

168 FERC ¶ 61,212
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Hartree Partners, LP
Griffith Energy LLC
Cogen Technologies Linden Venture, L.P.
East Coast Power Linden Holding, L.L.C.
Footprint Power Salem Harbor Development LP
Brookfield Asset Management Inc.

Docket No. EC19-104-000

ORDER CONDITIONALLY AUTHORIZING DISPOSITION OF
JURISDICTIONAL FACILITIES AND ACQUISITION OF SECURITIES

(Issued September 30, 2019)

1. On June 19, 2019, pursuant to sections 203(a)(1) and 203(a)(2) of the Federal Power Act (FPA)¹ and Part 33 of the Commission's regulations,² Hartree Partners, LP (Hartree), Griffith Energy LLC (Griffith), Cogen Technologies Linden Venture, L.P. (Linden Venture), East Coast Power Linden Holding, L.L.C. (East Coast Linden), Footprint Power Salem Harbor Development LP (Salem) (together, Seller Public Utilities), and Brookfield Asset Management Inc. (Brookfield) (collectively Applicants) filed an application requesting authorization for Brookfield to acquire a 62 percent ownership interest in Oaktree Capital Group, LLC (Oaktree), the owner of indirect, upstream interests of greater than 10 percent in the Seller Public Utilities (Proposed Transaction).³

¹ 16 U.S.C. § 824b (2018).

² 18 C.F.R. pt. 33 (2019).

³ Hartree Partners, LP, et al., Application for Authorization Under Section 203 of the Federal Power Act, Docket No. EC19-104-000 (filed June 19, 2019) (Application).

2. We have reviewed the Proposed Transaction under the Commission's Merger Policy Statement.⁴ As discussed below, we conditionally authorize the Proposed Transaction as consistent with the public interest.

I. Background

A. Description of Applicants

1. Seller Public Utilities and their Relevant Affiliates

3. Applicants explain that Oaktree is an investment manager that specializes in alternative investments. Oaktree Capital Group Holdings GP, LLC controls Oaktree's business activities. Among other investment activities not related to the U.S. energy industry, Oaktree wholly owns and controls Highstar Capital GP IV, L.P., which is engaged in the management of private investment funds. Oaktree also owns the interests in the Seller Public Utilities.⁵

4. Applicants state that Salem owns and operates an approximately 674 megawatt (MW) natural gas-fired, electric combined-cycle power generation facility in Massachusetts. The generation facility is interconnected with the National Grid-New England Power Company transmission system, which is operated by ISO New England Inc. (ISO-NE). Salem is an exempt wholesale generator (EWG) and has been granted market-based rate authority. Oaktree indirectly holds 87.5 percent of the voting interests in Salem.⁶

⁴ 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).

⁵ Application at 5-6.

⁶ *Id.* at 6-7. Applicants state that the remaining 12.5 percent interest in Salem is not part of the Proposed Transaction.

5. Applicants explain that Griffith owns and operates a 570 MW natural gas-fired combined cycle electric generating facility in Arizona, which is in its own, generation-only balancing authority area interconnected with the Western Area Power Administration – Lower Colorado balancing authority area. Griffith is an EWG and has been granted market-based rate authority. Oaktree indirectly holds 62.5 percent of the limited liability company interests in Griffith’s direct parent company.⁷

6. Applicants state that Hartree is a merchant energy and commodities firm with market-based rate authority. Hartree does not control the capacity or electrical output of any generating facility and does not control or own any transmission facilities or transmission capacity. Oaktree, through wholly owned affiliates, owns 61 percent of the outstanding voting securities of Hartree.⁸

7. Applicants state that Linden Venture and East Coast Linden own a qualifying cogeneration facility in New Jersey (Linden Facility).⁹ The Linden Facility has a total nameplate capacity of approximately 974.1 MW, of which 761.6 MW are located in the New York Independent System Operator, Inc. (NYISO) balancing authority area and 212.5 MW are located in the PJM Interconnection, L.L.C. (PJM) balancing authority area. Oaktree indirectly owns 14 percent of Linden Venture and East Coast Linden. Linden Venture is an EWG, and Linden Venture and East Coast Linden each have been granted market-based rate authority. In addition, the portion of the Linden Facility located in the NYISO balancing authority area operates as a merchant facility with EDF Energy Services, LLC as its energy manager. Thermal and certain electrical output from the portion of the Linden Facility located in the PJM balancing authority area is sold to a Phillips 66 Company refinery under a long-term requirements agreement expiring in 2032. Available excess energy and capacity from this portion of the Linden Facility is sold in the PJM market or pursuant to bilateral agreements.¹⁰

⁷ *Id.* at 7-8.

