

170 FERC ¶ 61,065
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Gauley River Power Partners, LLC

Docket No. EC20-12-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued January 30, 2020)

1. On October 21, 2019, pursuant to section 203(a)(1) of the Federal Power Act (FPA)¹ and Part 33 of the Commission's regulations,² Gauley River Power Partners, LLC (Gauley River) filed an application requesting authorization for the disposition of its upstream ownership interests to Central Rivers Powers US, LLC (Buyer) (Proposed Transaction).
2. We have reviewed the Proposed Transaction under the Commission's Merger Policy Statement.³ As discussed below, we authorize the Proposed Transaction as consistent with the public interest.

¹ 16 U.S.C. § 824b (2018).

² 18 C.F.R. pt. 33 (2019).

³ *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996) (cross-referenced at 77 FERC ¶ 61,263) (Merger Policy Statement), reconsideration denied, Order No. 592-A, 79 FERC ¶ 61,321 (1997); *see also FPA Section 203 Supplemental Policy Statement*, 120 FERC ¶ 61,060 (2007) (Supplemental Policy Statement), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008); *Transactions Subject to FPA Section 203*, Order No. 669, 113 FERC ¶ 61,315 (2005), *order on reh'g*, Order No. 669-A, 115 FERC ¶ 61,097, *order on reh'g*, Order No. 669-B, 116 FERC ¶ 61,076 (2006); *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000) (cross-referenced at 93 FERC ¶ 61,164), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001).

I. Background

A. Description of Applicants/Parties

1. Gauley River

3. Gauley River states that it is a limited liability company that was formed to finance, construct, operate, and maintain an approximately eighty megawatt (MW) hydroelectric generating facility (Summersville Project) located in the PJM Interconnection, L.L.C. (PJM) market.⁴

4. According to Gauley River, it is wholly owned by EGPNA REP Hydro Holdings, LLC (EGPNA REP Hydro), which is wholly owned by EGPNA Renewable Energy Partners, LLC (EGPNA Renewable Energy). Gauley River states that EGPNA REP Holdings, LLC (EGP Seller) and EFS Green Power Holdings, LLC (EFS Seller) (together, Sellers) are the sole members of EGPNA Renewable Energy.

5. Gauley River states that EGP Seller is an indirect, wholly owned subsidiary of Enel S.p.A. (Enel), an Italian joint-stock company. EFS Seller is an indirect, wholly owned subsidiary of General Electric Company.

2. Buyer

6. Gauley River states that Buyer is a limited liability company that was formed for the purpose of acquiring EGPNA REP Hydro. According to Gauley River, the ultimate upstream controlling entity of Buyer is Hull Street Energy, LLC (Hull Street), which is a private equity firm primarily involved in the development and acquisition of, and investment in, energy infrastructure assets, and related ownership, operation and management of these assets, including electric generation.

7. Gauley River explains that Hull Street is currently controlled by Sarah Wright, an individual who is not affiliated with any electric generation facility, electric transmission facility, or any essential input to electricity products or electric power production other than through Hull Street. Gauley River states that Hull Street is affiliated with generation facilities in the PJM, ISO New England Inc. (ISO-NE), and New York Independent System Operator, Inc. markets, each with a combined generation capacity of approximately 67 MW, 345 MW, and 108 MW, respectively.⁵

⁴ October 21 Application of Gauley River Power Partners, LLC (Application) at 2.

⁵ *Id.* at 7-10.

8. Gauley River states that Hull Street is also affiliated with Berkshire Feedline Acquisition Limited Partnership, which owns a 6.2-mile natural gas pipeline lateral in ISO-NE.⁶

9. According to Gauley River, none of the Buyer nor any of its affiliates owns or controls any other generation, transmission, or distribution facilities, or inputs to electric generation.⁷

B. Description of the Proposed Transaction

10. Gauley River states that, pursuant to the Proposed Transaction, Sellers will sell their ownership interests in Gauley River to Buyer. Following the consummation of the Proposed Transaction, Buyer will be the indirect, upstream owner of 100 percent of the interests in Gauley River.⁸

II. Notice of Filing and Responsive Pleadings

11. Notice of the Application was published in the *Federal Register*, 84 Fed. Reg. 57,719 (2019), with interventions and protests due on or before November 12, 2019. On November 12, 2019, City of Summersville, West Virginia (Summersville) and Noah Corp. (Noah) (together, Protesters) filed a motion to intervene and protest (Protest). On November 19, 2019, Gauley River filed an answer (Answer).

III. Discussion

A. Procedural Matters

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept Gauley River's answer because it has provided information that assisted us in our decision-making process.

