UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Westar Energy, Inc. | Docket No. EC06-48-001
ONEOK Energy Services Company, L.P.

ORDER ON REHEARING

(Issued October 4, 2006)

1. Westar Energy, Inc. (Westar Energy) and the Oklahoma Municipal Power Authority (OMPA) request clarification or rehearing of the Commission order issued in this proceeding on May 22, 2006 (the Order).[1] The Order conditionally authorizes disposition and acquisition of jurisdictional and generating facilities in connection with the sale to Westar Energy of the ONEOK Energy Services Company L.P. (ONEOK) Spring Creek generating facility (the Facility) and an associated power purchase agreement (the Power Purchase Agreement). The Order requires Westar Energy to make a compliance filing within 30 days after the Southwest Power Pool (SPP) acts on any Westar Energy application to have 225 MW from the Facility designated as a network resource. Under the Order, in its compliance filing, Westar Energy must address whether transmission upgrades required by the SPP will provide sufficient available transmission capability (ATC) to restore market concentration to within 100 HHI[2] of the pre-transaction level. If they will not, the Order specifies that Westar Energy must pay for additional transmission upgrades to provide such additional ATC. The Order also

[1] *Westar Energy, Inc. and ONEOK Energy Services Company*, L.P., 115 FERC ¶ 61,228 (2006).

[2] The Herfindahl-Herschman Index "is a measure of market concentration and is a function of the number of firms in a market and their respective market shares. The HHI statistic is calculated by summing the squares of the individual market shares, expressed as percentages, of all potential suppliers to the destination market." 18 C.F.R. § 33.3(c)(5) (2006).

provides for interim mitigation in case the Facility is designated a network resource before the permanent mitigation is in place. For the reasons discussed below, we grant in part Westar Energy's request for rehearing and clarification and deny OMPA's request.

I. Background

2. On December 21, 2005, Westar Energy and ONEOK (collectively, Applicants) filed the application under section 203 of the Federal Power Act (FPA).[3] The proposed transaction also includes the transfer from ONEOK to Westar Energy of the wholesale Power Purchase Agreement, which provides for the sale to OMPA of approximately 75 MW of capacity and associated energy from the Facility. The jurisdictional facilities also include step-up transformers, generation lead lines and switchyard facilities necessary to interconnect the Facility to Oklahoma Gas & Electric Company's (OG&E) transmission system.

3. The Commission conditionally authorized the proposed transaction, finding that although the transaction passes the Competitive Analysis Screen if the Facility does not become a network resource, additional transmission upgrades will be necessary to mitigate adverse effects on competition if the Facility becomes a network resource because, as a network resource, the capacity of the Facility would be able to sell into the Westar Energy market, thus increasing Westar Energy's market share and the market concentration and harming competition. In order to mitigate this possible harm to competition, the Order requires Westar Energy to increase transfer capability into the Westar Energy market by an amount that will bring market concentration within screening tolerances of the pre-transaction level. The Order also requires Westar Energy to make a compliance filing demonstrating whether any transmission upgrades required by the SPP will provide sufficient additional ATC (with the Westar Energy load as the designated point of delivery, using the SPP planning model under winter conditions) to restore market concentration in the Winter Super Peak period to within 100 HHI screening tolerances.

4. On July 6, 2006, OMPA filed a response to Westar Energy's request for clarification or rehearing. On July 20, 2006, Westar Energy filed a reply to OMPA's request for rehearing and clarification. On July 21, 2006, the Commission issued an order granting rehearing for further consideration.

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[3] 16 U.S.C. § 824b (2000), *amended by* Energy Policy Act of 2005 § 1289, Pub. L. No. 109-58, 119 Stat. 594, 982-93 (2005) (EPAct 2005).

II. Arguments Raised

A. OMPA's Request for Rehearing and Clarification

5. OMPA requests rehearing on the amount of transmission capability needed to restore competition lost due to the transaction. OMPA alleges that only requiring that transfer capability be increased to bring market concentration within screening tolerances falls short of the Commission's policy of requiring mitigation to "restore" competition lost because of a merger or acquisition.[4] Given that the Commission has defined the pre-transaction level of market concentration as an HHI of 1,653 for the Winter Super Peak, that would require Westar Energy to restore competition to an HHI of up to 1,753, which is near 1,800, the threshold to be considered a highly concentrated market. OMPA argues that this would permit the post-transaction market to be dangerously close to highly concentrated, even though the pre-transaction market was only moderately concentrated. OMPA urges the Commission to eliminate the 100 HHI tolerance.