⁸ *Id.* at 8.

⁹ Applicants note that Linden Venture and East Coast Linden are not subject to FPA section 203(a)(1) by virtue of the exemption under 18 C.F.R. § 292.601(c) (2019), but are described below to comply with 18 C.F.R. § 33.2(c)(3), (c)(4) (2019). Application at 9.

¹⁰ *Id.* at 9-10.

2. Brookfield and its Affiliates

8. Applicants explain that Brookfield is a Canadian asset manager that invests in real estate, infrastructure, renewable power, and private equity. Partners Limited directly owns 100 percent of the Class B shares and approximately 0.08 percent of the Class A shares of Brookfield. Brookfield indirectly owns and controls a variety of entities with generation capacity in ISO-NE, NYISO, and PJM as well as several power marketers with market-based rate authority.¹¹

9. Applicants also state that Brookfield indirectly holds 65.31 percent of the Class A voting common stock of TerraForm Power, Inc. (TerraForm). As a result, Brookfield is affiliated with various utility-scale wind and solar projects as well as distributed generation and behind-the-meter solar projects throughout the United States, including, as relevant here, generating facilities with market-based rate authority in ISO-NE, NYISO, and PJM.¹² In sum, Applicants explain that Brookfield is affiliated with 1,658 MW in ISO-NE, 933 MW in NYISO, and 158 MW in PJM.¹³

3. Vistra Energy Corporation

10. In addition, Applicants state that Brookfield owns approximately nine percent of the issued common shares of Vistra Energy Corporation (Vistra) and that Oaktree owns approximately 5.5 percent of the issued common shares of Vistra. Applicants state that, to avoid a scenario in which, post-consummation, Oaktree and Brookfield are deemed to be affiliated with Vistra by virtue of their combined holdings, Oaktree has initiated the process of transferring all of its holdings in Vistra into a voting trust pursuant to Delaware General Corporation Law (Voting Trust), an unexecuted copy of which Applicants submitted with the Application. Applicants state that the transfer will be completed concurrently with the closing of the Proposed Transaction.¹⁴

11. Applicants state that the voting trustee is independent of Oaktree or Brookfield and will exercise independent voting discretion with respect to the transferred shares of Vistra and will not be affiliated with or under the control of either Oaktree or Brookfield, except to the extent that Oaktree will have limited consent and veto rights necessary to protect the economic value of its investment in Vistra. Applicants add that these consent

¹¹ *Id.* at 10-16.

¹² *Id.* at 16-19.

¹³ *Id.* at 26.

¹⁴ *Id.* at 19.

and veto rights are the type of passive, non-managing ownership interests that are consistent with *AES Creative Resources, L.P.*¹⁵ Specifically, Applicants state that Oaktree's consent and veto rights include only the following: (1) issuances of stock; (2) liquidation of Vistra; (3) bankruptcy; (4) changes to Vistra's corporate form or tax treatment; (5) changes to certain investor rights under Vistra's corporate charter; and (6) merger or consolidation. In addition, Applicants state that the voting trustee can be removed only for cause, which includes a breach of the trust agreement. Further, Applicants point out that Oaktree will not have any direct or indirect control over Vistra or its jurisdictional facilities or activities.¹⁶ Applicants therefore assert that neither Brookfield nor Oaktree should be considered to be affiliated with Vistra for purposes of FPA section 205.¹⁷

B. Description of the Proposed Transaction

12. Applicants explain that the Agreement and Plan of Merger among Oaktree, Oslo Holdings LLC, Oslo Holdings Merger Sub LLC, Brookfield, and Berlin Merger Sub, LLC (Merger Agreement) provides the terms of the Proposed Transaction. Specifically, the Merger Agreement provides that, upon consummation of the Proposed Transaction, each Oaktree Class A common unit and unit of equity interest in Oslo Holdings LLC, an indirect, wholly owned subsidiary of Oaktree Capital Group Holdings, GP established to effectuate the Proposed Transaction, will be converted into cash or a proportional voting share right in Brookfield, subject to proration. As a result of the Proposed Transaction, Brookfield will ultimately acquire an approximate 62 percent indirect, economic interest in Oaktree's fund management business.¹⁸

