total electric demand will reach 195 MW after 2020 and the NSTAR Electric distribution system currently only has the capacity to provide approximately 75 MW of electric service to the Longwood Medical Area. Harvard Medical states that to make the necessary improvements to serve the 75 MW load in the absence of the MATEP Facility would require constructing a new 75 MW substation, as well as other improvements, and estimates the cost to be between \$51.8 and \$76.8 million.³² Therefore, Harvard Medical concludes that it is a captive customer of the MATEP Facility.

c. Applicants' Response

34. Applicants reassert that each customer of the MATEP Facility is not a captive customer. Applicants also explain that the expansion of the MATEP Facility was not an

³¹ *Id.* at 10.

³² *Id.* at 11.

alternative to increased distribution capacity, but was installed to meet Harvard Medical's needs more efficiently and in a more environmentally sound manner. Applicants further contend that expansion of the MATEP Facility had nothing to do with meeting the Harvard Medical's increased load, which only increased by 3 MW, and has never been reflected in Harvard Medical's rates. Applicants clarify that the MATEP Facility is not now and has never been part of a cost-regulated rate base and has never been used to serve captive customers under cost-based rates. Finally, Applicants state that the Proposed Transaction is an arm's-length transaction between unaffiliated parties and that under Commission precedent such transactions do not raise any cross-subsidization issues.³³

d. Commission Determination

35. We find that the Proposed Transaction is within the scope of the Commission's safe harbor for transactions in which no franchised public utility with captive customers is involved.³⁴ Massachusetts is a retail choice state. As the Commission stated in Order No. 707, customers with retail choice are not considered to be customers served under "cost-based regulation" and therefore are not considered captive customers. These customers have retail choice, i.e., by virtue of state law they can purchase at market-based rates from retail suppliers other than a franchised public utility.³⁵ The Commission has also explained that it is not the role of this Commission to evaluate the success or failure of a state's retail choice program.³⁶ The Massachusetts Department of Public Utilities has not requested that Harvard Medical or any other customer be deemed captive.³⁷ Further, we find that the Applicants qualify for a second safe harbor because the proposed transaction only involves non-affiliated parties.

36. Based on the Applicants' representations in Exhibit M, the Commission finds that the Proposed Transaction will not result in cross-subsidization³⁸ of a non-utility associate

³³ Applicants' response at 11 (*Citing FPA Section 203 Supplemental Policy Statement*, 120 FERC ¶ 61,060, at P 19 (2007)).

³⁴ *FPA Section 203 Supplemental Policy Statement* at P 17.

³⁵ *See Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264, at P 45 (2008).

³⁶ *Id.* at n.40.

³⁷ *Id.* P 45.

³⁸ *See FPA Section 203 Supplemental Policy Statement* at fn. 14, When "cross-subsidization" occurs, some of the costs of dealings between affiliated regulated and

company or the pledge or encumbrance of utility assets for the benefit of an associate company. Therefore, we find that the Proposed Transaction does not raise concerns regarding inappropriate cross-subsidization.

37. Although Harvard Medical argues that it is a captive customer of MATEP LLC, and could be harmed by inappropriate cross-subsidization, Harvard Medical's concerns relate to whether sufficient distribution capacity exists in order for Harvard Medical to access alternative energy supplies when the Restated Contracts expire in 2021. This issue is within the jurisdiction of the state regulatory authority.

38. When a controlling interest in a public utility is acquired by another company, whether a domestic company or a foreign company, the Commission's ability to adequately protect public utility customers against inappropriate cross-subsidization may be impaired absent access to the parent company's books and records. Section 301(c) of the FPA gives the Commission authority to examine the books and records of any person who controls, directly or indirectly, a jurisdictional public utility insofar as the books and records relate to transactions with or the business of such public utility.

D. Other Matters

39. The Commission has considered the merits of the Application as well as the arguments set forth by the intervenors. We find Applicants have provided sufficient information to determine that the Proposed Transaction is consistent with the public interest and find no need to set this proceeding for hearing. We will grant Applicants' request for a partial waiver to provide additional information pursuant to sections 33.2(c)(1), 33.2(c)(4)-(8), as requested, because Applicants have provided sufficient information for the Commission to analyze the Proposed Transaction and its effects.

40. Information and/or systems connected to the bulk power system involved in this transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to 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.

unregulated companies are borne by the regulated utility affiliate. The costs might be passed on to captive customers through the rates of the regulated affiliate.

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

The Commission orders:

(A) We hereby grant authorization under section 203(a)(1) for the Proposed Transaction, as discussed in the body of this order, effective as of the date of this order.

(B) 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.

(C) 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.

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

(E) If the Proposed Transaction results 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 (2009) shall be made.

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

(G) Applicants must 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.

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

By the Commission.

Kimberly D. Bose,
Secretary.