

126 FERC ¶ 61,141
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

EDF Development, Inc.
Constellation Energy Group, Inc.
Constellation Energy Nuclear Group, LLC

Docket No. EC09-40-000

ORDER AUTHORIZING DISPOSITION AND ACQUISITION OF
JURISDICTIONAL FACILITIES

(Issued February 19, 2009)

1. On January 6, 2009, as clarified on February 4, 2009, EDF Development, Inc. (EDF Development) and Constellation Energy Group, Inc. (Constellation Energy) together with Constellation Energy Nuclear Group, LLC (Constellation Nuclear) (collectively, Constellation, and together with EDF Development, Applicants) filed a joint application under section 203 of the Federal Power Act (FPA)¹ requesting that the Commission authorize EDF Development's acquisition of a 49.99 percent ownership interest in Constellation Nuclear (Proposed Transaction).² Applicants request expedited treatment of their Application, with approval on or before February 20, 2009.

¹ 16 U.S.C. § 824b (2006).

² The Proposed Transaction is part of a larger transaction implemented by the Master Put Option and Membership Interest Purchase Agreement (Master Agreement) between EDF Development and Constellation Energy, as well as E.D.F. International S.A. (EDF International) and Constellation Nuclear. The Master Agreement provides for: (1) the grant of ten put options to Constellation Energy covering eleven non-nuclear generating facilities (the Master Agreement Put Options); and (2) EDF Development's acquisition of a 49.99 percent ownership interest in Constellation Nuclear. The application for the Master Agreement Put Options is filed in Docket No. EC09-37-000, *et al.*

2. The Commission has reviewed the Proposed Transaction under the Commission's Merger Policy Statement.³ As discussed below, we will authorize the Proposed Transaction under section 203(a)(1) and 203(a)(2), as we find that it is consistent with the public interest. Although Applicants do not specifically state whether they are seeking authorization under section 203(a)(1) or 203(a)(2), in the instant order the Commission is asserting jurisdiction under both of these subsections of section 203. We remind applicants that when they submit an application seeking authorization under section 203 of the FPA, they must specify the subsection(s) of section 203 under which they are seeking authorization.

I. Background

A. Description of the Parties

1. The Purchasers

3. EDF Development's ultimate parent company, Électricité de France, SA (EDF SA), is an electric utility company in France and is 84.8 percent owned by the French Government. Outside of the United States, EDF SA owns and operates 98 gigawatts (GW) of generating capacity and has ownership interests in approximately 124.5 GW of installed generating capacity. Applicants state that EDF SA is a holding company under the Public Utility Holding Company Act of 2005 (PUHCA 2005)⁴ through its indirect interests in enXco, Inc. (enXco) and Eagle Energy Partners I, LP (Eagle). With the exception of enXco and Eagle, EDF SA does not: (1) directly or indirectly own or

³ 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) (Merger Policy Statement). See also *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008). 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).

⁴ *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, Order No. 667, FERC Stats. & Regs. ¶ 31,197 (2005), *order on reh'g*, Order No. 667-A, FERC Stats. & Regs. ¶ 31,213, *order on reh'g*, Order No. 667-B, FERC Stats. & Regs. ¶ 31,224 (2006), *order on reh'g*, Order No. 667-C, 118 FERC ¶ 61,133 (2007).

control any generation or transmission facilities in the United States; (2) engage in wholesale sales of electric energy, or any other Commission jurisdictional, transactions in the United States; or (3) hold electric transmission rights and natural gas transportation rights in the United States. In addition, EDF SA does not directly or indirectly own any physical natural gas transportation facilities or own or control other physical inputs to electric generation or transmission in the United States.

4. EDF Development was formed in 2007 to partner with Constellation on the development of new nuclear energy in the United States. Applicants state that in 2007, EDF Development and Constellation Energy established UniStar Nuclear Energy, LLC (UniStar), a joint venture with the purpose of developing, building, owning, and operating new United States and Canadian nuclear projects. UniStar is currently developing four projects: (1) Calvert Cliffs Unit 3 in Maryland; (2) Callaway Unit 2 in Fulton, Missouri; (3) Bell Bend Unit 1 near Berwick, Pennsylvania; and (4) Nine Mile Point Unit 3 near Oswego, New York.⁵

