181 FERC ¶ 61,055
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
James P. Danly, Allison Clements,
Mark C. Christie, and Willie L. Phillips.

TransAlta Energy Marketing (U.S.) Inc. Docket No. EC22-45-000
TransAlta Energy Marketing Corp.
TransAlta Centralia Generation LLC
TransAlta Wyoming Wind LLC
Lakeswind Power Partners, LLC
Big Level Wind LLC
Eagle Canada Common Holdings LP
BIF IV Eagle NR Carry LP

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES AND ACQUISITION OF SECURITIES

(Issued October 20, 2022)

1. On February 28, 2022, pursuant to sections 203(a)(1)(A) and (a)(2) of the Federal Power Act (FPA)[1] and part 33 of the Commission's regulations,[2] TransAlta Energy Marketing (U.S.) Inc.; TransAlta Energy Marketing Corp.; TransAlta Centralia Generation LLC; TransAlta Wyoming Wind LLC; Lakeswind Power Partners, LLC; Big Level Wind LLC; Eagle Canada Common Holdings LP; and BIF IV Eagle NR Carry LP (together, Applicants) filed an application requesting approval for a change in control that may occur upon the termination of certain standstill provisions in a 2019 debt securities agreement between TransAlta Corporation (TransAlta) and Brookfield BRP Holdings (Canada) Inc. (Investor) (Proposed Transaction).

2. We have reviewed the Proposed Transaction under the Commission's Merger Policy Statement.[3] As discussed below, we find that the Application is late-filed but

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

[2] 18 C.F.R. pt. 33 (2021).

[3] *Inquiry Concerning the Commission's Merger Pol'y Under the Fed. Power Act: Pol'y 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 Pol'y*

authorize the Proposed Transaction on a prospective basis as consistent with the public interest.

I. Background

A. TransAlta Entities

3. Applicants state that TransAlta Energy Marketing (U.S.) Inc., TransAlta Energy Marketing Corp., TransAlta Centralia Generation LLC, TransAlta Wyoming Wind LLC, Lakeswind Power Partners, LLC, and Big Level Wind LLC (together, TransAlta Companies) are all wholly owned subsidiaries of TransAlta Corporation (TransAlta). Applicants state that TransAlta is engaged in the production and sale of electric energy in Canada, the United States, and Australia.[4]

4. Applicants state that the TransAlta Companies and their affiliates do not own or control any electric transmission facilities in the United States, except for limited and discrete interconnection equipment necessary to connect their generation facilities to the grid that meets the requirements for the blanket waiver in 18 C.F.R. § 35.28(d)(2) (2021). Applicants state that none of the TransAlta Companies or any of their affiliates owns or controls any essential inputs to electricity products or electric power production in the United States. Applicants state that TransAlta is not affiliated with any public utility with a franchised electric service territory in the United States.[5]

a. TransAlta Energy Marketing (U.S.) Inc.

5. Applicants state that TransAlta Energy Marketing (U.S.) Inc. (TEMUS) is a Delaware corporation and a wholly owned subsidiary of TransAlta Holdings U.S. Inc., which is 86% indirectly owned by TransAlta. Applicants state that TEMUS is a power marketer that has been authorized by the Commission to make wholesale sales of energy,

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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 Reguls.*, 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).

[4] Application at 5.

[5] *Id*. at 9.

capacity, and ancillary services at market-based rates. Applicants state that TEMUS does not own any generation or transmission facilities.[6]

b. TransAlta Energy Marketing Corp.

6. Applicants state that TransAlta Energy Marketing Corp. (TEMC) is a Canadian corporation and a direct subsidiary of TransAlta. Applicants state that TEMC is a power marketer that has been authorized by the Commission to make wholesale sales of energy, capacity, and ancillary services at market-based rates. Applicants state that TEMC does not own any generation or transmission facilities.[7]

