

154 FERC ¶ 61,109  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

Pennsylvania Electric Company  
Metropolitan Edison Company  
Jersey Central Power & Light Company  
FirstEnergy Transmission, LLC  
Mid-Atlantic Interstate Transmission, LLC

Docket No. EC15-157-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued February 18, 2016)

1. On June 19, 2015, Pennsylvania Electric Company (Pennsylvania Electric), Metropolitan Edison Company (Met-Ed), and Jersey Central Power & Light Company (Jersey Central) (collectively, FirstEnergy East Operating Companies), and FirstEnergy Transmission, LLC (FirstEnergy Transmission) and Mid-Atlantic Interstate Transmission, LLC (Mid-Atlantic Interstate) (collectively with the FirstEnergy East Operating Companies, Applicants) filed an application under sections 203(a)(1)(A) and 203(a)(2) of the Federal Power Act (FPA),<sup>1</sup> and Part 33 of the Commission's regulations,<sup>2</sup> requesting authorization for a transaction in which: (1) FirstEnergy Transmission will make a cash investment in Mid-Atlantic Interstate in exchange for the Class A membership interest in and sole operational control and management of Mid-Atlantic Interstate; and (2) the FirstEnergy East Operating Companies will contribute their transmission assets to Mid-Atlantic Interstate in a tax-free contribution in exchange for passive, Class B membership interests in Mid-Atlantic Interstate (Proposed Transaction). The Commission has reviewed the Proposed Transaction under the

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<sup>1</sup> 16 U.S.C. § 824b (2012).

<sup>2</sup> 18 C.F.R. pt. 33 (2015).

Commission's Merger Policy Statement.<sup>3</sup> As discussed below, we authorize the Proposed Transaction as consistent with the public interest.

## **I. Background**

### **A. FirstEnergy and the FirstEnergy East Operating Companies**

2. Applicants state that each Applicant is a wholly owned subsidiary of FirstEnergy, a diversified energy company headquartered in Akron, Ohio. They state that FirstEnergy is a holding company under the Public Utility Holding Company Act of 2005 (PUHCA)<sup>4</sup> and has both regulated and unregulated subsidiaries and affiliates. Applicants further state that FirstEnergy's subsidiaries and affiliates are involved in the generation, transmission, and distribution of electricity, as well as energy management and other energy-related services.<sup>5</sup> As indicated above, the FirstEnergy East Operating Companies are Pennsylvania Electric, Met-Ed, and Jersey Central.

3. Applicants state that Pennsylvania Electric, an electric public utility in Pennsylvania, provides distribution and retail electric services in parts of Pennsylvania and is regulated by the Pennsylvania Public Utility Commission (Pennsylvania Commission). Pennsylvania Electric currently owns 2,877 miles of transmission lines and related facilities within its service territory under the functional control of PJM Interconnection, L.L.C. (PJM).<sup>6</sup>

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<sup>3</sup> See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996) (1996 Merger Policy Statement), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997); 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 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).

<sup>4</sup> 42 U.S.C. § 16,451 *et seq.* (2012).

<sup>5</sup> Application at 9.

<sup>6</sup> *Id.* at 10.

4. Applicants state that Met-Ed, an electric public utility in Pennsylvania, provides retail and distribution services in parts of Pennsylvania and is regulated by the Pennsylvania Commission. Met-Ed currently owns 1,406 miles of transmission lines and related facilities within its service territory under the functional control of PJM.<sup>7</sup>

5. Applicants state that Jersey Central, an electric public utility in New Jersey, provides retail electric and distribution services in parts of New Jersey and is regulated by the New Jersey Board of Public Utilities (New Jersey Board). Jersey Central owns 2,569 circuit miles of transmission lines and related facilities within its service territory under the functional control of PJM. It also owns a 50 percent ownership interest in the 400 megawatt Yards Creek pumped storage plant (Yards Creek Facility), a hydroelectric generation station located in northwest New Jersey. Jersey Central operates the Yards Creek Facility under a Commission-approved operating license.<sup>8</sup>

6. Applicants further state that the rate that each FirstEnergy East Operating Company charges for service on its respective transmission assets is currently fixed under a Commission-approved stated annual revenue requirement.<sup>9</sup> They state that each FirstEnergy East Operating Company has been granted market-based rate authority.<sup>10</sup>

**B. FirstEnergy Transmission**

7. Applicants state that FirstEnergy Transmission is a direct, wholly owned subsidiary of FirstEnergy. FirstEnergy Transmission is the parent company of two stand-alone transmission subsidiaries, American Transmission Systems, Incorporated (American Transmission) and Trans-Allegheny Interstate Line Company (Trans-

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 10-11. *See Jersey Cent. Power & Light Co.*, 143 FERC ¶ 62,102 (2013).

<sup>9</sup> Application at 11 (citing PJM Tariff, Attachment H-4 (Jersey Central); PJM Tariff, Attachment H-5 (Met-Ed); PJM Tariff, Attachment H-6 (Pennsylvania Electric); *see also GPU Serv. Corp.*, 85 FERC ¶ 61,348 (1998) (approving settlement rate for Pennsylvania Electric, Met-Ed and Jersey Central)).

<sup>10</sup> Application at 11. *See also FirstEnergy Serv. Co.* 117 FERC ¶ 61,081 (2006); *Jersey Cent. Power & Light Co.*, Docket No. ER04-366-000 (Mar. 16, 2004) (delegated letter order).

Allegheny), and has an ownership interest in Potomac-Appalachian Transmission Highline, LLC (PATH).<sup>11</sup>

**C. Mid-Atlantic Interstate**

8. Applicants state that Mid-Atlantic Interstate is a newly-formed Delaware limited liability company that will provide transmission services in the FirstEnergy East Operating Companies' zones of PJM under the PJM Tariff. Mid-Atlantic Interstate is also a wholly owned subsidiary of FirstEnergy Transmission. Applicants state that, upon consummation of the Proposed Transaction, FirstEnergy Transmission will have the controlling Class A membership interest in Mid-Atlantic Interstate, and each FirstEnergy East Operating Company will have passive Class B membership interests in Mid-Atlantic Interstate.<sup>12</sup>

**D. Description of Proposed Transaction and Transmission Assets**

**1. Proposed Transaction**

9. Applicants state that FirstEnergy is implementing its Energizing the Future transmission program across its transmission system. They explain that the Energizing the Future program is designed to increase the reliability of the FirstEnergy transmission system, improve the condition of equipment, enhance system performance, and improve operational flexibility. They assert that the Proposed Transaction will facilitate significant planned transmission investment under the Energizing the Future program in the service territories of the FirstEnergy East Operating Companies.<sup>13</sup>

10. As noted, the Proposed Transaction will consist of two primary components. First, FirstEnergy Transmission will make a cash investment in Mid-Atlantic Interstate. Applicants state that, in exchange for this equity investment, FirstEnergy Transmission will receive 100 percent of the Class A membership interest in Mid-Atlantic Interstate, along with the sole authority to appoint the Board of Managers that will operate and manage Mid-Atlantic Interstate. They state that the Class A membership interest will represent initially approximately five percent of Mid-Atlantic Interstate's total equity as

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<sup>11</sup> Application at 11.

<sup>12</sup> *Id.* at 12.

<sup>13</sup> *Id.* at 1.

reflected in FirstEnergy Transmission's capital account maintained by Mid-Atlantic Interstate.<sup>14</sup>

11. Second, Applicants state that, simultaneously with FirstEnergy Transmission's cash investment in Mid-Atlantic Interstate, the FirstEnergy East Operating Companies will contribute their transmission assets to Mid-Atlantic Interstate in a tax-free transfer. They state that the transmission assets to be contributed to Mid-Atlantic Interstate are all assets classified by an independent consultant as serving a "transmission function," together with associated regulatory assets and liabilities, interconnection agreements, and certain pre-Order No. 888<sup>15</sup> agreements related to transmission service.<sup>16</sup> Applicants state that in exchange, the FirstEnergy East Operating Companies will receive passive, Class B membership interests in Mid-Atlantic Interstate. They explain that the Class B membership interests will be allocated to each FirstEnergy East Operating Company in proportion to the percentage of the total value of the transmission assets contributed by that company to Mid-Atlantic Interstate. Applicants state that the FirstEnergy East Operating Companies' Class B membership interests collectively will initially amount to the remaining approximately 95 percent of Mid-Atlantic Interstate's total equity as reflected on the FirstEnergy East Operating Companies' respective capital accounts maintained by Mid-Atlantic Interstate. Pennsylvania Electric's investment will total approximately 23 percent, Met-Ed's investment will total approximately 17 percent, and Jersey Central's investment will total approximately 55 percent. Mid-Atlantic Interstate

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<sup>14</sup> *Id.* at 12.

