

126 FERC ¶ 61,140
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. Docket Nos. EC09-36-000
Constellation Energy Group, Inc.
Handsome Lake Energy, LLC

EDF Development, Inc. EC09-37-000
Constellation Energy Group, Inc.
CER Generation II, LLC

EDF Development, Inc. EC09-38-000
Constellation Energy Group, Inc.

EDF Development, Inc. EC09-39-000
Constellation Energy Group, Inc.
Constellation Power Source Generation
LLC

EDF Development, Inc. EC09-41-000
Constellation Energy Group, Inc.
Constellation Power Source Generation
LLC

EDF Development, Inc. EC09-42-000
Constellation Energy Group, Inc.

EDF Development, Inc. EC09-43-000
Constellation Energy Group, Inc.

EDF Development, Inc. EC09-44-000
Constellation Energy Group, Inc.
Constellation Power Source Generation
LLC

EDF Development, Inc. EC09-45-000
Constellation Energy Group, Inc.

EDF Development, Inc.
Constellation Energy Group, Inc.
Constellation Power Source Generation,
Inc.

EC09-46-000

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), Constellation Energy Group, Inc. (Constellation Energy) and the other applicants identified above (collectively, Applicants) filed ten separate applications under section 203 of the Federal Power Act (FPA)¹ seeking Commission authorization for the disposition and acquisition of jurisdictional facilities under an agreement pursuant to which Constellation Energy would have the option but not an obligation to sell its ownership interests in various non-nuclear generating plants and certain associated jurisdictional assets to EDF Development (Proposed Transactions).² Applicants request expedited treatment of their Application, with approval on or before February 20, 2009.

2. The Commission has reviewed the Proposed Transactions under the Merger Policy Statement.³ As discussed below, we will authorize the Proposed Transactions under

¹ 16 U.S.C. § 824b (2006).

² The Proposed Transactions are 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 Group. 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 (JV Transaction). The application for the JV Transaction is filed in Docket No. EC09-40-000.

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*

(continued)

section 203(a)(1) and 203(a)(2), as we find that they are 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 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.

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, at P 28 (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).

4. EDF Development was formed in 2007 to partner with Constellation Energy 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. As explained in more detail below, EDF Development is the entity that, under the Master Agreement, is to purchase the 49.99 percent interest in Constellation Nuclear and would purchase the non-nuclear generation facilities pursuant to the Master Agreement Put Options, if Constellation Energy were to exercise any of those put options.

6. 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. 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.⁵ 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 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

⁵ 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).

companies that are holding companies solely with respect to one or more QFs, EWGs, or foreign utility companies.⁶

7. Eagle is a power marketer, co-owned by EDF Trading North America, Inc. and EDF Trading North America Management, LLC.⁷ The Commission authorized Eagle to engage in wholesale sales of electricity at market-based rates.⁸ Applicants state that Eagle is not, and does not directly or indirectly own or control, a franchised utility in North America. Eagle also does not own any physical natural gas transportation facilities or own or control other physical inputs to electric generation or transmission.

8. 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

9. 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, Inc. (Constellation Power), Constellation Nuclear Energy Group, LLC (Constellation Nuclear), Constellation Energy Commodities Group, Inc., and Constellation Energy, Inc.

10. Constellation Energy also owns numerous additional energy companies that are engaged in a variety of energy-related businesses, including retail gas supply, electric

⁶ See 18 C.F.R. § 366.3 (2008).

⁷ 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).

⁸ *Eagle Energy Partners I, L.P.*, Docket No. ER03-774-000 (June 11, 2003) (unpublished letter order).

generation, electric products and services, fuel processing, and operations and maintenance services.⁹

11. BG&E is a direct wholly-owned subsidiary of Constellation Energy. 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 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.¹⁰ Applicants note that BG&E has no captive retail customers because Maryland has adopted retail choice.

12. 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 49.99 percent of Constellation Energy's nuclear business.