c. TransAlta Centralia Generation LLC

7. Applicants state that TransAlta Centralia Generation LLC (Centralia) owns and operates a coal-fired electric generation facility with a combined nameplate capacity rating of approximately 730 megawatts (MW). Applicants state that Centralia's generation facility is located in Centralia, Washington, within the Gridforce Energy Management, LLC (Gridforce) balancing authority area that is operated by Gridforce and is interconnected to the Bonneville Power Administration (BPA) transmission system. Applicants state that Centralia owns only limited interconnection facilities necessary to interconnect its generation to the grid. Applicants state that Centralia has exempt wholesale generator (EWG) status and has been authorized by the Commission to make wholesale sales of energy, capacity, and ancillary services at market-based rates.[8]

d. TransAlta Wyoming Wind LLC

8. Applicants state that TransAlta Wyoming Wind LLC (Wyoming Wind) owns and operates a wind-powered generation facility with a nameplate capacity rating of approximately 144 MW located in Uinta County, Wyoming (the Wyoming Wind Facility). Applicants state that Wyoming Wind owns interconnection facilities, and that the Wyoming Wind Facility is located in the PacifiCorp East balancing authority area. Applicants state that Wyoming Wind has EWG status and has been authorized by the Commission to make wholesale sales of energy, capacity, and ancillary services at market-based rates.[9]

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[6] *Id.* at 6.

[7] *Id.*

[8] *Id.* at 6-7.

[9] *Id.* at 7.

e. Lakeswind Power Partners, LLC

9. Applicants state that Lakeswind Power Partners, LLC (Lakeswind) owns and operates a 50 MW wind generating facility in Clay, Becker, and Otter Tail counties, Minnesota (the Lakeswind Facility). Applicants state that the Lakeswind Facility is interconnected to the Great River Energy transmission system located in the Midcontinent Independent System Operator, Inc. (MISO) market. Applicants state that Lakeswind has EWG status and has been granted authority by the Commission to make sales of energy, capacity, and ancillary services at market-based rates.[10]

f. Big Level Wind LLC

10. Applicants state that Big Level Wind LLC (Big Level) owns and operates a 90 MW wind generation facility located in Potter County, Pennsylvania (the Big Level Facility). Applicants state that the Big Level Facility is interconnected to the Pennsylvania Electric Company transmission system located in the PJM Interconnection, L.L.C. (PJM) market. Applicants state that Big Level has EWG status and has been granted authority by the Commission to make sales of energy, capacity, and ancillary services at market-based rates.[11]

11. Applicants state that TransAlta also has a 100% indirect interest in Antrim Wind Energy LLC (Antrim), a company that owns and operates a 28.8 MW wind generation facility in Hillsborough County, New Hampshire (the Antrim Facility). Applicants state that the Antrim Facility is interconnected to the Public Service Company of New Hampshire transmission system located in the ISO New England Inc. (ISO-NE) market. Applicants state that the Antrim Facility is self-certified as a qualifying facility (QF) and Antrim has been granted authority by the Commission to make sales of energy, capacity, and ancillary services at market-based rates.[12]

2. Brookfield Entities

12. Applicants state that Eagle Canada Common Holdings LP and BIF IV Eagle NR Carry LP (together, Shareholders) are Ontario limited partnerships that were formed to own Common Shares of TransAlta. Applicants state that all of the voting interests in Shareholders are held by investment vehicles of a private equity fund (Brookfield Infrastructure Fund IV or BIF IV). Applicants state that the BIF IV investment vehicles

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[10] *Id.* at 8.

[11] *Id.* at 22-23.

[12] *Id.* at 8-9.

are managed and controlled by a general partner, which is a wholly owned indirect subsidiary of Brookfield Asset Management Inc. (BAM).[13]

13. Applicants state that none of the holders of over 10% ownership of BAM exercise control or direction over, directly or indirectly, (i) a 10% or greater voting interest in any electric generation facilities in the United States, (ii) any electric transmission facilities that are used for the transmission of electricity in interstate commerce in the United States or outside of the United States that can be used to reach markets in the United States, or (iii) any essential inputs to electricity products or electric power production in the United States, including fuel supplies, fuel delivery systems, or intrastate natural gas transportation, interstate natural gas storage or distribution facilities, physical coal supply sources, or ownership or control over who may access transportation of coal supplies.[14]

