

132 FERC ¶ 61,096
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Mirant Corporation and its Public Utility Subsidiaries
RRI Energy, Inc. and its Public Utility Subsidiaries

Docket No. EC10-70-000

ORDER AUTHORIZING MERGER AND DISPOSITION AND ACQUISITION
OF JURISDICTIONAL FACILITIES

(Issued August 2, 2010)

1. On May 14, 2010, Mirant Corporation (Mirant), RRI Energy, Inc. (RRI Energy) and their respective public utility subsidiaries (collectively, Applicants) filed an application pursuant to section 203(a)(1) of the Federal Power Act (FPA)¹ requesting authorization for a transaction resulting in a merger between the applicants (Proposed Merger). Jurisdictional facilities affected by the Proposed Merger include market-based rate schedules, contracts entered into under such market-based rate schedules and associated books and records, the Mirant Potrero Power Plant cost-based Reliability Must Run (RMR) agreement, several cost-based reactive power schedules, and certain facilities used to interconnect generation facilities with the transmission grid.
2. The Commission has reviewed the application under the Commission's Merger Policy Statement.² As discussed below, we will authorize the Proposed Merger as consistent with the public interest.

¹ 16 U.S.C. § 824b (2006).

² See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). See also *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement). See also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC

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I. Background

A. Description of the Parties

1. Mirant and its Public Utility Subsidiaries

3. Mirant states that it is a Delaware corporation that, through subsidiaries, owns and operates independent power production facilities and markets wholesale electricity in the United States. Through certain of its public utilities, Mirant owns or leases approximately 10,000 MW of electric generating capacity in the PJM Interconnection, L.L.C. (PJM), ISO New England Inc. (ISO-NE), New York Independent System Operator, Inc. (NYISO), and California Independent System Operator Corporation (CAISO) footprints. In addition, through its indirect subsidiary, Mirant Marsh Landing, LLC, Mirant is developing an approximately 760 MW natural-gas fired peaking generation facility at the site of the existing Contra Costa power plant in Antioch, California. Mirant also operates an asset management and energy marketing organization at its headquarters in Atlanta, Georgia.

4. Mirant represents that it has the following subsidiaries that are public utilities under section 201 of the FPA:³ Mirant Energy Trading, LLC (Mirant Energy Trading), Mirant Mid-Atlantic, LLC (Mirant Mid-Atlantic), Mirant Chalk Point, LLC (Mirant Chalk Point), Mirant Potomac River, LLC (Mirant Potomac River), Mirant Canal, LLC (Mirant Canal), Mirant Kendall, LLC (Mirant Kendall), Mirant Bowline, LLC (Mirant Bowline), Mirant Delta, LLC (Mirant Delta), and Mirant Potrero, LLC (Mirant Potrero) (collectively, Mirant Public Utilities). Mirant Energy Trading is an indirect wholly-owned subsidiary of Mirant and a power marketer that is primarily engaged in the business of marketing electricity and other energy commodities at wholesale throughout North America, and is responsible for the generation, transmission and sales activities of the other Mirant Public Utilities in their respective markets. The Mirant Public Utilities are each authorized to sell energy, capacity and certain ancillary services at market-based rates.

5. Mirant Mid-Atlantic, Mirant Chalk Point, and Mirant Potomac River are each indirect, wholly-owned subsidiaries of Mirant and are exempt wholesale generators

Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). *See also Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

³ 16 U.S.C. § 824 (2006).

(EWGs) that own/lease and operate generation facilities in PJM. Mirant Mid-Atlantic and Mirant Chalk Point own or lease and operate generation facilities in Maryland. Mirant Potomac River owns and operates generation facilities in Virginia. Through Mirant Energy Trading, Mirant Mid-Atlantic, Mirant Chalk Point, and Mirant Potomac River receive cost-based compensation for reactive power under Schedule 2 to the PJM Open Access Transmission Tariff (OATT).⁴

6. Mirant Canal and Mirant Kendall are each indirect, wholly-owned subsidiaries of Mirant and are EWGs that own and operate generation in ISO-NE. Mirant Canal and Mirant Kendall own and operate generation facilities in Massachusetts. Mirant Bowline, LLC is also an indirect, wholly-owned subsidiary of Mirant and an EWG that owns and operates a generating station in the NYISO footprint.

