

172 FERC ¶ 61,083
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

El Paso Electric Company
Sun Jupiter Holdings, LLC

Docket Nos. EC19-120-001
EC19-120-002

ORDER ACCEPTING PROPOSED MITIGATION
AND ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued July 22, 2020)

1. On March 30, 2020, the Commission issued an order pursuant to section 203 of the Federal Power Act (FPA)¹ conditionally authorizing the disposition of jurisdictional facilities that would result from the merger of Sun Merger Sub, Inc. (Merger Sub), a wholly owned subsidiary of Sun Jupiter Holdings, LLC (Sun Jupiter), with and into El Paso Electric Company (El Paso), the surviving entity (Proposed Transaction).²
2. Approval of the Proposed Transaction was conditioned on Sun Jupiter and El Paso (together, Applicants) proposing mitigation to address the adverse effect on competition of the transaction in certain circumstances and Commission approval of such mitigation.³ On April 15, 2020, Applicants proposed such mitigation.⁴
3. On April 9, 2020, Senators Jeffrey A. Merkley, Oregon; Edward J. Markey, Massachusetts; and Bernard Sanders, Vermont, submitted a letter requesting rehearing of the March 2020 Order. On April 29, 2020, Public Citizen, Inc. (Public Citizen) filed a request for rehearing of the March 2020 Order.

¹ 16 U.S.C. § 824b (2018).

² *El Paso Electric Co.*, 170 FERC ¶ 61,280 (2020) (March 2020 Order).

³ *Id.* at Ordering Paragraph B.

⁴ Applicants, Proposed Mitigation Options for Alternative Analysis Scenario, Docket No. EC19-120-001 (filed Apr. 15, 2020) (Mitigation Filing).

4. As discussed below, we approve the mitigation proposed in the Mitigation Filing.
5. Pursuant to *Allegheny Defense Project v. FERC*,⁵ the rehearing requests filed in this proceeding may be deemed denied by operation of law. As permitted by section 313(a) of the Federal Power Act (FPA),⁶ however, we are modifying the discussion in the March 2020 Order and continue to reach the same result in this proceeding, as discussed below.⁷ In addition, we dismiss the Senators' request for rehearing on procedural grounds.

I. Background

A. The Parties to the Proposed Transaction

6. The March 2020 Order describes Applicants in detail. Briefly, El Paso is a vertically integrated utility engaged in the generation, transmission, distribution, and sale of electricity at retail and wholesale. El Paso has been authorized by the Commission to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates. El Paso also makes power sales to wholesale customers at cost-based rates pursuant to certain rate schedules on file with the Commission. El Paso owns or holds an interest in generating units in the southwestern United States.⁸

7. Sun Jupiter is the sole shareholder of Merger Sub, a corporation formed for the purpose of merging with and into El Paso. Sun Jupiter's ultimate upstream owner is IIF US Holding 2 LP (IIF US Holding 2), 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. According to Applicants, 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 stated that IIF is not an actual entity, but rather an umbrella name

⁵ *Allegheny Defense Project v. FERC*, No. 17-1098 (D.C. Cir. June 30, 2020).

⁶ 16 U.S.C. § 825l(a) (2018) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

⁷ *Allegheny Defense Project*, slip op. at 30. The Commission is not changing the outcome of the March 2020 Order. See *Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

⁸ March 2020 Order, 170 FERC ¶ 61,280 at PP 3-4.

used to refer to the three master partnerships that hold all of IIF's investments.⁹ The IIF companies, including IIF US Holding 2, IIF US Holding 2 GP, and Sun Jupiter, are collectively referred to as the IIF Companies in this order.

B. The March 2020 Order

8. Public Citizen protested the Proposed Transaction, asserting that the IIF Companies, in particular IIF US Holding 2 GP, are actually under the control of J.P. Morgan Chase & Co. (J.P. Morgan) and that J.P. Morgan should be deemed an affiliate of Sun Jupiter for purposes of the Commission's analysis of the Proposed Transaction pursuant to FPA section 203. Senators Merkley, Markey, and Sanders also submitted comments questioning whether the IIF Companies are affiliated with J.P. Morgan and urged the Commission to hold an evidentiary hearing to make a determination regarding affiliation. In a December 2019 deficiency letter, Commission staff requested that Applicants detail the IIF Companies' relationship with J.P. Morgan Investment Management, Inc. (J.P. Morgan Investment)¹⁰ and the impact of deeming J.P. Morgan Investment to be an affiliate of Sun Jupiter on Applicants' analysis of the Proposed Transaction.