14. Applicants state that BAM is affiliated with four power marketers in the United States with nationwide market-based rate authority that do not own any generation assets: Brookfield Energy Marketing Inc., Brookfield Energy Marketing LP, Brookfield Renewable Energy Marketing US LLC, and Brookfield Renewable Trading and Marketing LP.[15] Applicants state that BAM also is affiliated with two additional power marketers with market-based rate authority in specific markets: Evolugen Trading and Marketing LP and BREG Aggregator LLC.[16]

15. Applicants state that BAM is affiliated with entities that own or control generation facilities located throughout the United States.[17] Applicants state that BAM also is affiliated with numerous solar-powered QFs that range in size and configuration from less than 1 MW rooftop installations to up to 20 MW projects.[18]

16. Applicants state that BAM is affiliated with Smoky Mountain Transmission LLC, which owns 86 miles of limited and discrete transmission lines in the Southeast region that are used solely to connect generation facilities to third-party transmission systems. Applicants state that BAM also is affiliated with Natural Gas Pipeline Company of

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[13] *Id.* at 9-10.

[14] *Id.* at 10-11.

[15] BAM also is affiliated with Brookfield Energy Marketing US, LLC, a power marketer that owns and markets power from Hawks Nest Hydro, LLC. *Id.* at 20.

[16] *Id.* at 11-12.

[17] *Id.,* Ex. B.

[18] *Id.* at 21.

America LLC, Horizon Pipeline Company, L.L.C., and Kinder Morgan Illinois Pipeline LLC. Additionally, BAM is affiliated with Tres Palacios Gas Storage LLC, Dominion Energy Cove Point LNG, LP and Cheniere Energy Partners, L.P., owners of natural gas facilities.[19]

17. Applicants state that BAM owns or controls a 62% indirect interest in Oaktree Capital Group (Oaktree), an investment manager that specializes in alternative investments. Through Oaktree, BAM is affiliated with Hartree Partners, L.P., a merchant energy commodities firm that has market-based rate authority.[20]

B. Description of the Proposed Transaction

18. Applicants state that in March 2019, Investor, an affiliate of BAM, purchased debt securities in TransAlta with an option to convert into an equity interest in TransAlta's hydroelectric assets in Alberta, Canada. Applicants state that the debt securities do not confer any equity-related voting rights with respect to TransAlta and are not convertible into an equity interest in any of TransAlta's U.S. assets, including but not limited to the TransAlta Companies. Applicants state that consistent with the 2019 debt securities agreement, TransAlta's board of directors was expanded from 10 to 12 members, two of which may be nominated by Investor while it holds the debt securities. Applicants state that part of the debt securities agreement included the establishment of the Standstill Agreement, which establishes barriers to the exercise of control applicable during a standstill period of no less than three years, expected to end on or about May 1, 2022. Applicants state that the Standstill Agreement included the following prohibitions on the activities of Investor and its affiliates (including Shareholders):

- acquiring over 19.9% of the outstanding Common Shares;
- engaging in any take-over activities;
- effecting any restructurings or material dispositions of assets;
- soliciting proxies from other shareholders or participating in any such solicitation;
- requesting or calling a shareholder meeting;
- proposing a shareholder proposal;
- seeking to obtain additional representation on the Board;

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[19] *Id.* at 22.

[20] *Id.* at 23-24.

- decoupling voting rights from TransAlta's voting shares;
- engaging in short sales of securities of TransAlta or any of its subsidiaries; and
- assisting, advising, or encouraging any other person to engage in any of the foregoing activities.[21]

19. In addition, Applicants state that the Standstill Agreement provides that any voting rights associated with shares in TransAlta owned by Investor or its affiliates must be exercised in favor of the Board's management nominees and voted in accordance with any recommendations by the Board on all other proposals and matters, including director appointments and removals, at annual shareholder meetings. Applicants argue that as a result, Investor, Shareholders, and other BAM affiliates currently have no discretion to vote any Common Shares, except solely with respect to a Board-recommended extraordinary transaction that would result in a person acquiring more than 50% of the outstanding Common Shares.