<sup>15</sup> *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

<sup>16</sup> Application at 12, 16. Applicants explain that they engaged Navigant Consulting, Inc. to evaluate the appropriate classification of all transmission and distribution facilities owned by the FirstEnergy East Operating Companies using the Commission's seven factor test (Navigant Report). *See* Application, Attachment 5, Mackauer Test., at Exh. JJM-1. Applicants also state that the transmission service agreements are identified in Exhibit G to the Application.

will make distributions to FirstEnergy Transmission and each FirstEnergy East Operating Company *pro rata* in accordance with each entity's capital account balance.<sup>17</sup>

12. Applicants state that the Proposed Transaction will not result in the creation of any goodwill, but will result in the transfer of goodwill from the FirstEnergy East Operating Companies to Mid-Atlantic Interstate. They explain that the associated goodwill derives from the 2001 merger between FirstEnergy and GPU, Inc., the previous parent company of the FirstEnergy East Operating Companies (FirstEnergy-GPU Merger).<sup>18</sup>

13. On August 28, 2015, Commission staff issued a data request seeking more information on the origins of the associated goodwill to be transferred by the FirstEnergy East Operating Companies to Mid-Atlantic Interstate.

14. On September 28, 2015, Applicants filed a response to the data request.

## **II. Notice of Filing and Responsive Pleadings**

15. Notice of the Application was published in the *Federal Register*, 80 Fed. Reg. 36,800 (2015), with interventions and protests due on or before July 10, 2015.

16. The Pennsylvania Commission and the New Jersey Board filed notices of intervention. PJM, Met-Ed Industrial Users Group, Penelec Industrial Customer Alliance, Pennsylvania Office of Consumer Advocate, American Municipal Power, Inc., Old Dominion Electric Cooperative, and Public Service Electric and Gas Company filed motions to intervene. Public Power Association of New Jersey (Public Power) filed a motion to intervene and comments.

17. Rockland Electric Company and New Jersey Division of Rate Counsel filed out-of-time motions to intervene. LSP Transmission Holdings, LLC (LSP Transmission) filed an out-of-time motion to intervene and comments.

18. Applicants filed an answer to the comments.

19. The Pennsylvania Commission and the New Jersey Board filed motions for stay. Pennsylvania Office of the Consumer Advocate, Med-Ed Industrial Users Group, and Pennsylvania Electric Industrial Customer Alliance<sup>19</sup> filed a letter in support of the

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<sup>17</sup> Application at 12-13.

<sup>18</sup> *Id.* at 23.

<sup>19</sup> This entity referred to itself as "Penelec Industrial Customer Alliance" in its motion to intervene.

Pennsylvania Commission's motion for stay. The New Jersey Division of Rate Counsel filed a letter in support of the New Jersey Board's motion for stay.

20. Applicants filed an answer to each motion for stay. The New Jersey Board filed an answer to Applicants' answer to its motion for stay.

21. Notice of the response to the data request was published in the *Federal Register*, 80 Fed. Reg. 60,893 (2015), with interventions and protests due on or before October 19, 2015. None were filed.

### **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 (2015), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

23. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2015), the Commission will grant Rockland Electric Company's, New Jersey Division of Rates Counsel's, and LSP Transmission's late-filed motions to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

24. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015) prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept Applicants' answer and the New Jersey Board's answer because they have provided information that assisted us in our decision-making process.

#### **B. Substantive Matters**

##### **1. Standard of Review Under FPA Section 203**

25. 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.<sup>20</sup> The Commission's

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<sup>20</sup> 16 U.S.C. § 824b(a)(4). Approval of the Proposed Transaction is also required by other regulatory agencies pursuant to their respective statutory authority before the Proposed Transaction may be consummated. Our findings under FPA section 203 do not affect those agencies' evaluations pursuant to their respective statutory authorities.

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.<sup>21</sup> 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.”<sup>22</sup> 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.<sup>23</sup>

## **2. Analysis of the Proposed Transaction**

### **a. Effect on Competition**

#### **i. Applicants’ Analysis**

26. Applicants assert that the Proposed Transaction will have no adverse effect on competition because it raises no horizontal or vertical market power concerns. Applicants explain that the Proposed Transaction will result in the transfer of ownership and control of the FirstEnergy East Operating Companies’ transmission assets only and will not result in a change in ownership or control of any generating facilities or inputs to power production. Therefore, Applicants state that the Proposed Transaction does not require horizontal market power or vertical competitive analyses. Applicants further state that Mid-Atlantic Interstate will continue to provide service over the transferred transmission assets pursuant to the PJM Tariff, thereby ensuring that all transmission customers will continue to have open access to transmission service over the transmission assets.<sup>24</sup>

#### **ii. Protest**

27. LSP Transmission states that it does not oppose the Proposed Transaction, but is concerned that the Commission, in approving the Proposed Transaction, does not

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<sup>21</sup> 1996 Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

<sup>22</sup> 16 U.S.C. § 824b(a)(4).

<sup>23</sup> 18 C.F.R. § 33.2(j) (2015).

<sup>24</sup> Application at 5, 20.

inadvertently provide Mid-Atlantic Interstate a competitive advantage that the individual FirstEnergy East Operating Companies would not have enjoyed under the requirements of Order No. 1000.<sup>25</sup> LSP Transmission argues that Mid-Atlantic Interstate will own and operate all existing transmission assets in the regions currently served by the FirstEnergy East Operating Companies, and develop, own, and operate new transmission assets. It points out that FirstEnergy plans to invest \$2.5 to \$3 billion over the next five to ten years to upgrade and modernize its transmission system in those service territories.

28. LSP Transmission states that Order No. 1000 permits an incumbent transmission owner to retain a right of first refusal for upgrades to existing facilities as well as local projects (located solely within its retail distribution service territory or footprint).<sup>26</sup> LSP Transmission notes that, in Order No. 1000-A, the Commission clarified that “a local transmission facility is one that is located within the geographical boundaries of a public utility transmission provider’s retail distribution service territory, *if it has one*, otherwise the area is defined by the public utility transmission provider’s footprint.”<sup>27</sup>

29. LSP Transmission refers to Applicants’ statements that, upon consummation of the Proposed Transaction, Mid-Atlantic Interstate will succeed to the transmission rights and obligations of the FirstEnergy East Operating Companies. LSP Transmission states that currently such rights and obligations include a right of first refusal solely within the individual retail service territories of the FirstEnergy East Operating Companies. It argues that, in theory, after the Proposed Transaction is consummated, Mid-Atlantic Interstate will not have a retail distribution service territory and, therefore, could assert that it is entitled to a right of first refusal over the broader “footprint” that represents the combined retail distribution service territories of the FirstEnergy East Operating Companies. LSP Transmission claims that this would permit Mid-Atlantic Interstate to exclude transmission additions within that broader footprint in PJM from being subject to PJM’s competitive process. Accordingly, LSP Transmission requests that the Commission condition any approval of the Proposed Transaction on “maintaining the status quo with regard to rights of first refusal to prohibit the ability of [Mid-Atlantic

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<sup>25</sup> *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh’g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh’g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff’d sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

<sup>26</sup> LSP Transmission Protest at 2 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 63).

<sup>27</sup> *Id.* at 3 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 429).

Interstate] to assert a right of first refusal in a significantly broader area” than the FirstEnergy East Operating Companies could individually.<sup>28</sup>

**iii. Applicants’ Answer**

30. Applicants argue that LSP Transmission attempts to conflate its Order No. 1000 issue with the FPA section 203 analysis of adverse impact on rates. They point out that LSP Transmission has previously attempted to introduce Order No. 1000 issues into an FPA section 203 proceeding, citing the proposed Entergy-ITC transaction in Docket No. EC12-145-000 that was related to Entergy Corp.’s integration into Midcontinent Independent System Operator, Inc.<sup>29</sup> Applicants contend that LSP Transmission’s concerns about incumbent transmission owner rights under Order No. 1000 are not relevant to any of the factors the Commission considers when evaluating section 203 applications. They further maintain that LSP Transmission’s issues are being addressed in the Commission’s Order No. 1000 proceedings and in the PJM and PJM transmission owners’ compliance with Order No. 1000. Applicants also argue that the Commission has previously explained that its authority under section 203 is limited to addressing specific, transaction-related harm, and that LSP Transmission’s concern is not related to the Proposed Transaction or the Commission’s review of the transaction under section 203.<sup>30</sup>

**iv. Commission Determination**

31. In analyzing whether a proposed transaction will adversely affect competition, the Commission first examines its effects on concentration in generation markets or whether the proposed transaction otherwise creates an incentive to engage in behavior harmful to competition, such as the withholding of generation.<sup>31</sup> The Commission also considers the vertical combination of upstream inputs, such as transmission or natural gas, with

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<sup>28</sup> *Id.* at 3-4.