13. Constellation Power, which has market-based rate authority,¹¹ 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.

3. Facilities Associated with the Put Options

14. Handsome Lake Energy, LLC, a wholly-owned indirect subsidiary of Constellation Energy, owns a 100 percent interest in the Handsome Lake power plant, an approximately 267 MW natural gas-fired generating facility located in Rockland

⁹ Constellation Energy's additional energy companies are described in Exhibit B-2 of the Application.

¹⁰ 18 C.F.R. § 33.1(b)(5) (2008).

¹¹ *AmerGen Vermont, LLC*, 90 FERC ¶ 61,307 (2000).

Township, Pennsylvania. Handsome Lake is located in the control area of PJM and has been granted market-based authority by the Commission.¹²

15. The West Valley facility is an approximately 200 MW capacity natural gas-fired generating facility located in West Valley City, Utah. The facility is owned by CER Generation II, LLC (CER Generation), which is an indirect, wholly-owned subsidiary of Constellation Energy. CER Generation was granted market-based rate authority by the Commission.¹³

16. The Panther Creek facility is an 80 MW waste coal-fired qualifying facility located in Colver Township, Pennsylvania. The facility is owned by Panther Creek Partners. Constellation Energy, through wholly-owned subsidiaries, has a 50 percent ownership interest in Panther Creek Partners.

17. The Colver Power facility is a 104 MW waste coal-fired qualifying facility located in Colver Township, Pennsylvania. The facility is owned by Inter-Power/AhlCon Partners L.P. Constellation Energy, through wholly-owned subsidiaries, has a 25 percent economic ownership interest and 50 percent control ownership interest in Inter-Power/AhlCon Partners L.P.

18. The C.P. Crane Plant consists of a 385 MW coal-fired generation facility plus a 14 MW oil-fired combustion turbine, located in Baltimore County, Maryland. The facility is owned by Constellation Power.

19. The Conemaugh plant is a 1,711 MW coal-fired facility located in Indiana County, Pennsylvania. Constellation Power has a 10.6 percent undivided ownership interest in this facility.

20. The ACE Cogen Facility is a 102 MW (net) coal-fired topping cycle cogeneration qualifying facility located in Trona, California. The facility is owned by ACE Cogeneration Company. Constellation Energy, through wholly-owned subsidiaries, has a 33.8 percent economic ownership interest and 50 percent control ownership interest in ACE Cogeneration Company.

21. The Sunnyside Cogeneration Facility is a 51 MW cogeneration qualifying facility located in Sunnyside, Utah. The facility is owned by Sunnyside Cogeneration

¹² See *Constellation Power Source*, Docket No. ER01-556-000, *et al.* (Jan. 19, 2001) (unpublished letter order).

¹³ See *CER Generation II, LLC*, Docket No. ER08-860-000 (May 27, 2008) (unpublished letter order).

Associates. Constellation Energy, through wholly-owned subsidiaries, has a 50 percent ownership interest in Sunnyside Cogeneration Associates.

22. Perryman is a 355 MW natural gas/oil fired unit located in Harford County, Maryland. Perryman is owned by Constellation Power.

23. The Safe Harbor Facility is a 417 MW hydroelectric facility located in Safe Harbor, Pennsylvania. The facility is owned by the Safe Harbor Water Power Corporation.¹⁴ Constellation Power has a 66.7 percent economic ownership interest and 50 percent control ownership interest in the Safe Harbor Water Power Corporation.

24. The Keystone plant is a 1,711 MW coal-fired facility located in Armstrong and Indiana Counties, Pennsylvania. Constellation Power has a 21.0 percent undivided ownership interest in this facility.

B. Description of the Proposed Transaction

25. On December 17, 2008, Constellation Energy, Constellation Nuclear, EDF International, and EDF Development executed the Master Agreement.¹⁵ 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

¹⁴ See *Safe Harbor Water Power Corporation*, Docket No. ER08-537-000, *et al.* (May 6, 2008) (unpublished letter order). The Commission granted market-based rates to Safe Harbor Water Power Corporation effective March 1, 2008.