7. Mirant Delta is an indirect, wholly-owned subsidiary of Mirant and an EWG that owns the Pittsburg and Contra Costa power plants in the CAISO footprint. Mirant Potrero is also an indirect, wholly-owned subsidiary of Mirant, and an EWG that owns and operates the Potrero Power Plant in the CAISO footprint. The operational units at the Potrero Power Plant are subject to a cost-based RMR agreement with the CAISO, and under a settlement agreement with the City of San Francisco, Mirant Potrero has agreed to permanently shut down the Potrero Power Plant at such time as it is no longer needed for reliability, and its units are no longer subject to any RMR agreements.⁵

2. RRI Energy and its Public Utility Subsidiaries

8. RRI Energy states that it is a Delaware Corporation that, through its subsidiaries, owns and operates generating facilities throughout the United States and provides electricity to wholesale customers. Through its public utility subsidiaries, RRI Energy owns or leases approximately 14,000 MW of electric generating capacity in the states of Florida and Mississippi, and in the PJM, Midwest Independent Transmission System Operator, Inc. (Midwest ISO) and CAISO footprints. RRI Energy represents that it has the following subsidiaries that are public utilities under section 201 of the FPA: Orion Power Midwest, L.P. (Orion), RRI Energy Florida, LLC (RRI Florida), RRI Energy Mid-Atlantic Power Holdings, LLC (RRI Mid-Atlantic), RRI Energy Services, Inc. (RRI Energy Services), RRI Energy Solutions East, LLC (RRI Energy Solutions), RRI Energy West, Inc. (RRI West), RRI Energy Wholesale Generation, LLC (RRI Energy

⁴ Application at 4-6.

⁵ Applicants state that Mirant's Potrero Power Plant will be retired as of December 31, 2010. Affidavit at 25-26.

Wholesale), and Sabine Cogen, LP (Sabine) (collectively, RRI Public Utilities).⁶ Each of the RRI Public Utilities is an indirect, wholly-owned subsidiary of RRI Energy, except for Sabine, in which RRI Energy indirectly holds a 50 percent ownership interest.⁷ In addition, with the exception of RRI Energy Solutions, each of the RRI Public Utilities is authorized to sell energy, capacity and certain ancillary services at market-based rates.⁸

9. RRI Energy states that Orion is an EWG that owns and operates three generation facilities in the PJM region and three generating facilities in the Midwest ISO region. RRI Florida is an EWG that owns and operates two generating facilities in Florida. RRI Mid-Atlantic is an EWG that owns or leases 17 generating facilities located in the PJM region. RRI Energy Services is a power marketer that does not own any generation, transmission or distribution facilities. However, RRI Energy Services has a long-term power purchase agreement with Vandolah Power Company pursuant to which it purchases the capacity of the Vandolah facility which is located in the Progress Energy Florida balancing authority area in Florida. RRI Energy Services has a right to schedule the full output of the Vandolah facility.

10. RRI Energy states that RRI Energy Solutions is a power marketer that does not own any generation, transmission or distribution facilities. In addition, RRI Energy represents that RRI Energy West, which was formerly known as RRI Energy Ormond Beach, Inc.,⁹ is an EWG that owns five generating facilities located in the CAISO region.

⁶ *Id.* at 9-16.

⁷ RRI Energy states that ArcLight Energy Partners Fund III, L.P. owns the remaining 50 percent interest in Sabine and is responsible for operation of the facility. Application at n.45.

⁸ In the Application, RRI Energy states that although RRI Energy Solutions had a tariff on file with the Commission for wholesale sales of energy, capacity and certain ancillary services at market-based rates, that tariff was cancelled effective May 15, 2010. Application at 13 (citing *RRI Energy Solutions East, LLC*, Docket No. ER10-894-000 (Apr. 16, 2010) (unpublished letter order)).