20. Applicants state that Shareholders increased their aggregate holdings to 10.1% of the Common Shares of TransAlta in March 2020 and have continued to hold 10% or more of the Common Shares, subject to the restrictions in the Standstill Agreement. Applicants state that Shareholders currently hold approximately 13% in aggregate of TransAlta's Common Shares, all of which were acquired through a series of secondary open market transactions that did not involve the initial issuance or reacquisition of securities by TransAlta. Applicants state that before the Standstill Agreement expires, Applicants are seeking Commission approval for affiliates of BAM to own, with power to vote, 10% or more of the Common Shares. Applicants state that because termination of the Standstill Agreement would result in a change in control over the TransAlta Companies if Shareholders, together with any other BAM affiliates, own 10% or more of the Common Shares, Applicants request Commission authorization for the Proposed Transaction and associated change in control over the TransAlta Companies.[22]

II. Notice of Filing and Responsive Pleadings

21. Notice of the Application was published in the *Federal Register*, 87 Fed. Reg. 12,685 (Mar. 7, 2022), with interventions and protests due on or before March 21, 2022.

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[21] *Id.* at 26.

[22] *Id.* at 28.

PJM and Public Citizen, Inc. filed motions to intervene. On August 25, 2022, the Commission issued an order tolling the time for action for an additional 180 days.[23]

III. Discussion

A. Procedural Matters

22. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2021), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Substantive Matters

1. Timeliness of Filing

23. Applicants argue that notwithstanding Shareholders' ownership of 10% or more of TransAlta's Common Shares, the restrictions of the Standstill Agreement ensure that BAM and its affiliates (including Shareholders) cannot exercise control over TransAlta or its subsidiaries. Therefore, Applicants argue that a change in control requiring prior Commission approval will not occur until the expiration of the standstill provisions, anticipated to occur on or about May 1, 2022.[24]

24. We disagree. We find that Shareholders' acquisition of more than 10% of TransAlta's Common Shares required prior Commission approval under both section 203(a)(1)(A) and 203(a)(2), and that the execution of the Standstill Agreement did not defer the need for that approval. Section 203(a)(1)(A) states:

> No public utility shall, without first having secured an order of the Commission authorizing it to do so. . . Sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $10,000,000….[25]

25. The Commission has stated that transactions that do not transfer control of a public utility or jurisdictional facilities do not fall within the "or otherwise dispose" language of section 203(a)(1)(A) and thus do not require approval under that section.[26]

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[23] *TransAlta Energy Mktg. (U.S.) Inc.*, 180 FERC ¶ 61,124 (2022).

[24] Application at 2.

[25] 16 U.S.C. § 824b(a)(1)(A).

[26] Supplemental Policy Statement, 120 FERC ¶ 61,060 at P 37.

The Commission has established that an ownership share under 10% creates a rebuttable presumption of no control.[27]

26. Applicants cite to *Cascade Investment, L.L.C.*[28] to support their argument that the initial investment did not result in a change of control given the limitations included in the Standstill Agreement.[29] The proceeding in *Cascade* involved a standstill agreement that included certain provisions intended to restrict the ability of the purchaser (Cascade) to indirectly control the public utility through ownership in the holding company (Otter Tail Corporation). These provisions included a limit on Cascade's holdings to less than 20% of Otter Tail Corporation's outstanding voting securities and a bar on forming or joining a group of unaffiliated third parties with respect to any voting securities of Otter Tail Corporation. Cascade also committed to not hold any seat on the board of directors of Otter Tail Corporation or Otter Tail Power Company (Otter Tail Power), and committed not to seek to set or influence the price at which power is sold from Otter Tail Power's generating facilities, or how and when power generated by the facilities would be sold. As a result of the conditions placed upon Cascade's ownership, the Commission found that the proposed transaction would not result in Cascade's ability to assert control over Otter Tail Power or Otter Tail Corporation.[30]

27. There are several key distinctions between this proceeding and the Commission's decision in *Cascade* that lead us to find that the acquisition of more than 10% of TransAlta's Common Shares by Shareholders was a change of control that required prior approval under section 203(a)(1)(A). First, the application in *Cascade* was filed prior to obtaining more than 10% of the voting securities of Otter Tail Corporation. Here, Applicants acquired 10.1% of TransAlta in March 2020, which is above the ownership

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[27] *See* Order No. 669-A, 115 FERC ¶ 61,097 at P 101.

