

168 FERC ¶ 61,010
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Crius Energy Corporation
Vistra Energy Corp.

Docket No. EC19-59-000

ORDER AUTHORIZING DISPOSITION AND ACQUISITION
OF JURISDICTIONAL FACILITIES

(Issued July 8, 2019)

1. On February 19, 2019, Crius Energy Corporation (Crius) and Vistra Energy Corp. (Vistra) (together, Applicants) filed an application (Application) pursuant to sections 203(a)(1)(A) and 203(a)(2) of the Federal Power Act (FPA)¹ requesting authorization for a proposed transaction pursuant to which Vistra will indirectly acquire 100 percent of the equity interests in Crius (Proposed Transaction).

2. We have reviewed the Proposed Transaction under the Commission's Merger Policy Statement.² As discussed below, we authorize the Proposed Transaction as consistent with the public interest.

¹ 16 U.S.C. §§ 824b(a)(1)(A), (2) (2012).

² See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996) (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). *See also 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). *See also 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).

I. Background**A. Description of Applicants/Parties****1. Vistra**

3. Applicants state that Vistra is a corporation which is publicly traded on the New York Stock Exchange. Applicants state that Vistra operates in 12 states and six of the seven competitive markets in the United States, and its generation fleet totals approximately 40,000 megawatts (MW) of generation capacity. Applicants state that Vistra is the ultimate parent company of, and conducts its principal operations through, Vistra Asset Company, LLC (Vistra Asset) in connection with Vistra Asset's wholly or indirectly owned retail electric provider and power generation company subsidiaries. Applicants state that Vistra Asset also directly and wholly owns Vienna Acquisition B.C. LTD. (Vienna Acquisition), a corporation organized under the laws of the Province of British Columbia formed for the purpose of acquiring the indirect interests in Crius.

4. Applicants state that Electric Energy, Inc. (EEInc) is an indirect subsidiary of Vistra that owns six parallel generation tie lines that range between approximately eight and 10 miles in length and operates a generation-only balancing authority area that is directly interconnected with the Tennessee Valley Authority and the Louisville Gas and Electric Company/Kentucky Utilities Company balancing authority areas. Applicants state that EEInc has filed an Open Access Transmission Tariff (OATT) with the Commission and that the Commission has granted EEInc waiver of certain other transmission owner requirements. Applicants represent that other than through its interest in EEInc, Vistra does not directly or indirectly own or control any transmission facilities other than those limited and discrete facilities interconnecting its electric generation facilities to the grid. Applicants also represent that Vistra has five subsidiaries that operate intrastate pipeline segments for gas supply to certain of the Vistra generating facilities.³

2. Crius

5. Applicants state that Crius is a direct, wholly owned subsidiary of Crius Energy Holdings, Inc. (Crius Energy Holdings), which is a direct, wholly owned subsidiary of Crius Energy Trust (CET), a publicly traded trust listed on the Toronto Stock Exchange. Applicants assert that neither Crius nor its affiliates or subsidiary companies owns, operates or controls any electric generation or transmission facilities, or any interstate or intrastate natural gas or fuel oil transportation, distribution or storage, coal production or

³ Application for Authorization of Transaction Under Section 203 of the Federal Power Act, Docket No. EC19-59-000, at 4 (Feb. 19, 2019) (Application).

transportation facilities or other facilities that can be used as inputs to electric power production in the United States. Crius owns a controlling interest in Crius Solar Fulfillment, LLC (CSF) and directly and wholly owns Crius Energy, LLC (Crius Energy), both of which directly and indirectly and wholly own the public utility subsidiaries described below (Crius Public Utilities).⁴

a. CSF

6. Applicants state that CSF is a Delaware limited liability company that was formed to serve as the debtor-in-possession lender and bidder for the purchase of certain residential solar installation assets of Verengo, Inc. (Verengo) in a bankruptcy proceeding under chapter 11 of the United States Bankruptcy Code. CSF is owned by Crius and CET, 99 percent and 1 percent, respectively. CSF directly and wholly owns Verengo, a Delaware corporation, which in turn, directly and wholly owns U.S. Gas & Electric, Inc. (USG&E).