⁶ *Id.* at 8.

⁷ *Id.* at 10.

⁸ *Id.* at 11.

B. Substantive Matters**1. FPA Section 203 Standard of Review**

14. FPA section 203(a)(4) requires the Commission to approve proposed dispositions, consolidations, acquisitions, or changes in control if the Commission determines that the proposed transaction will be consistent with the public interest.⁹ The Commission's analysis of whether a proposed transaction is 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.¹⁰ FPA section 203(a)(4) also requires the Commission to find 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, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."¹¹ The Commission's regulations establish verification and informational requirements for entities that seek a determination that a proposed transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.¹²

2. Analysis of the Proposed Transaction**a. Effect on Horizontal Competition****i. Gauley River's Analysis**

15. Gauley River states that the Proposed Transaction raises no horizontal market power concerns because all of the output of the Summersville Project is committed to Appalachian Power Company, an unaffiliated entity, under a long-term power purchase agreement (PPA) that extends until July 30, 2027.¹³ Furthermore, Gauley River notes that

⁹ 16 U.S.C. § 824b(a)(4).

¹⁰ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

¹¹ 16 U.S.C. § 824b(a)(4).

¹² 18 C.F.R. § 33.2(j) (2019).

¹³ Application at 13 (citing *Nev. Sun-Peak Ltd. P'ship*, 97 FERC ¶ 62,017 (2001); *Am. Ref-Fuel Co. of Essex Cnty.*, 94 FERC ¶ 62,113 (2001); *Morgan Stanley Capital Grp. Inc.*, 69 FERC ¶ 61,175, at 61,692-93 (1994)).

Buyer currently controls only sixty-seven MWs in PJM, which is roughly 0.037 percent of PJM's installed capacity.¹⁴

ii. Commission Determination

16. In analyzing whether a proposed transaction will adversely affect horizontal competition, the Commission examines the effects on concentration in the generation markets and whether the proposed transaction otherwise creates the incentive and ability to engage in behavior harmful to competition, such as withholding of generation.¹⁵

17. Based on Gauley River's representations, we find that the Proposed Transaction will not have an adverse effect on horizontal competition because all of the output of the Summersville Project is fully committed to an unaffiliated entity under a long-term PPA.¹⁶ In addition, there is a *de minimis* amount of overlap of capacity in PJM.

b. Effect on Vertical Competition

i. Gauley River's Analysis

18. Gauley River states that the Proposed Transaction raises no vertical market power concerns because it does not involve transmission facilities and will not result in a combination of generation facilities with transmission facilities or other upstream relevant products.¹⁷ In addition, neither Gauley River nor Buyer owns or controls any inputs to electricity products or electric power production in the relevant market.¹⁸

ii. Commission Determination

19. In analyzing whether a proposed transaction presents vertical market power concerns, the Commission considers the vertical combination of upstream inputs, such as transmission or natural gas, with downstream generating capacity. As the Commission has previously found, transactions that combine electric generation assets with inputs to

¹⁴ *Id.* at 13-14.

¹⁵ *Nev. Power Corp.*, 149 FERC ¶ 61,079, at P 28 (2014).

¹⁶ *See Denver City Energy Associates, L.P.* 131 FERC ¶ 61,029, at P 20 (2010) (citing *NorthWestern Corp.*, 117 FERC ¶ 61,100, at P 23 (2006)).

¹⁷ Application at 14.

¹⁸ *Id.* Although Buyer is affiliated with an entity that owns natural gas pipeline assets, those assets are located in ISO-NE, and therefore have no effect on competition in PJM, where the asset subject to the transaction is located. *Id.* at 8.

generating power (such as natural gas, transmission, or fuel) can harm competition if the transaction increases an entity's ability or incentive to exercise vertical market power in wholesale electricity markets. For example, by denying rival entities access to inputs or by raising their input costs, an entity created by a transaction could impede entry of new competitors or inhibit existing competitors' ability to undercut an attempted price increase in the downstream wholesale electricity market.¹⁹

20. Based on Gauley River's representations, we find that the Proposed Transaction will not have an adverse effect on vertical competition because the Proposed Transaction does not involve transmission facilities, Buyer is not affiliated with any transmission facilities, and neither Gauley River nor Buyer owns or controls any inputs to electricity products or electric power production in the PJM market.

c. Effect on Rates

i. Gauley River's Analysis

21. Gauley River states that the Proposed Transaction will have no adverse effect on rates because, both before and after the Proposed Transaction is consummated, all wholesale sales of electric energy, capacity and ancillary services by Gauley River will be made pursuant to its market-based rate authority. Gauley River states that the Commission has established that market-based wholesale power sales do not raise concerns about a transaction's possible adverse effect on rates.²⁰ In addition, Gauley River states that it has no captive wholesale customers.