[28] 129 FERC ¶ 61,011 (2009) (*Cascade*).

[29] Application at 25.

[30] *Cascade*, 129 FERC ¶ 61,011 at P 21.

threshold provided in the blanket authorization[31] and eliminates the rebuttable presumption that BAM cannot control TransAlta.[32]

28. Second, unlike in *Cascade*, Investor and its affiliates have an agreement to nominate for appointment two out of the 12 members of TransAlta's Board of Directors, and have placed two executives from BAM affiliates on the Board of Directors.[33] Applicants argue that the holding of two board seats is insufficient to gain control, as the large size and independent composition of the Board operates to restrict Investor's directors from exercising control over management decisions. Applicants argue that two directors cannot influence any Board decision unless at least five other directors, none of which is affiliated with each other, also individually support the same outcome.[34]

29. However, the Commission has stated that it has concerns with "structures where the investor itself would be represented on the board through the appointment of the investor's own officers or directors, or other appointee accountable to the investor, in order to support a finding of control."[35] As we find in the *Evergy* decision issued contemporaneously, board membership confers rights, privileges, and access to non-public information, including information on commercial strategy and operations.[36] Where an investor's own officer or director, or other appointee accountable to the

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[31] 18 C.F.R. 33.1(c)(2) (2021) provides authorization for holding companies to acquire: "Any voting security in a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility or an electric utility company if, after the acquisition, the holding company will own less than 10 percent of the outstanding voting securities."

[32] Order No. 669-A, 115 FERC ¶ 61,097 at P 101.

[33] *See* Application, attach. 3 at art. 5.1(e).

[34] Application at 26 n.102.

[35] *Pub. Citizen, Inc. v. CenterPoint Energy, Inc.*, 174 FERC ¶ 61,101, at P 33 (2021).

[36] *See Evergy Kan. Central, Inc.,* 181 FERC ¶ 61,044 (2022). In that proceeding, the Commission finds that where an investor appoints a non-independent director, such as its own officer or director, or other appointee accountable to the investor, to the board of a public utility or public utility holding company, that appointment functions to rebut the presumption of lack of control under section 35.36(a)(9)(v). While that finding is prospective and does not apply to the purchase of shares by Shareholders in March 2019, consideration of the importance of non-independent board members applies to the facts at issue here as well.

investor, is appointed to the board of a public utility or holding company that owns public utilities, the investor itself will have those rights, privileges, and access, and thus the authority to influence significant decisions involving the public utility or public utility holding company. We clarify, consistent with our finding in *Evergy*, that the appointment of two board members that are not independent from Investor and its affiliates to TransAlta's Board of Directors does constitute a change of control. Going forward, appointment of an investor's own officers or directors, or other appointee accountable to the investor, to the board of a public utility or holding company that owns public utilities will require prior Commission approval under section 203(a)(1)(A). As a result, the appointment of non-independent directors from Shareholder on the TransAlta Board of Directors represents a significant distinction with the facts as presented in *Cascade*.

30. Third, while the Standstill Agreement contains limitations on the ability of Investor and its affiliates to vote shares, unlike *Cascade* it contains no explicit prohibitions on or commitments regarding Shareholders' ability to influence the day-to-day activities of TransAlta, its public utility subsidiaries, or the jurisdictional facilities they hold.

31. As a result, we find that the Standstill Agreement was not sufficient to prevent a change in control as a result of the purchase by Shareholders of over 10% of the Common Shares of TransAlta.

32. However, even if we were to find that no change in control occurred, prior authorization would still be required pursuant to section 203(a)(2) of the FPA, which requires prior approval for a holding company within a holding company system to purchase more than $10 million in shares of a utility.[37] The Commission has stated that, unlike section 203(a)(1), "[j]urisdiction over acquisitions of securities under section

[37] Applicants argue that as a result of the standstill provisions in the 2019 debt securities agreement, Shareholders do not own, control, or hold, with power to vote, 10% or more of the outstanding voting securities of TransAlta and therefore Shareholders currently are not "holding companies" within the meaning of FPA section 203(a)(2). However, Applicants state that because Shareholders are in a holding company system that includes transmitting utilities and electric utilities, Shareholders conservatively request Commission approval for the Proposed Transaction under FPA section 203(a)(2) without a determination of whether the Commission has jurisdiction under FPA section 203(a)(2). Application at 2 n.3.