¹⁵ 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.

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.

26. Under the terms of the Master Agreement, the parties have agreed to an exercise price with respect to each of the 11 generation assets that is subject to a put option (as such interests are described above relating to Handsome Lake Energy, West Valley, Panther Creek, Colver Power, C.P. Crane, Conemaugh, ACE Cogen, Sunny Side Cogen, Perryman, Safe Harbor, and Keystone), provided that the aggregate exercise prices under the put options may not exceed \$2 billion. Subject to such limitation and to the satisfaction of other customary conditions precedent (including the receipt of all necessary regulatory approvals), Constellation Energy has complete discretion over which of the put options it may wish to exercise. If Constellation Energy exercises any of the put options, EDF Development is obligated to complete the purchase of the affected generating plant within five business days following the satisfaction of all conditions precedent to closing. 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. The put options expire no later than December 31, 2010.

II. Notice of Filing and Responsive Pleadings

27. Notices of the Put Option Applications were published in the *Federal Register*, 74 Fed. Reg. 2,579 (2009), with interventions and protests due on or before January 27, 2009. The Public Service Commission of Maryland filed a notice of intervention, and the Maryland Office of People's Counsel filed a timely motion to intervene.

28. Notice of the Applicants' Clarification to their Application was published in *Federal Register*, 74 Fed. Reg. 7414 (2009), with interventions and protests due on or before February 13, 2009. None were filed.

III. Discussion

A. Procedural Issues

29. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹⁶ 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 Under Section 203

30. 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.¹⁷ 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."¹⁸ 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.¹⁹

C. Analysis Under Section 203

1. Effect on Competition – Horizontal Market Power

a. Applicants' Analysis

31. 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

¹⁶ 18 C.F.R. § 385.214 (2008).

¹⁷ See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

¹⁸ 16 U.S.C. § 824b(a)(4) (2006).

¹⁹ 18 C.F.R. § 33.2(j) (2008).

generation overlaps.²⁰ Applicants state that Constellation Energy owns approximately 139 MW of generation in CAISO.²¹ 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.²² 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.²³

32. Applicants state that although several of the generating facilities included in the Master Agreement Put Options (Handsome Lake, Perryman, Panther Creek, Colver Power, Keystone, Conemaugh, C.P. Crane, and Safe Harbor) and one generating facility included in the JV Transaction (Calvert Cliffs Nuclear Power Plant) are located in the PJM market, neither EDF Development nor any EDF Development affiliate owns any generation assets located in the PJM market. Thus, Applicants state that the only competitive effect that would occur as a result of Constellation Energy exercising a put option with regard to any of these assets would be to deconcentrate the PJM market. Hence, Applicants contend that no further analysis of the PJM market is required.

b. Commission Determination

33. The Commission finds that the Proposed Transactions do not raise horizontal market power concerns. Applicants have demonstrated that the effect of combining their

²⁰ Exhibit J, Affidavit and Exhibits of William Hieronymus (Hieronymus Affidavit).

²¹*Id.* Applicants state that all of these facilities are QFs, and that all of the output of these QFs is committed under long-term contracts.

²² *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).

²³ Hieronymus Affidavit at 2-3.

operations in the relevant geographic markets is *de minimis*. Therefore, the Master Agreement Put Options either considered alone or in conjunction with the JV 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

34. Applicants contend that the Proposed Transactions do not raise any vertical market power concerns. Applicants state that none of them 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 Energy’s affiliate, BG&E, owns transmission in PJM, which is under PJM’s operational control and subject to PJM’s OATT’s terms and conditions.²⁴ Applicants contend that the Proposed Transactions raise no vertical market power issues because no change in control over electric transmission assets, other than interconnection facilities, will occur under the Master Agreement. Moreover, the Proposed Transactions do not involve the transfer of any gas transportation facilities or inputs to electric generation.

b. Commission Determination

35. 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.