9. In the March 2020 Order, the Commission reviewed the Proposed Transaction under the Commission's Merger Policy Statement¹¹ and, based on the evidence in the record, conditionally authorized the transaction as consistent with the public interest. With respect to the effect of the Proposed Transaction on competition, the Commission concluded that the Proposed Transaction would not have an adverse effect subject to Applicants proposing mitigation to address certain issues identified in Applicants'

⁹ *Id.* PP 7-8.

¹⁰ Earlier in this proceeding, in response to allegations that the IIF Companies have extensive financial and contractual ties to J.P. Morgan, Applicants disclosed that J.P. Morgan Investment is an investment advisor to IIF US Holding 2. *Id.* n.11.

¹¹ *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996) (cross-referenced at 77 FERC ¶ 61,263) (Merger Policy Statement), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997); *see also FPA Section 203 Supplemental Policy Statement*, 120 FERC ¶ 61,060 (2007) (Supplemental Policy Statement), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008); *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).

Delivered Price Test.¹² The Commission also concluded that the Proposed Transaction would not have an adverse effect on rates or regulation, and would not result in cross-subsidization. With respect to each of the findings, the Commission concluded that Applicants' analysis demonstrated that the Proposed Transaction would not have adverse effects or result in cross-subsidization even if Sun Jupiter were deemed to be an affiliate of J.P. Morgan Investment.

10. The Commission also dismissed the requests for an evidentiary hearing, noting that, even if there are disputed issues of material fact in a proceeding, the Commission was not obligated to establish an evidentiary hearing if the Commission could determine that the Proposed Transaction was consistent with the public interest based on the written record in this proceeding.¹³

II. Notice of the Mitigation Filing

11. Notice of the Mitigation Filing was published in the *Federal Register*, 85 Fed. Reg. 22,423 (Apr. 22, 2020), with interventions and protests due on before May 6, 2020. None was filed.

12. On July 7, 2020, Applicants submitted a letter requesting prompt approval of their mitigation proposal.

III. Discussion

A. Procedural Matters

13. We dismiss the letter requesting rehearing of the March 2020 Order filed by Senators Merkley, Markey, and Sanders. Section 313 of the FPA and Rule 713(b) of the Commission's Rules of Practice and Procedure state that any party to a proceeding may apply for rehearing of a Commission order within 30 days of the issuance of such order.¹⁴ Senators Merkley, Markey, and Sanders, however, did not file motions to intervene in this proceeding and were not otherwise made parties to it. Accordingly, they do not have standing under the FPA to request rehearing of the March 2020 Order. Moreover, we note that the letter does not meet the requirements of Rule 713(c)(2), which establishes the specific components that a request for rehearing must include. Nevertheless, we address the issues raised by the Senators, many of which are similar to the issues raised in Public Citizen's rehearing request.

¹² Neither the Senators nor Public Citizen challenge the condition imposed by the March 2020 Order.

¹³ March 2020 Order, 170 FERC ¶ 61,280 at P 32.

¹⁴ 16 U.S.C. § 8251 (2018); 18 C.F.R. § 385.713(b) (2019).

B. Substantive Matters**1. The Mitigation Filing****a. Overview of the Mitigation Filing**

14. The March 2020 Order explained that an affiliate of Sun Jupiter, Mesquite Power, LLC (Mesquite), is the owner of part of the Mesquite Generating Station (Mesquite Station), which is located in Arizona. In the underlying FPA section 203 application, Applicants explained that all of the Mesquite Station's capacity is currently committed to third parties, some pursuant to a combination of three interrelated contracts with counterparties that are not affiliated with Sun Jupiter or El Paso (Surplus Output Contracts). As part of their Delivered Price Test, Applicants prepared a sensitivity analysis to examine the competitive effects of the Proposed Transaction in a scenario where the Surplus Output Contracts terminated before May 1, 2021. In the March 2020 Order, the Commission concluded that this alternative analysis raised competitive concerns due to the levels of screen failures. The Commission conditioned approval of the Proposed Transaction on Applicants proposing mitigation to address the adverse effect on competition identified in the sensitivity analysis. The mitigation would go into effect if the Surplus Output Contracts are terminated early.¹⁵

15. Applicants propose two options for mitigation, claiming that the proposed mitigation would reduce their controlled capacity from the time the Surplus Output Contracts are terminated early until April 30, 2021. Applicants' mitigation proposals would only go into effect if Mesquite receives notice of early termination of the Surplus Output Contracts.