<sup>29</sup> Applicants Answer at 5 (citing *ITC Holdings Corp.*, 143 FERC ¶ 61,256 (2013) (stating that the Commission did not address the protest by LSP Transmission or its attempts to commingle the section 203 proceeding with other proceedings regarding applicants’ integration into a regional transmission organization)).

<sup>30</sup> *Id.* at 5-6.

<sup>31</sup> *ITC Holdings Corp.*, 121 FERC ¶ 61,229, at P 105 (2007). These concerns are usually referred to as horizontal competition concerns.

downstream generating capacity.<sup>32</sup> Here, Applicants have shown that the Proposed Transaction does not have an adverse effect on competition in either respect, horizontal or vertical, because the Proposed Transaction does not involve a change in ownership or control of generating assets or inputs to electricity products. As Applicants explain, the Proposed Transaction involves only the transfer of transmission assets. For these reasons, we find that the Proposed Transaction does not raise any concerns regarding horizontal or vertical competition.

32. We also decline to condition approval of the Proposed Transaction on the FirstEnergy East Operating Companies maintaining the status quo with regard to rights of first refusal, as requested by LSP Transmission. The Commission has already found, in the case of the Entergy Operating Companies, that the combined retail distribution service territories of the Entergy Operating Companies together constitute a single footprint for purposes of defining local transmission facilities pursuant to Order No. 1000.<sup>33</sup>

**b. Effect on Rates**

**i. Applicants' Analysis**

**(a) Transmission Service**

33. Applicants assert that the Proposed Transaction will not have an adverse effect on rates for transmission service or wholesale power sales. They state that the FirstEnergy East Operating Companies provide service over the transmission assets pursuant to a Commission-approved stated rate. Additionally, Applicants state that the Proposed Transaction will not result in any cost-shifting between transmission and distribution customers and that the rate base attributable to existing transmission assets will not increase solely as a result of the Proposed Transaction. They explain that the Proposed Transaction is a tax-free exchange, so the Accumulated Deferred Income Taxes (ADIT) associated with the transmission assets will transfer to Mid-Atlantic Interstate, assuring that Mid-Atlantic Interstate's expected transmission rate base for existing assets accurately reflects the credit balance of ADIT as a reduction, thereby avoiding a rate shift to transmission customers.<sup>34</sup>

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<sup>32</sup> *Id.* These concerns are usually referred to as vertical competition concerns.

<sup>33</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 147 FERC ¶ 61,127, at P 414 (2014).

<sup>34</sup> Application at 21.

34. Applicants further state that they commit to hold Mid-Atlantic Interstate's transmission customers harmless from transaction-related costs. Specifically, they commit that Mid-Atlantic Interstate will not collect through transmission rates any transaction-related costs, except to the extent it can demonstrate (through a separate future filing under FPA section 205) that the transaction-related savings equal or exceed all the transaction-related costs.<sup>35</sup> Applicants assert that the Commission deems such "hold harmless" commitments sufficient to demonstrate that a transaction will have no adverse effect on rates and approves transactions under section 203 on that basis. Applicants note that the Commission is considering a change in its acceptance of hold harmless commitments that are limited in duration. As such, they state that they do not set an expiration period for their hold harmless commitment, but retain the right to seek recovery of transaction-related costs in a potential future section 205 filing (with a demonstration that the benefits derived from the Proposed Transaction exceed those costs).<sup>36</sup>

35. Applicants also state that the Proposed Transaction will not result in the creation of any goodwill. However, the Proposed Transaction will result in the transfer of goodwill from the FirstEnergy East Operating Companies to Mid-Atlantic Interstate. They explain that the associated goodwill derives from the 2001 FirstEnergy-GPU Merger. They state that the amount of goodwill to be transferred to Mid-Atlantic Interstate will be based on the relative fair value of the transmission assets being transferred to the fair value of the transmission assets being transferred plus the fair value of the remaining operations of each of the FirstEnergy East Operating Companies. Mid-Atlantic Interstate notes the Commission's policy that acquisition premiums, including goodwill, must be excluded from jurisdictional rates absent a filing under FPA section 205 and specific Commission authorization granting recovery of an acquisition premium in rates. Accordingly, Mid-Atlantic Interstate affirms that it will not recover in its transmission rate any acquisition premium or goodwill that is transferred from the FirstEnergy East Operating Companies to Mid-Atlantic Interstate absent a separate section 205 filing and explicit Commission authorization to do so. Applicants state that,

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<sup>35</sup> Applicants state that "[t]he applicable [t]ransaction-related costs are all costs, including internal labor and other than labor costs, beginning with such costs incurred to discuss, gather information and investigate the feasibility of creating [Mid-Atlantic Interstate], and continuing through the completion of the [Proposed] Transaction." *Id.*, Attachment 4, Taylor Test. at 13.

<sup>36</sup> *Id.* at 21-22.

under long-standing precedent, the Commission relies on similar commitments in finding that a proposed transaction will not adversely affect transmission rates.<sup>37</sup>

36. Applicants commit to continue to comply with their prior section 203 commitments in the FirstEnergy-GPU Merger and the merger in 2010 between FirstEnergy and Allegheny Energy, Inc. regarding inclusion of merger-related costs in rates.<sup>38</sup>

**(b) Capital Structure**

37. Applicants state that the FirstEnergy East Operating Companies provide service over the transmission assets pursuant to a Commission-approved stated rate. They state that after the Commission authorizes the Proposed Transaction, Mid-Atlantic Interstate will file a request under FPA section 205 for Commission authorization for a formula rate for service over both the existing transmission assets (what Mid-Atlantic Interstate acquires through the Proposed Transaction) as well as the transmission assets that Mid-Atlantic Interstate develops and owns in the future. Applicants state that Mid-Atlantic Interstate's formula rate will go into effect on the date that the Proposed Transaction closes, and will apply to the transmission rate charged by PJM for use of Mid-Atlantic Interstate's transmission facilities.<sup>39</sup>

38. Applicants explain that the FirstEnergy East Operating Companies are not transferring debt to Mid-Atlantic Interstate as part of the Proposed Transaction. Therefore, they state that Mid-Atlantic Interstate's capital structure will consist of all equity on "day one" of its operations after consummation of the Proposed Transaction. Applicants state that Mid-Atlantic Interstate intends to file an application with the Commission pursuant to FPA section 204 after the Commission issues an order in this

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<sup>37</sup> *Id.* at 23 (citing *NorthWestern Corp.*, 147 FERC ¶ 62,138 (2014); *Kan. City Power & Light Co.*, 145 FERC ¶ 62,170 (2013); *MidAmerican Energy Holdings Co.*, 113 FERC ¶ 61,298 (2005)).

<sup>38</sup> *Id.* at 24 (citing *FirstEnergy Corp.*, 133 FERC ¶ 61,222, at PP 58-64 (2010); *Ohio Edison Co.*, 94 FERC ¶ 61,291, at 62,046 (2001) (Merger Order)). In the FirstEnergy-Allegheny merger, the Commission approved applicants' commitment that, for a period of five years, they would not seek to include merger-related costs in their transmission revenue requirements unless they could demonstrate merger-related savings equal to or in excess of the merger-related costs. *FirstEnergy Corp.*, 133 FERC ¶ 61,222 at PP 58-64 (2010).

