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New Fortress Energy: Contract with Nicaraguan Company with Strong Ties to Sanctioned Entity and Unknown Ownership Raises Red Flags, Potentially Exposing New Fortress to Legal Risk, Experts Say

On February 17, New Fortress Energy (NFE) signed a 25-year Power Purchase Agreement with Nicaragua's electricity distribution company, known as Disnorte-Dissur, to build a natural gas power plant in Puerto Sandino and supply it with liquified natural gas.

That contract formalized New Fortress Energy's largest growth project in terms of the company's projected sales, forecasting that it will account for 66.7% of its volumes sold from new projects and 23.9% sold from its total operations in 2021, according to the company's most recent investor slide deck.

But Disnorte-Dissur has ties to Alba de Nicaragua ("Albanisa"), a company sanctioned by the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC"). Further, it is not clear who currently is the majority owner of Disnorte-Dissur. Both the relationship with Albanisa and the unknown ownership of Disnorte-Dissur expose New Fortress Energy to heightened regulatory risk and possible sanctions from OFAC, according to legal experts interviewed by *The Capitol Forum*.

New Fortress Energy discussed the regulatory risk and potential consequences in its most recent quarterly filing, stating "If any of our counterparties becomes subject to sanctions as a result of [international actions related to Nicaragua], [New Fortress Energy] may face an array of issues, including, but not limited to: having to suspend our development or operations on a temporary or permanent basis, being unable to recuperate prior invested time and capital or being subject to lawsuits, investigations or regulatory proceedings that could be time-consuming and expensive to respond to and which could lead to criminal or civil fines or penalties."

In addition to the possibility of increased regulatory risk, New Fortress Energy may also face counterparty risk due to Disnorte-Dissur's economic condition. The distribution company is currently in default on payments to its electricity suppliers and it is renegotiating contracts with private operators, according to local reporting and confirmation from an operator in Nicaragua who spoke with *The Capitol Forum* on the condition of anonymity.

New Fortress Energy did not return multiple requests for comment.

A spokesperson for Disnorte-Dissur declined to comment on its ownership structure or the New Fortress Energy project.

The Treasury Department declined to comment.

Sanctioned entity Albanisa has significant dealings and ties with Disnorte-Dissur. Albanisa is a private company created in 2007 that funnels funds into subsidiaries led by affiliates of Nicaraguan President Daniel Ortega's regime in order "to remain in power and pay a network of patronage," according to an OFAC October 9 sanctions announcement.

Some members of Ortega's party "have used [the] funds to purchase television and radio stations, hotels, cattle ranches, electricity generation plants, and pharmaceutical laboratories," according to OFAC's July 2018 sanction announcement.

According to OFAC, Albanisa is considered a blocked entity—meaning its assets are frozen and "U.S. persons are generally prohibited from dealing with them"—because it is 51% owned by a sanctioned entity, the "Specially Designated National" Petroleos de Venezuela, S.A. according to the Federal Register and OFAC's website.

OFAC guidance explains that in addition to blocking "all property and interests in property" of a designated entity, "any entity owned in the aggregate, directly or indirectly, 50 percent or more by one or more blocked persons is itself considered to be a blocked person."

The remaining 49% of Albanisa is owned by the designated Nicaraguan state gas company DNP Petronic.

Since its founding in 2007, Albanisa has had significant business dealings with Disnorte-Dissur through Albanisa's import and sale of fossil fuels to Disnorte-Dissur and through Albanisa's power plants which generate electricity that is sold directly to the electric distribution company, according to contracts between the parties and project specifications obtained by *The Capitol Forum* and local reporting (for example, here and here).

Further, in 2018 Disnorte-Dissur's Director Francisco López was ousted from his role at the company after OFAC announced that he and two others were Specially Designated Nationals pursuant to Executive Order 13851 which "targets corrupt financial operations and Ortega regime supporters."

López, also the Vice President of Albanisa and President of DNP Petronic at the time, "has placed numerous individuals throughout the government who have helped him steal millions of dollars on an annual basis, and has used his position to his and his family's benefit by using companies they own to win government contracts," according to the OFAC 2018 release.

The Director that assumed López's position at Disnorte-Dissur, Iván Acosta, was sanctioned by OFAC in May of this year for his "significant financial support to the Ortega regime" in his role as the Minister of Finance and Public Credit, specifically citing his "threat[s] [to] banks to not participate in a strike organized by opposition leaders in March 2019," according to a May 22 OFAC release.

On May 29, Ortega ousted Acosta from Disnorte-Dissur, but did not announce a replacement, according to the government's register.

Ortega Administration continues to hide Disnorte-Dissur's ownership. On February 12, Disnorte-Dissur's majority owner, TSK-Melfosur, divested its 84% share in the electricity distribution company to an undisclosed buyer, citing fears over international sanctions, according to reporting by the Nicaraguan outlet *Confidencial*.

From 2009 until February of this year, 16% of Disnorte-Dissur has been controlled through the government of Nicaragua while the remaining 84% has been bought and sold by a number of Spanish companies, with TSK-Melfosur holding the majority stake from 2013 to February 2020, according to information maintained by the Instituto Nicaragüense de Energía.

