

170 FERC ¶ 61,280
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

El Paso Electric Company
Sun Jupiter Holdings LLC

Docket No. EC19-120-000

ORDER CONDITIONALLY AUTHORIZING
DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued March 30, 2020)

1. On August 13, 2019, as supplemented on September 23, 2019, January 6, 2020, and January 17, 2020, pursuant to section 203 of the Federal Power Act (FPA)¹ and Part 33 of the Commission's regulations, El Paso Electric Company (El Paso) and Sun Jupiter Holdings LLC (Sun Jupiter) (together, Applicants) filed an application requesting authorization for the disposition of jurisdictional facilities that will result from the merger of Sun Merger Sub, Inc. (Merger Sub), a wholly owned subsidiary of Sun Jupiter, with and into El Paso, which will be the surviving entity (Proposed Transaction).²
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, subject to the condition discussed below.

¹ 16 U.S.C. § 824b (2018).

² Applicants, Joint Application for Authorization under Section 203 of the Federal Power Act and Request for Waivers and Confidential Treatment, Docket No. EC19-120-000 (Aug. 13, 2019) (Application); Supplement to Joint Application for Authorization under Section 203 of the Federal Power Act, Docket No. EC19-120-000 (filed Sept. 23, 2019) (Supplement); Applicants, Second Supplement to Joint Application for Authorization Under Section 203 of the Federal Power Act, Docket No. EC19-120-000 (filed Jan. 17, 2020) (Second Supplement). *See also* Applicants, Response to Deficiency Letter, Docket No. EC19-120-000 (filed Jan. 6, 2020) (Response to Deficiency Letter).

³ *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs.

I. Background

A. Description of Applicants

1. El Paso

3. Applicants state that El Paso is a vertically integrated utility that is engaged in the generation, transmission, distribution and sale of electricity at retail and wholesale. With respect to its retail operations, Applicants explain that El Paso owns distribution facilities through which it provides service to customers at rates subject to the jurisdiction of the Public Utility Commission of Texas (Texas Commission) and the New Mexico Public Regulation Commission (New Mexico Commission). Applicants note that El Paso is a publicly traded company that is directly owned by its shareholders.

4. According to Applicants, El Paso has been authorized by the Commission to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates outside of its own balancing authority area, the El Paso Balancing Authority Area, which is located in southern New Mexico and western Texas. Applicants state that El Paso makes power sales to wholesale customers at cost-based rates pursuant to certain rate schedules on file with the Commission. In addition, Applicants explain that El Paso owns or holds an interest in generating units representing a total net capacity of approximately 2,157 megawatts (MW) in the El Paso Balancing Authority Area, including a share of the Palo Verde Nuclear Generating Station that is physically located in the Arizona Public Service Company Balancing Authority Area.

¶ 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).

5. Applicants state that, in addition to its generating assets, El Paso owns transmission facilities and provides transmission service over those facilities pursuant to its Open Access Transmission Tariff (OATT), which is on file with the Commission.⁴

2. Sun Jupiter and its Relevant Affiliates

6. Applicants state that Sun Jupiter is the sole shareholder of Merger Sub, a corporation that was formed for the purpose of merging with and into El Paso, with El Paso as the surviving entity.

7. According to Applicants, Sun Jupiter is an indirect, wholly owned subsidiary of IIF Sun Jupiter Ultimate Holdings LP (Sun Jupiter Ultimate). IIF Sun Jupiter Holdings LLC holds the general partnership interests in IIF Sun Jupiter Ultimate; IIF US Holding 2 LP (IIF US Holding 2) holds the limited partnership interests in IIF Sun Jupiter Ultimate and also owns IIF Sun Jupiter Holdings LLC.

8. Applicants explain that IIF US Holding 2 is an infrastructure investment fund managed and controlled by its general partner, IIF US Holding 2 GP, LLC (IIF US Holding 2 GP), which is owned by three private individuals, the IIF GP Owners.⁵ Applicants state that IIF US Holding 2 is part of the Infrastructure Investments Fund (IIF), an open-ended infrastructure fund that invests in infrastructure companies in developed countries. Applicants state that IIF is not an actual entity, but rather an umbrella name used to refer to the three master partnerships that hold all of IIF's investments: IIF US Holding 2, IIF US Holding LP (IIF US Holding), and IIF Int'l Holding L.P. (IIF Int'l).⁶ Applicants state that IIF US Holding is an affiliate of Sun Jupiter.