7. Applicants state that USG&E is a Delaware corporation and a licensed energy service company that is primarily engaged in selling natural gas to commercial and residential retail customers. Applicants state that USG&E is certified to market gas to various commercial and residential retail customers in New York, New Jersey, Ohio, Indiana, Illinois, Kentucky, Michigan, Maryland, and Pennsylvania, but does not make retail electric sales at this time. Applicants state that USG&E owns a 20 percent equity position in three liability companies that own interests in natural gas wells in Pennsylvania: USG&E Gas Drilling I, LLC, USG&E Gas Drilling II, LLC, and USG&E Gas Drilling III, LLC (collectively, the USG&E LLCs). Applicants state that an unaffiliated third-party operates the natural gas wells and uses its own gathering system to extract natural gas for sale to an intrastate closed natural gas distribution system to which various retail natural gas customers are connected.⁵

8. Applicants assert that USG&E also wholly owns ESPI, a New York corporation that sells electricity to commercial and residential retail customers in the District of

⁴ Applicants state that the Crius Public Utilities are the following entities with market-based rate tariffs: Energy Services Providers, Inc. (ESPI), Massachusetts Gas & Electric, Inc. (MAG&E), Connecticut Gas & Electric, Inc. (CTG&E), Public Power, LLC (Public Power), Public Power (PA), LLC, Public Power & Utility of NY, Inc., Public Power & Utility of Maryland, LLC, Everyday Energy NJ, LLC, Viridian Energy, LLC (Viridian), Viridian Energy NY, LLC (Viridian Energy NY), Viridian Energy PA, LLC (Viridian Energy PA), Cincinnati Bell Energy LLC (CBE), Energy Rewards, LLC (Energy Rewards), Everyday Energy, LLC (Everyday Energy), and TriEagle Energy, LP.

⁵ Application at 6-7.

Columbia, New York, New Jersey, Illinois, Maryland, Ohio, and Pennsylvania. Applicants state that ESPI received authorization to sell energy, capacity, and ancillary services at market-based rates⁶ and ESPI is a registered load serving entity in NYISO, PJM, and MISO.⁷ Applicants state that ESPI wholly owns MAG&E, a Massachusetts corporation. MAG&E supplies electricity to retail customers in Massachusetts, and also received authorization to sell energy, capacity, and ancillary services at market-based rates.⁸ Applicants also state that ESPI also wholly owns CTG&E, a Delaware corporation, which is certified to act as a retail supplier of electricity. Applicants explain that CTG&E supplies electricity to retail customers in Connecticut, and received authorization to sell energy, capacity, and ancillary services at market-based rates.⁹

b. Crius Energy

9. Applicants state that Crius Energy is one of the largest independent energy retailers in the United States, providing electricity and natural gas products to nearly 800,000 residential and commercial customers, on a residential customer equivalent basis. Applicants explain that Crius Energy has six direct, wholly owned energy subsidiaries: (1) Public Power; (2) Regional Energy Holdings, Inc. (REH); (3) Everyday Energy; (4) TriEagle Energy 1, LLC (TriEagle Energy 1); (5) TriEagle Energy 2, LLC (TriEagle Energy 2); and (6) Big Sky Gas Holdings, LLC (Big Sky). Applicants explain that Crius also has several indirect, wholly owned energy subsidiaries under Public Power, REH, TriEagle Energy 1, TriEagle Energy 2, and Big Sky.¹⁰

10. Applicants state that Public Power, a Connecticut limited liability company, and its energy subsidiaries – Public Power (PA), LLC, Everyday Energy NJ, LLC, Public Power & Utility of NY, Inc., and Public Power & Utility of Maryland, LLC – serve more than 300,000 residential and commercial customers, on a residential customer equivalent basis, in Connecticut, Illinois, Maryland, Massachusetts, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, and Washington D.C. Applicants state that Public Power

⁶ *Id.* at 7-8 (citing *U.S. Gas & Electric, Inc.*, Docket Nos. ER10-1130-000, ER10-1130-001 (June 7, 2010) (delegated order)).