⁹ RRI Energy notes that on May 1, 2010, an RRI Energy internal reorganization occurred pursuant to which RRI Energy Coolwater, Inc., RRI Energy Ellwood, Inc., RRI Energy Etiwanda, Inc., and RRI Energy Mandalay, Inc. (collectively, the Merged RRI Companies) were merged into RRI Energy Ormond Beach, Inc. (RRI Ormond Beach), which is the surviving company. RRI Energy states that the corporate name of RRI Ormond Beach was changed to RRI Energy West, Inc., and that as a result of the merger, RRI Energy West acquired all of the assets owned by the Merged RRI Companies, including their generating facilities and their FPA-jurisdictional facilities. RRI Energy

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RRI Energy states that RRI Energy Wholesale is an EWG that owns and operates generating facilities located in the PJM region, the Tennessee Valley Authority balancing authority area, and the Midwest ISO region. RRI Energy also explains that Sabine, a limited partnership in which RRI Energy indirectly holds a 50 percent ownership interest, owns a cogeneration facility located in Texas in the Entergy balancing authority area that is a qualifying facility (QF).

B. Description of the Transaction

11. Applicants seek authorization under section 203(a)(1) of the FPA for a proposed transaction resulting in a merger by and among RRI Energy, RRI Energy Holdings, Inc. (Merger Sub) and Mirant. Under the Agreement and Plan of Merger (Merger Agreement), Merger Sub, a direct wholly-owned subsidiary of RRI, will be merged with and into Mirant, at which point Mirant will be the surviving entity, and a direct, wholly-owned subsidiary of RRI Energy. The Applicants state that each issued and outstanding share of Mirant common stock will be converted automatically into 2.835 shares of RRI Energy common stock, subject to adjustment in certain circumstances. The Applicants also state that, following the merger, RRI Energy will continue to be based in Houston, Texas, but its name will be changed to “GenOn Energy, Inc.”¹⁰ Applicants represent that the Proposed Merger satisfies the requirements of section 203 of the FPA because it will have no adverse impact on competition, rates, or regulation, and will not result in cross-subsidization or the pledge or encumbrance of utility assets for the benefit of any associate company.

II. Notice of Filing and Responsive Pleadings

12. Notice of the application was published in the *Federal Register*, 75 Fed. Reg. 29,750 (2010), with interventions and comments due on or before June 17, 2010. Timely motions to intervene were filed by American Municipal Power, Inc. and the PJM Industrial Customer Coalition. A timely motion to intervene and comments were filed by FirstEnergy Service Company (FirstEnergy). On June 21, 2010, Applicants filed an answer to the comments filed by FirstEnergy.

states that the Merged RRI Companies and RRI Ormond Beach had blanket authorization under section 203 of the FPA to consummate the merger pursuant to section 33.1(c)(6) of the Commission’s regulations, 18 C.F.R. § 33.1(c)(6) (2010). Application at n.40.

¹⁰ *Id.* at 17.

III. Discussion

A. Procedural Issues

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the Applicants' answer because it has provided information that assisted us in our decision-making process.

B. Standard of Review Under Section 203

15. Section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest. The Commission's analysis of whether a transaction will be 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.¹¹ Section 203 also requires the Commission to find that the 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."¹² The Commission's regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.¹³

C. Analysis Under Section 203

1. Effect on Competition – Horizontal Market Power

a. Applicants' Analysis

16. Applicants state that the Proposed Merger will not adversely affect competition. Applicants submitted an affidavit (Affidavit) analyzing the Proposed Merger's impact on competition in support of their argument that the Proposed Merger will not create

¹¹ See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

¹² 16 U.S.C. § 824b(a)(4) (2006).

