

125 FERC ¶ 61,188
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

SUEZ Energy North America, Inc.
SUEZ Bidco, LLC
Energy Capital Partners GP I, LLC
FirstLight Power Enterprises, Inc.

Docket No. EC08-124-000

ORDER AUTHORIZING DISPOSITION AND ACQUISITION OF JURISDICTIONAL
FACILITIES

(Issued November 20, 2008)

1. SUEZ Energy North America, Inc. (SUEZ Energy), on behalf of its indirect, wholly-owned subsidiary, SUEZ Bidco, LLC (SUEZ Bidco) (collectively, Purchasers), and Energy Capital Partners GP I, LLC, on behalf of its subsidiary private equity funds (collectively, Sellers) and FirstLight Power Enterprises, Inc. (FirstLight Enterprises) and its public utility subsidiaries (Purchasers, Sellers and FirstLight Enterprises and its public utility subsidiaries collectively, Applicants) jointly request Commission authorization for a disposition of jurisdictional facilities pursuant to section 203 of the Federal Power Act (FPA)¹ resulting from the sale of a 100 percent ownership interest in FirstLight Enterprises to Purchasers. The transaction will result in the disposition of jurisdictional facilities from Energy Capital Partners GP I, LLC that include interconnection facilities, market-based rate schedules and related wholesale power sales contracts, accounts, books and records.

2. The Commission has reviewed the application under the Commission's Merger Policy Statement.² As discussed below, we will assert jurisdiction under, and authorize

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); *Transactions Subject to FPA Section 203*, Order

(continued...)

the transaction under, sections 203(a)(1)(A)³ and 203(a)(2),⁴ as we find that it is consistent with the public interest. We remind Applicants that when they seek an authorization under section 203 of the FPA, they must specify the subsections of section 203 under which they are seeking authorization.

I. Background

A. Description of Applicants

1. The Sellers

3. FirstLight Enterprises is currently owned, directly or indirectly, by five private equity funds (collectively, Funds): (1) Energy Capital Partners I, LP; (2) Energy Capital Partners I-A, LP; (3) Energy Capital Partners I-B, LP; (4) ECP I (NE Energy IP), LP; and (5) ECP I (NE Energy Co-Invest), LP. The Funds are owned by Energy Capital Partners GP I, LLC, as a general partner, and various passive limited partner investors. The passive investors have no decision-making role in running the business portfolios of the Funds or in the day-to-day operation of their investments, and therefore have no direct or indirect control, over the day-to-day operations of FirstLight Enterprises or its wholly-owned subsidiaries (FirstLight Operating Companies).

4. Energy Capital Partners GP I, LLC is a wholly-owned subsidiary of Energy Capital Partners, LLC, which is primarily involved in the development and acquisition of, and investment in, energy infrastructure assets, and related ownership, operation and management of those assets, including electric generation and inputs to electric generation in North America. Energy Capital Partners, LLC is owned by six individual persons and their estate planning vehicles.

2. FirstLight Enterprises and FirstLight Operating Companies

5. FirstLight Enterprises, through the FirstLight Operating Companies, owns 13 hydroelectric generating facilities in Massachusetts and Connecticut, a coal-fired plant in Massachusetts, and a kerosene-fired facility in Connecticut and is developing a gas-fired

No. 669, FERC Stats. & Regs. ¶ 31,200, *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).

³ 16 U.S.C. § 824b(a)(1)(A) (2006).

⁴ 16 U.S.C. § 824b(a)(2) (2006).

peaking plant in Connecticut. Collectively, FirstLight Enterprises owns approximately 1,538 megawatts (MW) of generation capacity in the ISO New England, Inc. (ISO-NE) balancing authority area.

6. FirstLight Hydro Generating Company (FirstLight Hydro), a wholly-owned subsidiary of FirstLight Enterprises, owns and operates approximately 1,296 MWs of primarily pumped storage and conventional hydroelectric generating assets within the ISO-NE control area, including approximately 108 MWs of hydroelectric generation assets within the Southwest Connecticut submarket. FirstLight Hydro is an exempt wholesale generator and is authorized by the Commission to make wholesale sales of energy, capacity and ancillary services at market-based rates.