⁷ *Id.*

⁸ *Id.* at 8 (citing *U.S. Gas & Electric, Inc.*, Docket No. ER10-1131-000 (June 7, 2010) (delegated order)).

⁹ *Id.* (citing *Connecticut Gas & Electric, Inc.*, Docket No. ER11-2449-000 (Feb. 23, 2011) (delegated order)).

¹⁰ *Id.* at 9.

was granted market-based rate authority in 2007,¹¹ and each of the energy subsidiaries of Public Power also has market-based rate authority.¹²

11. Applicants state that REH owns 100 percent of the interests in Viridian, Viridian Energy NY, Viridian Energy PA, CBE, and Energy Rewards. Viridian, Viridian Energy NY, and Viridian Energy PA are retail energy companies that provide electricity that is more than 50 percent renewable, natural gas with carbon offsets to mitigate usage, and residential solar power to a range of customers throughout 11 states plus Washington D.C. Viridian, Viridian Energy NY, and Viridian Energy PA each have market-based rate authority.¹³ Applicants state that CBE offers 100 percent renewable electricity and natural gas service to residential and commercial customers in southwestern Ohio and has market-based rate authority.¹⁴ Applicants state that Energy Rewards offers residential customers in Maine and New Hampshire electricity plan options for sustainability, and also has market-based rate authority.¹⁵ Applicants state that Everyday Energy provides service to residential customers in California, Connecticut, Illinois, Indiana, Massachusetts, New York, Ohio, and Pennsylvania, and has market-based rate authority.¹⁶

12. Applicants state that TriEagle Energy 1 and TriEagle Energy 2 respectively hold the general partner interest and limited partner interest in TriEagle Energy LP, a limited partnership organized under the laws of the state of Texas. Applicants explain that TriEagle Energy LP is a licensed retail provider of energy that offers electricity to

¹¹ *Id.* at 10 (citing *Public Power, LLC*, Docket Nos. ER07-1161-000, ER07-1161-001 (Sept. 17, 2007) (delegated order)).

¹² *Id.* (citing *Public Power & Utility of New Jersey, LLC*, Docket No. ER12-2250-000 (Sept. 14, 2012) (delegated order)).

¹³ *Id.* (citing *New England Gas & Electric, Inc.*, Docket Nos. ER09-1025-000, ER09-1025-001 (Jun. 17, 2009) (delegated order); *Viridian Energy PA, LLC*, Docket No. ER10-0210-000 (Nov. 10, 2009) (delegated order); *Viridian Energy NY, LLC*, Docket No. ER10-2661-000 (Sept. 16, 2010) (delegated order)).

¹⁴ *Id.* at 11 (citing *Cincinnati Bell Energy, LLC*, Docket No. ER11-2663-000 (Jan. 13, 2011) (delegated order)).

¹⁵ *Id.* (citing *FairPoint Energy, LLC*, Docket No. ER11-4326-000 (Sept. 15, 2011) (delegated order)).

¹⁶ *Id.* (citing *FTR Energy Services, LLC*, Docket No. ER12-1769-002 (July 26, 2012) (delegated order)).

commercial and residential customers in Texas, New Jersey, and Pennsylvania, and also has market-based rate authority.¹⁷

13. Applicants state that Big Sky, a Delaware limited liability company, owns 100 percent of Big Sky Gas, LLC, a Montana limited liability company that is a licensed retail provider of energy that offers natural gas to commercial and residential customers in Montana.¹⁸