¹³ 18 C.F.R. § 33.2(j) (2010).

horizontal market power concerns. Applicants analyzed the effects of the Proposed Merger on energy market concentration for the two markets and the one submarket where Mirant and RRI Energy both own or control generation. Specifically, they analyzed the PJM, PJM East, and CAISO markets by examining and the effect of the Proposed Merger on horizontal market power by performing the delivered price test using Economic Capacity and by examining installed capacity. Additionally, Applicants studied the market concentration in the PJM Capacity and Ancillary Services markets and the CAISO Ancillary Services markets. Applicants state that performing a delivered price test using Available Economic Capacity for PJM and CAISO would be meaningless and impractical because the traditional link between generation and load obligations no longer exists.¹⁴ Applicants note that the Commission has allowed applicants to use only the Economic Capacity measure where, as here, the relevant geographic markets are restructured and the applicants do not have traditional load-service obligations.¹⁵

i. PJM Market

17. In terms of installed capacity, in PJM, Mirant owns or controls 5,196 MW of summer rated generation capacity (3.2 percent of the approximately 165,000 MW of installed capacity in PJM) and RRI Energy owns or controls 6,940 MW of generation capacity (4.2 percent of installed capacity in PJM).¹⁶ After the Proposed Merger is completed, the combined companies will own or control 7.38 percent¹⁷ of the 165,000 MW of installed generation capacity in the PJM market, which results in a change in the Herfindahl-Hirschman Index (HHI)¹⁸ of 27 points. After the integration of the assets of

¹⁴ Application at 19-20 (citing Affidavit at 10). Traditionally, vertically integrated utilities have served load obligation with owned generation. Applicants explain that in restructured markets, such as PJM and CAISO, it is difficult to model what obligations are tied to each generator.

¹⁵ *Id.* at 20 (citing *Vermont Yankee Nuclear Power Corp.*, 98 FERC ¶ 61,122, at 61,342-43 (2002); *Nevada Power Co. & GenWest LLC*, 113 FERC ¶ 61,265, at P 15 (2005); *National Grid plc & KeySpan Corp.*, 117 FERC ¶ 61,080, at P 27 (2006)).

¹⁶ Affidavit at 3.

¹⁷ *See id.* at 20.

¹⁸ 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 unconcentrated; markets in which the HHI is greater than or

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American Transmission Systems, Inc. (ATSI) into PJM, the combined companies will control approximately 7.6 percent of the installed generation capacity in the PJM market and the HHI will increase by 27 points.¹⁹

18. Applicants performed a Competitive Analysis Screen for Economic Capacity using the delivered price test,²⁰ and state that using a range of prices during various seasons and differing load conditions following the Proposed Merger, the combined companies' market share in PJM ranges from 4 to 7 percent, and the Proposed Merger causes a change in HHI of no more than 22 points. In the PJM East submarket, the combined companies' share of installed capacity remains constant because Mirant does not own any capacity in that submarket, and therefore the HHI change for installed capacity is zero.²¹ Applicants represent that their analysis of Economic Capacity in the PJM East submarket across various seasons and load levels indicates that the combined companies will have a market share that is between 3 and 6 percent, and that the Proposed Merger will result in an 11 point change in HHI, at most.²²

equal to 1,000 but less than 1,800 points are considered moderately concentrated; and markets in which the HHI is greater than or equal to 1,800 points are considered highly concentrated. The Commission has adopted the Federal Trade Commission/Department of Justice Horizontal Merger Guidelines, which state that in a horizontal merger, an increase of more than 50 HHI in a highly concentrated market or an increase of 100 HHI in a moderately concentrated market fails its screen and warrants further review. U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, 57 Fed. Reg. 41,552 (1992), *revised*, 4 Trade Reg. Rep (CCH) ¶ 13,104 (April 8, 1997). We note that on April 20, 2010, the Federal Trade Commission and Department of Justice proposed new Horizontal Merger Guidelines that change these guidelines but those proposed changes have yet to be adopted.