6. OMPA further states that Westar Energy's dominance in the market supports a restoration to 1,653 HHI. Even at 1,653 HHI, Westar Energy's market share of 37 percent exceeds the 35 percent market share deemed worrisome by the Horizontal Merger Guidelines.[5] The 100 HHI tolerance will permit Westar Energy's market share to exceed the pre-transaction level of 37 percent, which is not acceptable given that a market share of over 35 percent is problematic.

7. Alternatively, OMPA argues for a tolerance of no more than 50 HHI. In support, it quotes the Merger Policy Statement, which states that "if the *post-merger* HHI exceeds 1,800 and the change in HHI exceeds 50, the merger potentially raises significant competitive concerns; if the change in HHI exceeds 100, it is presumed that the merger is likely to create or enhance market power."[6] OMPA claims that the post-transaction HHI of 2,035, with an HHI change of 381, indicates a highly concentrated post-transaction

[4] OMPA rehearing request at 3, *quoting Oklahoma Gas & Electric Co.*, 108 FERC ¶ 61,004, P 31 (2004) *reh'g denied*, 111 FERC ¶61,075 (2005).

[5] *Id.* at 4.

[6] *Id.* at 5, *quoting Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 at 68,601 n.33 (Dec. 30, 1996), FERC Stats. & Regs. ¶ 31,044 at 30,119 n.33 (1996), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,340 (June 19, 1997), 79 FERC ¶ 61,321 (1997) (*Merger Policy Statement*).

market, but that the Commission used the threshold for a moderately concentrated market to set the tolerance. If the Commission is going to apply any tolerance level, it should require Westar Energy to upgrade transmission capability to return the market to within 50 HHI of the pre-transaction level, consistent with the *Merger Policy Statement*, which requires that the tolerance be based on the highly concentrated, post-transaction market conditions.

8. OMPA also notes that the Commission's analysis of the competitive effects on the Westar Energy control area and the resulting mitigation required are based on the 225 MW that Westar Energy says it plans to designate as a network resource. OMPA is concerned with what will happen if Westar Energy decides to designate more than 225 MW, and asks the Commission to ensure that any such designation not escape review under FPA section 203. It asks the Commission to clarify that Westar Energy will be required to make a compliance filing within 30 days of any application to have more than 225 MW designated as a network resource, and that the filing must include an Appendix A analysis of the competitive effects on Westar Energy's control areas.

9. OMPA is concerned because, in the short term, the Power Purchase Agreement obligates ONEOK (current owner of the Facility) to sell 75 MW of the Facility's capacity to OMPA, which is why the Commission did not require Westar Energy to mitigate for the full 300 MW capacity of the Facility. Westar Energy could seek to designate the remaining capacity sooner than 2016; OMPA cites a recent petition it filed in the District Court for Oklahoma County seeking a declaratory judgment that any transfer of the Facility by ONEOK without OMPA's consent is a material breach of the Power Purchase Agreement, excusing OMPA from further performance. If OMPA is excused from further performance, Westar Energy could seek to designate the full 300 MW of the Facility's capacity as a network resource. OMPA states that the Commission should consider the competitive effects of the full 300 MW designation in this section 203 proceeding, not a later section 205 proceeding, and asks the Commission to clarify that Westar Energy must make a section 203 compliance filing in this proceeding when it seeks to designate the additional 75 MW. If such designation does not take place until far in the future, the Commission can consider then whether it is reasonable to analyze the transaction as if it were part of this original transaction.

B. Westar Energy's Request for Clarification or Rehearing

10. Westar Energy states that the Order requires it to increase import capability into its control area by approximately 325 MW, which is 100 MW more than the 225 MW of the Facility's capacity that Westar Energy is proposing to designate as a network resource. It proposes two new options for satisfying its mitigation obligation and asks the Commission to clarify that Westar may use either option. Option One is for Westar Energy to commit not to use its 225 MW of network integration transmission services

associated with the Facility's capacity during the Winter period until market conditions change so that the change to the HHI would be 100 or less. Option Two is for Westar Energy to add transmission facilities providing 100 MW of incremental ATC from the OG&E market into the Westar Energy control areas when Westar Energy designates the Facility as a network resource.[7] If the Commission does not grant the requested clarifications, Westar Energy requests rehearing of the Order.