13. Applicants add that, while Brookfield and Oaktree will each continue to exist and each will continue to operate its respective businesses independently, Brookfield will be affiliated with the Seller Public Utilities. Therefore, Applicants explain that the market power analysis in this Application assumes that Brookfield will indirectly become the holding company, for all FPA purposes, of the Seller Public Utilities.¹⁹

¹⁵ *Id.* at 20 (citing *AES Creative Resources, L.P.*, 129 FERC ¶ 61,239, at PP 26-28 (2009) (*AES Creative*) (describing rights that do not confer control over a public utility or allow the holder to participate in the public utility's day-to-day operations)).

¹⁶ *Id.* at 20-23.

¹⁷ *Id.* at 20.

¹⁸ *Id.* at 23.

¹⁹ *Id.* at 23-24.

II. Notice of Filing

14. Notice of the Application was published in the *Federal Register*, 84 Fed. Reg. 30,104 (2019), with interventions and protests due on or before July 10, 2019. None was filed.

15. Commission staff issued a deficiency letter on August 21, 2019. Applicants filed a response to the deficiency letter on August 30, 2019 (Response). Notice of the Response was published in the *Federal Register*, 84 Fed. Reg. 46,948 (2019), with interventions and protests due on or before September 20, 2019. None was filed.

III. Discussion

A. FPA Section 203 Standard of Review

16. 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

B. Analysis of the Proposed Transaction

17. As discussed below, we conditionally authorize the Proposed Transaction, subject to Brookfield and Oaktree not having more than one representative on the Vistra Board in the future without obtaining the Commission's prior approval.

²⁰ 16 U.S.C. § 824b(a)(4).

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

²² 16 U.S.C. § 824b(a)(4).

²³ 18 C.F.R. § 33.2(j).

1. Effect on Horizontal Competition

a. Applicants' Analysis

18. Applicants contend that the Proposed Transaction does not raise any horizontal market power concerns. As a threshold matter, Applicants note that the relevant geographic markets for the Proposed Transaction are ISO-NE, PJM, and NYISO because those are the balancing authority areas in which Brookfield and the Seller Public Utilities have overlapping generation. In PJM, Applicants assert that the overlap is *de minimis*, i.e., post-transaction, Applicants will be affiliated with less than one percent of the capacity in PJM.²⁴ However, for the ISO-NE and NYISO balancing authority areas, Applicants performed a Delivered Price Test, also referred to as an Appendix A analysis or Competitive Analysis Screen,²⁵ to analyze the impacts of the Proposed Transaction on horizontal competition.²⁶

19. In ISO-NE, Applicants explain that the Delivered Price Test demonstrates HHI changes that range from seven to 19 points in an unconcentrated market for the Economic

²⁴ Application at 26-27, 31-32.

²⁵ The Delivered Price Test determines the pre- and post-transaction market shares from which the change in market concentration, or the change in the Herfindahl-Hirschman Index (HHI), due to a proposed transaction can be derived. The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are considered to be unconcentrated; markets in which the HHI is greater than or equal to 1,000, but less than 1,800 points, are considered to be moderately concentrated; markets in which the HHI is greater than or equal to 1,800 points are considered to be highly concentrated. In the Merger Policy Statement, the Commission adopted the 1992 Federal Trade Commission/Department of Justice Horizontal Merger Guidelines, which state that in a horizontal merger, an increase of more than 50 HHI points in a highly concentrated market or an increase of 100 HHI points in a moderately concentrated market fails its screen and warrants further review. Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,129; *see also Analysis of Horizontal Market Power under the Federal Power Act*, 138 FERC ¶ 61,109 (2012) (affirming the Commission's use of the thresholds adopted in the Merger Policy Statement).

²⁶ Application at 27.