7. Mt. Tom Generating Company, LLC (Mt. Tom), a wholly-owned subsidiary of FirstLight Enterprises, owns and operates a 145.7 MW coal-fired electric generating facility and associated interconnection facilities located in Holyoke, Massachusetts within the ISO-NE balancing authority area. Mt. Tom is an exempt wholesale generator and is authorized by the Commission to make wholesale sales of energy, capacity and ancillary services at market-based rates.

8. FirstLight Waterbury Holdings, LLC (FirstLight Waterbury), a wholly-owned subsidiary of FirstLight Enterprises, owns 98 percent of Waterbury Generation LLC (Waterbury Generation).⁵ Waterbury Generation is developing an approximately 96 MW peaking generating facility and associated interconnection facilities located in Waterbury, Connecticut within the Southwest Connecticut submarket. Waterbury Generation expects the facility to be operational on or around July 1, 2009. Waterbury Generation is a self-certified exempt wholesale generator and is authorized by the Commission to make wholesale sales of energy, capacity and ancillary services at market-based rates.

9. FirstLight Power Resources Management, LLC (FirstLight Management), a wholly-owned subsidiary of FirstLight Enterprises, is a power marketer that the Commission authorized to make wholesale sales of energy, capacity and ancillary services at market-based rates. FirstLight Management does not own or operate any generation or transmission facilities.

⁵ Applicants initially state that Waterbury Generation is a wholly-owned subsidiary of FirstLight Enterprises. Application at 1. However, Applicants later state that AW Power Holdings, LLC owns a 1.3 percent interest in Waterbury Generation and that Sasco River Advisors owns a 0.7 percent interest in Waterbury Generation. Application at 6.

3. The Purchasers

10. SUEZ Bidco is a wholly-owned subsidiary of SUEZ Energy, which is a wholly-owned subsidiary of GDF SUEZ, S.A. (GDF SUEZ). GDF SUEZ, a French company, holds ownership interests in a number of energy-related subsidiaries that internationally engage in the production, transportation and distribution of electricity; power marketing; transportation and distribution of natural gas; the transport and distribution of liquefied natural gas; and the worldwide development and ownership of energy projects. SUEZ Energy is a Delaware corporation that owns direct and indirect interests in energy facilities within the United States, Canada and Mexico. SUEZ Energy also manages GDF SUEZ's energy positions in North America, including electricity generation and cogeneration, natural gas and liquefied natural gas, asset-based trading and origination, and retail energy sales related services to commercial and industrial customers. Outside of the Electricity Council of Texas, SUEZ Energy does not own or control any transmission facilities in the United States.

11. SUEZ Energy has an interest in five generating companies located within the ISO-NE balancing authority area, including Pinetree Power Fitchburg, Inc., Pinetree Power, Inc., Pinetree Power-Tamworth, Inc., Ryegate Associates, and Winooski One Partnership. SUEZ Energy also has a non-controlling interest in a 340 MW natural-gas fired electric generating facility (Bellingham Facility) in Bellingham, Massachusetts. The Bellingham Facility is under the operational control of FPL Group, Inc. (FPL) and is consistently treated as FPL-controlled generation for purposes of its market power analyses submitted to the Commission.⁶

12. In addition, SUEZ Energy is affiliated with several energy companies in New England and New York. In New England, SUEZ Energy is affiliated with Green Mountain Power Corporation (Green Mountain), Vermont Gas Systems, Inc. (Vermont Gas), Bucksport Energy, LLC (Bucksport) and Distrigas of Massachusetts, LLC (Distrigas). Green Mountain is a vertically integrated utility that is primarily engaged in the distribution and sale of electricity to retail and wholesale electric service customers in Vermont. It owns and controls approximately 468 MWs of generation in ISO-NE. Green Mountain is also a joint owner of Vermont Transco LLC, which owns the principal electric transmission facilities in Vermont that operate at voltages of 115 kilovolts (kV) and above, and Vermont Power Company, Inc., which operates the transmission facilities. Vermont Gas is an intrastate pipeline that imports natural gas from Canada for delivery to customers in northwestern Vermont. Applicants state that the Vermont Gas system delivers natural gas at retail to its distribution customers and does not supply gas to any material amounts of electric generation. Bucksport owns a 157 MW facility in the ISO-NE market that is fully committed under long-term contracts. Distrigas owns

⁶ Application at 8.

and operates the Everett Marine Liquefied Natural Gas Terminal in Everett, Massachusetts. In the New York Independent System Operator, Inc. (NYISO) balancing authority area, SUEZ Energy is affiliated with Syracuse Energy Corporation, Nassau Energy Corporation, Astoria Energy LLC and SUEZ-DEGS of Rochester, LLC., which are public utilities.