ii. Commission Determination

22. Based on Gauley River's representations, we find that the Proposed Transaction will not have an adverse effect on wholesale rates because all wholesale sales of electric energy, capacity, and ancillary services will continue to be made at market-based rates. In addition, the Proposed Transaction will not have an adverse effect on transmission rates because it does not involve transmission facilities.

d. Effect on Regulation

i. Gauley River's Analysis

23. Gauley River states that the Proposed Transaction will have no adverse effect on regulation because Gauley River will continue to be regulated by the Commission under

¹⁹ *Upstate N.Y. Power Producers*, 154 FERC ¶ 61,015, at P 15 (2016); *Exelon Corp.*, 138 FERC ¶ 61,167, at P 112 (2012).

²⁰ Application at 15.

the FPA to the same degree as before.²¹ Gauley River further states that the Proposed Transaction will not impair the ability of any state authorities to regulate retail sales because Gauley River does not make any retail sales subject to the ratemaking jurisdiction of a state commission.²²

ii. Commission Determination

24. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap.²³ As to whether a proposed transaction will have an effect on state regulation, the Commission explained in the Merger Policy Statement that it ordinarily will not set the issue of the effect of a proposed transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the proposed transaction. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission may set the issue for hearing and it will address such circumstances on a case-by-case basis.²⁴ Based on Gauley River's representations, we find no evidence that either state or federal regulation will be impaired by the Proposed Transaction. We note that no party alleges that regulation, state or federal, would be impaired by the Proposed Transaction, and no state commission has requested that the Commission address the issue of the effect on state regulation.

e. Cross-Subsidization

i. Gauley River's Analysis

25. Gauley River claims that the Proposed Transaction qualifies for "safe harbor" treatment because it does not involve a franchised public utility with captive ratepayers. Gauley River verifies that, based on facts and circumstances known to it or that are reasonably foreseeable, the Proposed Transaction will not result in, at the time of the Proposed Transaction or in the future, any cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company.²⁵

²¹ *Id.*

²² *Id.*

²³ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

²⁴ *Id.*

²⁵ Application at 16-17.

ii. **Commission Determination**

26. Based on Gauley River's representations, we find that the Proposed Transaction will not result in the cross-subsidization of a non-utility associate company by a utility company, or in a pledge or encumbrance of utility assets for the benefit of an associate company. We note that no party has argued otherwise.

3. **Protest**

27. Protesters argue that the transfer of interests from Enel to Buyer will abrogate important contractual rights and is unlawful unless and until specific contractual rights and obligations are respected. According to Protesters, they and Enel are parties to a Participation Agreement that established the roles of each party in the development of the Summersville Project. The Participation Agreement (1) describes a process by which Enel would first make Summersville aware of Enel's future interest in disposing of its interests in the Participation Agreement to Summersville, then offer to Summersville a "Right of First Offer" to reacquire those interests, and Summersville would be afforded thirty (30) days to accept such an offer; and (2) prevents the parties from assigning their interests in the Participation Agreement to a third party absent the consent of the other parties.²⁶

28. However, Protesters state that Enel has not honored its contractual obligations. First, Protesters argue that Summersville was not apprised by Enel of its intent to sell its interests, was not made an offer for the sale of the interests, and was not afforded thirty (30) days to accept such an offer.²⁷ Second, Protesters state that Enel has not sought the approval of either Summersville or Noah to assign its interests to Buyer.²⁸

29. Protesters also raise several procedural objections to Gauley River's filing. Protesters argue that the Application does not provide sufficient detail for the Commission to approve the Proposed Transaction. In particular, Protesters state that Gauley River seeks a waiver of 18 C.F.R. § 33.2(c)(4), which requires applicants for section 203 approval to provide a "description of all joint ventures, strategic alliances, tolling arrangements or other business arrangements, . . . to which the applicant or its

²⁶ Protest at 3-4. Protesters state that Noah has acted and continues to act as an agent for Summersville in the development, construction and operation of the Summersville Project.

²⁷ *Id.* at 8-9.

²⁸ *Id.* at 11.

parent companies, energy subsidiaries, and energy affiliates is a party.”²⁹ Protesters believe that the Application is deficient due to its failure to fully describe Gauley River’s intent with respect to continued operation of the Summersville Project and its contractual obligations under the Participation Agreement.