5. enXco is a holding company and an indirect, wholly-owned subsidiary of EDF Energies Nouvelles S.A., a French limited liability company. enXco develops, operates, and manages renewable energy projects throughout North America. Currently it indirectly owns or controls approximately 762 megawatts (MW) of wind-powered generation capacity at 23 wind projects across the United States that are qualifying facilities (QF) or are owned through subsidiaries that are exempt wholesale generators (EWG). enXco also provides operation and maintenance services to 2,084 turbines across the country through another subsidiary. Applicants note that some of enXco's generating subsidiaries are authorized by the Commission to make sales at market-based rates.⁶ They also state that enXco is not, and does not own or control, a franchised utility in North America and does not directly or indirectly own or control transmission facilities in North America.⁷ enXco does not own any physical natural gas transportation facilities or own or control other physical inputs to electric generation or transmission. enXco holds no natural gas transportation rights and holds, through its subsidiaries, only those

⁵ Application at 4.

⁶ *Id.* at 6 and Exhibit B-1.

⁷ Applicants note that through its subsidiary, Oasis Power Partners, LLC (Oasis), enXco holds an equity interest in the Sagebrush Partnership (Sagebrush). Sagebrush owns and operates a 230kV transmission line that extends from the Tehachapi region of California to Southern California Edison Company's Vincent Substation. Oasis sells the full power output of its wind projects to San Diego Gas & Electric Company under a long-term wholesale power purchase agreement. *See Sagebrush*, 103 FERC ¶ 61,300 (2003).

electric energy transportation rights sufficient to enable the delivery of electric energy generated by such subsidiaries to their respective customers' points of receipt under long-term power purchase agreements. Applicants also state that EDF SA and enXco qualify for exemptions from the Commission's PUHCA 2005 regulations that apply to companies that are holding companies solely with respect to one or more QFs, EWGs, or foreign utility companies.⁸

6. Eagle is a power marketer, co-owned by EDF Trading North America, Inc. and EDF Trading North America Management, LLC.⁹ The Commission authorized Eagle to engage in wholesale sales of electricity at market-based rates.¹⁰ Applicants state that Eagle is not, and does not own or control, a franchised utility in North America, and does not directly or indirectly own or control, a franchised utility in North America.¹¹ Eagle also does not own any physical natural gas transportation facilities or own or control other physical inputs to electric generation or transmission.

7. EDF International, an affiliate of EDF Development, is a wholly-owned subsidiary of EDF SA that was established to conduct EDF SA's international business. EDF International owns an 8.52 percent interest in Constellation Energy, which was acquired through stock purchases on the open market.

2. The Sellers

8. Constellation Energy is a public utility holding company with both traditional franchised utility operations and market-based wholesale operations in a number of markets. It has an energy supply business that includes 83 generating units, totaling approximately 9,000 MW of owned generating capacity, that provide energy in competitive wholesale and retail power markets across North America. Through its subsidiaries, Constellation Energy also provides consulting services for the operation and maintenance of energy facilities, as well as products and services to residential and small commercial customers. Its subsidiaries include Baltimore Gas & Electric Company (BG&E), Constellation Power Source Generation (Constellation Power), Inc.,

⁸ 18 C.F.R. § 366.3 (2008).

⁹ EDF Trading North America Management LLC purchased Eagle as of October 31, 2008 from subsidiaries of Lehman Brothers Holdings. *Lehman Brothers Commodity Services, Inc.*, 125 FERC ¶ 61,122 (2008).

¹⁰ *Eagle Energy Partners, Inc.*, Docket No. ER03-774-000 (June 11, 2003) (unpublished letter order).

¹¹ Application at 7.

Constellation Nuclear, Constellation Energy Commodities Group, Inc., and Constellation Energy, Inc.