B. Description of the Transaction

13. SUEZ Bidco will acquire all of the ownership interests in FirstLight Enterprises. The net result is that FirstLight Enterprises and the FirstLight Operating Companies will be indirect, wholly-owned subsidiaries of SUEZ Energy and GDF SUEZ.

II. Notice and Responsive Pleadings

14. Notice of Applicants' filing was published in the *Federal Register*, 72 Fed. Reg. 55,062 (2008), with interventions and protests due on or before September 30, 2008. Norwich Public Utilities (Norwich) filed a timely motion to intervene and protest. Representative Christopher S. Murphy of the Fifth District of Connecticut filed comments requesting the Commission's full consideration and review of the transaction. Applicants filed an answer to Norwich's protest. Norwich filed a response to Applicants' answer.

III. Discussion

A. Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), Norwich's timely, unopposed motion to intervene serves to make it a party to this proceeding.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Applicants' answer because it has provided information that assisted us in our decision-making process. We are not persuaded to accept Norwich's answer and will, therefore, reject it.

B. Standard of Review under Section 203

17. FPA section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest. Under the Commission's regulations, its analysis of whether a transaction will be consistent with the public interest generally involves considering three factors: (1) the effect on

competition; (2) the effect on rates; and (3) the effect on regulation.⁷ 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.”⁸ 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.⁹

C. Analysis under Section 203

1. Effect on Competition – Horizontal Market Power

a. Applicants’ Analysis

18. Applicants report that the ISO-NE market is unconcentrated because the Herfindahl-Hirschman Index (HHI)¹⁰ for installed capacity as of August 2007 was 525, which is below the upper limit of an HHI value of 1,000 for an unconcentrated market.¹¹ Using the above assumptions, Applicants calculate SUEZ Energy’s market share to be approximately 1.7 percent, and FirstLight Enterprises’ to be approximately 4.1 percent,

⁷ See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

⁸ 16 U.S.C. § 824b(a)(4) (2006).

⁹ 18 C.F.R. § 33.2(j) (2008).

¹⁰ The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are considered unconcentrated; markets in which the HHI is greater than or equal to 1,000 but less than 1,800 points are considered moderately concentrated; and markets where the HHI is greater than or equal to 1,800 points are considered highly concentrated. The Commission has adopted the Federal Trade Commission/Department of Justice Horizontal Merger Guidelines, which state that in a horizontal merger, an increase of more than 50 HHI in a highly concentrated market or an increase of 100 HHI in a moderately concentrated market fails its screen and warrants further review. U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, 57 Fed. Reg. 41,552 (Sept. 10, 1992), *revised*, 4 Trade Reg. Rep (CCH) ¶ 13,104 (April 8, 1997).

¹¹ Affidavit at 7.

for an HHI change of 14 points. Applicants argue that the transaction does not harm horizontal competition because it does not increase the market HHI to more than 1,000, as per the Merger Policy Statement's Appendix A guidelines. Applicants also note that even if the ISO-NE installed capacity market were moderately concentrated, the transaction would cause no harm to competition because the resultant HHI change is 14 points, well below the threshold of a 100 point HHI change for a moderately concentrated market. Applicants conclude that the effect of the transaction is *de minimis* and requires no further horizontal market power analysis.¹²