9. Applicants state that IIF US Holding 2 and IIF US Holding indirectly own or control a 10 percent or greater voting interest in certain generation facilities throughout the United States. Applicants state that IIF US Holding 2 and IIF US Holding are affiliated with certain generating facilities in other markets, but that the output of all but one of those facilities is fully committed under long-term contracts.⁷

10. Applicants note that IIF US Holding 2 is affiliated with entities that own natural gas distribution facilities in Arkansas, Oklahoma, Colorado, Maine, and Missouri. Other

⁴ Application at 2-4.

⁵ *Id.* at 4-5.

⁶ Response to Deficiency Letter at 1.

⁷ Application at 5-6.

than these gas distribution facilities, Applicants state that none of IIF US Holding 2, IIF US Holding, the IIF GP Owners, or any of their respective affiliates owns, operates, or controls, directly or indirectly, a 10 percent or greater interest in any essential inputs to electricity products or electric power production in the United States.

B. Description of the Proposed Transaction

11. Applicants state that, pursuant to the Proposed Transaction, Merger Sub will merge with and into El Paso, with El Paso as the surviving entity. Following the Proposed Transaction, El Paso will be a wholly owned subsidiary of Sun Jupiter. Applicants represent that the following jurisdictional facilities will be affected by the Proposed Transaction: (1) El Paso's market-based rate tariff and any related agreements; (2) El Paso's cost-based rate schedules and any related agreements; (3) El Paso's OATT and any related agreements; (4) El Paso's WestConnect Point-to-Point Regional Transmission Service Tariff and any related agreements; (5) the transmission facilities owned by El Paso over which El Paso provides jurisdictional services; (6) the interconnection facilities associated with the electric generation facilities owned by El Paso; and (7) various books and records.⁸

II. Notice of Filing and Responsive Pleadings

12. Notice of the Application was published in the *Federal Register*, 84 Fed. Reg. 43,115 (Aug. 20, 2019), with interventions and protests due on or before October 15, 2019. Public Citizen, Inc. (Public Citizen) filed a motion to intervene.

13. On September 20, 2019, Public Citizen filed comments on the Application.

14. On September 23, 2019, Applicants filed the Supplement. Notice of the Supplement was published in the *Federal Register*, 84 Fed. Reg. 51,535 (Sept. 30, 2019), with interventions and protests due on or before October 15, 2019.

15. On September 26, 2019, Applicants filed an answer to Public Citizen's September 20, 2019 comments.

16. On September 30, 2019, Public Citizen filed a protest of the Application. On October 7, 2019, Public Citizen filed additional comments and a protest.

17. On October 15, 2019, Applicants filed a motion to answer and answer to the comments and protests submitted by Public Citizen on September 30, 2019, and October 7, 2019.

⁸ *Id.* at 8.

18. On November 6, 2019, Public Citizen filed an answer to Applicants' October 15, 2019 answer.
19. On November 26, 2019, Applicants filed a motion for leave to reply and limited reply comments to Public Citizen's November 6, 2019 answer.
20. On December 2, 2019, Representative Veronica Escobar, 16th District, Texas, submitted comments on the Application, expressing concern regarding the post-transaction transparency of El Paso, including the public's access to important information regarding the utility.
21. On December 5, 2019, Commission staff issued a deficiency letter requesting additional information from Applicants. On January 6, 2020, Applicants submitted their response. Notice of the response was published in the *Federal Register*, 85 Fed. Reg. 2126 (Jan. 14, 2020), with comments due on or before January 27, 2020.
22. On January 7, 2020, Public Citizen filed a request for a 45 day comment period to respond to Applicants' response to the deficiency letter.
23. On January 17, 2020, Applicants filed the Second Supplement. Notice of the Second Supplement was published in the *Federal Register*, 85 Fed. Reg. 4963 (Jan. 28, 2020), with interventions and protests due on or before January 27, 2020.
24. On January 23, 2020, Jesus Manuel Reyes filed a motion to intervene. On January 24, 2020, Adrian P. Ordonez, Dominic E. Chacon, and Sunrise Movement El Paso filed motions to intervene.
25. On January 27, 2020, Public Citizen filed a protest of Applicants' response to the deficiency letter.
26. On January 29, 2020, Priscilla Munoz filed a motion to intervene.
27. On March 10, 2020, Senators Jeffrey A. Merkley, Oregon; Edward J. Markey, Massachusetts; and Bernard Sanders, Vermont, submitted comments requesting an evidentiary hearing regarding the ownership of, and control over, IIF.