Capacity measure.²⁷ For the Available Economic Capacity measure, the Proposed Transaction results in HHI changes that range from 11 to 35 points in an unconcentrated market. Applicants explain that the results of the price sensitivities are not materially different.²⁸ Applicants also assert that the Proposed Transaction does not raise competitive concerns in the ISO-NE capacity market. Applicants' analysis demonstrates that, post-transaction, Applicants are affiliated with 5.44 percent of qualified capacity based on the results of Forward Capacity Auction-13 (2022-2023) and that the Proposed Transaction results in an HHI change of 12 points in the ISO-NE-wide capacity market.²⁹ In addition, Applicants argue that the Proposed Transaction raises no competitive concerns with respect to ISO-NE ancillary services markets because supply offered for various ancillary services exceeds the supply cleared, and the ISO-NE internal market monitor deemed recent ancillary services auctions to be consistent with a structurally competitive level.³⁰

20. In NYISO, Applicants explain that the Delivered Price Test demonstrates HHI changes that range from six to 10 points in an unconcentrated market for the Economic Capacity measure. For the Available Economic Capacity measure, the HHI changes due to the Proposed Transaction range from 12 to 30 points. Applicants state that the results of the price sensitivities are not materially different.³¹ Applicants also assert that the Proposed Transaction raises no concerns in the NYISO capacity market. Applicants' analysis demonstrates that, post-transaction, Applicants are affiliated with 3.56 percent of installed capacity in the NYISO capacity market and that the Proposed Transaction

²⁷ Each supplier's Economic Capacity is the amount of capacity that could compete in the relevant market given market prices, running costs, and transmission availability. Available Economic Capacity is based on the same factors but deducts the supplier's native load obligation from its capacity and adjusts transmission availability accordingly. *See Wis. Energy Corp.*, 151 FERC ¶ 61,015, at P 25 (2015).

²⁸ Application at 28-29. Applicants explain that, because most states within ISO-NE and New York have been restructured such that traditional suppliers generally do not own both generation and have load-serving responsibility, Economic Capacity is the appropriate measure to focus on for the Delivered Price Test analysis for both ISO-NE and NYISO. Applicants nevertheless also conducted an Available Economic Capacity analysis. *Id.* at nn.111 & 112.

²⁹ Application, Ex. J at 19-20.

³⁰ *Id.*, Ex. J at 20-21.

³¹ *Id.* at 30-31.

results in a HHI change of six points in the NYISO-wide market.³² In addition, Applicants contend that the Proposed Transaction raises no concerns with respect to NYISO ancillary services markets because, among other things, Brookfield's affiliated generation in NYISO is not suited to provide ancillary services.³³

21. In their Response, Applicants provide further explanation for their assertion that Brookfield and Oaktree should not be considered affiliates of Vistra following consummation of the Proposed Transaction. Applicants assert that the scope of the voting rights that Oaktree will have under the Voting Trust, which is described above, is far narrower than what is permitted under *AES Creative*.³⁴ Applicants also reiterate that, when the Voting Trust is implemented, Oaktree cannot be deemed to hold, with the right or power to vote, any of the current Oaktree-owned securities of Vistra. Applicants explain that, post-transaction, the combined Brookfield-Oaktree will: (1) directly own the same amount of Vistra's voting shares that Brookfield currently holds pre-transaction, which is less than 10 percent of the outstanding voting shares in Vistra; and (2) be the indirect and passive beneficiary of an additional approximately 5.5 percent of Vistra stocks over which it solely has passive interests of a lesser nature than that approved in *AES Creative*. Applicants thus contend that, post-transaction, the combined Brookfield-Oaktree will not be a "holding company" or an "affiliate" of Vistra, nor of Vistra's public utility subsidiaries,³⁵ and that consequently Vistra need not be included in the Delivered Price Test.³⁶

b. Commission Determination

22. 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.³⁷ As

³² *Id.*, Ex. J at 23-24.

³³ *Id.*, Ex. J at 24-25.

³⁴ Response at 11.

³⁵ *Id.* at 13.

³⁶ *Id.* at 15.

³⁷ *Nev. Power Corp.*, 149 FERC ¶ 61,079, at P 28 (2014).

discussed below, we find that the Proposed Transaction has no adverse effect on competition.

23. Applicants assert that the Proposed Transaction results only in the combination of public utilities and jurisdictional facilities affiliated with Brookfield or Oaktree, and that Brookfield and Oaktree are not affiliated with Vistra by virtue of the Voting Trust. Applicants assert that the placement of Oaktree's Vistra voting securities into the Voting Trust, leaving Oaktree with only limited consent and veto rights, means that these voting securities are, as of the closing date of the Proposed Transaction, non-voting securities consistent with *AES Creative*.³⁸ According to Applicants, this means that neither Brookfield nor Oaktree should be considered a holding company or affiliate of Vistra and that, consequently, Vistra assets should not be studied in a Delivered Price Test.