<sup>39</sup> Application at 25.

proceeding. They explain that the section 204 application will request authorization to issue debt to fund Mid-Atlantic Interstate's planned transmission investment over the first two years of operations. Applicants anticipate that once Mid-Atlantic Interstate issues those debt securities, it will have an actual capital structure within the range of Commission-approved capital structures.<sup>40</sup>

39. Applicants note that the Commission has previously found that a change in capital structure associated with the formation of a stand-alone transmission company could be considered a "rate effect" of the transaction.<sup>41</sup> They state that the FirstEnergy East Operating Companies' stated rate is based on an implied capital structure with an equity ratio of almost 50 percent. Applicants recognize that there may be a potential concern that Mid-Atlantic Interstate's initial, temporary, all-equity capital structure could result in an increase in transmission customers' rates when Mid-Atlantic Interstate's formula rate becomes effective. However, they argue that the impact of Mid-Atlantic Interstate's initial capital structure on transmission rates under a formula rate mechanism would not constitute a transaction-related cost for purposes of the Commission's FPA section 203 analysis of whether the Proposed Transaction would have an adverse rate impact. Nevertheless, Applicants state that to mitigate against a rate change resulting from a change to the implied capital structure underlying the current stated rate, Mid-Atlantic Interstate commits that, in its future section 205 formula rate filing, it will apply a 50 percent equity/50 percent debt capital structure for ratemaking purposes for a two-year transition period. They state that, at the end of the transition period, Mid-Atlantic Interstate will have established an actual capital structure consistent with Commission precedent.<sup>42</sup>

(c) **Wholesale Power Sales**

40. Applicants state that the Proposed Transaction will have no adverse effect on the rates for wholesale power sales. They explain that FirstEnergy Transmission, as the holding company of transmission-only companies, does not have wholesale power sales customers. Additionally, Applicants state that Mid-Atlantic Interstate, as a transmission-only company, will not have wholesale power sales customers. They further state that, while the FirstEnergy East Operating Companies make wholesale power sales pursuant to their respective Commission-approved market-based rate tariffs, the Commission has

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 25-26 (citing *ITC Holdings Corp.*, 143 FERC ¶ 61,256 at P 119).

<sup>42</sup> *Id.* at 26.

concluded that such market-based rate sales do not raise any concerns about a transaction's possible adverse effect on rates.<sup>43</sup>

**ii. Protest**

41. Public Power argues that the Commission should accept Applicants' offer to condition approval upon a hypothetical capital structure of 50 percent debt and 50 percent equity for a minimum of two years after the effective date of such formula rate. It contends that the Commission should clarify that the two year period should be a minimum term, and that the period should commence with the later of the closing date of the Proposed Transaction, or the date upon which the Commission first authorizes any future formula rate. Public Power argues that the Proposed Transaction should not be approved without this 50-50 hypothetical capital structure.<sup>44</sup>

42. Public Power further argues that the Commission should articulate that its approval of the Proposed Transaction is not the same as pre-approval of incentive rate treatment in the coming section 205 formula rate request.<sup>45</sup>

**iii. Applicants' Answer**

43. Applicants point out that, in the Application, Mid-Atlantic Interstate stated that "in its future Section 205 formula rate filing, it will apply a 50 percent equity/50 percent debt capital structure for ratemaking purposes for a two-year transition period."<sup>46</sup> They point out that the Commission has previously permitted the use of a transitional capital structure in a Commission-jurisdictional rate for the duration of time it will take for a newly-formed company to develop an actual capital structure appropriate for use in ratemaking. Applicants assert that Public Power's request regarding the transitional capital structure is not inconsistent with this approach, and therefore no further action is warranted.<sup>47</sup>

44. Applicants argue that Public Power's request regarding incentive rate treatment is beyond the scope of the Commission's analysis of the Proposed Transaction under the

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<sup>43</sup> *Id.* at 5-6; 26-27 (citing *Cinergy Corp.*, 140 FERC ¶ 61,180, at P 41 (2012)).

<sup>44</sup> Public Power Protest at 4.

<sup>45</sup> *Id.*

<sup>46</sup> Applicants Answer at 3 (quoting Application at 26).

<sup>47</sup> *Id.*

FPA section 203 public interest standard of review and thus can be rejected. Applicants assert that the “effect on rates” prong of this analysis differs from the Commission’s analysis of whether rates are just and reasonable under section 205 of the FPA. They further point out that the Commission has held that rate treatment of assets, such as a determination on incentive rate treatment, should be addressed in applications for rate treatment pursuant to section 205 of the FPA.<sup>48</sup> However, Applicants state that, notwithstanding these differences, Applicants clarify that Mid-Atlantic Interstate is not requesting a determination on incentive rate treatment in this proceeding.

#### iv. Commission Determination

45. We find that the Proposed Transaction will not have an adverse effect on rates. Applicants represent that Mid-Atlantic Interstate will not have any wholesale power sales customers and that the FirstEnergy East Operating Companies will make wholesale power sales pursuant to their respective market-based rate authority.

46. Applicants make two commitments in order to address the effects of the Proposed Transaction on rates. First, Applicants propose a hold harmless commitment pursuant to which Mid-Atlantic Interstate’s transmission customers will be protected from transaction-related costs. Second, Applicants propose to apply a 50 percent equity/50 percent debt capital structure for ratemaking purposes for a two-year transition period to address the effects of the Proposed Transaction on rates that are not due to transaction-related costs. As discussed below, these two commitments, together with other representations, address the rate effects of the Proposed Transaction and enable the Commission to find that the Proposed Transaction will not have an adverse effect on rates.

47. We accept Applicants’ commitment to hold Mid-Atlantic Interstate’s transmission customers harmless from transaction-related costs by excluding from Mid-Atlantic Interstate’s transmission rates any transaction-related costs, including, but not limited to, all of Mid-Atlantic Interstate’s transaction-related costs, which include “internal labor and other than labor costs, beginning with such costs incurred to discuss, gather information and investigate the feasibility of creating [Mid-Atlantic Interstate]” except to the extent it can demonstrate (through a separate future filing under FPA section 205) that the transaction-related savings equal or exceed all the transaction-related costs. We interpret this hold harmless commitment to apply to all transaction-related costs, including costs related to consummating the Proposed Transaction and transition costs.<sup>49</sup>

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<sup>48</sup> *Id.* at 4 (citing *NV Energy, Inc.*, 145 FERC ¶ 61,170, at P 51 (2013)).

<sup>49</sup> *Exelon Corp.*, 149 FERC ¶ 61,148, at P 105 (2014) (Exelon).

48. The Commission has established that, where applicants make hold harmless commitments in the context of FPA section 203 transactions, in order to recover transaction-related costs, applicants must demonstrate offsetting benefits at the time they apply to recover those costs. The Commission has clarified its procedures for recovery of such costs under FPA sections 203 and 205.<sup>50</sup> Consistent with those clarifications, and given the commitment by Applicants to hold Mid-Atlantic Interstate's transmission customers harmless from transaction-related costs, if Mid-Atlantic Interstate seeks to recover transaction-related costs incurred prior to the consummation of the Proposed Transaction or after the consummation of the Proposed Transaction, then Mid-Atlantic Interstate must make that filing in a new FPA section 205 docket<sup>51</sup> and submit that same filing as a concurrent informational filing in this FPA section 203 docket.<sup>52</sup> The Commission will notice the new FPA section 205 filing for public comment.

49. In the FPA section 205 proceeding, the Commission will determine first, whether Mid-Atlantic Interstate has demonstrated offsetting savings, supported by sufficient evidence, to customers served under Commission jurisdictional rate schedules such that recovery of transaction-related costs is consistent with the hold harmless commitment and, second, whether the resulting new rate is just and reasonable in light of all the other factors underlying the proposed new rate. In the FPA section 205 filing, Mid-Atlantic Interstate must: (1) specifically identify the transaction-related costs it is seeking to recover, and (2) demonstrate that those costs are exceeded by the savings produced by the Proposed Transaction. Mid-Atlantic Interstate must show that the proposed rate is just and reasonable in addition to providing appropriate evidentiary support, such as reasonable documentation and estimates of the costs avoided, demonstrating that transaction-related costs have been offset by transaction-related savings in order to recover those transaction-related costs and comply with its hold harmless commitment. Those savings must be realized prior to, or concurrent with, any authorized recovery of transaction-related costs, and cannot be based on estimates or projections of future savings, but must be based on a demonstration of actual transaction-related savings realized by jurisdictional customers.<sup>53</sup> The Commission will consider rates not to be

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<sup>50</sup> *Id.* PP 106-109.

<sup>51</sup> The Commission will not authorize the recovery of transaction-related costs in an annual informational filing under existing formula rates.

<sup>52</sup> Upon receipt, the Commission will not act on or notice the concurrent informational filing.