9. Constellation Energy also owns numerous additional energy companies that are engaged in a variety of energy-related businesses, including retail gas supply, electric generation, electric products and services, fuel processing, and operations and maintenance services.¹²

10. BG&E is a direct wholly-owned subsidiary of Constellation. It is a combination natural gas and electric utility that transmits and distributes services to the City of Baltimore, Maryland and all or part of 10 central Maryland counties. BG&E's transmission facilities are under the operational control of PJM Interconnection, LLC (PJM) and open-access transmission service over those facilities is provided under the terms of the PJM's open access transmission tariff (OATT). Applicants state that BG&E does not have any captive customers as that term is defined in the Commission's regulations.¹³ Applicants note that BG&E has no captive retail customers because Maryland has adopted retail choice.¹⁴

11. Constellation Nuclear is a holding company for Constellation Energy's nuclear generation. It provides corporate and engineering services for all of Constellation Energy's nuclear generation, but it does not provide services directly to the public. Under the Proposed Transaction, EDF Development will purchase a 49.99 percent interest in Constellation Nuclear as the vehicle for its acquisition of a 49.99 percent of Constellation Energy's nuclear business.

12. Constellation Power, which has market-based rate authority,¹⁵ was created in 2000 to acquire BG&E's non-nuclear generating facilities. All of its generating facilities are located in the PJM market, and it owns and operates the following: (1) more than approximately 3,600 MW of generating capacity at nine wholly-owned generation facilities in Maryland; (2) 539.8 MW in generation associated with partial ownership interests in the Keystone and Conemaugh generating plants in Pennsylvania; and (3) an entitlement to 277 MW of generating capacity from a hydroelectric generating plant in Pennsylvania.

¹² Application, Exhibit B-2 (describing Constellation Energy's additional energy companies).

¹³ 18 C.F.R. § 33.1(b)(5) (2008).

¹⁴ Application at 9 & n.10.

¹⁵ *AmerGen Vermont, LLC*, 90 FERC ¶ 61,307 (2000).

B. Description of the Proposed Transaction

13. On December 17, 2008, Constellation Energy, Constellation Nuclear, EDF International, and EDF Development executed the Master Agreement.¹⁶ Under that agreement EDF Development: (1) will acquire a 49.99 percent ownership interest in the nuclear generation and operation business for \$4.5 billion; (2) has provided a \$1 billion up-front cash investment in Constellation Energy in the form of non-voting, non-convertible cumulative preferred stock; and (3) will provide Constellation Energy with additional liquidity support of up to \$2 billion through put options under the Master Agreement, which will remain in effect until the end of 2010. Along with the Master Agreement, Constellation Energy and EDF International executed an Amended and Restated Investor Agreement that provides EDF International with the right to nominate one director to Constellation Energy's board following the Proposed Transaction, expanding the board from 12 to 13 directors. Applicants state that EDF International does not and will not have authority to direct or cause the direction of the management or policies of Constellation Energy. Applicants state that EDF International will not have a controlling interest in Constellation Energy because its interest in Constellation Energy of less than 10 percent and its ability to appoint less than 10 percent of the members of Constellation Energy's board will not allow it (either alone or in conjunction with others) to direct or cause the direction of the management or policies of Constellation Energy. Applicants state that as a result, Constellation Energy is not an affiliate or an energy affiliate of EDF International or any other EDF SA companies.¹⁷

14. Applicants note that the Master Agreement Put Options are intended to provide Constellation Energy with liquidity and thus support its current investment graded ratings. Constellation Energy does not expect to exercise any of these options, but notes that the options provide the ability to raise cash quickly in the event that it is needed in the future.

II. Notice of Filing and Responsive Pleadings

15. Notice of the filing was published in the *Federal Register*, 74 Fed. Reg. 2,579 (2009), with interventions and protests due on or before January 27, 2009. The Public

¹⁶ Prior to that time, MidAmerican Energy Holdings Company (MidAmerican) and Constellation Energy executed an agreement under which MidAmerican would purchase Constellation Energy for approximately \$4.7 billion. Constellation Energy and MidAmerican terminated their agreement after EDF International submitted a bid to Constellation Energy's board of directors to acquire an ownership interest in Constellation's nuclear generation and operation business for \$4.5 billion.

¹⁷ Application at 4.

Service Commission of Maryland filed a notice of intervention, and the Maryland Office of People's Counsel filed a timely motion to intervene.

16. Notice of the Applicants' Clarification to their Application was published in the *Federal Register*, 74 Fed. Reg. 7,414 (2009), with interventions and protests due on or before February 13, 2009. None were filed.

III. Discussion

A. Procedural Matters

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹⁸ the notice of intervention and the timely, unopposed motion to intervene serve to make the entities that filed them parties to this proceeding.

B. Standard of Review

18. 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.¹⁹ 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."²⁰ 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.²¹

¹⁸ 18 C.F.R. § 385.214 (2008).