203(a)(2) attaches whether or not there is a transfer of control if the acquisition is over $10 million."[38]

33. We find that contrary to the requirements of FPA section 203, Applicants failed to file a timely request for the disposition of a public utility and acquisition of securities. Specifically, Applicants were required to receive Commission approval prior to the acquisition by Shareholders of greater than 10% of the outstanding TransAlta shares. While we take no further action here, Applicants are reminded that they must submit required filings on a timely basis or face possible sanctions by the Commission. As Applicants filed for approval upon the impending termination of the Standstill Agreement, we evaluate the Proposed Transaction on a prospective basis below.

2. FPA Section 203 Standard of Review

34. 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.[39] 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.[40] 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."[41] 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.[42]

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[38] *Blanket Authorization Under FPA Section 203*, Order No. 708, 122 FERC ¶ 61,156, at P 55 n.41, *order on reh'g*, Order No. 708-A, 124 FERC ¶ 61,048 (2008), *order on reh'g*, Order No. 708-B, 127 FERC ¶ 61,157 (2009).

[39] 16 U.S.C. § 824b(a)(4).

[40] Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

[41] 16 U.S.C. § 824b(a)(4).

[42] 18 C.F.R. § 33.2(j).

3. Analysis of the Proposed Transaction

a. Effect on Horizontal Competition

i. Applicants' Analysis

35. Applicants explain that the Proposed Transaction has no adverse effect on rates. In the BPA balancing authority area and PJM market, there is an overlap of uncommitted capacity of approximately 405 MW and 1,259 MW, respectively. The Proposed Transaction will result in a combined market share of uncommitted capacity of approximately 1.47% in the BPA balancing authority area and less than 0.7% in the PJM market. Applicants explain that there is no other overlap of controlled generation capacity in other markets in which Applicants operate because in the ISO-NE and MISO markets and the PACE and New Brunswick Power Corporation balancing authority areas, TransAlta's affiliated capacity is fully committed under long-term contracts. Applicants conclude the Proposed Transaction will not have an adverse effect on horizontal market power.[43]

ii. Commission Determination

36. 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.[44]

37. We find that the Proposed Transaction will not have an adverse effect on horizontal competition because the combination of TransAlta affiliated assets and Brookfield affiliated assets will not result in a greater than *de minimis* increase in concentration in any relevant market in which both operate.

b. Effect on Vertical Competition

i. Applicants' Analysis

38. Applicants explain that the Proposed Transaction does not raise any vertical market power concerns. The Proposed Transaction does not involve a change in control over any transmission facilities, except for interconnection equipment. Further, the TransAlta Companies and their affiliates do not own or control any electric transmission facilities in the United States, except for interconnection facilities. Smoky Mountain

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[43] Application at 30-31.

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

Transmission, LLC, an affiliate of Brookfield, is located in the southeast region. With respect to the natural gas facilities affiliated with Brookfield, Applicants explain that none of the TransAlta affiliated generation facilities are powered by natural gas. Applicants state that while Centralia's facility uses coal as a fuel source, its affiliation with an entity that provides rail transportation services will not cause vertical market power concerns as Centralia's facility is set to retire at the end of 2025 to comply with state emissions legislation. Further, Applicants explain that Centralia is the only coal-fired generation plant in Washington State and it represents only 2.6% of the total installed electric generation capacity of 28,000 MW in the BPA balancing authority area.[45]

ii. Commission Determination

39. 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.[46]

40. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on vertical competition as the combination of TransAlta affiliated generation facilities with Brookfield's inputs to generation will not advantage TransAlta. TransAlta's facilities either do not use the relevant inputs for energy production or are remote from Brookfield's facilities. Further, Applicants' affiliated uncommitted generation capacity in the BPA balancing authority area consists of 404.5 MW out of approximately 28,000 MW of installed capacity (or 1.4%), which provides limited ability or incentive to use affiliated rail delivery assets to benefit their affiliate.

