

169 FERC ¶ 61,043
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Empire Generating Co, LLC

Docket No. EC19-99-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued October 17, 2019)

1. On June 4, 2019,¹ as amended on June 17, 2019,² pursuant to section 203(a)(1) of the Federal Power Act³ (FPA) and the Commission's regulations,⁴ Empire Generating Co, LLC (Empire Generating or Applicant) requested authorization for the disposition of jurisdictional facilities for the sale of its upstream owner to Black Diamond Capital Holdings, L.L.C. (Black Diamond), AEIF Trade, LLC and ASSF IV AIV B Holdings III, L.P. (together, Ares Holders), and SPTIF Parent, LLC (collectively, Buyers) (Proposed Transaction).
2. We have reviewed the Proposed Transaction under the Commission's Merger Policy Statement.⁵ As discussed below, we authorize the Proposed Transaction as consistent with the public interest.

¹ Application for Approval of Transaction Under Section 203 of the Federal Power Act, Docket No. EC19-99-000 (June 4, 2019) (Application).

² Amended Application for Approval of Transaction Under Section 203 of the Federal Power Act, Docket No. EC19-99-000 (June 17, 2019) (Amended Application).

³ 16 U.S.C. § 824b (2018).

⁴ 18 C.F.R. pt. 33 (2019).

⁵ 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*

I. Background

A. Description of Parties

1. Empire Generating

3. Applicant states that it owns and operates an approximately 653.7 megawatt (MW) natural gas-fired electric generating facility and related interconnection facilities located in Rensselaer, New York, within the New York Independent System Operator, Inc. (NYISO) market. Applicant states that it is an exempt wholesale generator and has authorization from the Commission to make wholesale sales of electric capacity, energy, and ancillary services at market-based rates.⁶

4. Applicant asserts that it is indirectly and wholly owned by Empire Gen Holdings, LLC (Empire Gen Holdings). Empire Gen Holdings is indirectly and wholly owned by TTK Power, LLC (TTK Power). TTK Power is indirectly owned by three entities: 50 percent by Tyr Energy, Inc.; 25 percent by The Kansai Electric Power Co., Inc.; and 25 percent by Tokyo Gas Co., Ltd.⁷

2. Buyers

5. Applicant states that as of the closing of the Proposed Transaction, the majority of the voting membership interests (an amount expected to be 51.5 percent of the voting membership interests) in Empire Acquisition LLC, the purchasing entity for Applicant, will be owned directly by subsidiaries of one private equity fund and two collateralized loan obligation vehicles, which are each indirectly controlled by Black Diamond. Applicant states that Black Diamond is not a public utility and is not engaged in the

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).

⁶ Application at 6.

⁷ *Id.* at 6-7.

electricity business, and it does not own, and is not affiliated with anyone who owns, equity interests in electric generating or transmission facilities in NYISO.⁸

6. Applicant states that as of the closing of the Proposed Transaction, the Ares Holders will hold approximately 34.4 percent of the voting membership interests in Empire Acquisition LLC. Applicant states that Ares Holders are indirectly owned by Ares Holdings L.P. (Ares), which is indirectly owned by Ares Management Corporation (Ares Management), a publicly traded company. Applicant asserts that Ares and Ares Holders are not public utilities. Applicant states that Ares' affiliates own energy assets in NYISO.⁹

7. Applicant states that as of the closing of the Proposed Transaction, a newly formed entity to be named SPTIF Parent, LLC will hold approximately 10.3 percent of the voting membership interests in Empire Acquisition LLC. Applicant states that SPTIF Parent, LLC will be a wholly owned subsidiary of Starwood Property Trust, Inc. (Starwood). Applicant asserts that Starwood is a publicly traded commercial real estate finance company that does not own and is not affiliated with anyone who owns equity interests in electric generating or transmission facilities in NYISO.¹⁰

B. Description of the Proposed Transaction

8. Applicant states that a disposition of jurisdictional facilities will result from the sale of an entity upstream from the Applicant, pursuant to a purchase and sale agreement, in connection with bankruptcy proceedings. Applicant states that at the closing of the Proposed Transaction, voting membership interests in the purchasing entity, Empire Acquisition LLC, will be issued to the listed creditors.¹¹ Applicant states that on May 19, 2019, it along with its upstream owners filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. Applicant and its upstream owners filed a joint motion requesting approval of bid procedures relating to the sale of all of the issued and outstanding membership interests of Empire Gen Holdings. Empire Acquisition LLC was formed by the administrative agent under the credit agreement as a bidder for the purpose of acquiring the Empire Gen Holdings membership interests. After the consummation of the Proposed Transaction, the

⁸ Amended Application at 8.