III. Discussion

A. Procedural Matters

28. 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.

29. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2019), we grant Priscilla Munoz's late-filed motion to intervene given her interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

30. 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 or an answer unless otherwise ordered by the decisional authority. We accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

31. Public Citizen argues that, based on the complexity of the Proposed Transaction, and because of Applicants' failure to demonstrate full candor with the Commission as to the nature of the relationship between IIF US Holding 2 GP and J.P. Morgan Chase & Co. (J.P. Morgan), and the complexity of the corporate structure of IIF, a full evidentiary hearing is necessary to ensure that the Proposed Transaction is in the public interest.⁹

32. We deny the requests for an evidentiary hearing. Even if there are disputed issues of material fact in a proceeding, the Commission is not obligated to establish an evidentiary hearing if the Commission can determine whether the Proposed Transaction is consistent with the public interest based on the written record.¹⁰ As discussed in further detail below, Applicants have demonstrated that even if Sun Jupiter were affiliated with J.P. Morgan or any of its affiliates, such affiliation would not change the outcome of the Commission's analysis of the Proposed Transaction under FPA section 203.¹¹ No participant in this proceeding has disputed Applicants' analysis or demonstrated how Sun Jupiter's affiliation with J.P. Morgan would cause the Proposed

⁹ Protest of Public Citizen, and Request for an Evidentiary Hearing at 1, 8, Docket No. EC19-120-000 (Sept. 30, 2019) (Public Citizen September Protest).

¹⁰ *Entergy Nuclear Operations, Inc.*, 112 FERC ¶ 61,117, at P 50 (2005) ("The Commission has broad discretion regarding its processes. We are not obliged to conduct a trial-type, evidentiary hearing, even if there are disputed issues of material fact, if the issues can be adequately resolved on the written record."). See also *Ocean State Power II*, 69 FERC ¶ 61,146, at 61,544 (1994).

¹¹ As discussed in further detail below, Public Citizen alleges that IIF Holding 2 has extensive financial and contractual ties to J.P. Morgan. In response, Applicants stated, among other things, that J.P. Morgan Investment is an investment advisor to IIF US Holding 2.

Transaction to have an adverse effect on competition, rates, regulation, or result in cross-subsidization.

B. Substantive Matters

1. FPA Section 203 Standard of Review

33. 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.¹² 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.¹³ 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."¹⁴ 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.¹⁵

¹² 16 U.S.C. § 824b(a)(4) (2018). Approval of the Proposed Transaction is also required by other regulatory agencies pursuant to their respective statutory authorities before the Proposed Transaction may be consummated. Application, Exhibit L: Regulatory Orders. Our findings under FPA section 203 do not affect those agencies' evaluation of the Proposed Transaction pursuant to their respective statutory authorities.

¹³ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

¹⁴ 16 U.S.C. § 824b(a)(4).

¹⁵ 18 C.F.R. § 33.2(j) (2019).

2. Analysis of the Proposed Transaction

a. Effect on Horizontal Competition

i. Applicants' Analysis

34. Applicants performed a Delivered Price Test, also referred to as an Appendix A analysis or Competitive Analysis Screen,¹⁶ to analyze the impacts of the Proposed Transaction on horizontal competition under two different scenarios, as described in further detail below. Applicants analyzed the effect on competition of the Proposed Transaction in the following relevant destination markets: the El Paso Balancing Authority Area; the Public Service Company of New Mexico Balancing Authority Area and the Tucson Electric Power Company Balancing Authority Area, both of which are first-tier to El Paso; and the Arizona Public Service Company Balancing Authority Area and the Salt River Project Agricultural Improvement and Power District (SRP) Balancing Authority Area, in which Applicants or their affiliates own generation.¹⁷

35. Applicants explain that IIF US Holding owns Mesquite Power, LLC (Mesquite), the owner of Block 2 of the Mesquite Generating station (Mesquite Station), a 595 megawatt (MW) natural gas-fired facility located in Arizona, within the SRP

¹⁶ 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).

¹⁷ Application at 12.