¹⁹ See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

²⁰ 16 U.S.C. § 824b(a)(4) (2006).

²¹ 18 C.F.R. § 33.2(j) (2008).

1. Effect on Competition – Horizontal Market Power

a. Applicants' Analysis

19. Applicants argue that the Proposed Transaction does not raise any horizontal market power concerns. In support of this assertion, Applicants submit an affidavit analyzing market concentration in the California Independent System Operator Corporation (CAISO) balancing authority area, the only geographic area where their generation overlaps.²² Applicants state that Constellation owns approximately 139 MW of generation in CAISO.²³ Applicants state that Constellation Energy's total CAISO generation accounts for 0.2 percent of the installed capacity in CAISO, a *de minimis* share. Applicants state that EDF Development, through its affiliate enXco, owns approximately 402 MW of generation in CAISO, all of which is committed under long-term contracts. Applicants state that enXco's generation share in CAISO is 0.7 percent, a *de minimis* amount. Applicants state that using a very conservative "2AB" calculation, the HHI change for total capacity in CAISO is less than 1 point, even after ignoring the fact that all of enXco's capacity is either wind or solar generation, which would be derated based on typical capacity factors in a more formal full delivered price test.²⁴ Applicants state that in all other markets the HHI change will be either zero or negative (in the case that the Proposed Transaction has a de-concentrating effect on the market), and thus no horizontal market power concerns are present.²⁵

b. Commission Determination

20. The Commission finds that the Proposed Transaction either considered alone or in conjunction with the Master Agreement Put Options does not raise horizontal market power concerns. Applicants have demonstrated that the effect of combining their operations in the relevant geographic markets is *de minimis*. Therefore, the Proposed

²² Exhibit J, Affidavit and Exhibits of William Hieronymus (Hieronymus Affidavit).

²³ *Id.* at 1-2. Applicants state that all of these facilities are QFs, and that all of the output of these QFs is committed under long-term contracts.

²⁴ *Id.* at 2. Denoting Constellation's share as "A" percent, and EDF Development's share as "B" percent, their contribution to the HHI pre-transaction is $A^2 + B^2$ and post-transaction it is $(A+B)^2$. Since $(A+B)^2$ equals $A^2 + B^2 + 2AB$, the increase in the HHI is $2AB$. See *Union Electric Co.*, 114 FERC ¶ 61,252, at P 26 (2006); *MidAmerican Energy Holdings Co.*, 113 FERC ¶ 61,298, at P 28 & n.22 (2005).

²⁵ Hieronymus Affidavit at 2-3.

Transaction will not eliminate a competitor or materially increase market concentration in the relevant markets. Moreover, because the HHI change is either zero or negative in all other relevant markets, the Proposed Transaction poses no horizontal market power concerns elsewhere.

2. Effect on Competition – Vertical Market Power

a. Applicants' Analysis

21. Applicants contend that the Proposed Transaction does not raise any vertical market power concerns. Applicants state that none of the Applicants control transmission in any area where the other has generation. Applicants state that enXco owns no transmission other than that necessary to connect its generation to the grid, and Constellation's affiliate, BG&E, owns transmission in PJM, which is under PJM's operational control and subject to PJM OATT's terms and conditions.²⁶ Applicants contend that the Proposed Transaction raises no vertical market power issues because no change in control over electric transmission assets, other than interconnection facilities, will occur under the Master Agreement.²⁷ Moreover, the Proposed Transaction does not involve the transfer of any gas transportation facilities or inputs to electric generation.

b. Commission Determination

22. In transactions combining electric generation assets with inputs to generating power (such as natural gas transportation or fuel) or electric transmission assets, competition can be harmed if the transaction increases a firm's ability or incentive to exercise vertical market power in wholesale electricity markets. For example, by denying rival firms' access to inputs or by raising their input costs, a post-transaction firm could impede entry of new competitors or inhibit existing competitors' ability to undercut an attempted price increase in the downstream wholesale electricity market. As discussed below, Applicants have shown that the Proposed Transaction does not raise any of these concerns.

23. Applicants have shown that the proposed combination of electric transmission and generation assets will not harm competition. Turning over operational control of transmission facilities to an independent entity mitigates any concerns about transmission-related vertical market power because it eliminates a company's ability to use its transmission system to harm competition. In a number of cases, we have stated that both the ability and incentive to exercise vertical market power are necessary for a

²⁶ *Id.* at 3.