24. Based on the specific facts and circumstances here, we agree with Applicants that Brookfield and Oaktree are not affiliates of Vistra by virtue of the placement in the Voting Trust of the voting securities that Oaktree holds in Vistra, subject to the condition described below. In *AES Creative*, the Commission found that the ownership interests, and the consent or veto rights associated with those interests, held by the tax equity investors in that case did not confer control or allow the holder to participate in the public utility's day-to-day operations.³⁹ Here, Applicants explain that the voting rights that Oaktree will retain after the Vistra securities it holds are placed in the Voting Trust include only the following: (1) issuances of stock; (2) liquidation of Vistra; (3) bankruptcy; (4) changes to Vistra's corporate form or tax treatment; (5) changes to certain investor rights under Vistra's corporate charter; and (6) merger or consolidation.⁴⁰ We agree with Applicants that these rights are sufficiently limited and consistent with those discussed in *AES Creative* such that Oaktree's placement of its Vistra securities in the Voting Trust renders them non-voting securities.⁴¹

³⁸ See Application at 19-20; Response at 12-17.

³⁹ *AES Creative*, 129 FERC ¶ 61,239 at P 25.

⁴⁰ Application at 20-23.

⁴¹ The Public Utility Holding Company Act of 2005 (PUHCA 2005) defines a voting security as "any security *presently* entitling the owner or holder thereof to vote in the direction or management of the affairs of a company." 42 U.S.C. § 16451(17) (2012) (emphasis added). When Oaktree's shares are placed in the voting trust, Oaktree will have no present entitlement to vote those shares, and thus they will not be voting securities.

25. Although Oaktree's shares are non-voting securities as a consequence of the Voting Trust, our approval of the Proposed Transaction is conditioned upon Brookfield and Oaktree not having more than one representative on the Vistra Board in the future without obtaining the Commission's prior approval.⁴²

26. We find that, with this additional condition to the proposed Voting Trust, there will be no change in control over Vistra resulting from the combination of Brookfield and Oaktree, and thus no affiliation between Applicants and Vistra. Therefore, we will not require a Delivered Price Test assuming affiliation with Vistra's generation facilities, and will instead rely on the Delivered Price Test submitted with the Application. Based on the analysis presented by Applicants described above, we find that the Proposed Transaction does not increase market concentration in any market significantly enough to raise market power concerns.

27. In the future, applicants asserting that a voting trust breaks an affiliate relationship should provide the Commission with information regarding their combined representation on relevant boards of directors (or similar governing bodies) and any other facts and circumstances that would indicate a lack of common control.⁴³

2. Effect on Vertical Competition

a. Applicants' Analysis

28. Applicants state that the Proposed Transaction raises no vertical market power concerns. Applicants explain that the Proposed Transaction does not involve any

⁴² *Entegra Power Group LLC*, 125 FERC ¶ 61,143, at P 33 (2008) ("The fact that the investment firm SPO Advisory Corp., a minority shareholder, holds two seats on the board of directors, including the Chairman of the Board, suggests that minority shareholders SPO Advisory Corp. and Harbinger acting together, or Harbinger acting together with other minority shareholders, are able to exercise control over Calpine.").

⁴³ We note that Applicants' combined representation on Vistra's Board recently decreased from two to one directors. *See Vistra Energy, Board of Directors*, <https://www.vistraenergy.com/about/leadership/governance/> (last visited Sept. 27, 2019); *see also Vistra Energy Corp.*, Form 8-K Current Report (filed Sept. 19, 2019) ("On September 18, 2019, Cyrus Madon advised Vistra Energy Corp. (the 'Company') that he would resign from his positions as a member of the Board of Directors (the 'Board') of the Company and a member of the Nominating and Governance Committee of the Board, effective immediately.").

transmission facilities other than interconnection facilities or any upstream inputs to electricity products.⁴⁴