Balancing Authority Area.¹⁸ Applicants state that all of the Mesquite Station's capacity is currently committed to third parties. Applicants explain that Mesquite currently sells 271 MW from Block 2 on a firm basis to a group of 20 wholesale purchasers pursuant to a power purchase agreement (PPA). Applicants state that the output of Block 2 that is not sold pursuant to the PPA is not under Mesquite's control and is sold through the combination of three interrelated contracts with counterparties that are not affiliated with Sun Jupiter or El Paso (Surplus Output Contracts). Applicants represent that while the PPA and the Surplus Output Contracts are in effect, Mesquite does not control the output of Block 2.¹⁹

36. Applicants identify two changes scheduled to occur in the future that could affect competitive conditions. First, Applicants state that the Surplus Output Contracts will terminate at the end of April 2021. Second, on May 1, 2021, the capacity committed under the PPA will increase from 271 MW to 483 MW, reducing the amount of Mesquite's capacity that is not committed under the PPA from 324 MW to 112 MW.²⁰ Applicants state that the Base Case of the Delivered Price Test takes these changes into consideration and shows that the Proposed Transaction does not result in any market screen failures.²¹

37. Applicants also prepared an alternative sensitivity analysis to examine the competitive effects of the Proposed Transaction in a scenario where the Surplus Output Contracts are terminated before May 1, 2021 (Alternative Analysis). Applicants explain that the Alternative Analysis, which covers the period between close of the Proposed Transaction until May 1, 2021, shows that some Available Economic Capacity, ranging from 10 to 14 MW, would be available from the Mesquite Station for import into the El Paso Balancing Authority Area during three seasons/load periods. The Alternative Analysis results in several screen failures, in moderately to highly concentrated markets.²²

¹⁸ *Id.* at 6-7.

¹⁹ *Id.* at 6.

²⁰ Second Supplement at 2.

²¹ Application at 10. In the Second Supplement, Applicants notified the Commission of several non-material changes related to the Supply Output Contracts. Applicants represent that the reported changes do not require any changes to the competitive analysis provided in the Application.

²² The HHI changes are 121 in the Summer Super Peak 2 season/load period,

38. Applicants argue that because IIF Holding 2 and its affiliates have no uncommitted capacity in the relevant markets under the Base Case, there is no change in market concentration as a result of the Proposed Transaction. With respect to the screen failures in the Alternative Analysis, Applicants argue that they do not raise any competitive concerns for several reasons. First, Applicants note that El Paso does not have market-based rate authority in the El Paso Balancing Authority Area. Second, Applicants state that electric quarterly report data for 2017 and 2019 shows that there have been no sales from the Mesquite Station into the El Paso Balancing Authority Area. Based on these two factors, Applicants conclude that there is no basis for finding that the Mesquite Station's capacity actually competes for sales into the El Paso Balancing Authority Area, notwithstanding the theoretical allocation of a small amount of capacity into that market in the Alternative Analysis. Applicants also note that there is only one wholesale customer in the El Paso Balancing Authority Area. According to Applicants, that customer has a peak load of approximately 13 MW and is served under an existing requirements contract that has a two-year notice to terminate provision. Applicants argue that, as a consequence, no wholesale customers could be adversely affected by the Proposed Transaction because the only wholesale customer in the market would be taking firm full requirements service under a contract that cannot be terminated until after May 1, 2021. Finally, Applicants state that, following consummation of the Proposed Transaction, any sales by Mesquite in the El Paso Balancing Authority Area would have to be at cost-based rates approved by the Commission,²³ which eliminates the ability and incentive to exercise market power.²⁴

ii. Deficiency Letter and Applicants' Response

39. In its deficiency letter, staff requested that Applicants detail IIF's relationship with J.P. Morgan Investment Management, Inc. (J.P. Morgan Investment) and the impact of deeming J.P. Morgan Investment to be an affiliate of Sun Jupiter on Applicants' analysis of the Proposed Transaction. In particular, staff requested that Applicants provide a

which is moderately concentrated; 172 in the Winter Super Peak season/load period, which is highly concentrated; and 157 in the Shoulder Super Peak season/load period, which is highly concentrated. The market shares for the three screen failures are 35.2% for the Summer Super Peak 2 season/load period, 51.3% for the Winter Super Peak season/load period, and 40.3% for the Shoulder Super Peak season/load period. Application, Attachment 1, Exhibit J: Affidavit of Julie R. Solomon (Solomon Aff.) at Table 3.

²³ These sales would occur pursuant to a future filing to revise Mesquite's market-based rate authorization with respect to the El Paso Balancing Authority Area.