⁹ *Id.* at 9-10.

¹⁰ *Id.* at 12.

¹¹ *Id.* at 1.

following entities will hold voting membership interests in Empire Acquisition LLC: Black Diamond will own 51.5 percent, Ares Holders will own 34.4 percent, and SPTIF Parent, LLC will own 10.3 percent.¹²

II. Notice of Filing and Responsive Pleadings

9. Notice of the Application was published in the *Federal Register*, 84 Fed. Reg. 27,105 (2019), with interventions and protests due on or before June 25, 2019. Notice of the Amended Application was published in the *Federal Register*, 84 Fed. Reg. 29,511 (2019), with interventions and protests due on or before July 8, 2019. Motions to intervene were filed by Black Diamond and SPTIF Parent, LLC. Ares Management filed a motion to intervene and limited protest (Ares Management Protest). Applicant and Black Diamond filed answers to the Ares Management Protest.

10. On June 21, 2019, Commission staff issued a data request (Data Request). Applicant submitted a response to the Data Request (Data Response) on July 18, 2019. Notice of the Data Response was published in the *Federal Register*, 84 Fed. Reg. 35,668 (2019), with interventions and protests due on or before September 3, 2019. Ares Management filed a motion for permission to answer Applicant's Answer and Data Response (Ares Management Answer). Applicant filed a motion to reject the Ares Management Answer and a limited answer (Applicant Motion to Reject Answer). Ares Management filed an answer to the Applicant Motion to Reject Answer (Ares Management Answer to Motion).

III. Discussion

A. Procedural Matters

11. 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.

12. 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.

¹² *Id.* at 3-6.

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

13. 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.¹³ 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.¹⁴ 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."¹⁵ 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.¹⁶

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

14. Applicant asserts that the Proposed Transaction does not raise horizontal market power issues. Applicant states that the combination of Applicant and its post-transaction affiliates will constitute less than 3.7 percent of NYISO's generating capacity.¹⁷

¹³ 16 U.S.C. § 824b(a)(4). 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. *See* Application at 16. Our findings under FPA section 203 do not affect those agencies' evaluation of the Proposed Transaction pursuant to their respective statutory authorities.

¹⁴ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

¹⁵ 16 U.S.C. § 824b(a)(4).

¹⁶ 18 C.F.R. § 33.2(j) (2019).

¹⁷ Applicant states that total generation in NYISO owned by Applicant and its post-transaction affiliates will be approximately 1,470.5 MW and the 2019 New York

Applicant also states that the Proposed Transaction does not involve any acquisition of interests in, or control over, electric generating capacity by Empire Generating, nor any consolidation of any electric generating capacity with capacity owned or controlled by Empire Generating. Applicant asserts that the Proposed Transaction involves only a change in upstream ownership.¹⁸

ii. Data Request and Response

15. In the Data Request, Commission staff requested workpapers used to calculate the combination of Applicant and its post-transaction affiliates that constitute the total generation capacity in the NYISO market and a Horizontal Competitive Analysis Screen.

16. In the Data Response, Applicant performed a calculation similar to that contained in the Amended Application and used seasonal capacity instead of nameplate capacity.¹⁹ Applicant performed a Delivered Price Test (DPT), also referred to as an Appendix A analysis or Competitive Analysis Screen,²⁰ to analyze the impacts of the Proposed

Control Area generating capability is 39,295 MW. Amended Application at n.61.

¹⁸ Amended Application at 23-24.

¹⁹ Data Response at 2 and n.8; *see also* Data Response, Exh. J at 3, Table 2; Amended Application at n.61.

²⁰ The DPT 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).