B. Description of the Proposed Transaction

14. Applicants explain that pursuant to the terms of a Purchase and Sale Agreement, Vienna Acquisition will acquire all of the equity interests in Crius Energy Holdings. Applicants state that immediately thereafter, Vienna Acquisition will undergo an internal reorganization whereby it will merge with Crius Energy Holdings, with Vienna Acquisition as the surviving entity. Vienna Acquisition will then liquidate and distribute all of the outstanding stock of Crius to Vistra Asset. Applicants state that Crius will thus become a direct, wholly owned subsidiary of Vistra Asset and an indirect, wholly owned subsidiary of Vistra as a result of the Proposed Transaction.¹⁹

II. Notice of Filing and Responsive Pleadings

15. Notice of the Application was published in the *Federal Register*, 84 Fed. Reg. 5998 (2019), with interventions and protests due on or before March 12, 2019. On February 25, 2019, Public Citizen, Inc. (Public Citizen) filed a motion to intervene, and on March 12, 2019, filed a protest. On March 15, 2019, Applicants filed an answer to Public Citizen's protest (Applicants' Answer).

III. Discussion

A. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2018), the timely, unopposed motion to intervene serves to make Public Citizen a party to this proceeding.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2018), prohibits an answer to a protest unless otherwise ordered by the

¹⁷ *Id.* (citing *TriEagle Energy, LP*, Docket No. ER14-2245-000 (Aug. 5, 2014) (delegated order)).

¹⁸ *Id.* at 12.

¹⁹ *Id.*

decisional authority. We accept Applicants' Answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

1. FPA Section 203 Standard of Review

18. 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.²⁰ 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.²¹ 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."²² 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.²³

2. Analysis of the Proposed Transaction

a. Effect on Horizontal Competition

i. Applicants' Analysis

19. Applicants request that the Commission authorize the Proposed Transaction without requiring the filing of a horizontal competitive screen analysis set forth in Appendix A to the *Merger Policy Statement*. Applicants assert that section 33.3(a)(2)(i) of the Commission's regulations provides that such a filing is not required if the applicant "[a]ffirmatively demonstrates that the merging entities do not currently conduct business in the same geographic markets or that the extent of the business transactions in the same geographic markets is *de minimis*["²⁴ Applicants explain that neither Crius nor any of

²⁰ 16 U.S.C. § 824b(a)(4) (2012).

²¹ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

²² 16 U.S.C. § 824b(a)(4) (2012).

²³ 18 C.F.R. § 33.2(j) (2018).

²⁴ Application at 14 (citing 18 C.F.R. § 33.3(a)(2)(i) (2018)).

its affiliates own or control generation in any geographic markets in North America. Applicants also state that, as power marketers, the Crius Public Utilities do not own or control capacity through power purchase agreements or other contracts in markets that overlap with any markets in which Vistra or its affiliates directly or indirectly own or control any generation capacity. Applicants assert that the Proposed Transaction will therefore not result in any new combination of electric generating facilities that could have an impact on the competitive situation in the relevant markets, and thus no Appendix A analysis is required with respect to the Proposed Transaction.

ii. Commission Determination

20. 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.²⁵

21. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on horizontal competition. As explained by Applicants, neither Crius nor any of its affiliates own or control generation in any geographic markets in North America. Applicants also state that in their capacity as power marketers, the Crius Public Utilities do not own or control capacity through power purchase agreements or other contracts in markets that overlap with any markets in which Vistra or its affiliates directly or indirectly own or control any generation capacity, and thus the Proposed Transaction does not present any horizontal market power concerns.

b. Effect on Vertical Competition

i. Applicants' Analysis

22. Applicants also argue that the Proposed Transaction does not raise any vertical market power issues. Applicants assert that neither Crius nor any of its affiliates own or control electric transmission or distribution facilities or any other facilities that would affect downstream electricity markets. Applicants also assert that neither Vistra nor any of its affiliates owns a 10 percent or greater voting interest in or controls any electric transmission facilities other than: (1) limited discrete facilities necessary to interconnect individual generating facilities to the transmission grid, which are subject to waiver consistent with Order No. 807;²⁶ and (2) facilities that are subject to a Commission-

²⁵ *Nev. Power Corp.*, 149 FERC ¶ 61,079, at P 28 (2014).