²⁴ Application at 13-14.

revised competitive analysis that reflected the impact of deeming J.P. Morgan Investment an affiliate of Sun Jupiter.

40. In their response to the deficiency letter, Applicants argue that the Proposed Transaction would not have an adverse impact on competition if the Commission deemed J.P. Morgan Investment an affiliate of Sun Jupiter. According to Applicants, JPM Capital Corporation (JPM Capital), an affiliate of J.P. Morgan Investment, owns a 10% or greater interest in two wind generation facilities located in the PJM Interconnection, L.L.C. (PJM) market. Applicants conclude that because PJM is not a market relevant to the Proposed Transaction, the Proposed Transaction would not raise any competitive concerns even if the Commission treated J.P. Morgan Investment as an affiliate of Sun Jupiter.

41. Applicants also note that JPM Capital holds passive, non-controlling interests in companies that own and operate wind and solar powered electric generation facilities across the United States that are not considered affiliates, consistent with Commission precedent.²⁵ Applicants add that J.P. Morgan, directly or through its subsidiaries, (1) owns passive investments in energy companies, and (2) holds as a fiduciary interests in the securities of energy companies, which in both cases, do not result in affiliation under the Commission's regulations and precedent. Applicants confirm that, except for the wind generation owned by JPM Capital and the passive interests referred to above, J.P. Morgan Investment and its affiliates do not directly or indirectly own or control a 10% or greater equity interest in any electric generating or transmission assets or generation output in any relevant market.

iii. Commission Determination

42. 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.²⁶

43. Upon consideration of Applicants' Delivered Price Tests under the Base Case and Alternative Analysis scenarios, we agree with Applicants that, under the Base Case scenario, the Proposed Transaction will not have an adverse effect on competition. We cannot, however, reach the same conclusion with respect to the Alternative Analysis. As a result, as discussed in further detail below, as a condition to our authorization of the

²⁵ Response to Deficiency Letter at 17 (citing *AES Creative Resources, L.P.*, 129 FERC ¶ 61,239 (2009) and *Ad Hoc Renewable Energy Financing Group*, 161 FERC ¶ 61,010 (2017)).

²⁶ *Nev. Power Co.*, 149 FERC ¶ 61,079, at P 28 (2014).

Proposed Transaction, Applicants must, no later than 45 days from the issuance of this order, file proposed mitigation to address the market power screen failures identified in the Alternative Analysis. This mitigation would go into effect if the Surplus Output Contracts are terminated prior to May 2021 and would address the concerns resulting from the reduction in competitive supply options identified by the screen failures in the Alternative Analysis.

44. As Applicants explain, the early termination of the Surplus Output Contracts would allow more generation capacity from the Mesquite Station to revert to the control of an affiliate and, in turn, result in more affiliated capacity becoming available for sale in the El Paso Balancing Authority Area. The Alternative Analysis reflecting this scenario results in screen failures that indicate reduced competition. The screen failures are significant and occur in moderately to highly concentrated markets.²⁷

45. The Alternative Analysis raises competitive concerns due to the levels of the screen failures. We recognize that termination of the Surplus Output Contracts is not a known outcome, and that, at the time of the Application, “Mesquite has received no notice of early termination, nor has Mesquite received any indication from the counterparties that they will provide such notice.”²⁸ Nevertheless, Applicants submitted the Alternative Analysis to examine the potential competitive effects of the Proposed Transaction in recognition of the “theoretical possibility of early termination of the Surplus Output Contracts.”²⁹ And this analysis demonstrates that such an early termination raises a competitive concern. As a consequence, as a condition of our authorization of the Proposed Transaction, Applicants must, no later than 45 days from the issuance of this order, file proposed mitigation to address the adverse effect on competition identified in the Alternative Analysis to go into effect if the Surplus Output Contracts are terminated early. To remedy such effects, Applicants could, for example, commit to relinquishing operational control of a sufficient amount of the output of affiliated capacity or to selling the output of such capacity under a long-term firm contract.³⁰

46. Finally, we conclude that our analysis of the Proposed Transaction would not change even if the Commission deemed J.P. Morgan Investment an affiliate of Sun Jupiter. As Applicants explain, J.P. Morgan Investment is affiliated with J.P. Morgan Capital, which in turn owns a 10 percent or greater interest in two wind generation

²⁷ See *supra* note 22.

²⁸ Application, Solomon Aff. at n.25.