<sup>53</sup> See *Audit Report of National Grid, USA*, Docket No. FA09-10-000, at 55 (Feb. 11, 2011). See also *Ameren Corp.*, 140 FERC ¶ 61,034, at PP 36-37 (2012).

“just and reasonable” if they include recovery of costs subject to a hold harmless commitment made in connection with an FPA section 203 application and if applicants fail to show offsetting savings due to the transaction.<sup>54</sup>

50. The Commission will be able to monitor Mid-Atlantic Interstate’s hold harmless commitment under its authority under section 301(c) of the FPA<sup>55</sup> and the books and records provision of the Public Utility Holding Company Act of 2005.<sup>56</sup> Moreover, the commitment is fully enforceable based on the Commission’s authority under section 203 of the FPA.

51. We also accept Mid-Atlantic Interstate’s commitment to apply a 50 percent equity/50 percent debt capital structure in its future FPA section 205 filing for ratemaking purposes for a two-year transition period. We recognize the concern that Mid-Atlantic’s initial, temporary, all-equity capital structure could result in an increase in transmission customers’ rates when Mid-Atlantic Interstate’s formula rate becomes effective. However, as Applicants note, the FirstEnergy East Operating Companies’ stated rate is based on an implied capital structure with an equity ratio of almost 50 percent. Specifically, Applicants represent that their stated rate was approved consistent with equity ratios of 48.69 percent for Pennsylvania Electric, 49.45 percent for Met-Ed, and 47.92 percent for Jersey Central.<sup>57</sup> Moreover, the hypothetical 50 percent equity/50 percent debt capital structure is within the Commission’s range of acceptable capital structures and is proposed for a limited period of two years. For these reasons, we find that the Proposed Transaction will not have an adverse effect on rates. Regarding Public Power’s concern about incentive rate treatment, we accept Applicants’ clarification that Mid-Atlantic Interstate is not seeking a determination on incentive rate treatment.

**c. Effect on Regulation**

**i. Applicants’ Analysis**

52. Applicants assert that the Proposed Transaction will not have an adverse effect on regulation because the Commission will continue to regulate the rates, terms and conditions of transmission service over the transmission assets the FirstEnergy East

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<sup>54</sup> *Exelon*, 149 FERC ¶ 61,148 at P 107.

<sup>55</sup> 16 U.S.C. § 825(c) (2012).

<sup>56</sup> 42 U.S.C. § 16452 (2012).

<sup>57</sup> Application at 26 (citing *GPU Service Corp.*, 85 FERC ¶ 61,348 (1998)).

Operating Companies will contribute to Mid-Atlantic Interstate. They further note that inter-affiliate transactions involving Mid-Atlantic Interstate will be subject to the Commission's affiliate transaction rules and pricing policies. Applicants explain that with the minor exception of the six Met-Ed 34.5 kilovolt (kV) facilities that are being reclassified from transmission to distribution, all of the transmission assets to be contributed will remain subject to the Commission's jurisdiction following the Proposed Transaction.

**ii. Motions for Stay (Jurisdictional Issues)**

53. In their motions for stay, the Pennsylvania Commission and the New Jersey Board argue that the Commission's approval of the Proposed Transaction before the Pennsylvania Commission's review is complete will impair the state proceeding, in which many of the same issues are to be weighed, tested, and litigated by the parties. The Pennsylvania Commission cites as examples issues related to the data, methodology, and conclusions contained in the Navigant Report under the "Seven Factor Test" to determine the proper classification of dual use facilities which are likely to be tested by the parties in the state proceeding and be adjudicated by the Pennsylvania Commission.<sup>58</sup> The New Jersey Board argues that it is reviewing a joint application filed by Jersey Central and Mid-Atlantic Interstate on June 19, 2015, which raises issues similar to those pending before the Commission. For example, the New Jersey Board states that Jersey Central and Mid-Atlantic Interstate are seeking approval of the transfer of Jersey Central's existing transmission assets and a ground lease between the parties under New Jersey law, and approval of a state advertising waiver. The New Jersey Board argues that in other similar proceedings, it has considered a proposed transaction's impact on rates, regulation, competition, service quality and employees.<sup>59</sup>

54. Both the Pennsylvania Commission and the New Jersey Board take issue with the classification of transmission assets and designation of Mid-Atlantic Interstate as a public utility, and raise jurisdictional issues regarding the safety and reliability oversight of the transmission systems.<sup>60</sup>

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<sup>58</sup> Pennsylvania Commission Motion for Stay at 6-7.

<sup>59</sup> New Jersey Board Motion for Stay at 7-8.

<sup>60</sup> Pennsylvania Commission Motion for Stay at 9; New Jersey Board Motion for Stay at 12.

55. The Pennsylvania Commission explains that, in Order No. 888, the Commission determined that it would defer to state regulatory authorities' recommendations in determining Commission jurisdiction and cost allocation for such facilities to be included in rates provided that such recommendations are consistent with the essential elements of the Seven Factor Test. It states that the Commission has deferred to state commission classification of facilities under the Seven Factor Test. The Pennsylvania Commission further asserts that it is not ready to commit to a position on several issues before the Commission that may prejudice the outcome of the state proceeding. Such issues include the appropriateness of Applicants' classification under the Seven Factor Test, and whether the proposed section 203 contribution will have no anti-competitive or discriminatory effect or that it is in the public interest.<sup>61</sup>

56. The New Jersey Board argues that, if the Commission approves the Proposed Transaction and the related corporate reorganization, it will be perceived as implicitly approving Applicants' proposed classification of transmission facilities. It argues that the Commission should provide clear direction that consultation with the New Jersey Board is a prerequisite for a Commission declaratory ruling pursuant to a reclassification under Order No. 888. The New Jersey Board contends that this coordination should be accomplished before a Commission decision is filed in this matter or the other section 204 and 205 filings that Applicants anticipate making.<sup>62</sup>

57. The Pennsylvania Commission further argues that the formation of Mid-Atlantic Interstate as a public utility, under both the Commission's and the Pennsylvania Commission's jurisdiction, will create jurisdictional issues for both agencies with regard to transmission facilities. It explains that Mid-Atlantic Interstate will be subject to the Pennsylvania Commission's siting and affiliated interest agreement jurisdiction but it is unclear from which state reliability and safety exemptions Mid-Atlantic Interstate is seeking an exemption. The Pennsylvania Commission argues that it is the primary agency responsible for ensuring that jurisdictional electric utilities are implementing necessary physical and cybersecurity measures to prevent system failures from external threats.<sup>63</sup> The Pennsylvania Commission and the New Jersey Board are concerned about the creation of a jurisdictional vacuum wherein neither the Commission nor the state commissions would have safety and reliability oversight for facilities classified as transmission but fall under the 100 kV Commission/NERC "bright line" standard. The New Jersey Board further argues that it needs to carefully explore Mid-Atlantic

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<sup>61</sup> Pennsylvania Commission Motion for Stay at 7.

<sup>62</sup> New Jersey Board Motion for Stay at 11-12.

<sup>63</sup> Pennsylvania Commission Motion for Stay at 8-9.

Interstate's designation as a public utility before the transfer of those assets to Mid-Atlantic Interstate. It contends that Jersey Central's request for Mid-Atlantic Interstate's designation as a public utility repeatedly references the Commission's jurisdiction and control over Mid-Atlantic Interstate's assets. However, the New Jersey Board contends that FirstEnergy Transmission claims in the application before the Commission that Mid-Atlantic Interstate is not a public utility or holding company subject to Commission jurisdiction as of the date of the filing, but asserts that it will be a public utility subject to Commission jurisdiction for ratemaking purposes. The New Jersey Board contends that clarification of these statements and other elements of Jersey Central's application are best achieved in the state proceeding.<sup>64</sup>

58. The Pennsylvania Commission argues that the potential removal of critical assets from the Pennsylvania Commission's jurisdiction into a newly-formed entity that may seek different jurisdictional treatment is of great concern to the Pennsylvania Commission. It asserts that these assets have been jurisdictional to the Pennsylvania Commission for decades and their removal from its jurisdiction may impede its duty under the state Public Utility Code to ensure safe, reliable and efficient public utility service. The Pennsylvania Commission and the New Jersey Board further contend that there is no indication that the Energizing the Future program has been proposed as part of PJM's Regional Transmission Expansion Plan process, and Applicants have not indicated any urgency associated with approving the transaction given their requested action approval date of December 19, 2015.<sup>65</sup>

**iii. Applicants' Answers to Motions for Stay**

59. Applicants argue that neither the Pennsylvania Commission nor the New Jersey Board have identified a reasonable basis for the Commission to depart from its long-standing and unequivocal policy, as set forth in the Merger Policy Statement, of rejecting requests to delay action on a section 203 application to accommodate the schedules of parallel state proceedings.<sup>66</sup> They point out that the Commission has repeatedly rejected attempts by intervenors to delay a section 203 proceeding while the state commission reviews the transaction, explaining that the Commission's ruling in the section 203 proceeding does not impede the state's ability to decide retail rate issues and other issues

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<sup>64</sup> New Jersey Board Motion for Stay at 12.