¹⁹ American Transmission Systems, Inc. has signed an agreement to join PJM effective June 1, 2011. *American Transmission Systems, Inc.*, 129 FERC ¶ 61,249 (2009). Applicants state that market share and HHI changes are almost identical pre-ATSI integration and post-ATSI integration. Affidavit at 19.

²⁰ Applicants state that they did not perform an Available Economic Capacity analysis because PJM is a restructured market, and argue the link between load obligations and generation ownership no longer exists. Application at 19-20.

²¹ Affidavit at 21.

²² *Id.* at 22.

19. In PJM, Applicants also studied the Reliability Pricing Model Capacity Market and the ancillary services markets including regulation, energy imbalance, synchronized reserve, and operating reserve-supplemental reserve services, and determined that no competitive concerns are raised in any market or submarket.²³ Applicants state that in the PJM RTO-wide installed capacity market, the HHI will change by 27 points as a result of the Proposed Merger. In the local deliverability area where both Mirant and RRI Energy own facilities (the Mid-Atlantic Area Council), the HHI will change from 1101 to 1199 as a result of the Proposed Merger, which is below the threshold for concern in a moderately concentrated market.²⁴

20. In the PJM regulation market, Applicants state that they have a combined market share of less than 10 percent, and that following the Proposed Merger, the implied HHI change is less than 50 points. Thus, Applicants conclude that there is no adverse competitive impact on the regulation market. Applicants state that in PJM energy imbalance service is provided through the real-time energy market, and because the energy market has been analyzed, no separate analysis is needed for the energy imbalance market.²⁵ In the Mid-Atlantic Area Council synchronized reserve market, Mirant and RRI Energy each control approximately 7 percent of the generation; however, not all generation owned by the Applicants would qualify to provide synchronized reserves. Applicants also conclude that the PJM Day Ahead Scheduling Reserve Market is over-supplied, and that Applicants' share is likely to be no more than their share of the energy market.²⁶

ii. CAISO Market

21. In terms of installed capacity in the CAISO market, Applicants state that Mirant owns or controls 2,347 MW of summer rated generation capacity, and state that Mirant's Potrero Power Plant will be retired as of December 31, 2010.²⁷ RRI Energy owns or controls 3,406 MW of summer rated generation capacity. After the Proposed Merger is completed, the combined companies will own or control 9.35 percent of the

²³ *Id.* at 22-25.

²⁴ *Id.* at 23.

²⁵ *Id.*

²⁶ *Id.* at 25.

²⁷ *Id.* at 25-26.

approximately 58,000 MW of installed generation capacity in the CAISO market, which will result in a change in the HHI of 41 points.²⁸

22. Applicants performed a Competitive Analysis Screen for Economic Capacity using the delivered price test.²⁹ Applicants state that under various seasons and load conditions, after the Proposed Merger, the combined companies' market share in CAISO ranges from 0 to 7.5 percent, and the Proposed Merger will result in a change in HHI of no more than 26 points.³⁰

23. Applicants state that since Mirant and RRI Energy are located in different zones in California, the smallest relevant market for ancillary services in which they both compete would be the CAISO system-wide market. Applicants claim they had difficulty in gathering data to analyze this market, and they assert that given the relatively small shares held by each company in the energy and capacity markets in CAISO, there is no expected competitive impact in ancillary services.³¹

b. Commission Determination

24. We agree with Applicants' conclusion that the Proposed Merger will not create horizontal market power concerns. While the Proposed Merger involves the combination of two large independent power producers, the changes in HHI that will result from the Proposed Merger in the markets in which they overlap show that the thresholds established in the Commission's competitive analysis screen under the Economic Capacity and installed capacity studies are not exceeded in any market for any product. Applicants have shown that the Proposed Merger does not raise the concern that Applicants will gain the ability to withhold generation in any relevant market for the purpose of raising prices to their benefit. In addition, Applicants have provided sufficient analysis to reflect the impact of the Proposed Merger on market concentration. The Proposed Merger will not create horizontal market power concerns in the PJM or CAISO markets where Applicants have overlapping generation assets, or in any other market.