²⁹ *Id.*

³⁰ See, e.g., *Bluegrass Generation Co.*, 139 FERC ¶ 61,094, at P 31 (2012).

facilities located in PJM. PJM, however, is not a relevant geographic market for the Proposed Transaction. Accordingly, any affiliation between J.P. Morgan Investment and Sun Jupiter would not change the outcome of the Commission's analysis of the effect of the Proposed Transaction on competition.

b. Effect on Vertical Competition

i. Applicants' Analysis

47. Applicants state that the Proposed Transition will not raise any vertical market power concerns. First, Applicants note that El Paso provides transmission service over the transmission facilities it owns pursuant to its Commission-approved OATT, which mitigates any potential vertical market power issues. Applicants note that the Proposed Transaction involves limited and discrete interconnection facilities associated with individual generating facilities, all of which qualify for the blanket OATT waiver pursuant to the Commission's regulations.

48. Second, Applicants acknowledge that IIF US Holding 2 is affiliated with natural gas distribution facilities in Arkansas and Oklahoma, Maine, and Missouri, but explain that these facilities cannot serve or impact electric generation within the El Paso Balancing Authority Area, or any of the other relevant markets. Applicants note that the Commission has adopted a rebuttable presumption that ownership or control of such inputs does not allow an entity to erect barriers to entry. Applicants represent that neither they nor any of their affiliates owns or controls any other essential inputs to electricity products or electric power production in the United States.³¹

ii. Commission Determination

49. 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

³¹ Application at 14-15.

competitors or inhibit existing competitors' ability to undercut an attempted price increase in the downstream wholesale electricity market.³²

50. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on vertical competition. As Applicants note, aside from limited and discrete interconnection facilities associated with individual generating facilities, the Proposed Transaction does not involve any upstream inputs into electric generation products. While IIF Holding 2 is affiliated with natural gas distribution facilities, those facilities cannot serve or impact electric generation within the El Paso Balancing Authority Area, or any of the other relevant markets, and we find no evidence that ownership or control of such inputs would allow Applicants to erect barriers to entry.

c. Effect on Rates

i. Applicants' Analysis

51. Applicants argue that the Proposed Transaction will not have an adverse effect on rates. Applicants state that El Paso has market-based rate authority in markets outside of the El Paso Balancing Authority Area, and that, under Commission policy, there is no concern regarding adverse effects on rates for customers that purchase power under market-based rates. Applicants note that Sun Jupiter's affiliates also sell power at market-based rates. With respect to El Paso's cost-based wholesale power and transmission customers, Applicants assert that the Proposed Transaction will not change El Paso's rates. Applicants state that the Commission will retain its jurisdiction under the FPA to approve El Paso's rates for jurisdictional services, and El Paso will retain its rights to propose changes to its rates, subject to Commission review and approval.

52. Applicants offer to make the same type of hold harmless commitment addressed in the Merger Policy Statement and the Commission's policy statement on hold harmless commitments.³³ Specifically, Applicants commit that, for a period of five years, El Paso will not include transaction-related costs in its transmission rates, cost-based wholesale requirements, cost-based wholesale power, or cost-based wholesale distribution service rates, except to the extent it can demonstrate in a separate FPA section 205 proceeding that merger-related savings are equal to or in excess of all of the transaction-related costs

³² *Upstate N.Y. Power Producers*, 154 FERC ¶ 61,015, at P 15 (2016); *Exelon Corp.*, 138 FERC ¶ 61,167, at P 112 (2012).

³³ *Policy Statement on Hold Harmless Commitments*, 155 FERC ¶ 61,189 (2016) (Hold Harmless Policy Statement).

so included in the proposed rates. Applicants also commit not to seek recovery of any acquisition premium.³⁴

53. In their response to the deficiency letter, Applicants conclude that even if Sun Jupiter were deemed an affiliate of J.P. Morgan Investment, the Proposed Transaction would still not have an adverse effect on rates. Applicants reiterate that they have made a five-year hold harmless commitment with respect to transaction-related costs and have committed not to seek recovery of any acquisition premium.³⁵

ii. Commission Determination

54. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on rates. As Applicants note, the Commission has concluded that where customers are served under market-based rate authority, a proposed transaction is unlikely to have an adverse impact on rates.³⁶ We also find that the Proposed Transaction will not have an adverse effect on El Paso's cost-based wholesale power and transmission customers. First, the Commission will retain its jurisdiction under the FPA to approve El Paso's rates for jurisdictional services, and El Paso will retain its rights to propose changes to its rates, subject to Commission review and approval. Second, Applicants' hold harmless commitment will protect those customers from costs related to the Proposed Transaction.³⁷

55. Accordingly, we accept Applicants' commitment to hold customers harmless from costs related to the Proposed Transaction. We interpret Applicants' hold harmless commitment to apply to all transaction-related costs, including costs related to consummating the Proposed Transaction, incurred prior to the consummation of the Proposed Transaction, or in the five years after the Proposed Transaction's

³⁴ Application at 16-17.