Transaction on horizontal competition in the NYISO market. Applicant asserts that it readily passed the DPT in NYISO under the Economic Capacity measure and Available Economic Capacity measure.²¹ Under the Economic Capacity measure, Applicant states that its post-transaction market shares range from 3.2 percent to 5.0 percent, the market is unconcentrated, and the changes in HHI range from 5 to 12.²² Also, Applicant states that the price sensitivity analysis under the Economic Capacity measure shows post-transaction market shares ranging from 3.2 percent to 5.2 percent, the market remains unconcentrated, and the changes in HHI range from 0 to 12.²³ Under the Available Economic Capacity measure, Applicant asserts that its post-transaction market shares range from 4.9 percent to 7.9 percent, the market is unconcentrated, and the changes in HHI range from 12 to 30.²⁴ In addition, Applicant asserts that the price sensitivity analysis under the Available Economic Capacity measure shows post-transaction market shares ranging from 4.8 percent to 8.8 percent, the market remains unconcentrated, and the changes in HHI range from 0 to 34.²⁵

iii. Comments

17. Ares Management states that Applicant's Competitive Analysis Screen uses seasonal rather than nameplate statistics. Ares Management states that a number of its affiliates within NYISO are energy limited and are not eligible to use seasonal capacity measurement and must instead use nameplate measurements.²⁶ Ares Management states that market-based rate submissions must be based on disclosures and assumptions that are consistent with those relied upon in related section 203 applications.²⁷ Ares Management

²¹ 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 subtracts the supplier's native load obligation from its capacity and adjusts transmission availability accordingly.

²² Data Response at 2-3, Exh. J at 5 and Table 4.

²³ *Id.* at 3, Exh. J-5.

²⁴ *Id.*, Exh. J at 6 and Table 5.

²⁵ *Id.*, Exh. J-6.

²⁶ Ares Management Answer at 4 (citing Order No. 816, 153 FERC ¶ 61,065, at P 15 (2015)).

²⁷ *Id.* (citing Order No. 697, 119 FERC ¶ 61,295, at P 1033 (2007)).

states that it intends to comply with the applicable requirements in its future market-based rate filings.²⁸

18. Ares Management notes that the public utility naming protocols used in Applicant's Competitive Analysis Screen are not identical to those used in the Commission's records, including the Appendix B affiliate listing for Ares Management that was attached to the Amended Application. Ares Management seeks to prevent any confusion as to the identity of affiliates, so it invites the Commission's attention to that Appendix B.²⁹

19. Applicant responds that Ares Management makes statements questioning Applicant's use of seasonal capacity and cites to FPA section 205 market power analysis precedent and not FPA section 203 market power analysis precedent. Applicant also states that the Commission has allowed seasonal capacity measurement in the section 203 context.³⁰

iv. 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.³¹

21. Based on Applicant's representations, we find that the Proposed Transaction will not have an adverse effect on horizontal competition. We find that, under the Merger Policy Statement, the increase in HHI levels in the relevant market is below the threshold for competitive concerns and does not warrant further review. We agree with Applicant that the concerns raised by Ares Management relate to section 205 market-based rate proceedings and do not affect our finding here that the Proposed Transaction will not have an adverse effect on horizontal competition.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Applicant Motion to Reject Answer at n.3 (citing *Cobalt Power, L.L.C.*, 168 FERC ¶ 62,005 (2019); *Ok. Gas & Elec. Co.*, 167 FERC ¶ 62,115 (2019); *Bridgeport Energy LLC*, 166 FERC ¶ 62,134 (2019)).

³¹ *Nev. Power Corp.*, 149 FERC ¶ 61,079, at P 28 (2014).

b. Effect on Vertical Competition**i. Applicant's Analysis**

22. Applicant states that the Proposed Transaction does not raise vertical market power issues. Applicant asserts that the Proposed Transaction will not result in the acquisition of any electric transmission capacity or other assets relevant to the Commission's vertical market power analysis, nor the consolidation of any electric transmission capacity or inputs to electricity production. Applicant states that it and its affiliates post-transaction do not currently provide inputs to electricity products or electric power production in the same geographic market. Also, Applicant asserts that it has not and will not erect any barriers to entry.³²

ii. Commission Determination

23. 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.³³

24. Here, the Proposed Transaction will not have an adverse effect on vertical market power because it does not involve the acquisition or consolidation of any electric transmission capacity or inputs to electricity production. In addition, Applicant and its post-transaction affiliates do not provide inputs to electricity products or electric power production in the same geographic market.

³² Amended Application at 24-25.