²⁷ Application at 17.

merger to harm competition.²⁸ Here, BG&E has turned over control of its transmission facilities to an independent entity – PJM – so it has no ability to use its transmission to disadvantage its competitors. Moreover, enXco owns no transmission facilities other than those needed to connect to the transmission grid. In addition, none of the Applicants own or control inputs to generation in any relevant market where other Applicants own or control generation resources.

3. Effect on Rates

a. Applicants' Analysis

24. Applicants assert that the Proposed Transaction will have no adverse impact on transmission or power rates. Applicants state that none of the facilities being transferred under the Proposed Transaction are included in any transmission rates or rates for long-term wholesale requirements customers.²⁹ Applicants also state that the entities in which EDF Development will acquire an interest through the Proposed Transaction all have received market-based rate authorization from the Commission. They maintain that since the Proposed Transaction does not involve the transfer of control over entities selling energy at wholesale pursuant to cost-based rates, it does not raise concerns that any rates subject to the Commission's jurisdiction will be adversely affected.

b. Commission Determination

25. The Commission finds that Applicants have shown that the Proposed Transaction will not adversely affect rates. None of the facilities being transferred are included in any transmission rates or rates for long-term wholesale requirements customers, and all entities whose interests will be transferred in the Proposed Transaction sell electricity at market-based rates. The Commission has found that, where electricity is sold under market-based rates, the Transaction is unlikely to have an adverse impact on rates.³⁰ We note that no customer has argued that its rates will be affected by the Proposed Transaction.

²⁸ See, e.g., *National Grid plc and KeySpan Corp.*, 117 FERC ¶ 61,080, at P 45 (2006); *American Electric Power Co.*, 90 FERC ¶ 61,242, at 61,788 (2000), *review denied sub nom. Wabash Valley Power Assn. v. FERC*, 268 F.3d 1105 (D.C. Cir. 2001). See also Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,911.

²⁹ Hieronymus Affidavit at 18.

³⁰ *Union Electric Co. d/b/a Ameren UE*, 114 FERC ¶ 61,255, at P 45 (2006).

4. Effect on Regulation

a. Applicants' Analysis

26. Applicants state that the Proposed Transaction will not affect the manner or extent to which the Commission, any state, or any other federal agency regulates the Applicants. Applicants state that the jurisdictional status of the Applicants under the FPA will not change as a result of the Proposed Transaction. The facilities that are covered by the Proposed Transaction will remain subject to regulation to the same extent each is regulated presently.³¹

b. Commission Determination

27. Applicants have shown that the Proposed Transaction will not have an adverse impact on regulation. We find that the Proposed Transaction will not impair either state or federal regulation. The Commission's review of the transaction's effect on regulation is focused on ensuring that it 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 regulatory authority over the Applicants and the facilities referenced in the Master Agreement. Further, Applicants state that following the Proposed Transaction, they will be regulated by the various states the same way as before, and we note that no state commission has requested that the Commission address the effect on state regulation. Based on Applicants' representation, we find that the Proposed Transaction will not have an adverse effect on federal or state regulation. We note that no state agency protested the Proposed Transaction.

5. Cross-subsidization

a. Applicants' Analysis

28. Applicants state that the Proposed Transaction will not result in, at the time of the Proposed 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. Applicants note that the Proposed Transaction does not include regulated franchised public utility assets but rather only merchant assets. Neither EDF Development nor any of its affiliates is a traditional utility company with wholesale or retail customers under cost-based regulation. Applicants state that BG&E, Constellation's affiliate, is a traditional utility that owns or provides transmission service

³¹ *Id.*

over jurisdictional transmission facilities.³² Applicants also, however, state that BG&E is not involved in any of the transactions covered by the Master Agreement.³³

29. The Applicants also provided representations regarding cross-subsidization attached as Exhibit M-1. Based on this, Applicants state that the Proposed Transaction will not result in cross-subsidization of a non-utility company or the pledge or encumbrance of utility assets, consistent with the four-factor test set forth in 18 C.F.R. § 33.2(j)(1)(ii). Applicants state that the Proposed Transaction will not result, now or in the future, in: (1) transfers 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) 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) new pledges or encumbrances 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) new affiliate contracts between a non-utility associate company and 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 FPA sections 205 and 206.³⁴

b. Commission Determination

30. Based on Applicants' representations, in Exhibit M-1, as discussed above, the Commission finds 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. However, we do not agree with Applicants' assertion that the fact that BG&E is not directly involved in the transaction means that the Proposed Transaction falls within the scope of the "safe harbor" discussed in Order

³² Applicants' Clarification at 4.