19. Applicants identify ISO-NE as the only relevant geographic market in which to analyze the effect of the transaction on horizontal competition. Applicants argue that it is not necessary to perform a full delivered price test to analyze the impact of the transaction on competition, and instead use the "2ab" calculation.¹³ Applicants argue that the 2ab calculation is conservative because it ignores the fact that most of FirstLight Enterprises' capacity is hydroelectric generation capacity that in a more formal delivered price test would be de-rated based on its historical capacity factors. Applicants reason that because the facility is an energy-limited, peaking facility, its economic capacity will shrink much faster than total market capacity. Applicants state that given this fact, the transaction will pass the Commission's screens in all other periods because it passes in the super-peak period. Applicants conclude that further analysis is thus unnecessary.¹⁴ Applicants also argue that the analysis is conservative because it attributes substantial capacity to SUEZ Energy based on its affiliate's fractional interest in Gaz Metro Limited Partnership despite the fact that: (1) its allocable share of equity in that capacity is much smaller; (2) much of that capacity consists of purchases via long-term contracts that do not provide physical control of any generation; and (3) the substantial majority of that capacity is used to serve the retail load of Green Mountain, a utility located in Vermont, which did not restructure its vertically integrated utilities.¹⁵

¹² Application at 13-14.

¹³ Denoting SUEZ Energy's share as "a" percent, and FirstLight Enterprises' 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 $2ab$. *Horizontal Merger Guidelines*, 57 Fed. Reg. at 41,558 n.18.

¹⁴ Affidavit at 6.

¹⁵ *Id.* at 2. Applicants note that this calculation is effectively the calculation for the summer super peak period. They argue that this is the most conservative calculation, because in the other periods, their joint post-transaction market share will be less, primarily as a result of de-rating FirstLight Enterprises' capacity to reflect energy limits. *Id.* at 2-3.

b. Norwich's Protest

20. Norwich is concerned that Applicants have not adequately evaluated the impact of the transaction on competition. Norwich argues that, as a result of the transaction, SUEZ Energy will gain ownership and control of Northfield Mountain, a 1,080 MW pumped storage generating facility.¹⁶ Norwich states that once the transaction is complete, SUEZ Energy will control more than 64 percent of the hydroelectric storage capacity located in New England. Norwich contends that the operation of Northfield Mountain can significantly affect the region's reliability and the viability of alternative electricity sources that rely on the availability of facilities that can perform peaking and backup functions.¹⁷

c. Applicants' Answer

21. Applicants argue that Norwich fails to support its suggestion that the transaction would have an adverse impact on competition. Applicants state that they performed a horizontal power analysis for the transaction using conservative assumptions in accordance with Commission precedent. Applicants reiterate that their consultant used the full rated capacity of all of FirstLight Enterprises' generating facilities so that the analysis accounts for the most severe effects that the transaction could possibly have on the ISO-NE on-peak energy market.

22. Furthermore, Applicants argue that Norwich is attempting to distort the horizontal market power analysis by treating pumped storage hydro as a new product. Applicants point out that the Commission does not treat pumped storage capacity as a separate product market when evaluating a proposed transaction under FPA section 203. According to Applicants, the characteristics of individual generators are only relevant to the extent that they may affect whether the output of the facility can be economically delivered to the relevant market.

d. Commission Determination

23. Applicants have adequately demonstrated that the transaction does not harm horizontal competition in the relevant market. Although Applicants have not performed a full delivered price test as specified in Appendix A of the Merger Policy Statement, they have provided a convincing argument that a full Appendix A analysis is not necessary

¹⁶ Norwich's Protest at 4-5. Pumped storage facilities allow the plant operator to pump water into a reservoir when electricity prices are low and release the water to produce electricity when electricity prices are high.

¹⁷ *Id.*

when analyzing the horizontal competitive impact of units with low capacity factors (peaking units).¹⁸ As Applicants demonstrate, due to the low market concentration in this period, and to the low HHI change induced by the transaction, the transaction does not harm horizontal competition. With respect to off-peak periods, as Applicants note, Commission policy allows them to de-rate energy-limited resources, because their opportunity cost of production is high in off-peak periods.¹⁹ We further agree with Applicants that it is not appropriate to create a separate “product” for pumped storage hydro to analyze the effect of the transaction on horizontal competition. Peak energy, which can be supplied by multiple sources other than pumped storage hydro, is the relevant product in this case and Applicants have shown that the change in market concentration for peak energy is well below the Commission’s threshold for potential harm to competition.