During that seven-year period, employees at Disnorte-Dissur told local media outlets that the organization was run by Albanisa despite TSK-Melfosur's ownership, explaining that TSK-Melfosur had limited experience in running an electricity distribution company and had a small presence in Nicaragua. When TSK-Melfosur purchased the Disnorte-Dissur shares in 2013, Albanisa was the company's principal creditor.

Since TSK-Melfosur's divestment, the Ortega administration has kept the identity of the owners hidden from the public, despite repeated probes from the country's press corps (examples here, here and here).

"There's an issue of control. If Albanisa doesn't own Disnorte-Dissur but controls it, it's more complicated," Crowell & Moring's International Trade and White Collar & Regulatory Enforcement Partner Carlton Greene and former chief counsel at the Financial Crimes Enforcement Network and assistant director for transnational threats at OFAC told *The Capitol Forum* in an interview.

"It's not as clear, but any U.S. entity interested in doing business with Disnorte-Dissur would have to closely scrutinize that a Specially Designated National wasn't involved or receiving a clear benefit. Generally, 'directly or *indirectly*' providing goods or services to a sanctioned entity, or receiving these things from one, is prohibited. If Albanisa supplied equipment to the New Fortress project, for example, that would apply to this provision," Greene said (emphasis added).

Other foreign companies that buy and sell power to and from Disnorte-Dissur either declined requests for comment regarding the entity's ownership or stated they "did not know" who held the majority ownership position, according to interviews with spokespeople from Canada-based companies Polaris Infrastructure (TSX: PIF) and Calibre Mining Corporation (TSX: CXB) respectively.

Legal risk. While a sanctions analysis is difficult due to the lack of information about Disnorte-Dissur's current majority owner, New Fortress Energy should be aware of the specifics of precisely what entities benefit from its contract with the entity, according to OFAC legal experts interviewed by *The Capitol Forum*.

"Without knowing who the divestiture was made to, in addition to the fact that its potentially operated by a Specially Designated National, it's hard to understand how a U.S. entity would feel comfortable dealing with the party in question," Benjamin Hutten, Counsel at Buckley LLP told *The Capitol Forum* in an interview.

"It would take a great deal of diligence, with supporting documents and information, and expansive oversight and control over the company's business with Disnorte-Dissur to feel confident about ongoing compliance," Hutten concluded.

Crowell & Moring attorney Greene echoed Hutten's sentiment, saying "the mystery owner is a red flag. From a diligence standpoint, if you have a big contract with Disnorte-Dissur and are not clear on who owns it, you would need to do a lot of work to ensure compliance … OFAC would likely consider it insufficient diligence if the company was unaware of Disnorte-Dissur's ownership and may penalize New Fortress Energy in the event the owner was in fact a sanctioned entity. Sanctions are a strict liability offense—so OFAC wouldn't need to prove intent in bringing a civil penalty," Greene said.

Matthew Tuchband, Counsel at Arent Fox and former Treasury Deputy Chief Counsel for OFAC, agreed that New Fortress Energy should identify its business partners but that there is no affirmative OFAC requirement that the company do so, telling *The Capitol Forum* in an interview: "If Disnorte-Dissur is indeed blocked based on its ownership, and if a U.S. company tells OFAC, 'We didn't know who the owner was,' that would look very bad, particularly given the publicly available information that Albanisa is a blocked entity and that it may have close ties to Disnorte-Dissur. In a possible OFAC enforcement action, failure to do adequate due diligence likely would be a significant aggravating factor."

“In such a situation,” the former Treasury Department official continued, “I would strongly suggest that the company insist on obtaining accurate ownership information from Disnorte-Dissur. As an alternative, the company could seek guidance from OFAC, but OFAC relies in the first instance on companies to do their own due diligence and to avoid situations where there is a significant risk of sanctions violations.”

Whether or not the agency does bring an enforcement action is subject to a number of factors, according to the experts.

“OFAC’s intelligence unit, and other Treasury intelligence offices, informs who OFAC sanctions and who it doesn’t. OFAC would likely explore whether a Specially Designated National was in fact operating a company,” Hutten said.

The former Treasury Department official agreed that OFAC very well may look into it but warned “there’s political uncertainty too. Nicaragua may fall by the wayside amidst an administrative change or you might have people really determined to do something more in Nicaragua that feel there hasn’t been enough change—that can be common right before an election.”

While the political environment in Nicaragua continues to evolve, some think human rights abuses and the economic situation may worsen, according to an emailed statement from Paz Gómez of consulting firm Econ America and author of “Fixed for Failure: Corruption in Nicaragua’s Energy.”

“The Nicaragua electricity sector has deteriorated significantly, and I don't think that would change in the midterm, much less if Ortega continues ruling,” Gómez wrote. Even in a scenario in which United States lifts sanctions, Gómez highlighted that Nicaragua “would first need to invest in the maintenance of the power plants since they are not working at their full potential right now, due to the lack of spare parts.”

Gómez added, “I don't think the human rights situation is getting better. In fact, Ortega just sent three controversial bills to the Congress: one would allow sanctions to people revealing official information, the other is life imprisonment, and the last one would oblige people and companies receiving money from abroad to report the government each month about those transfers. The latter would decrease foreign investment even more and could trigger greater poverty if it becomes a barrier to receive remittances.”