³³ Applicants assert that because BG&E is not involved in the Proposed Transaction, this transaction falls within the scope of the "safe harbor" for transactions in which certain traditional utilities are not involved, and that it thus does not raise any issues with respect to cross-subsidization. Application at 19; Applicants' Clarification at 2-4.

³⁴ See Application, Exhibit M.

No. 669 and the Supplemental Policy Statement.³⁵ The Commission's focus regarding cross-subsidization generally has been on preventing a transfer of benefits from a public utility's captive customers or customers served over jurisdictional transmission facilities to shareholders of the public utility's holding company due to an intra-system transaction that involves electric power or energy generation facilities, or non-power goods and services. Here, the presence within the Constellation corporate family of such a utility along with market-regulated and non-utility affiliates creates the possibility of cross-subsidization, thus necessitating the full Exhibit M showing. The safe-harbors are designed for transactions involving situations where such a possibility does not exist.

31. Further, 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 unless it has 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. However, the Commission's jurisdiction does not extend to foreign companies operating outside of U.S. borders. The Commission has acted previously to protect energy customers by requiring access to a foreign parent company's books and records³⁶ and the approval of the Proposed Transaction is conditioned on Applicants' agreement to provide access to *all* books and records within the lawful scope of section 301(c) of the FPA.

6. Assignment to an Affiliate

a. Applicants' Request

32. Applicants state that the Master Agreement permits EDF Development to assign its rights under the Master Agreement to an entity that qualifies as an affiliate of EDF Development under the Master Agreement. That agreement defines an affiliate of a person as any other person that, directly or indirectly, is controlled by, controlling or under common control with, such person.³⁷ Accordingly, Applicants request that the

³⁵ Order No. 669, FERC Stats. & Regs. ¶ 31,200 at P 147. *See also*, Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 13.

³⁶*See New England Power Co.*, 87 FERC ¶ 61,287 (1999). *See also Consolidated Water Power Co.*, 91 FERC ¶ 61,275, at 61,931-61,932 (2000); *PacifiCorp*, 87 FERC ¶ 61,288, at 62,152-62,153 (1999).

³⁷ Application, Exhibit I. The Master Agreement defines "control" in the same section as "the possession, directly or indirectly, of the power to direct or cause the

(continued)

Commission approve any subsequent assignment of EDF Development's rights under the Master Agreement to an affiliate.

b. Commission Determination

33. We will grant EDF Development's request for approval of a subsequent assignment of its rights under the Master Agreement to an affiliate, provided that the assignment does not otherwise reflect a departure from the facts the Commission relied upon in approving the Proposed Transaction. EDF Development must inform the Commission of any such assignment to an affiliate within 30 days of the assignment and provide an explanation showing how the assignment is consistent with our approval of the Proposed Transaction and how it does not reflect a departure from the facts the Commission relied upon in approving the Proposed Transaction. However, if the assignment reflects a departure from those facts, prior Commission authorization under section 203 would be required..

The Commission orders:

(A) The proposed disposition and acquisition of jurisdictional facilities is hereby authorized, as discussed in the body of this order.

(B) Applicants must inform the Commission of any change in circumstances that would reflect a departure from the facts the Commission relied upon in granting the application.

(C) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

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

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

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

direction of the management and policies of an entity, whether through the ownership of securities, by contract or otherwise." Master Agreement, section 9.14.

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

(H) If EDF Development assigns its rights under the Master Agreement to an affiliate and the assignment does not otherwise reflect a departure from the facts the Commission relied upon in approving the Proposed Transaction, Applicants must inform the Commission of that assignment within 30 days; Applicants must also provide an explanation showing how the assignment is consistent with our approval of the Proposed Transaction and how it does not reflect a departure from the facts the Commission relied upon in approving the Proposed Transaction.

By the Commission. Commissioner Kelliher is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.