29. Applicants state that neither Seller Public Utilities nor their affiliates own or control electric transmission facilities except for limited and discrete interconnection facilities that qualify for waiver of the Commission's open access requirements.⁴⁵ As to Brookfield, Applicants explain that Brookfield is affiliated with Smoky Mountain Transmission (Smoky Mountain), which owns transmission facilities connecting the Duke Carolinas transmission system in North Carolina to the Tennessee Valley Authority (TVA) transmission system in Tennessee and interconnecting to generation facilities owned and operated by an affiliate of Brookfield in the TVA balancing authority area. Applicants represent that Smoky Mountain has an open access transmission tariff on file with the Commission but has no customers beyond the Brookfield affiliate. Applicants also state that Brookfield is affiliated with transmission in the Electric Reliability Council of Texas, Inc. (ERCOT). Applicants explain that, except for Smoky Mountain and Brookfield's affiliate in ERCOT, none of Brookfield's affiliates own, operate, or control any transmission facility in any U.S. market beyond limited and discrete interconnection facilities necessary to connect their generation to the grid. Applicants explain that, except for Smoky Mountain and Brookfield's affiliate in ERCOT, Brookfield's affiliates that own, operate, or control discrete interconnection facilities qualify for waiver of the Commission's open access requirements.⁴⁶

30. Applicants state that, with limited exception, they do not own inputs to electric power generation.⁴⁷ Finally, Applicants assert that they have not and will not erect barriers to entry.⁴⁸

b. Commission Determination

31. 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

⁴⁴ Application at 32.

⁴⁵ *Id.*

⁴⁶ *Id.* at 32-33.

⁴⁷ Applicants note that Brookfield is affiliated with certain natural gas storage companies that operate in California and Oklahoma. *Id.* at 33-34.

⁴⁸ *Id.* at 34.

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.⁴⁹

32. We find that the Proposed Transaction will not have an adverse effect on vertical competition. Applicants' affiliated transmission and generation input assets are remote from the newly combined generation facilities. Therefore, Applicants' affiliated upstream and downstream facilities cannot be used to advantage affiliate generation at the expense of rivals.

3. Effect on Rates

a. Applicants' Analysis

33. Applicants state that the Proposed Transaction will have no adverse effect on rates. Specifically, Applicants explain that all sales of power, capacity, and ancillary services by Seller Public Utilities will continue to be made at market-based rates as authorized by the Commission. Applicants state moreover that the Seller Public Utilities do not have any transmission rates or transmission customers and that the Proposed Transaction does not involve any transmission rates or transmission customers.⁵⁰

b. Commission Determination

34. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on rates. The Proposed Transaction will not have an adverse effect on rates because all sales of energy, capacity, and ancillary services by Seller Public Utilities will continue to be made under market-based rate tariffs after the consummation of the Proposed Transaction.⁵¹ Further no transmission rates are affected by the Proposed Transaction.

⁴⁹ *Upstate N.Y. Power Producers*, 154 FERC ¶ 61,015, at P 15 (2016); *Exelon Corp.*, 138 FERC ¶ 61,167, at P 112 (2012).

⁵⁰ Application at 34-35.

⁵¹ See *Union Electric Co.*, 114 FERC ¶ 61,255, at P 45 (2006) (finding wholesale customers will not be adversely affected where Applicant provides wholesale service at market-based rates); *NorAm Energy Servs., Inc.*, 80 FERC ¶ 61,120, at 61,382-83 (1997)

4. Effect on Regulation

a. Applicants' Analysis

35. Applicants explain that the Proposed Transaction will have no adverse effect on regulation. Applicants argue that none of Applicants will cease being subject to the jurisdiction of the Commission or any state commission due to the Proposed Transaction, nor will the Proposed Transaction change the extent to which Seller Public Utilities and their affiliates are subject to Commission or state regulation.⁵²

b. Commission Determination

36. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap.⁵³ 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.⁵⁴ Based on Applicants' representations, we find no evidence that either state or federal regulation will be impaired by the Proposed Transaction.

5. Cross-Subsidization

a. Applicants' Analysis

37. Applicants explain that the Proposed Transaction involves non-affiliates with no captive customers and, as such, qualifies for a safe harbor such that the Exhibit M verifications are not required. Nevertheless, 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

(stating that the Commission's ratepayer protection concerns do not apply to customers charged market-based rates).

⁵² Application at 35.

⁵³ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

⁵⁴ *Id.*

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 206⁵⁵ of the FPA.⁵⁶

b. Commission Determination

38. Based on Applicants' 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.

C. Other Considerations

39. 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 215.⁵⁷ 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.

⁵⁵ 16 U.S.C. §§ 824d, 824e (2018).

⁵⁶ Application at 35-37 & Ex. M.

⁵⁷ 16 U.S.C. § 824o (2018).

40. 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 PUHCA 2005⁵⁸ are subject to the record-keeping and books and records requirements of PUHCA 2005.

41. 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.⁵⁹ 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 subject to condition, 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.

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

⁵⁹ 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).

(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.