³⁵ Response to Deficiency Letter at 17.

³⁶ *The Dayton Power & Light Co.*, 160 FERC ¶ 61,034, at P 31 (2017).

³⁷ We note also that any affiliation between Sun Jupiter and J.P. Morgan Investment would not change the outcome of the Commission's analysis of the effect of the Proposed Transaction on rates.

consummation in accordance with the Commission's policy on hold harmless commitments.³⁸

d. Effect on Regulation

i. Applicants' Analysis

56. Applicants claim that the Proposed Transaction will not have an adverse effect on regulation by the Commission or relevant state agencies. Applicants state that the Commission will continue to have undiminished jurisdiction over the wholesale rates, terms, and conditions for service for transmission and the wholesale sales of energy, capacity, and ancillary services by El Paso. Applicants note that El Paso's retail electric service would continue to be regulated by the Texas and New Mexico Commissions, "with no diminishment in state jurisdiction."³⁹

57. In their response to the deficiency letter, Applicants state that any affiliation between Sun Jupiter and J.P. Morgan Investment would not affect the Commission's, or any relevant state agency's ability or authority to regulate Applicants.⁴⁰

ii. Commission Determination

58. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap.⁴¹ 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.⁴² Based on Applicants' representations, we find no evidence that either state or federal regulation

³⁸ Hold Harmless Policy Statement, 155 FERC ¶ 61,189.

³⁹ Application at 17.

⁴⁰ Response to Deficiency Letter at 17.

⁴¹ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

⁴² *Id.*

will be impaired by the Proposed Transaction.⁴³ 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. **Applicants' Analysis**

59. Applicants argue that the Proposed Transaction will not result in cross-subsidization. First, Applicants state that the Proposed Transaction falls within one of the Commission's safe harbors under FPA section 203(a)(4), specifically, the safe harbor for transactions involving only non-affiliates. Applicants also note that the Proposed Transaction is subject to approval by the Texas and New Mexico Commissions, which Applicants claim have the authority to protect captive customers against inappropriate cross-subsidization for the benefit of unregulated companies. Second, Applicants assert that the Proposed Transaction meets the four-part test established in Order No. 669⁴⁴ that applicants must satisfy in order to address the concerns identified in FPA section 203 regarding any potential cross-subsidization, pledge or encumbrance of utility assets associated with a proposed transaction.

60. In their response to the deficiency letter, Applicants conclude that even if Sun Jupiter were deemed an affiliate of J.P. Morgan Investment, the Proposed Transaction would still fall within the "safe harbors" for transactions involving only non-affiliates and transactions subject to review by a state commission.⁴⁵

ii. **Commission Determination**

61. 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

⁴³ We also conclude that any affiliation between Sun Jupiter and J.P. Morgan Investment would not change the outcome of the Commission's analysis of the effect of the Proposed Transaction on regulation.

⁴⁴ *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).

⁴⁵ Response to Deficiency Letter at 17-18.

company, or in a pledge or encumbrance of utility assets for the benefit of an associate company.⁴⁶ We note that no party has argued otherwise.

3. Other Issues

a. Arguments Regarding Affiliation

i. Public Citizen

62. In its protests and answers, Public Citizen has raised issues related to the alleged affiliation between Sun Jupiter, the IIF companies, and J.P. Morgan and its affiliates. In its initial protest, for example, Public Citizen argues that Applicants failed to disclose extensive financial and contractual ties with J.P. Morgan, and requests that the Commission establish an evidentiary hearing to explore that relationship.⁴⁷ In the protest of Applicants' response to the deficiency letter, Public Citizen alleges that the weak corporate controls in place at the IIF companies ensure that J.P. Morgan controls the IIF GP Owners,⁴⁸ and that the Application remains deficient because Applicants have not disclosed certain information, such as the identity of the owners of the general partner of IIF Int'l, or provided the corporate bylaws and other related documents for IIF Int'l.⁴⁹ Noting that the Commission's affiliate restrictions are essential to protecting consumers from wholesale transactions and other Commission-jurisdictional activity, Public Citizen suggests that the Commission must make a finding of affiliation between J.P. Morgan and the IIF companies.