²⁶ Application at 15 (citing *Open Access and Priority Rights on Interconnection Customer's Interconnection Facilities*, Order No. 807, 150 FERC ¶ 61,211 (2015)).

approved OATT. Applicants argue that vertical market power concerns regarding the control of transmission facilities are adequately mitigated when, as here, those facilities are subject to an OATT.²⁷

23. Applicants also state that neither Crius nor any of its affiliates own or control any inputs to generation, and thus the Proposed Transaction will not involve or affect other inputs to generation that the Commission has indicated could be used to exercise vertical market power (e.g., intrastate natural gas transportation or storage facilities, natural gas distribution facilities, sites for generation capacity development, physical coal supply sources, or ownership or control over who may access coal transportation). Applicants assert that section 33.4(a)(2) of the Commission's regulations provides that a vertical competitive analysis need not be filed if the applicants affirmatively demonstrate that they do not currently provide essential electricity products and inputs to electricity products in the same geographic markets or that the extent of their business transactions in the same geographic markets is *de minimis*.²⁸ Accordingly, Applicants argue there is no need to file a vertical competitive analysis, and the Proposed Transaction does not raise any vertical market power concerns.

ii. Commission Determination

24. 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 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.²⁹

25. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on vertical competition. Applicants state that neither Crius nor any of its affiliates owns or controls electric transmission or distribution facilities or any

²⁷ *Id.* (citing *Duke Energy Corp.*, 136 FERC ¶ 61,245, at P 161 (2011), *reh'g denied*, 149 FERC ¶ 61,078 (2014); *Sharyland Utils., L.P.*, 131 FERC ¶ 61,275, at PP 17-18 (2010); *Great Plains Energy Inc.*, 121 FERC ¶ 61,069, at P 34 (2007)).

²⁸ *Id.* (citing 18 C.F.R. § 33.4(a)(2) (2018)).

²⁹ *Upstate N.Y. Power Producers*, 154 FERC ¶ 61,015, at P 15 (2016); *Exelon Corp.*, 138 FERC ¶ 61,167, at P 112 (2012).

other facilities that would affect downstream electricity markets, and neither Vistra nor any of its affiliates owns a 10 percent or greater voting interest in or controls any electric transmission facilities other than: (1) limited discrete facilities necessary to interconnect individual generating facilities to the transmission grid; and (2) facilities that are subject to a Commission-approved OATT. Applicants also state that neither Crius nor any of its affiliates owns or controls any inputs to generation.

c. Effect on Rates

i. Applicants' Analysis

26. Applicants state that the Proposed Transaction will not adversely affect rates because all sales of electric energy, capacity, and ancillary services by the Crius Public Utilities will continue to be made at market-based rates after the consummation of the Proposed Transaction. Applicants state that none of Applicants or their affiliates has any electric transmission customers or wholesale requirements customers whose rates could be affected by the Proposed Transaction.³⁰

ii. Protest

27. Public Citizen asserts that in a February 2019 presentation to investors, Applicants implied that the Proposed Transaction will have an adverse impact on rates, as the company “boasts that a result of the transaction will give its shareholders the ‘highest margin opportunity’ from integrating Vistra’s existing FERC-jurisdictional generation assets with the combined ‘VST Retail’ operations.”³¹ Public Citizen argues that the Commission should require Applicants to amend their application to explain how a higher profit “margin opportunity” for Vistra’s post-merger combined retail operations does not translate to higher electric rates for its retail customers.³²

iii. Answer

28. Applicants respond that the excerpt from the presentation discussed by Public Citizen in its protest does not mention or suggest any changes to rates and in no way supports its claim that the Proposed Transaction may have an adverse effect on the rates paid by Vistra’s and Crius’s retail customers. Applicants also assert that this proceeding is not the proper forum for such speculation because retail rates are not within the

³⁰ Application at 16.