30. Protesters question whether Gauley River should be in the position of seeking approval of its own sale. According to Protesters, the upstream owners of Gauley River should be the applicants, and should seek authorization to sell Gauley River to Buyer.³⁰ Protesters state that the Commission should require Gauley River to explain the current state of the Proposed Transaction and whether the closing has already occurred, when the Proposed Transaction is expected to close if it has not already, and when and how obligations to the Summersville under the Participation Agreement are expected to be met.³¹

a. Gauley River’s Answer

31. Gauley River responds that the Commission need not address the arguments in the Protest regarding the Participation Agreement because such contract disputes are outside the scope of FPA section 203 proceedings.³²

32. With respect to the procedural arguments, Gauley River responds that the Application provided sufficient information for the Commission to evaluate whether the Proposed Transaction is consistent with the public interest. According to Gauley River, the Application provides a thorough and well-supported explanation of why the Proposed Transaction is consistent with the public interest, and clearly demonstrates that the Proposed Transaction results only in an indirect upstream change in control over Gauley River and neither creates any new business arrangements nor seeks to affect any existing business arrangements of Gauley River.³³ Gauley River also notes that the Protest does not identify any additional information that is necessary for the Commission to conduct its public interest analysis.

33. Gauley River responds that it filed the Application in compliance with FPA section 203(a)(1), which imposes a requirement on public utilities to seek prior

²⁹ Protest at 11.

³⁰ *Id.* at 12-13.

³¹ *Id.* at 12.

³² Answer at 3.

³³ *Id.* at 4-5.

Commission authorization for certain transactions. Gauley River states that, because it owns the relevant jurisdictional facilities, has filed a rate tariff with the Commission pursuant to section 205 of the FPA, and is recognized by the Commission as a public utility under the FPA, it was appropriate for it to act as the applicant in this proceeding.³⁴ Gauley River also affirms that the Proposed Transaction has not yet closed and will not close without prior written approval of the Commission.³⁵

b. Commission Determination

34. We find that Protesters' arguments regarding the contractual dispute between themselves and Gauley River are outside the scope of this proceeding. The Commission will not condition section 203 approval based upon matters that should be addressed in another proceeding or forum. As the Commission has stated in other section 203 proceedings, "we will deny the relief requested in interventions in a section 203 proceeding where such interventions are based solely on contract disputes."³⁶

35. We also deny Protesters' procedural arguments. We find that Gauley River has provided sufficient information to allow us to evaluate the Proposed Transaction. As we note above, contractual arguments regarding the status of the Participation Agreement are outside the scope of this proceeding and thus further information regarding the Participation Agreement from Gauley River is not necessary. Additionally, as Gauley River explains, it is the jurisdictional entity involved in the Proposed Transaction and is thus the appropriate applicant. Finally, we note that Gauley River has affirmed that the Proposed Transaction has not yet closed and will not close without prior written approval of the Commission.

4. Other Considerations

36. Information and/or systems connected to the bulk system involved in this transaction may be subject to reliability and cybersecurity standards approved by the Commission pursuant to FPA section 215.³⁷ Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information database, and operating systems. If affiliates, personnel or investors are not authorized for access to such information and/or systems connected to the bulk power system, a public utility is obligated to take the appropriate measures to

³⁴ *Id.* at 6.

³⁵ *Id.* at 1 n.3.

³⁶ *LenderCo*, 110 FERC ¶ 61,044, at P 21 (2005).

³⁷ 16 U.S.C. § 824o (2018).

deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, etc., must comply with all applicable reliability and cybersecurity standards. The Commission, North American Electric Reliability Corporation, or the relevant regional entity may audit compliance with reliability and cybersecurity standards.

37. 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. The approval of the Proposed Transaction is based on such examination ability. In addition, applicants subject to the Public Utility Holding Company Act of 2005 (PUHCA) are subject to the record-keeping and books and records requirements of PUHCA 2005.³⁸

38. Section 35.42 of the Commission's regulations requires that sellers with market-based rate authority 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.³⁹ To the extent that a transaction authorized under FPA section 203 results in a change in status, sellers that have market-based rates are advised that they must comply with the requirements of Order No. 652.

³⁸ 42 U.S.C. § 16451-63 (2018).

³⁹ 18 C.F.R. § 35.42 (2019); *see also Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 110 FERC ¶ 61,097, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

The Commission orders:

(A) The Proposed Transaction is hereby authorized, as discussed in the body of this order.

(B) Gauley River must inform the Commission of any material change in circumstances that departs from the facts or representations that the Commission relied upon in authorizing the Proposed Transaction within thirty (30) days from the date of the material change in circumstances.

(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 not pending or 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) Gauley River shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction.

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

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.