63. Mr. Chacon likewise questions whether the IIF companies, including Sun Jupiter, have approached the Proposed Transaction with transparency and good faith, particularly with respect to their relationship with J.P. Morgan.⁵⁰

⁴⁶ We also conclude that any affiliation between Sun Jupiter and J.P. Morgan would not change the outcome of the Commission's analysis of whether the Proposed Transaction results in cross-subsidization.

⁴⁷ Public Citizen September Protest at 1, 4-7.

⁴⁸ Public Citizen, Protest at 4-5, Docket No. EC19-120-000 (Jan. 27, 2020).

⁴⁹ *Id.* at 6.

⁵⁰ Dominic Chacon, Motion to Intervene at 1 (doc less) (Jan. 24, 2020).

ii. Commission Determination

64. We decline to address herein the arguments related to whether the IIF companies are affiliated with J.P. Morgan and/or J.P. Morgan Investment. Applicants have demonstrated that affiliation would not change the outcome of the Commission's section 203 analysis of the Proposed Transaction. As noted above, in the Response to Deficiency Letter, Applicants revised their analysis of the Proposed Transaction to determine the effect, if any, of deeming J.P. Morgan Investment to be an affiliate of Sun Jupiter. Applicants demonstrated that treating J.P. Morgan Investment as an affiliate of Sun Jupiter would not change the Commission's evaluation of the effect of the Proposed Transaction on competition, rates regulation, or cross-subsidization. We note that neither Public Citizen nor any other participant to this proceeding has challenged, let alone rebutted, the conclusions of Applicants' analysis.⁵¹

b. Concerns Related to Climate and Business Practices

i. Sunrise Movement El Paso

65. On behalf of Sunrise Movement El Paso, Ms. Munoz opposes the Proposed Transaction on the grounds that it will have an adverse impact on El Paso's transition to clean, renewable energy, and that private equity funds are not structured to serve the interests of the communities currently served by El Paso.⁵²

ii. Commission Determination

66. We find the issues raised by Ms. Munoz, on behalf of Sunrise Movement El Paso, to be beyond the scope of this proceeding. Neither Ms. Munoz nor Sunrise Movement El Paso have shown that the issues they raise are relevant to the Commission's FPA section 203 analysis.⁵³

⁵¹ As noted above, we make no finding in this order as to whether J.P. Morgan Investment is an affiliate of Sun Jupiter.

⁵² Priscilla Munoz, Motion to Intervene (doc less) at 1-3, Docket No. EC19-120-000 (Jan. 29, 2020).

⁵³ *Exelon Corp.*, 149 FERC ¶ 61,148, at PP 140, 148 (2014).

4. Other Considerations

67. 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 215.⁵⁴ 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.

68. 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)⁵⁵ are subject to the record-keeping and books and records requirements of PUHCA 2005.

69. 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.⁵⁶ 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 conditionally authorized, as discussed in the body of this order.

⁵⁴ 16 U.S.C. § 824o (2018).

⁵⁵ 42 U.S.C. §§ 16451-63 (2018).

⁵⁶ 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).

(B) Applicants must file, no later than 45 days from the issuance of this order, proposed mitigation to address the adverse effect on competition identified in the Alternative Analysis. Applicants may not consummate the Proposed Transaction without first receiving approval for their proposed mitigation.

(C) 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.

(D) 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.

(E) 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.

(F) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

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

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

(I) If Applicants seek to recover transaction-related costs through their transmission or wholesale requirements rates, they must make a new FPA section 205 filing and submit concurrently an informational filing in the instant FPA section 203 docket. In the FPA section 205 filing, Applicants must: (1) specifically identify the transaction-related costs they are seeking to recover; and (2) demonstrate that those costs are exceeded by the savings produced by the Proposed Transaction.

(J) El Paso shall account for the transaction in conformance with requirements prescribed in the Uniform System of Accounts. El Paso shall submit its proposed accounting entries within six months of the date that the transaction is consummated, and the accounting submission shall provide all the accounting entries and amounts related to the transaction along with narrative explanations describing the basis for the entries.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.