³¹ Public Citizen Protest at 3.

³² *Id.*

Commission's jurisdiction. Applicants state that to the extent that Public Citizen is asserting that the Proposed Transaction will affect wholesale energy rates charged by the Crius Public Utilities, "the Application clearly states that all of the Crius Public Utilities will continue to make FERC-jurisdictional sales pursuant to their market-based rate tariffs that are on file with the Commission after the Proposed Transaction closes."³³

iv. Commission Determination

29. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on rates. As stated by Applicants, all wholesale sales of electric energy, capacity, and ancillary services by the Crius Public Utilities will continue to be made at market-based rates after the consummation of the Proposed Transaction,³⁴ and none of Applicants or their affiliates has any electric transmission customers or wholesale requirements customers whose rates could be affected by the Proposed Transaction. As a result, we reject Public Citizen's argument that the Proposed Transaction will adversely affect rates. Further, any argument that the Proposed Transaction could have an effect on retail rates is outside the scope of this proceeding, as retail rates are not within the Commission's jurisdiction.

d. Effect on Regulation

i. Applicants' Analysis

30. Applicants state that the Proposed Transaction will not diminish the Commission's regulatory authority or create a regulatory gap or shift regulatory authority between the Commission and any state commission. Applicants state that the status of each of Applicants and their public utility subsidiaries subject to the Commission's jurisdiction under the FPA will not change as a result of the Proposed Transaction, and the Proposed Transaction will not result in any facilities being removed from the Commission's jurisdiction. Applicants also assert that the Proposed Transaction will not affect the ability of any state regulatory authority to regulate retail rates. Accordingly, Applicants state that the Proposed Transaction will not impair the Commission's or any state commission's jurisdiction over Applicants.³⁵

³³ Applicants' Answer at 5 (citing Application at 16).

³⁴ *Cinergy Corp.*, 140 FERC ¶ 61,180, at P 41 (2012) (citing *Duquesne Light Holdings, Inc.*, 117 FERC ¶ 61,326, at P 25 (2006)) ("The Commission has previously stated that, when there are market-based rates, the effect on rates is not of concern.").

³⁵ Application at 16.

ii. Commission Determination

31. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap.³⁶ 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.³⁷ Based on Applicants' representations, we find no evidence that either state or federal regulation will be impaired by the Proposed Transaction.

e. Cross-Subsidization

i. Applicants' Analysis

32. Applicants explain that FPA section 203(a)(4) provides that the Commission must find that a proposed jurisdictional transaction will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission finds that such cross-subsidization, pledge or encumbrance is consistent with the public interest.³⁸ Applicants maintain that the Commission has stated that its concern about cross-subsidization is principally a concern over the effect of a transaction on rates charged to captive customers.

33. Applicants assert that the Proposed Transaction falls within one of the Commission's "safe harbors" under FPA section 203(a)(4), such that detailed explanation and evidentiary support to demonstrate a lack of cross-subsidization is not required.³⁹ Applicants state that as explained in the Application and set forth in Exhibit M, the Proposed Transaction does not involve any franchised public utility with captive customers (i.e., wholesale or retail electric energy customers served under cost-based regulation). Applicants assert that the Commission has found that, in these circumstances, there is no potential for harm to customers due to cross-subsidization, and

³⁶ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

³⁷ *Id.*

³⁸ Application at 17 (citing 16 U.S.C. § 824b(a)(4)).