16. Under the first option, Applicants commit that El Paso will enter into a power sales agreement for the sale of a 14 megawatt (MW) block of firm energy during peak periods backed by system power. The firm energy would be supplied by a designated El Paso generation facility chosen from those that Applicants' sensitivity analysis showed to be economic during the seasons and load periods with market power screen failures. These sales would be backed by system power to the extent the designated generating unit is not available.¹⁶

17. Under the second option, El Paso would sell, from its Palo Verde generation capacity, a 14 MW block of firm energy during peak periods to a non-affiliated third-party at the Four Corners trading hub. Failure of El Paso to deliver the energy to the buyer at the Four Corners trading hub would require El Paso to pay liquidated damages.

¹⁵ March 2020 Order, 170 FERC ¶ 61,280 at P 45.

¹⁶ Mitigation Filing at 3.

El Paso would also reassign to the buyer 14 MW of point-to-point firm transmission capacity from Four Corners to the El Paso Balancing Authority Area.¹⁷

b. Commission Determination

18. We approve Applicants' mitigation proposal and find that, in the event that the Surplus Output Contracts are terminated before May 1, 2021, either option would be sufficient to mitigate the competitive harms identified by Applicants' sensitivity analysis. Applicants shall notify the Commission if the Surplus Output Contracts are terminated and which mitigation proposal will be enacted within 60 days of Mesquite receiving notice of early termination.

2. Rehearing of the March 2020 Order

19. Public Citizen challenges the March 2020 Order on two grounds. First, Public Citizen asserts that the Commission did not address evidence it provided that allegedly demonstrates harm to rates stemming from J.P. Morgan's affiliation with the IIF Companies. Second, Public Citizen asserts that the Commission should have obtained the corporate documents for IIF US Holdings 2 GP because, without them, the Commission cannot make an informed decision about upstream ownership, control, or affiliation in this proceeding. Senators Merkley, Markey, and Sanders raise similar issues.

20. As discussed below, we disagree with Public Citizen and the Senators regarding these issues.

a. The Commission did not ignore Public Citizen's evidence of harm to rates.

i. Arguments

21. Public Citizen argues that the Commission ignored evidence that J.P. Morgan's potential affiliation with the IIF Companies could pose a risk to the rates of El Paso's captive customers. According to Public Citizen, the Commission must make a determination regarding whether J.P. Morgan is affiliated with the IIF Companies in this proceeding and consider the impact of such affiliation on rates. Senators Merkley, Markey, and Sanders also argue that J.P. Morgan's affiliation with the IIF Companies

¹⁷ *Id.* at 2-3.

could have an impact on the rates paid by customers of El Paso, adding that the affiliate restrictions should apply to J.P. Morgan and the IIF Companies.¹⁸

22. Public Citizen takes particular issue with the Commission's statement in the March 2020 Order that neither Public Citizen nor any other participant in this proceeding challenged, let alone rebutted, the conclusions of Applicants' analysis that examined the effects of the Proposed Transaction as if J.P. Morgan Investment and Sun Jupiter were affiliated. Public Citizen claims that it provided evidence in this proceeding of harm to rates stemming from J.P. Morgan's affiliation with the IIF Companies.¹⁹ Specifically, Public Citizen claims that it provided evidence of self-dealing by J.P. Morgan and the IIF Companies, and described the impact such self-dealing could have on the rates of El Paso's captive customers. Public Citizen asserts that the Commission ignored this evidence in the March 2020 Order.²⁰

ii. Commission Determination

23. We are not persuaded by these arguments. Pursuant to the Merger Policy Statement, we evaluate transactions subject to FPA section 203 by examining their effect on competition, rates, regulation, and whether they result in cross-subsidization. In the March 2020 Order, the Commission concluded, based on the record before it, including Public Citizen's pleadings and evidence, that the Proposed Transaction is consistent with the public interest. In reaching this conclusion the Commission considered an alternative analysis that evaluated the effects of the Proposed Transaction if the Commission deemed J.P. Morgan Investment and Sun Jupiter to be affiliated. That alternative analysis showed that the Proposed Transaction would have no adverse effect on rates even if the affiliation existed.²¹

¹⁸ Letter from Senators Jeffrey A. Merkley, Oregon; Edward J. Markey, Massachusetts; and Bernard Sanders, Vermont at 1, Docket No. EC19-120-002 (filed Apr. 9, 2020) (Letter).