<sup>65</sup> Pennsylvania Commission Motion for Stay at 9-11; New Jersey Board Motion to Stay at 13-14.

<sup>66</sup> Applicants Answer to Pennsylvania Commission's Motion for Stay at 4-5 (citing 1996 Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044, at 31,127-28).

that appropriately arise under the state's jurisdiction.<sup>67</sup> In response to the Pennsylvania Commission's motion for stay, Applicants argue that the Pennsylvania Commission has not presented any evidence to show that the Proposed Transaction does not meet the requirements of section 203 to justify a delay beyond the statutory six-month period. They contend that the Pennsylvania Commission's sole basis for requesting a delay is its assertion that a delay is necessary to enable it to consider the Proposed Transaction and related issues in its parallel state proceeding.

60. Applicants contend that, if the New Jersey Board's reasoning in its motion for stay were accepted, the Commission's goal of processing applications expeditiously and within the federal statutory deadline would be severely undermined. They assert that the Commission has little or no control over the timing of a state's decision in the parallel proceeding, and they can be complex and protracted. As such, Applicants argue that delaying a section 203 proceeding pending completion of a potentially protracted state review proceeding that the Commission cannot control would compromise the Commission's ability to process section 203 applications quickly and efficiently, in accordance with its statutory obligations and its own policies.<sup>68</sup>

61. Applicants further assert that neither the Pennsylvania Commission nor the New Jersey Board has satisfied the Commission's standards for granting a stay, in particular to demonstrate irreparable injury. Applicants state that the Pennsylvania Commission's sole claim of irreparable injury is a generalized concern that Commission action on the Proposed Transaction will be prejudicial to the parallel state proceeding. Additionally, they argue that both cases cited by the New Jersey Board to exemplify the Commission's stay requirements denied the requested stay because the movant failed to prove irreparable injury. Applicants state that, here, as in the cases cited by the New Jersey Board, the motion for stay should be denied because the New Jersey Board has not shown that it will be unable to effectively participate in this proceeding prior to the completion of its own review proceeding. Additionally, Applicants state that the New Jersey Board has an opportunity to independently review and approve the Proposed Transaction under state law standards before the Proposed Transaction can be consummated. As such, Applicants contend that neither the Pennsylvania Commission nor the New Jersey Board has shown it will suffer irreparable injury in the absence of a stay.<sup>69</sup>

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<sup>67</sup> *Id.* at 5 & n.10 (citing *Exelon*, 149 FERC ¶ 61,148 at P 123; *Nev. Power Co.*, 145 FERC ¶ 61,022, at P 48 (2013); *Appalachian Power Co.*, 143 FERC ¶ 61,074, at P 48 (2013); *Sierra Pac. Power Co.*, 87 FERC ¶ 61,077, at 61,332 (1999)).

<sup>68</sup> Applicants Answer to New Jersey Board Motion for Stay at 7.

<sup>69</sup> *Id.* at 9-10.

62. Applicants dispute the Pennsylvania Commission's and the New Jersey Board's arguments regarding jurisdiction over the transmission facilities in the Proposed Transaction. They argue that the assets to be contributed in the Proposed Transaction are, and will continue to be, subject to the exclusive jurisdiction of the Commission, notwithstanding any residual jurisdiction of the state. Applicants contend that the facilities that they propose to transfer are currently classified as transmission assets in the FirstEnergy East Operating Companies' respective FERC Form No. 1s (Form 1s) and in the PJM Tariff; that the costs associated with these facilities are recovered under a Commission-approved rate; and that PJM recognizes the assets as transmission facilities – i.e., these facilities provide Commission- jurisdictional transmission service. Applicants assert that the Proposed Transaction will not change the New Jersey Board's concern about state jurisdiction and that the Commission has expressly held that the transfer of transmission assets from utilities to an independent transmission company does not diminish the “effective regulation” of those facilities.<sup>70</sup> In response to the Pennsylvania Commission's and the New Jersey Board's arguments that the transfer of transmission assets below 100 kV potentially creates a jurisdictional vacuum regarding safety and reliability for such facilities, Applicants state that the Commission's statutory jurisdiction over the “bulk-power system” as defined in FPA section 215 is broader than the Commission's regulatory definition of the “bulk electric system.”<sup>71</sup> Applicants explain that with respect to jurisdiction over safety and reliability, NERC applies the Commission's regulatory definition of “bulk electric system” as a regulatory “threshold” (100 kV) for the mandatory reliability standards described in section 215.<sup>72</sup> Accordingly, Applicants assert that regardless of voltage level, the Commission retains jurisdiction over the entire “bulk power system,” including the transmission assets to be transferred to Mid-Atlantic Interstate, and those assets will be subject to state jurisdiction for reliability purposes, up to the point where the facilities are subject to Commission jurisdiction under the FPA.<sup>73</sup> Additionally, Applicants state that after the Proposed Transaction is consummated, they will file a petition for declaratory order recognizing the proposed classification of transmission assets.

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<sup>70</sup> *FirstEnergy Operating Cos.*, 89 FERC ¶ 61,090, at 61,262 & n.41 (1999).

<sup>71</sup> Applicants Answer to Pennsylvania Commission Motion for Stay at 7-8; Applicants Answer to New Jersey Board Motion for Stay at 13-14.

<sup>72</sup> Applicants Answer to New Jersey Board Motion for Stay at 15 (citing 16 U.S.C. § 824o(b)(1) (2012)).

<sup>73</sup> Applicants Answer to the Pennsylvania Commission Motion for Stay at 9-10; Applicants' Answer to New Jersey Board Motion for Stay at 15-16.

63. Applicants further take issue with the Pennsylvania Commission's and the New Jersey Board's concern regarding the classification of facilities pursuant to the Navigant Report. Applicants contend that any issues related to the classification of facilities pursuant to the Navigant Report are not relevant for determining whether the Proposed Transaction will have an adverse impact on competition, rates, or regulation or whether the Proposed Transaction will raise cross-subsidization concerns. They assert that the Navigant Report does nothing more than validate that the assets to be contributed continue to perform a transmission function, and that their current classification as transmission continues to be correct.<sup>74</sup>

**iv. New Jersey Board's Answer**

64. The New Jersey Board responds to Applicants' answer, stating that evidentiary hearings in the state proceeding are scheduled for February 2016, with the New Jersey Board's issuance of a final decision expected soon thereafter. Thus, they state that the hearing dates set by the New Jersey Board in the state proceeding show that only a small delay in the Commission's review of the Proposed Transaction would be necessary to allow the New Jersey Board to conduct a comprehensive and fair review of the common issues raised in both proceedings.<sup>75</sup>

**v. Commission Determination**

65. We find no evidence that either state or federal regulation will be impaired by the Proposed Transaction. 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.<sup>76</sup> We find that the Proposed Transaction will not create a regulatory gap at the federal level because the Commission will retain its regulatory authority over the transmission assets being transferred after the Proposed Transaction is consummated.<sup>77</sup>

66. We affirm that our approval of the Proposed Transaction under section 203 of the FPA does not affect or preempt any state proceedings under Pennsylvania and New Jersey law, and that the timing of our determination does not have any impact on state

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<sup>74</sup> *Id.* at 10-11; Applicants Answer to New Jersey Board Motion for Stay at 10-11.

<sup>75</sup> New Jersey Board Answer at 3.

<sup>76</sup> 1996 Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

<sup>77</sup> *Nev. Power Co.*, 145 FERC ¶ 61,022 at PP 47-48.

jurisdiction.<sup>78</sup> We also note that it is not Commission policy to delay ruling on an application when there are parallel proceedings.<sup>79</sup> Therefore, we deny the motions for stay filed by the Pennsylvania Commission and the New Jersey Board.