2. Effect on Competition – Vertical Market Power Issues

a. Applicants’ Analysis

24. Applicants assert that the transaction raises no vertical market power concerns. In support, Applicants state that the transaction does not involve the acquisition or transfer of control over any transmission or transportation facilities, other than the FirstLight Operating Companies’ interconnection facilities.²⁰ Furthermore, neither FirstLight Enterprises, nor any of its affiliates, nor SUEZ Energy, nor any of its affiliates, control transmission in any area where the other has generation.²¹

25. Applicants state that Green Mountain provides open access transmission service over its transmission facilities under the ISO-NE Open Access Transmission Tariff and

¹⁸ See, e.g., *Entergy Gulf States, Inc.*, 121 FERC ¶ 61,182 (2007) (approving the applicants’ analysis of three periods, summer super peak 1, summer super peak 2, and shoulder super peak, to measure the presence of a peaking unit in the market).

¹⁹ See *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 344 & n.345 (2007), *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh’g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 (2008), *reh’g pending*.

²⁰ Applicants state that these facilities are only used to transmit the FirstLight Operating Companies’ electrical output to the interstate transmission grid.

²¹ Application at 14-15.

that the Commission has found that having such a tariff on file adequately mitigates any transmission market power.²²

26. Applicants also state that SUEZ Energy will not be able to exercise vertical market power through its Vermont Gas affiliation. Applicants state that Vermont Gas system's sole purpose is to deliver natural gas at retail to its distribution customers in northwestern Vermont, and that it does not supply gas to any material amounts of electric generation. Applicants conclude that SUEZ Energy cannot use Vermont Gas's system to either favor its own generation or disadvantage competitors.²³

27. Applicants report that SUEZ Energy's ownership of Distrigas does not raise vertical market power concerns. Distrigas's system is connected to the Algonquin Gas Transmission Pipeline, Tennessee Gas Pipeline, and the Boston Gas local distribution system. Distrigas also has a direct connection to Mystic Development, LLC's generating units, Mystic Units 8 and 9 (Mystic Units). This direct connection is the Mystic Units' only direct source of supply. Applicants explain that even if the Commission deems the Mystic Units' capacity as controlled by Distrigas, the effect would be to increase SUEZ Energy's market share to 5.6 percent, which increases its post-transaction share to 9.7 percent and the HHI to 46 points.

28. Applicants further argue that SUEZ Energy, through its ownership of Distrigas, is unable to disadvantage competing generators in the region because competing generators can readily obtain gas from Algonquin Pipeline, Tennessee Gas Pipeline and the BostonGas/Keyspan gas local distribution company. Applicants also state that SUEZ Energy and its affiliates have not and will not erect barriers to entry into the relevant markets.

b. Norwich's Protest

29. Norwich argues that SUEZ Energy's control of gas storage capacity in New England enhances its position to affect the price of electricity or gas during peak periods. Norwich states that during cold weather periods, gas supply constraints in New England make it difficult to obtain needed supplies. In light of cold weather periods, Norwich contends that SUEZ Energy has not provided sufficient information about its gas supplies, including the amount of gas that Distrigas sells to units other than the Mystic Units, for the Commission to make a determination on whether the transaction is in the public interest.

²² *Id.* at 15 (citing Order No. 697, 121 FERC ¶ 61,260 at P 21).

²³ *Id.*

30. Norwich states that Applicants' demonstration that the Mystic Units make little difference in terms of SUEZ Energy's overall shares of New England's generating capacity misses several key points of concern to the region. Norwich states that Distrigas does not sell all of its available gas to the Mystic Units. Norwich argues that SUEZ Energy has the capability to increase the energy price paid for its own generation sources by withholding gas during peak periods; or alternatively, withholding Northfield Mountain's energy and raising the price of gas that Distrigas makes available during "cold snap" periods.²⁴ Norwich states that because of the importance of supply availability, especially during cold weather periods, and lack of deliverability throughout the region, New England has adopted a set of special procedures for operations during cold weather periods.

c. Applicants' Answer

31. Applicants state that FirstLight Enterprises controls no gas facilities in the electricity industry. Thus, Applicants argue that any vertical effect of the transaction would involve an increase in the incentive to reduce supply to and raise natural gas prices to rivals in the electricity market, although there would be no enhancement in SUEZ Energy's ability to do so.²⁵

32. Rather, Applicants contend that SUEZ Energy's subsidiary Distrigas has neither the ability nor the incentive to withhold natural gas for its own gain because Distrigas is competitively relevant only as the sole source of gas for the Mystic Units. Applicants further argue that natural gas is typically sold and delivered on a daily basis; hence any withholding strategy would have to encompass the entire day rather than only a targeted part of the day. Applicants state that any extra profits SUEZ Energy would hypothetically gain during peak periods would be offset by Distrigas's loss of revenue during non-peak periods.²⁶

d. Commission Determination

33. In transactions combining electric generation assets with inputs to generating power (such as natural gas, transmission, or fuel), competition can be harmed if a transaction increases the merged 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 merged firm could impede entry of new

²⁴ Norwich's Protest at 7.