²⁸ *Id.* at 27.

²⁹ Applicants did not perform an Available Economic Capacity analysis for CAISO because CAISO is a restructured market, and Applicants state the link between load obligations and generation ownership no longer exists.

³⁰ Affidavit at 28.

³¹ Affidavit at 30.

2. Effect on Competition – Vertical Market Power

a. Applicants' Analysis

25. Applicants contend that the Proposed Merger does not raise vertical market power concerns because none of Mirant, RRI Energy, or any of their respective affiliates owns or controls any transmission facilities, other than those needed to connect generation assets to the grid.³² Applicants also state that with one immaterial exception,³³ neither Mirant, RRI Energy, nor any of their affiliates owns any interest in fuel supply sources, fuel transportation systems, or other inputs to electricity products in the relevant markets that would allow them to erect barriers to entry to new generation.³⁴

b. Commission Determination

26. Based on the facts presented, we find that the Proposed Merger does not raise any vertical market power concerns. Applicants do not own or control transmission facilities or sufficient inputs to generation to impact vertical market power, or to erect barriers to entry in any market.

3. Effect on Rates

a. Applicants' Analysis

27. Applicants assert that the Proposed Merger will not have an adverse effect on rates. Applicants explain that wholesale sales of electric energy and ancillary services will continue to be made at market-based rates or pursuant to the terms of rate schedules on file with the Commission, and the Proposed Merger will have no effect on the rates for such sales. Applicants represent that none of the Applicants is, or is affiliated with, a

³² Application at 21; Affidavit at 30.

³³ Applicants state that Mirant's subsidiary, Hudson Valley Gas Corporation, owns a 4.2 mile, 24 inch diameter gas pipeline that connects Mirant Bowline's Bowline Point Generating Station with Columbia Gas Transmission's Buena Vista facility near Clarkstown, New York. Applicants state that the Hudson Valley intrastate pipeline was built for the sole purpose of supplying gas for a proposed expansion of the Bowline Point Generating Station, which was cancelled after the pipeline was completed, and that Mirant Bowline LLC is the only customer connected to the pipeline. Affidavit at 5, 30 & n.10.

³⁴ Application at 21; Affidavit at 30-31.

traditional utility with captive retail or wholesale customers, and none of the Applicants provides, or is affiliated with an entity that provides, unbundled transmission service. In addition, Applicants state that certain of the Mirant and RRI Energy Public Utilities make sales under cost-based rate schedules and tariffs for RMR service or for reactive power, but that none of these cost-based rate schedules and tariffs contains any mechanism that would allow for the pass through of costs associated with the Proposed Merger.³⁵

b. FirstEnergy's Comments

28. FirstEnergy interprets Applicants' statement regarding their ability to pass through costs associated with the Proposed Merger as a commitment by the Applicants to hold the FirstEnergy companies and other entities harmless from any increases in their cost-based rates due to the Proposed Merger. FirstEnergy does not oppose the Proposed Merger if the Commission conditions its authorization of the merger on a hold harmless provision to this effect.³⁶

c. Applicants' Reply

29. Applicants maintain that the Proposed Merger will have no adverse effect on rates for wholesale sales because none of Applicants' cost-based rate schedules or tariffs contains any mechanism that would allow for the pass through of costs associated with the Proposed Merger, but nonetheless are willing to make a hold harmless commitment as requested by FirstEnergy. Applicants propose to use the same hold harmless commitment made by FirstEnergy in its pending application for FPA section 203 approval of its proposed merger with Allegheny Energy Corporation, whereby FirstEnergy and Allegheny Energy Corporation "commit that for a period of five years, they will not seek to include merger-related costs in their filed transmission revenue requirements or their wholesale requirements rates unless they can demonstrate merger-related savings equal to or in excess of their merger-related costs so included."³⁷ Applicants submit that this hold harmless commitment is consistent with that

³⁵ *Id.* at 22.