¹⁹ Public Citizen, Request for Rehearing at P 2, Docket No. EC19-120-002 (Apr. 29, 2020) (Request for Rehearing).

²⁰ *Id.* PP 8-12.

²¹ March 2020 Order, 170 FERC ¶ 61,280 at P 54-55, n.37. We note that, while the Commission made no finding in the March 2020 Order as to whether J.P. Morgan Investment is an affiliate of Sun Jupiter, it is possible this issue could be considered in a future proceeding concerning El Paso's, Sun Jupiter's, or any affiliates' thereof, authority to charge market-based rates. *See id.* P 69 (Section 35.42 of the Commission's regulations, 18 C.F.R. § 35.42, requires sellers with market-based rate authority to 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.

24. The Commission did not, as Public Citizen argues, ignore the information it provided in its various pleadings. Indeed, it was partly in response to Public Citizen's various pleadings, and Applicants' responses to them, that Commission staff took the extra step of requesting additional information and explanation from Applicants in the deficiency letter regarding, among other things, the relationship between Sun Jupiter and its affiliates and J.P. Morgan Investment; the nature of the IIF GP Owners' ownership of Sun Jupiter and how those owners were selected; the day-to-day operation, including staffing, of several of the IIF Companies; and the impact of deeming J.P. Morgan Investment an affiliate of Sun Jupiter on Applicants' analysis of the Proposed Transaction. In the March 2020 Order, however, the Commission ultimately determined that even if the IIF Companies and J.P. Morgan Investment were affiliated, such affiliation would have no impact on the ultimate result of Commission's analysis of the effects of the Proposed Transaction under FPA section 203. Specifically, the Commission concluded that the Proposed Transaction would not have an adverse effect on rates for various reasons. First, the March 2020 Order noted that 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 because such rates are not affected by a seller's cost of service and, as a consequence, would not be adversely affected by a proposed transaction.²² Second, the Commission determined that customers served under cost-based wholesale rates would not be adversely affected by the Proposed Transaction because any changes to such rates would be subject to the Commission's authority under the FPA. Finally, the Commission concluded that Applicants' hold harmless commitment would protect customers from costs related to the Proposed Transaction.²³ The Commission found that any affiliation between Sun Jupiter and J.P. Morgan Investment would not change the outcome of its analysis of the effect of the Proposed Transaction on rates.²⁴

25. In its rehearing request, Public Citizen does not dispute these conclusions or reference evidence in the record that the Proposed Transaction would have an adverse effect on rates. Rather, Public Citizen continues its efforts to prove affiliation, which

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); *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).

²² *Id.* P 54 (citing *The Dayton Power & Light Co.*, 160 FERC ¶ 61,034, at P 31 (2017)).

²³ *Id.* P 54.

²⁴ *Id.* n.37.

the Commission in the March 2020 Order assumed for the sake of argument. After making that assumption, the Commission concluded even if the entities are affiliated, the Proposed Transaction would still satisfy the public interest standard under FPA section 203.²⁵ Furthermore, Public Citizen's evidence of alleged self-dealing is unrelated to El Paso and does not establish any effect – let alone an adverse impact – on rates that would result from the Proposed Transaction. In addition, we note that even if Sun Jupiter and J.P. Morgan Investment were deemed to be affiliates, the Proposed Transaction would still come under the Commission's "safe harbor" for transactions that do not require a detailed Exhibit M showing,²⁶ a point Public Citizen has not disputed. In sum, contrary to Public Citizen's argument on rehearing, the Commission addressed the evidence that Public Citizen filed. Accordingly, we disagree with Public Citizen's arguments.

b. The evidentiary record was sufficient for the Commission to determine that the Proposed Transaction is consistent with the public interest.

i. Arguments

26. Public Citizen faults the Commission for not obtaining IIF US Holdings 2 GP's corporate documents, such as articles of incorporation and corporate bylaws. Public Citizen contrasts this proceeding with *Goldman Sachs Renewable Power Marketing, Inc.*,²⁷ a proceeding on an application for market-based rate authority pursuant to FPA section 205²⁸ that also involved a private equity investment fund. Public Citizen asserts that, in that proceeding, the Commission made a determination regarding affiliation and did so on the basis of language in a management services agreement applicants

²⁵ *Id.* PP 46, n.37, n.43, n. 46 (any affiliation between Sun Jupiter and J.P. Morgan would not change the outcome of the Commission's analysis of the effect of the Proposed Transaction on competition, rates, and regulation, and whether the Proposed Transaction would result in cross subsidization, respectively).