²⁵ *Id.* at 10.

²⁶ *Id.* at 11.

competitors or inhibit existing competitors' ability to undercut an attempted price increase in the downstream wholesale electricity market. Here, as discussed below, Applicants have shown that the transaction does not raise any of these concerns.

34. We agree with Applicants that they do not own or control assets that would allow them to exert vertical market power in wholesale power markets. We disagree with Norwich that Applicants' combination of generation and natural gas storage will harm vertical competition. In Order No. 642, we stated that in order for a merger to create or enhance vertical market power, both the upstream and downstream markets must be highly concentrated.²⁷ Applicants have shown that the downstream market is not highly concentrated after the transaction. Moreover, as Norwich itself notes, New England has adopted a set of special procedures for operations during cold weather periods to frustrate any potential for Applicants to engage in the type of behavior Norwich posits. We therefore find that the transaction does not raise vertical market power concerns.

3. Effect on Rates

a. Applicants' Analysis

35. Applicants state that the acquisition will not have an adverse effect on rates because FirstLight Enterprises and SUEZ Energy's subsidiaries make all wholesale sales of energy and capacity at negotiated market-based rates. Applicants also state that concern over transmission rates is inapplicable because the transaction does not involve the transfer of control over any transmission services.

b. Norwich's Protest

36. Norwich states that it is concerned that Applicants have not properly or adequately evaluated the impact that approval of the proposed transaction may have on rates for both gas and electricity services in New England.

c. Commission Determination

37. The Commission has found that, where electricity is sold under market-based rates, the transaction is unlikely to have an adverse impact on rates.²⁸ Since the transaction will not affect rates for market-based sales and the Applicants are not transferring control over transmission, we find that the transaction will not have an

²⁷ Order No. 642 at 31,911.

²⁸ *JPMorgan Chase & Co.*, 123 FERC ¶ 61,088, at P 23 (2008) (citing *Union Electric d/b/a AmerenUE*, 114 FERC ¶ 61,255, at P 45 (2006)).

adverse effect on rates.²⁹ We note that no protests regarding the effect on rates were filed, except for Norwich's unsupported claim that Applicants have not adequately analyzed the effect of the transaction on rates.

4. Effect on Regulation

a. Applicants' Analysis

38. Applicants state that the transaction will not impair state or federal regulation. Applicants state that the jurisdictional status of the Applicants under the FPA will not change as a result of the transaction. Additionally, after the transaction is consummated, FirstLight Enterprises and SUEZ Energy's public utility subsidiaries and affiliates will continue to be regulated by the various states in which they operate in the same way as before the transaction is consummated.

b. Commission Determination

39. We find that neither state nor federal regulation will be impaired by the transaction. 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 transaction will not create a regulatory gap at the federal level, because the Commission will retain its authority over Applicants. Further, Applicants state that following the 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 the facts presented in the application, we find that the transaction will not have an adverse effect on federal or state regulation.

5. Cross-Subsidization

a. Applicants' Analysis

40. Applicants state that the transaction does not pose a risk of cross-subsidization and does not pledge or otherwise encumber utility assets. Further, Applicants state that although SUEZ Energy is affiliated with Green Mountain, the transaction does not affect

²⁹ Order No. 652 requires that sellers with market-based rate authorization timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. The foregoing authorization may result in a change in status. Accordingly, Applicants are advised that they must comply with the requirements of Order No. 652. In addition, Applicants shall make appropriate filings under section 205 of the FPA, to implement the transaction.

the ownership of Green Mountain and does not result in the transfer of control over it. Moreover, Applicants state that they do not have any captive customers. Applicants confirm that, based on the facts known to them, or that are reasonably foreseeable, the 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; or (4) any new affiliate contract between a non-utility associate company and a traditional public utility 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 206.³⁰

b. Commission Determination

41. Based on Applicants' representations, we 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.

42. 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 the transactions with or the business of such public utility. The approval of this transaction is based on such examination ability.