36. 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

²⁴ *Id.* at 3.

merger to harm competition.²⁵ 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

37. Applicants assert that the Proposed Transactions will not have an adverse impact on transmission or power rates. Applicants state that none of the facilities being transferred under the Proposed Transactions are included in any transmission rates or rates for long-term wholesale requirements customers. 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

38. The Commission finds that the Proposed Transactions will not adversely affect rates. None of the facilities being transferred pursuant to the Master Agreement Put Options 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.²⁶ We note that no customer has argued that its rates will be affected by the Proposed Transactions.

²⁵ 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.

²⁶ *Union Electric Co. d/b/a Ameren UE*, 114 FERC ¶ 61,255, at P 45 (2006).

4. Effect on Regulation

a. Applicants' Analysis

39. Applicants state that the Proposed Transactions will not affect the manner or extent to which the Commission or 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 Transactions. The facilities that are covered by the Proposed Transaction will remain subject to regulation to the same extent each is regulated presently.

b. Commission Determination

40. Applicants have shown that the Proposed Transactions 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 a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap at the federal or state level.²⁷ 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 Transactions, 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' representations, we find that the Proposed Transactions will not have an adverse effect on federal or state regulation. We note that no state agency protested the Proposed Transactions.

5. Cross-subsidization

a. Applicants' Analysis

41. 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 Energy's affiliate, is a traditional utility that owns or provides transmission service over

²⁷ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

jurisdictional transmission facilities.²⁸ Applicants also, however, state that BG&E is not involved in any of the transactions covered by the Master Agreement.²⁹

42. The Applicants also provide 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.

b. Commission Determination

43. Based on Applicants' representations, in Exhibit M-1, as discussed above, the Commission finds that the Proposed Transactions 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 transactions means that the Proposed Transactions fall within the scope of the "safe harbor" discussed in Order No. 669 and the Supplemental Policy Statement.³⁰ The Commission's focus regarding cross-subsidization generally has been on preventing a transfer of benefits from a public

²⁸ Clarification at 4.

²⁹ Applicants assert that because BG&E is not involved in the Proposed transactions, this transaction falls within the scope of the "safe harbor" for transactions in which certain traditional utilities are not involved, and that it does not raise any issues with respect to cross-subsidization. Clarification at 2-4.

³⁰ Order No. 669, FERC Stats. & Regs. ¶ 31,200 at P 147. *See also*, Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 13.

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 Energy 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.

44. 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 of any person who controls, directly or indirectly, a jurisdictional public utility insofar as the books and records relate to transactions with the business or 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 records³¹ and the approval of the Proposed Transactions are 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

45. Applicants state that the Master Agreement permits EDF Development to assign its rights under the Master Agreement to an entity that qualifies as EDF Development's affiliate 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.³² Accordingly, Applicants request that the Commission approve any subsequent assignment of EDF Development's rights under the Master Agreement to an affiliate.

³¹ See *New England Power Co.*, 87 FERC ¶ 61,287 (1999). See also *Consolidated Water Power Company*, 91 FERC ¶ 61,275, at 61,931-61,932 (2000); *PacifiCorp*, 87 FERC ¶ 61,288, at 62,152-62,153 (1999).

³² The Master Agreement defines "control" in the same section as "the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of an entity, whether through the ownership of securities, by contract or otherwise."

b. Commission Determination

46. We will grant EDF'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 transactions. 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 transactions. 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 Master Agreement Put Option transactions are hereby authorized, as discussed in the body of this order.
- (B) Applicants must inform the Commission of any change in circumstances that departs from the facts the Commission relied upon in granting the Put Option Applications.
- (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 Master Put Option transactions.
- (G) Applicants shall notify the Commission within 10 days of the date on which each of the Proposed Transactions 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.