**d. Cross-Subsidization**

**i. Applicants' Analysis**

67. Applicants assert that the Proposed Transaction falls within the Commission's "safe harbor" because none of the FirstEnergy East Operating Companies have captive retail customers, since Pennsylvania and New Jersey have each adopted retail choice. They further assert that FirstEnergy Transmission, as a holding company with no operations, has no captive customers. Applicants explain that Mid-Atlantic Interstate will provide a single service – transmission service pursuant to the PJM Tariff – and thus is not a franchised public utility with "captive customers." They contend that the Commission has concluded that there is no potential harm for consumers when, as here, there are no captive customers involved in the transaction.<sup>80</sup>

68. Even though Applicants assert that the Proposed Transaction falls within the safe harbor, they also provide the verifications required by the Commission under Exhibit M. With respect to the first prong of the Commission's four-pronged standard of review for a proposed transaction's effect on cross-subsidization, Applicants state that the Proposed Transaction involves the transfer of transmission facilities from the FirstEnergy East Operating Companies, which are traditional public utility associate companies that own and provide transmission jurisdictional facilities, to Mid-Atlantic Interstate, an associate company. However, they contend that the Proposed Transaction is consistent with the public interest and falls under the Commission's safe harbor because there are no captive customers involved. Applicants further assert that there are no non-regulated associate companies involved. Applicants provide assurances that they meet the other three prongs of the Commission's standard of review. Specifically, Applicants verify that, based on

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<sup>78</sup> *Id.* P 48.

<sup>79</sup> 1996 Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,127-28. *See, e.g., Sierra Pac. Power Co.*, 87 FERC ¶ 61,077 at 61,332 ("We conclude that it is not necessary to delay this proceeding, as the Nevada Commission requested, to avoid preemption or interference with the State's goals."). *See also Nev. Power Co.*, 145 FERC ¶ 61,022 at PP 47-48.

<sup>80</sup> Application at 28-29.

facts and circumstances known to them or that are reasonably foreseeable, the Proposed Transaction will not result in, at the time of the Proposed Transaction or in the future:

- (a) any new issuance of securities by 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;<sup>81</sup>
- (b) any new pledge or encumbrance 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
- (c) any new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and service agreements subject to review under sections 205 and 206<sup>82</sup> of the FPA.

## ii. Commission Determination

69. We find that, based on Applicants' representations, the Proposed Transaction will not result in the cross-subsidization of a non-utility associate company by a utility company, or in a pledge or encumbrance of utility assets for the benefit of an associate company.

70. When a controlling interest in a public utility is acquired by another company, whether a domestic company or a foreign company, the Commission's ability to adequately protect public utility customers against inappropriate cross-subsidization may be impaired unless it has access to the acquirer's books and records. Section 301(c) of the FPA gives the Commission authority to examine the books and records of any person who controls, directly or indirectly, a jurisdictional public utility insofar as the books and records relate to transactions with or the business of such public utility. In addition, Mid-

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<sup>81</sup> Applicants note that Mid-Atlantic Interstate intends to file an application pursuant to FPA section 204 to issue long- and short-term debt and equity securities to fund its activities. They assert that those financial transactions are to fund Mid-Atlantic Interstate's operation and maintenance of existing transmission facilities, and to fund the development, construction, and operation of new transmission facilities, and are not for the benefit of an associate company.

<sup>82</sup> 16 U.S.C. § 824e (2012).

Atlantic Interstate is subject to the record-keeping and books and records requirements of PUHCA 2005. The approval of the Proposed Transaction is based on such ability to examine books and records.

#### **IV. Accounting Analysis**

##### **A. Response to Data Request**

71. Commission staff's data request asked Applicants whether: (1) the FirstEnergy-GPU Merger affected the books and records of any jurisdictional subsidiary, including the transfer of goodwill; and (2) the FirstEnergy East Operating Companies notified the Commission of any such change. In their response, Applicants stated that the FirstEnergy-GPU Merger did affect the books of the FirstEnergy East Operating Companies by virtue of a transfer of goodwill to the FirstEnergy East Operating Companies just a few months following the Commission's approval of the merger. Applicants claim to have provided notice to the Commission of such change through a note included in the Form 1s for each of the FirstEnergy East Operating Companies for each of the years ending December 31, 2001, 2002, and 2003.

72. In their response, Applicants also provided merger accounting adjustments compiled from their existing accounting records for 2001, 2002, and 2003, and disclosed that they performed several fair-value adjustments impacting the books and records of the jurisdictional subsidiaries. Additionally, Applicants stated that the transmission rates of the FirstEnergy East Operating Companies are at fixed rates which went into effect pursuant to a Commission letter order dated December 1998 and have not changed; therefore, according to Applicants, no amounts related to the FirstEnergy-GPU Merger have been recovered in the rates of the FirstEnergy East Operating Companies' transmission customers.

##### **B. Commission Determination**

73. The Commission's approval of the FirstEnergy-GPU Merger in 2001 was based upon the representations made by FirstEnergy, including FirstEnergy's assurances that "Applicants do not propose any changes to the books and records of the jurisdictional subsidiaries."<sup>83</sup> The Commission concluded that, "[s]ince we do not expect the proposed merger to have any effect on the books and records of the jurisdictional subsidiaries, we will not require Applicants to submit their proposed accounting."<sup>84</sup> Instead, the

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<sup>83</sup> Merger Order, 94 FERC ¶ 61,291 at 62,047.

<sup>84</sup> *Id.*

Commission expressly stated that “if the merger (including merger-related costs) affects the books and records of a jurisdictional subsidiary, Applicants shall promptly inform the Commission and provide a full explanation for any proposed adjustments.”<sup>85</sup> In addition, the Commission required FirstEnergy to “promptly inform the Commission of any change in circumstances that would reflect a departure from the facts the Commission has relied upon in reviewing the merger accounting.”<sup>86</sup>

74. We find that the FirstEnergy East Operating Companies did not comply with the notification required in the Merger Order. The FirstEnergy East Operating Companies were directed to notify the Commission if the merger accounting affected the books and records of a jurisdictional subsidiary or of any change in the circumstances that would reflect a departure from the facts that the Commission relied upon in reviewing the merger accounting. We find that inclusion of an oblique note in a generally applicable form filed by all Major Electric Utilities (i.e., Form 1) does not put the Commission on notice of potentially important accounting changes and is not compliant with the requirement. Further, even if the FirstEnergy East Operating Companies’ Form 1 submissions were intended to provide the required notice, the FirstEnergy East Operating Companies failed to include all of the information required by the Commission’s order.<sup>87</sup> The Commission was never notified of the transfer of goodwill to the FirstEnergy East Operating Companies that occurred as part of the 2001 merger accounting. Such notification to the Commission should have been filed in the docket in which the Commission approved the section 203 transaction.

75. The FirstEnergy East Operating Companies’ non-compliance with the Commission’s order approving the FirstEnergy-GPU Merger is serious and the Commission is concerned that the FirstEnergy East Operating Companies’ post-merger accounting changes were never submitted, so there was no opportunity for the accounting to be scrutinized by the Commission. We expect the FirstEnergy East Operating Companies to develop written policies and procedures to timely identify proposed accounting changes that would trigger a notification to the Commission. The Commission expects the FirstEnergy East Operating Companies, and all entities that have a reporting requirement for transactions under FPA section 203, to fully comply with the orders approving such transactions, including requirements that notification be provided of any post-merger accounting changes that affect jurisdictional companies.

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> For example, the Commission’s order required any notification to include, “a *full explanation* for any *proposed* adjustment[.]” *Id.* (emphasis added).

### C. Other Accounting Matters

76. Applicants provided proposed accounting entries recording the effects of the Proposed Transaction on the books of the FirstEnergy East Operating Companies and Mid-Atlantic Interstate.<sup>88</sup> Applicants state that there will not be any goodwill as a result of this transaction; however, as previously described above, the FirstEnergy East Operating Companies will transfer goodwill to Mid-Atlantic Interstate related to the FirstEnergy/GPU merger transaction.<sup>89</sup> The amount of goodwill to be transferred to Mid-Atlantic Interstate will be based on the relative fair value of the transmission assets being transferred to the fair value of the remaining operations of each of the FirstEnergy East Operating Companies.<sup>90</sup> Additionally, Mid-Atlantic Interstate affirms that it will not recover in its transmission rate any acquisition premium or goodwill that is transferred from the FirstEnergy East Operating Companies to Mid-Atlantic Interstate absent a separate section 205 filing and explicit Commission authorization to do so.<sup>91</sup>

77. Mid-Atlantic Interstate proposes to record the transfer of goodwill related to the FirstEnergy/GPU Merger on its books by debiting Account 186, Miscellaneous Deferred Debits, and crediting Account 201, Common Stock Issued, consistent with prior Commission guidance.<sup>92</sup> The FirstEnergy East Operating Companies propose to record the transferred goodwill by crediting Account 186 of the individual books of Jersey Central, Met-Ed, and Pennsylvania Electric for their portion of goodwill transferred and debiting Account 123.1, Investment in Subsidiary Companies.