³⁰ Exhibit M at M-2 to -3.

D. Additional Issues**1. Scotland Project****a. Norwich's Protest**

43. Norwich and FirstLight Hydro are involved in a competitive relicensing process for FirstLight Hydro's Scotland Hydro Project (Project).³¹ Norwich requests that the Commission require SUEZ Energy to make certain affirmations related to the Project as a condition of any section 203 authorization. First, Norwich requests that the Commission require SUEZ Energy to reaffirm FirstLight Hydro's current Project relicensing proposal. In addition, Norwich has explained that it is fully prepared to improve the Project if SUEZ Energy does not intend to improve it.

44. Second, Norwich requests that the Commission require SUEZ Energy to make assurances, including: (1) that SUEZ Energy will continue to cooperate with Norwich with respect to its studies, site access and Norwich's preparation of its competing license application; (2) that SUEZ Energy is committed to FirstLight Hydro's run-of-river proposal and the prompt completion of any associated Project upgrades; and (3) that there are no conditions on the sale or known plans that would in any way impede the best development of the river. Finally, Norwich requests that the Commission condition approval of the transaction on SUEZ Energy being subject to all FPA provisions as if SUEZ Energy was the initial licensee.

b. Applicants' Answer

45. Applicants respond that these issues are extraneous to this proceeding and that the Commission does not have the authority, in a section 203 proceeding, to impose conditions and requirements related to the Project. Applicants argue that the Commission's jurisdiction in a section 203 proceeding is limited to whether the transfer of ownership of FirstLight Enterprises to SUEZ Energy is consistent with the public interest and does not extend to issues governed by another statutory process.³²

c. Commission Determination

46. Norwich requests that the Commission require SUEZ Energy to provide information and assurances to Norwich regarding the Project. As the Commission

³¹ Norwich's Protest at 8.

³² Applicants' Answer at 5 (citing *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002); *Wabash Valley Power Ass'n, Inc. v. FERC*, 268 F.3d 1105, 1116 (D.C. Cir. 2001)).

explained in the Merger Policy Statement, however, it will not consider matters that are unrelated or irrelevant to the merger in a section 203 proceeding.³³ The issues between Norwich and FirstLight Hydro, such as site access and cooperation, are wholly separate from, and unrelated to, the Commission's section 203 analysis. Therefore the Commission will deny Norwich's requests.

2. Additional Financial Scrutiny

a. Norwich's Protest

47. In light of current economic conditions and the importance of the FirstLight Operating Companies' facilities, Norwich requests that the Commission scrutinize the capability and the financial qualifications of the Purchasers. Norwich states that the public needs more information about SUEZ Energy's capital investment decisions and operations in the New England markets to ensure that SUEZ Energy will maintain, improve and sustain the FirstLight Operating Companies' facilities.

b. Applicants' Answer

48. In its answer, Applicants respond that such financial scrutiny is outside the scope of a section 203 proceeding. In addition, Applicants state that SUEZ Energy has a strong global financial foundation and has the financial and technical characteristics necessary to own and operate the FirstLight Enterprise generation assets.

c. Commission Determination

49. While the Commission is aware of the developments in the financial markets, Norwich has not persuaded us that the additional financial information it seeks is necessary to protect the public. As noted above, our approval of this transaction is based in part on our examination ability under section 301(c) of the FPA, which 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 the transactions with or the business of such public utility. Moreover, we find that Norwich has not provided adequate reason for us to depart from our section 203 guidelines and precedent in this circumstance.³⁴ For the reasons stated above, we will deny Norwich's request for additional information.

³³ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,127.

³⁴ See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044; Order No. 642, FERC Stats. & Regs. ¶ 31,111; and Order No. 669, FERC Stats. & Regs. ¶ 31,200.

The Commission orders:

- (A) The transaction is 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, amounts, 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 appropriate filings under section 205 of the FPA, as necessary, to implement the transaction.
- (G) Applicants shall notify the Commission within 10 days of the date that the disposition and acquisition of jurisdictional facilities have been consummated.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.