³⁶ FirstEnergy June 17, 2010 Comments at 3.

³⁷ Applicants' June 21, 2010 Answer at 3-4 (citing FirstEnergy Corp. Application for Authorization of Disposition of Jurisdictional Assets and Merger under Sections 203(a)(1) and 203(a)(2) of the Federal Power Act, Docket No. EC10-68-000 (filed May 11, 2010)).

contemplated by the Commission's Merger Policy Statement and with hold harmless commitments accepted in other FPA section 203 proceedings.³⁸

d. Commission Determination

30. We agree that the Proposed Merger will not have an adverse effect on rates. Applicants will continue to make wholesale sales of electric energy and ancillary services at market-based rates.³⁹ Further, we will accept Applicants' hold harmless commitment. We will interpret the commitment offered by Applicants to apply specifically to the cost-based contracts under which Applicants provide service, including both RMR and reactive power contracts. We note that nothing in the application indicates that rates to customers will increase as a result of the Proposed Merger, and no customer argues otherwise.

4. Effect on Regulation

a. Applicants' Analysis

31. Applicants contend that the Proposed Merger will not have an adverse effect on federal or state regulation because it will not impair the ability of the Commission to regulate rates for wholesale sales or of state regulators to regulate retail sales.⁴⁰

b. Commission Determination

32. We find that neither state nor federal regulation will be impaired by the Proposed Merger. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap at the federal or state level.⁴¹ We find that the Proposed Merger will not create a regulatory gap at the federal level, because the Commission will retain its regulatory authority over the companies after the transaction. We note that no party alleges that regulation would be impaired by the Proposed Merger, and no state commission has requested that the Commission address the issue of the effect on state regulation.

³⁸ *Id.* at 4.

³⁹ See *Union Electric Co.*, 114 FERC ¶ 61,255, at P 45 (2006).

⁴⁰ Application at 22.

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

5. Cross-Subsidization

a. Applicants' Analysis

33. Applicants state that the Proposed Merger will not result in cross-subsidization. Applicants point to the Supplemental Policy Statement where the Commission recognized three classes of transactions that are unlikely to present cross-subsidization concerns and adopted “safe harbors” for meeting the section 203 cross-subsidization demonstration, absent concerns identified by the Commission or evidence from intervenors that there is a cross-subsidy problem based on the particular circumstances presented.⁴² Applicants state that the Proposed Merger falls into the “safe harbor” for transactions that do not involve a franchised public utility with captive customers because none of Mirant, the Mirant Public Utilities, RRI Energy, or the RRI Public Utilities is a franchised public utility with captive customers.

34. In addition, Applicants state that that the Proposed Merger will not result in, at the time of the merger or in the future, cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets as to any associate company. In this regard, in accordance with section 33.2(j)(1)(ii) of the Commission’s regulations, Applicants verify that the transaction will not result in: (1) transfers of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) new issuances of securities by traditional public utility associate companies that have captive customers or that own or provide transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) new pledges or encumbrances of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) any new affiliate contracts between non-utility companies and traditional public utility associate companies that have captive customers or that own or provide transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA.⁴³

⁴² Application at 23 (citing Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 16).

⁴³ Application at Exhibit M.

b. Commission Determination

35. Based on the facts as presented in the application, we find that the Proposed Merger will not result in cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company. We note that no party has argued otherwise.

D. Other Considerations

36. Information and/or systems connected to the bulk power system involved in this transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to FPA section 215. Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information databases, 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 cyber security standards. The Commission, the North American Electric Reliability Corporation or the relevant Regional Entity may audit compliance with reliability and cyber security standards.

The Commission orders:

(A) The Proposed Merger is hereby authorized, as discussed in the body of this order.

(B) 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 cost, or any other matter whatsoever now pending or which may become before the Commission.

(C) 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.

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

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

(F) Applicants must inform the Commission within 30 days of any material change in circumstances that would reflect a departure from the facts the Commission relied upon in authorizing the Proposed Merger.

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.