³⁹ *Id.* (citing Order No. 669, 113 FERC ¶ 61,315 at P 167; Supplemental Policy Statement, 120 FERC ¶ 31,253 at P 13).

no further showing is required under the Commission's FPA section 203 Supplemental Policy Statement.⁴⁰

34. Applicants verify that, based on facts and circumstances known to them 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, including: (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 issuance 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 associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and service agreements subject to review under sections 205 and 206 of the FPA.⁴¹

ii. Protest

35. Public Citizen argues that the Proposed Transaction will result in cross subsidization. Public Citizen asserts that in a February 2019 presentation to investors, "Vistra explicitly references the financial benefits that shareholders will receive from the cross-subsidization between Vistra's generation assets and Crius' retail customers."⁴² Public Citizen states that "[i]t is clear from Vistra's own presentation to investors that the purpose of the merger with Crius is to take advantage of the new financial opportunities of integrating the company's [Commission]-jurisdictional generation assets with Crius' household retail customers" and that "the whole point of acquiring Crius is to exploit cross-subsidization opportunities. [The Commission] cannot find the Proposed

⁴⁰ *Id.* (citing Supplemental Policy Statement, 120 FERC ¶ 31,253 at P 17).

⁴¹ *Id.* at Ex. M.

⁴² Public Citizen Protest at 2.

Transaction to be consistent with the public interest without Vistra first providing evidentiary support that it does not feature cross-subsidization.”⁴³

36. Public Citizen also argues that some of Crius’ retail customers are captive customers. Public Citizen states that an investigation by the Attorney General for the Commonwealth of Massachusetts determined that a number of household customers were locked into three-year retail electricity contracts with Crius, and that a customer seeking early termination of the long-term contract would be subject to a punitive financial penalty. Public Citizen argues that “[i]t is reasonable to conclude that any household customer locked into any sort of long-term contract that subjects the customer to an early termination fee deems that customer ‘captive’ to the retail supplier, as the customer lacks a reasonable opportunity to ‘switch’ to another supplier or to default utility service.”⁴⁴ Public Citizen asserts that as part of an evidentiary documentation of the Proposed Transaction’s impact on cross-subsidization, the Commission “should require detailed reporting on the terms of conditions of retail electricity supply contracts for all Vistra and Crius retail accounts in order for the Commission to ascertain, by state and RTO service territory, the number of retail customers the Applicants have committed to long-term contracts that feature early-termination penalties or auto-renewal.”⁴⁵

37. Public Citizen also states that since 2012, Crius Energy and its subsidiaries have been forced to pay nearly \$24 million in refunds and penalties “for deceptive practices that preyed on retail energy consumers.”⁴⁶ Public Citizen argues that “[s]igning up retail electricity customers through coercion and deception is not the same as consumers exercising a competitive ‘choice.’”⁴⁷ Public Citizen lists a number of state regulatory proceedings in which Crius subsidiaries were ordered to pay refunds and penalties.⁴⁸

iii. Answer

38. In their Answer, Applicants assert that Public Citizen’s claim that the Proposed Transaction may result in impermissible cross-subsidization is baseless and inflammatory

⁴³ *Id.* at 2-3.

⁴⁴ *Id.* at 4.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 5.

⁴⁸ *Id.* at 5-6.

and should be rejected. Applicants explain that the Commission has been clear that its focus with respect to cross-subsidization is “preventing a transfer of benefits from a public utility’s captive customers 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” and that “[i]f no captive customers are involved, then there is no potential for harm to customers.”⁴⁹ Applicants argue that given that neither Vistra nor Crius are affiliated with any entities that have captive customers, there is no potential for any captive customers to be affected by the Proposed Transaction or to “subsidize” Vistra’s generation business.⁵⁰

39. Applicants state that consistent with the Commission’s requirements, they have demonstrated in the Application that the Proposed Transaction does not raise any cross-subsidization issues, as the Proposed Transaction falls under one of the Commission’s safe harbors in that it does not involve any franchised public utility with captive customers. Applicants also note that they represented to the Commission in their Application that, based on facts and circumstances known to them or that are reasonably foreseeable, 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 pledge or encumbrance of utility assets for the benefit of an associate company.⁵¹