78. The Commission generally requires public utilities to maintain detailed accounting records associated with goodwill and all other merger-related accounting entries so as to facilitate the evaluation of the effects of the transaction on common equity and other

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<sup>88</sup> Application, Exhibit N.

<sup>89</sup> Merger Order, 94 FERC ¶ 61,291 at 62,041.

<sup>90</sup> Application at 23. *See also* Application, Attachment 4, Taylor Test. at 8.

<sup>91</sup> Application at 23.

<sup>92</sup> *See Startrans IO, L.L.C.*, 122 FERC ¶ 61,307 (2008); *Great Plains Energy Inc.*, 121 FERC ¶ 61,069 (2007), *reh'g denied*, 122 FERC ¶ 61,177 (2008); *Michigan Elec. Transmission Co., LLC*, Docket No. AC03-9-000 (Feb. 5, 2004) (delegated letter order).

accounts in future periods if needed for ratemaking purposes.<sup>93</sup> Moreover, the amounts recorded as goodwill in a public utility's accounting records may not be included in formula-rate calculations absent prior regulatory approval. Applicants must make a section 205 filing before recovering any amounts recorded as goodwill from jurisdictional customers. Consequently, we will require Applicants to maintain detailed accounting records associated with the push-down and recording of goodwill. Applicants may use separate sub-accounts for maintaining the required information.

79. Additionally, Applicants state that the contribution of the FirstEnergy East Operating Companies' jurisdictional transmission assets will be structured as a tax-free contribution of assets as opposed to an asset sale. The FirstEnergy East Operating Companies represent that provisions of the Internal Revenue Code permit one or more shareholders to achieve a non-taxable transfer of assets to a corporation in exchange for stock, which results in a "carry over" of the existing tax basis in the assets being transferred.<sup>94</sup> Applicants explain that, since the book basis of the jurisdictional transmission assets will be contributed at their carrying value and the tax basis will be "carried over," the ADIT, representing the difference between the book and tax basis of the jurisdictional assets being contributed, will be transferred from the FirstEnergy East Operating Companies to Mid-Atlantic Interstate. According to Applicants, this is consistent with Commission policy.<sup>95</sup> Our approval for accounting purposes of the FirstEnergy East Operating Companies to Mid-Atlantic Interstate's proposed treatment of ADIT is subject to our review of the final accounting entries. Also, to provide transparency, we will require Applicants to explain the impact of the Proposed Transaction in its Form 1. In particular, Applicants must explain the impact of the Proposed Transaction in the Notes for the Financial Statements and provide disclosure in footnotes to the affected accounts on the balance sheet of their Form 1s in the year the accounting entries are made.

80. Applicants state that Mid-Atlantic Interstate anticipates it will incur an undisclosed amount of transaction-related costs related to the Proposed Transaction. Applicants state that the transaction-related costs are all costs, including internal labor and other than

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<sup>93</sup> See *PPL Corp.*, 133 FERC ¶ 61,083 (2010); *Michigan Elec. Transmission Co.*, 116 FERC ¶ 61,164 (2006); *Niagara Mohawk Holdings, Inc.*, 95 FERC ¶ 61,381, *reh'g denied*, 96 FERC ¶ 61,144 (2001).

<sup>94</sup> Application, Attachment 4, at 8.

<sup>95</sup> *Equitrans, L.P.*, Docket No. AC13-17-000 (2013); *Elba Express Company, L.L.C.*, Docket No. AC12-72-000 (2012); *So. Nat'l Gas Co.*, Docket No. AC12-6-000 (December 13, 2011).

labor costs incurred to discuss, gather information, and investigate the feasibility of creating Mid-Atlantic Interstate, and continuing through the completion of the Proposed Transaction. Consistent with their hold harmless commitment,<sup>96</sup> Applicants further state that all transaction-related costs are being charged to a work order and are recorded to Account 426.5, Other Deductions,<sup>97</sup> consistent with Commission precedent.<sup>98</sup>

81. Applicants' proposed accounting entries clear the respective contribution of the transmission electric plant assets through Account 102, Electric Plant Purchased or Sold. Mid-Atlantic Interstate's proposed accounting entries record the original cost and related accumulated depreciation of the assets on its books while the FirstEnergy East Operating Companies will remove the original cost and accumulated depreciation of the assets from their books. Applicants' proposed accounting for the contributed assets is found to be in compliance with Electric Plant Instruction No. 5 and the instructions for Account 102 of the Uniform System of Accounts.<sup>99</sup> Finally, Applicants shall submit their final accounting for the Proposed Transaction within six months after the Proposed Transaction is consummated. The accounting submission shall provide all accounting entries made to the books and records of all jurisdictional companies, along with the appropriate narrative explanations describing the basis for the entries.

82. Mid-Atlantic Interstate will be a signatory to the existing FirstEnergy Service Agreement under which FirstEnergy Service Company will provide corporate services such as accounting, legal, data processing, human resources, and other services to Mid-Atlantic Interstate. Mid-Atlantic Interstate will also be a party to the Mutual Assistance Agreement, pursuant to which employees of the FirstEnergy East Operating Companies will provide services as directed by FirstEnergy Transmission to Mid-Atlantic Interstate Transmission Facilities. As such, FirstEnergy Service Company will charge Mid-Atlantic Interstate for corporate services and the FirstEnergy East Operating Companies will charge Mid-Atlantic Interstate for services received for mutual assistance.

83. To the extent that costs are allocated or directly billed from Mid-Atlantic Interstate's parent company or any of its affiliates, we direct Mid-Atlantic Interstate to maintain information regarding the methodology for the allocation or direct-billing of those costs.

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<sup>96</sup> Application at 22.

<sup>97</sup> *Id.*, Attachment 4, at 13.

<sup>98</sup> *See, e.g., Exelon Corp.*, 138 FERC ¶ 61,167, at P 133 (2012).

<sup>99</sup> 18 C.F.R. pt. 101 (2015).

## V. Other Considerations

84. Information and/or systems connected to the bulk power system involved in this Proposed Transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to FPA section 215.<sup>100</sup> 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 cyber security standards. The Commission, NERC or the relevant regional entity may audit compliance with reliability and cyber security standards.

85. Order No. 652 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.<sup>101</sup> To the extent that a transaction authorized under FPA section 203 results in a change in status, sellers that have market-based rates are advised that they must comply with the requirements of Order No. 652.

### The Commission orders:

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

(B) 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.

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<sup>100</sup> 16 U.S.C. § 824o.

<sup>101</sup> *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005). *See* 18 C.F.R. § 35.42 (2015).

(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.

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

(H) Applicants shall maintain detailed accounting records associated with their transfer and recording of goodwill, as discussed in the body of this order. Applicants may use separate sub-accounts for maintaining the required information.

(I) Applicants shall submit their final accounting entries within six months of the date that the Proposed Transaction is consummated, and the accounting submissions shall provide all the accounting entries and amounts related to the transfer along with narrative explanations describing the basis for the entries.

(J) Applicants shall disclose the impact of the Proposed Transaction in its Form 1, Annual Report of Major Electric Utilities, Licensees and Others. In particular, Applicants must explain the impact of the Proposed Transaction in the Notes for the Financial Statements and provide disclosure in footnotes to the affected accounts on the balance sheet of its Form 1 in the year the accounting entries are made.

(K) If Applicants seek to recover transaction-related costs through Mid-Atlantic Interstate's transmission rates, they must make a new FPA section 205 filing and submit concurrently an informational filing in the instant FPA section 203 docket. In the FPA section 205 filing, Applicants must: (1) specifically identify the transaction-related costs

they are seeking to recover; and (2) demonstrate that those costs are exceeded by the saving produced by the Proposed Transaction.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.