²⁶ *Id.* P 61. Specifically, Applicants represent that the Proposed Transaction falls under the safe harbor for transactions that are subject to review of a state commission that has the authority to protect captive customers against inappropriate cross-subsidization for the benefit of "unregulated" affiliates, such as through the imposition of ring-fencing measures. The Proposed Transaction is subject to the approval of the Public Utility Commission of Texas and the New Mexico Public Regulation Commission. *See* Joint Application for Authorization under Section 203 of the Federal Power Act and Request for Waivers and Confidential Treatment, Exhibit M: Verifications on Cross-Subsidization at 1, Docket No. EC19-120-000 (filed Aug. 13, 2019).

²⁷ 171 FERC ¶ 61,074 (2020) (*Goldman Sachs*).

²⁸ 16 U.S.C. § 824d.

voluntarily provided. Public Citizen claims that the Commission cannot make informed decisions regarding upstream ownership, control, or affiliation without access to such documents.²⁹

27. Senators Merkley, Markey, and Sanders also question the integrity of the record in this proceeding, alleging that the Commission has allowed the underlying FPA section 203 application to move forward despite inaccuracies that were acknowledged in regulatory proceedings concerning the Proposed Transaction in Texas. The Senators also claim a lack of transparency on the part of the IIF Companies.³⁰

ii. Commission Determination

28. We are not persuaded by the arguments raised on rehearing. Here, the Commission considered the Proposed Transaction both in light of the evidence in the record and under the assumption that J.P. Morgan Investment and Sun Jupiter are affiliated. The record contained information regarding various issues, including: Applicants' relationship with the IIF Companies, the governance of the IIF Companies, and the effect of affiliations with other energy companies via J.P. Morgan Investment, IIF US Holding 2 GP's investment manager.³¹ Based on the record, the Commission determined that such affiliation would not change the outcome of the Commission's analysis of the Proposed Transaction under FPA section 203. Accordingly, in this proceeding, a conclusive finding regarding affiliation simply was not necessary for the Commission to evaluate whether the Proposed Transaction is consistent with the public interest. As a consequence, contrary to Public Citizen's assertion, the Commission did not need IIF US Holding 2 GP's corporate documents to engage in reasoned decision-making.³² That applicants in a separate, unrelated proceeding under a different provision of the FPA voluntarily provided certain corporate documents is not relevant to the Commission's decision in this proceeding and the absence of such documents here does not mean that the record was insufficient for the Commission to have made its finding in this case.

29. We also disagree with the Senators' allegations that the Commission is undermining the integrity of both its rules and approval process by allowing the FPA section 203 application to move forward despite alleged inaccuracies. The Commission takes seriously the integrity of the record in the proceedings before it. For this reason,

²⁹ Request for Rehearing at PP 5-7.

³⁰ Letter at 1.

³¹ March 2020 Order, 170 FERC ¶ 61,280 at PP 40-41.

³² We also note that, while affiliation is relevant to both FPA sections 203 and 205, they serve different purposes and involve different standards of review.

all FPA section 203 applications must be verified under oath and signed by a person, or persons, having authority with respect to the application and knowledge of the matters set forth therein.³³ We further note that Commission staff identified deficiencies in the underlying FPA section 203 application submitted by Applicants and took the extra step of requesting additional information from them in order for the Commission to ensure it had an adequate record to make a determination on the merits in this case.

The Commission orders:

(A) The mitigation proposed in the Mitigation Filing is approved, as discussed in the body of this order.

(B) Within 60 days of Mesquite receiving notice of early termination of the Surplus Output Contracts, Applicants shall notify the Commission that the Surplus Output Contracts are terminated and which mitigation proposal will be enacted.

(C) In response to the requests for rehearing, the March 2020 Order is hereby modified and the result sustained, as discussed in the body of the order.

(D) The Senators' request for rehearing is dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³³ 18 C.F.R. § 33.7 (2019).

Document Content(s)

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