40. Applicants argue that Public Citizen is incorrect in its assertion that retail electricity customers that are allowed to choose their electricity supplier pursuant to state-regulated programs are “captive customers” as a result of the customers voluntarily choosing to enter into a long-term contract with the competitive retail electricity supplier of their choice. Applicants state that Public Citizen’s assertion is directly contrary to the Commission’s regulations, which define “captive customers” for purposes of FPA section 203 as “any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation.”⁵² Applicants state that neither Vistra nor Crius are affiliated with any franchised public utilities, and their retail electricity suppliers operate only in those states with retail choice such that their customers are able to choose their retail electricity supplier. Applicants conclude that, by definition, none of

⁴⁹ Applicants’ Answer at 4 (citing Supplemental Policy Statement, 120 FERC ¶ 31,253 at PP 13 and 17).

⁵⁰ *Id.*

⁵¹ *Id.* (citing Application at 17, Ex. M).

⁵² Applicants Answer at 2 (citing 18 C.F.R. § 33.1(b)(5) (2018)).

Vistra's or Crius's retail electricity customers can possibly be a captive customer under the Commission's regulations.⁵³

41. Applicants finally argue that Public Citizen's list of legal and state regulatory matters purportedly involving Crius's subsidiaries is not relevant to the Commission's deliberations of the Application under FPA section 203. Applicants state that as explained in the Application, the Proposed Transaction will not change how these entities are regulated, and that therefore, state regulatory oversight will continue after the Proposed Transaction closes without creating any regulatory gap.⁵⁴

iv. Commission Determination

42. 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. Applicants state that the Proposed Transaction does not involve any franchised public utility with captive customers. Applicants also represent that, based on facts and circumstances known to them or that are reasonably foreseeable, 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 pledge or encumbrance of utility assets for the benefit of an associate company.

43. We reject Public Citizen's claim that the Proposed Transaction will result in cross-subsidization. Neither Vistra nor Crius are affiliated with any entities that have captive customers, so there is no potential for any captive customers to be affected by the Proposed Transaction. The Commission has previously rejected the argument that retail customers in a retail choice state were "effectively" captive if they chose to continue to buy power from their local franchised utility, explaining that "it is not the role of this Commission to evaluate the success or failure of a state's retail choice program."⁵⁵ The Commission's regulations state that captive customers are "wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation."⁵⁶ Retail customers in retail choice states are "not served under cost-based *regulation*, since

⁵³ *Id.* at 2-3.

⁵⁴ *Id.* at 5-6.

⁵⁵ *Duquesne Light Holdings, Inc.*, 117 FERC ¶ 61,326, at P 38 (2006).

⁵⁶ 18 C.F.R. 33.1(b)(5) (2018).

that term indicates the absence of retail choice.”⁵⁷ Applicants state that neither Vistra nor Crius are affiliated with any franchised public utilities, and their retail electricity suppliers operate only in those states with retail choice such that their customers are able to choose their retail electricity supplier. Therefore, the Proposed Transaction cannot lead to inappropriate cross-subsidization as there are no benefits transferred from captive customers to an associate company.

44. We also conclude that the state regulatory proceedings listed by Public Citizen in which Crius subsidiaries were ordered to pay refunds or penalties are beyond the scope of this proceeding and are not part of the Commission’s cross-subsidization analysis, as those proceedings involve retail customers.

3. Other Considerations

45. 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 215.⁵⁸ 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 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.

46. 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 2005)⁵⁹ are subject to the record-keeping and books and records requirements of PUHCA 2005.

⁵⁷ *Duquesne Light Holdings, Inc.*, 117 FERC ¶ 61,326 at P 38 (emphasis in original).

⁵⁸ 16 U.S.C. § 824(o) (2012).

⁵⁹ 42 U.S.C. § 16451 *et seq.* (2012).

47. Order No. 652 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.⁶⁰ 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.

The Commission orders:

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

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

⁶⁰ *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). See 18 C.F.R. § 35.42 (2018).

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.