³³ *Upstate N.Y. Power Producers*, 154 FERC ¶ 61,015, at P 15 (2016); *Exelon Corp.*, 138 FERC ¶ 61,167, at P 112 (2012).

c. Effect on Rates

i. Applicant's Analysis

25. Applicant states that the output from its facility is sold pursuant to market-based rate authority. Applicant asserts that upon the consummation of the Proposed Transaction, it will continue to sell power under its market-based rate tariff and under individual market-based rate power sales agreements entered into pursuant to that tariff.³⁴ Applicant states that the Proposed Transaction will not affect the rates of the electricity output from the facility, and that the Commission has concluded that market-based rate sales do not raise any concerns about a transaction's possible adverse effect on rates. Accordingly, Applicant states that there are no wholesale ratepayers or transmission customers whose rates could be affected by the Proposed Transaction.

ii. Commission Determination

26. Based on Applicant's 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 Applicant will continue to sell power under its market-based rate tariff and under individual market-based rate power sales agreements after the consummation of the Proposed Transaction.

d. Effect on Regulation

i. Applicant's Analysis

27. Applicant states that the Proposed Transaction will have no adverse effect on regulation. According to Applicant, the Proposed Transaction will not affect the manner or extent to which the Commission, any state, or any other federal agency may regulate it. Applicant asserts that its regulatory status as a public utility and an exempt wholesale generator whose output is sold pursuant to market-based rate authority will remain unchanged following consummation of the Proposed Transaction. Also, Applicant states that the Proposed Transaction will not affect the extent to which any state authority may regulate retail rates or any other aspect of the continued operation of Applicant's facility.³⁵

³⁴ Amended Application at 25-26.

³⁵ *Id.* at 26.

ii. Commission Determination

28. 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

29. Based on Applicant's representations, we find no evidence that either state or federal regulation will be impaired by the Proposed Transaction. We note that no party alleges that regulation, state or federal, would be impaired by the Proposed Transaction, and no state commission has requested that the Commission address the issue of the effect on state regulation.

e. Cross-Subsidization

i. Applicant's Analysis

30. Applicant states that following the consummation of the Proposed Transaction, Empire Acquisition LLC and Buyers are not affiliated with and will not become affiliated with a traditional public utility company that has captive ratepayers in the United States or that owns or provides transmission service over jurisdictional transmission facilities in the United States.³⁸ Thus, Applicant states that the Proposed Transaction falls within the scope of the safe harbor for transactions in which "no franchised public utility with captive customers is involved."³⁹

31. Out of an abundance of caution, Applicant also provides an Exhibit M addressing cross-subsidization issues.

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

³⁷ *Id.*

³⁸ Amended Application at 27.

³⁹ *Id.* (citing Supplemental Policy Statement, 120 FERC ¶ 61,060 at P 17).

ii. Commission Determination

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

f. Other Issues

i. Post-Transaction Governance

(a) Ares Management Protest

33. Ares Management states in its protest that it supports the Proposed Transaction. However, Ares Management requests that the Commission require Applicant to provide additional information concerning the post-transaction governance of Applicant and Empire Acquisition LLC.⁴⁰

34. Ares Management argues that Applicant has not provided information concerning how, or by whom, Empire Acquisition LLC will be managed and controlled.⁴¹ Ares Management argues that the Commission is thus unable to make the threshold determination of whether the ownership interests are active or passive.⁴² Ares Management also contends that the Amended Application violates part 33 of the Commission's regulations because Applicant fails to provide required documents and information concerning the governance of Empire Acquisition LLC.⁴³

35. Ares Management notes that Applicant's requests for waiver of the Exhibit D filing requirements draw a distinction between business arrangements that are part of the Proposed Transaction and separate business arrangements that are a result of the Proposed Transaction. Ares Management argues that Applicant has provided no precedent supporting this distinction, and it has not made any attempt to describe how the Proposed

⁴⁰ Ares Management Protest at 1-2.

⁴¹ *Id.* at 7.

⁴² *Id.* at 8.

⁴³ *Id.* at 11 (citing 18 C.F.R. § 33.2(c)(4) requiring applicants to provide as Exhibit D to the application a "description of all joint ventures, strategic alliances, tolling arrangements or other business arrangements, . . . unless the applicant demonstrates that the proposed transaction does not affect any of its business interests").

Transaction will or will not affect its business interests. Ares Management also argues that the Amended Application makes no attempt to explain what business arrangements Applicant considers to be part of the Proposed Transaction, which is problematic given Applicant's failure to provide relevant information and documents.⁴⁴ Finally, Ares Management states that absent additional information about Empire Acquisition LLC's governance, Ares Management will not know whether its ownership interests in Empire Acquisition LLC will come with indicia of control that could trigger regulatory obligations.⁴⁵

(b) Answers

36. Applicant argues that Ares Management's protest is a misguided attempt by Ares Management to inject into this proceeding corporate governance issues that are irrelevant to the Commission's consideration of the Proposed Transaction.⁴⁶ Applicant states that Ares Management, Black Diamond, and Starwood will each own ten percent or more of the outstanding voting securities in Empire Acquisition LLC, which is sufficient to establish the Commission's FPA section 203 jurisdiction.⁴⁷ Applicant also argues that it has fully complied with the information submission requirements of part 33 of the Commission's regulations and that Ares Management's assertion that Applicant does not satisfy the requirements of part 33 is simply incorrect, and should be rejected.⁴⁸ Black Diamond also opposes Ares Management's protest.