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[45] Application at 32-33.

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

c. **<u>Effect on Rates</u>**

i. **<u>Applicants' Analysis</u>**

41. Applicants state that the Proposed Transaction will have no adverse effect on rates. All sales of electric energy, capacity, and ancillary services by the TransAlta Companies will continue to be made at market-based rates after the Proposed Transaction. Nor will the Proposed Transaction affect the terms or conditions of any of the TransAlta Companies' power purchase agreements in effect before or after the Proposed Transaction. None of the TransAlta Companies have any electric transmission customers or wholesale requirements customers whose rates could be affected by the Proposed Transaction.

ii. **<u>Commission Determination</u>**

42. We agree with Applicants that the Proposed Transaction will not have an adverse effect on rates. Applicants do not make wholesale power sales at cost-based rates, and they will continue to make sales of electric energy pursuant to their market-based rate authorizations. The Commission has previously stated that, when there are market-based rates, the effect on wholesale rates is not of concern "because market-based rates will not be affected by the seller's cost of service and, thus, will not be adversely affected by the [proposed transaction]."[47] Further, Applicants do not have transmission customers that may be adversely affected by the Proposed Transaction.

d. **<u>Effect on Regulation</u>**

i. **<u>Applicants' Analysis</u>**

43. Applicants state that the Proposed Transaction will have no adverse effect on regulation. Applicants explain that Proposed Transaction will not impair the ability of the Commission or any state regulatory authority to regulate the TransAlta Companies. After the Proposed Transaction is consummated, the Commission will be able to exercise the same jurisdiction that it currently exercises over the TransAlta Companies and their sales of capacity, energy, and ancillary services. Similarly, the Proposed Transaction will have no effect on state commission regulation.[48]

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[47] *Cinergy Corp.*, 140 FERC ¶ 61,180, at P 41 (2012) (citing *Duquesne Light Holdings, Inc.*, 117 FERC ¶ 61,326, at P 25 (2006)); *accord The Dayton Power & Light Co.*, 160 FERC ¶ 61,034, at P 31 (2017).

[48] Application at 35.

ii. Commission Determination

44. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap.[49] 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.[50] Based on Applicants' representations, we find no evidence that either state or federal regulation will be impaired by the Proposed Transaction. Applicants represent that their wholesale rates will be subject to the Commission's jurisdiction and that the Proposed Transaction will not affect the ability of any state authority to regulate retail rates. Finally, 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

45. Applicants explain the Proposed Transaction will not result in cross-subsidization. None of the parties to the Proposed Transaction is a traditional public utility associate company that has captive ratepayers, and the Proposed Transaction falls within the "safe harbor" identified by the Commission for a transaction in which "no franchised public utility with captive customers is involved in the transaction."[51] Applicants also support this assertion with an Exhibit M affirming that there is no mechanism in which to supply an inappropriate cross-subsidy.[52]

ii. Commission Determination

46. 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

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[49] Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

[50] *Id.*

[51] Application at 35 (citing Supplemental Policy Statement, 120 FERC ¶ 61,060 at P 17).

[52] *Id.* at 35, Ex. M.

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.

4. **Other Considerations**

47. Information and/or systems connected to the Bulk Power System involved in this transaction may be subject to reliability and cybersecurity standards approved by the Commission pursuant to FPA section 215.[53] 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, the North American Electric Reliability Corporation, or the relevant regional entity may audit compliance with reliability and cybersecurity standards.

48. FPA section 301(c) 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.[54] The approval of the Proposed Transaction is based on such examination ability. In addition, applicants subject to Public Utility Holding Company Act of 2005 (PUHCA 2005)[55] are subject to the record-keeping and books and records requirements of PUHCA 2005.

49. 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 section 35.42.

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[53] 16 U.S.C. § 824o.

[54] 16 U.S.C. § 825(c).

[55] 42 U.S.C. §§ 16451-63.

[56] 18 C.F.R. § 35.42 (2021).

<u>The Commission orders</u>:

(A) The Proposed Transaction is hereby authorized prospectively, 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 now pending or which 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.

By the Commission.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.