37. Ares Management answers Applicant's answer and argues that Applicant does not indicate how Ares Management will be able to exercise control in the absence of being advised of what obligations Ares Management will have in Applicant's organizational structure, or whether Ares Management will be responsible for Applicant's regulatory operations, reporting, or management.⁴⁹ Ares Management states it does not know whether it will or will not be responsible for the following: assembling and submitting Applicant's electric quarterly reports; complying with NYISO's tariff and market rules; and supervising, managing, or conducting Applicant's electric reliability compliance

⁴⁴ *Id.* at 11-13.

⁴⁵ *Id.* at 13.

⁴⁶ Applicant Answer at 1.

⁴⁷ *Id.* at 2-3.

⁴⁸ *Id.* at 4-5.

⁴⁹ Ares Management Answer at 2.

activities.⁵⁰ Ares Management does not know if it will be entitled to receive information concerning power sales by Applicant and if it will be treated by Applicant or its co-owners as being responsible for submitting any notice of change in status or triennial updates.⁵¹

38. Applicant requests that the Commission reject Ares Management's answer, because Ares Management overstates post-transaction compliance challenges and that Ares Management has all of the information that it will need to be able to file a post-transaction notice of change in status for its market-based rate affiliates. Applicant states that the filing of electric quarterly reports and compliance with NYISO tariff requirements will be the responsibility of Empire Generating and not its upstream owners.⁵²

39. In response to Applicant's motion to reject, Ares Management renews its request, stating that it does not know what its rights and its obligations will be with respect to the Applicant's regulatory disclosure and compliance activities following consummation of the Proposed Transaction, nor what its rights and obligations might be with respect to the contractor(s) engaged by the Applicant to perform regulatory tasks.⁵³

(c) Commission Determination

40. We deny Ares Management's request to condition approval of the Proposed Transaction upon Applicant's providing additional information on post-transaction governance structure.⁵⁴ For purposes of Commission review of the Proposed Transaction, we note that Applicant has assumed that each of the listed Buyers will have control over the new entity and Applicant has performed its competitive analysis under these assumptions. Therefore, the information requested by Ares Management concerning the post-transaction governance structure would not affect the results of Applicant's competitive analysis or the Commission's conclusions regarding the effect of

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Applicant Motion to Reject Answer at 2-3.

⁵³ Ares Management Answer to Motion at 1.

⁵⁴ We note Applicant states that the filing of electric quarterly reports and compliance with NYISO tariff requirements will be the responsibility of Empire Generating and not its upstream owners.

the Proposed Transaction on competition.⁵⁵ Applicant has complied with the information submission requirements of Part 33 of the Commission's regulations or has requested waivers of certain of its provisions.⁵⁶ Accordingly, we are not persuaded that it is necessary to require additional details regarding the governance structure of Applicant following the Proposed Transaction for purposes of our review of this Application, and we decline the request that we do so.

3. Other Considerations

41. 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.

42. 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

⁵⁵ We therefore reject the objections of Ares Management to the requested waiver of 18 C.F.R. § 33.2(f) and grant that waiver.

⁵⁶ Ares Management similarly objects to Applicant's requested waiver of 18 C.F.R. § 33.2(c)(4) requiring applicants to provide Exhibit D and 18 C.F.R. § 33.2(e)(1) requiring applicants to provide a separate narrative description of the transaction. In this instance we find that there is sufficient information in the application for the Commission to conduct its public interest analysis. Therefore, Applicant's request for these waivers is hereby granted. *See, e.g., Bayou Cove Peaking Power*, 165 FERC ¶ 61,226, at P 129 (2018).

⁵⁷ 16 U.S.C. § 824o (2018).

2005 (PUHCA 2005) are subject to the record-keeping and books and records requirements of PUHCA 2005.⁵⁸

43. 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, as discussed in the body of this order.

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

⁵⁸ 42 U.S.C. §§ 16451-63 (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) Applicant 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.