11. Westar Energy raises a number of objections to the mitigation the Commission imposed. In support of Option One, it points out that the Commission found no adverse competitive effect from the proposed transaction unless Westar Energy designates 225 MW of the Facility's capacity as a network resource; even then, there is only an adverse competitive effect during the Winter Super Peak period, where there is a violation of the available economic capacity (AEC)[8] measure.[9] The potential for any adverse competitive impact is hypothetical because operation of the Facility is likely to be economic only during the Summer Peak.[10] Westar Energy asks the Commission to clarify that it may commit not to use its network integration transmission services service agreement associated with the import of the Facility's capacity during the winter months (December, January, and February) as long as the HHI change in the Westar Energy control areas would be more than 100 during the Winter period. According to Westar Energy, this would mitigate its hypothetical ability to exercise market power during the Winter Super Peak period because it would not have access to firm energy from the Facility.

12. Further, Westar Energy claims that the Order imposes on it an obligation "to mitigate *future* competitive concerns, not those analyzed by the Commission in the case

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[7] The Order requires Westar Energy to increase transfer capability into the Westar Energy market by an amount that will bring market concentration to within 100 HHI of pre-transaction levels, and estimates that it would require approximately 325 MW of increased transfer capacity to do so. Order at P 81. Because of perceived difficulties in making such calculations, Westar proposes instead to simply increase transfer capacity by 100 MW of ATC.

[8] "[T]he amount of generating capacity meeting the definition of economic capacity less the amount of generating capacity needed to serve the potential supplier's native load commitments . . . ." 18 C.F.R. § 33.3(c)(4)(i)(B) (2006).

[9] Westar Energy request for rehearing at 6, *citing* the Order at P 72, 78.

[10] *Id.*, *citing* the Order at P 75.

before it."[11] Because the Commission required Westar Energy to prepare a new competitive screen analysis using different data than those used to identify the competitive harm, Westar Energy claims that there is no nexus between the mitigation requirement and the harm identified. Westar Energy also claims that it is impossible to determine how much transmission import capability it might need to provide in order to bring the HHI change associated with the transaction to 100 points or less as measured using data prepared in the future. For that reason, it proposes Option Two.

13. Westar Energy says it contacted the SPP after the Order was issued to find out how it could obtain the necessary simultaneous import capability data so that it could perform the calculations required by the Commission. SPP said that it does not routinely make such calculations, and that it could take up to six months to prepare a new simultaneous import capability base case analysis and another three to six months to update it with the results of the SPP aggregate study containing Westar Energy's network request to import energy from the Facility. Once that was completed, Westar would need to apply that data to its Appendix A analysis to determine whether the HHI change met the criteria in the Order; which would not be possible to do in the 30-day compliance filing timeframe contained in the Order. The Order also does not allow Westar Energy to evaluate the transaction before the October 14, 2006 date given for Westar Energy or ONEOK to terminate their asset sale agreement.

14. According to Westar Energy, another problem with the mitigation the Commission imposed is that the variable nature of the data and data usage problems could spawn lengthy disputes regarding whether Westar Energy has satisfied its mitigation obligation. It points to disputes that have arisen under similar circumstances in a case involving OG&E.[12] The SPP is in the best position to calculate simultaneous import capability because it can get transmission usage data. If Westar Energy did its own planning analysis of the import capability created by the Facility's network integration transmission service request, that analysis would vary from the SPP analysis that Westar Energy originally submitted, which would differ from any short-term operational planning analysis that the SPP may prepare. Varying analyses of import capability prepared using different future data bases will not determine definitely whether Westar Energy has mitigated the harm to competition found in the Order.

[11] *Id.* at 7.

[12] *Citing Oklahoma Gas and Electric Company and NRG McClain LLC*, 115 FERC ¶ 61,350, at P 29 (2006) (*OG&E Compliance Order*).

15. According to Westar Energy, such analyses are not needed because the Commission has determined that Westar Energy may mitigate the harm by providing 100 MW of ATC from OG&E into the Westar Energy control area. Therefore, Westar Energy requests that the Commission clarify that it may satisfy its mitigation obligation through Option Two by adding transmission facilities from OG&E into the Westar Energy control area to provide 100 MW of new ATC along this path, if needed to provide a total of 325 MW of import capability.[13]

16. According to Westar Energy, SPP has said that it can add an incremental 100 MW transmission request (in addition to Westar Energy's request for 225 MW of network integration transmission services) from OG&E to Westar Energy in SPP's current aggregate study process. The study would identify transmission facilities needed to satisfy this additional increment; SPP has said that Westar Energy may arrange for the construction of the necessary facilities outside of the aggregate study process. Westar Energy proposes to add this incremental service if it proves cost-effective. Westar Energy would not use the 100 MW of additional capacity; the SPP would make it available to the market under the regional open access transmission tariff. Westar Energy asserts that the additional capacity provided under Option Two would fully satisfy its mitigation obligations, is consistent with the OG&E settlement order, provides certainty and finality, and is in the public interest.

C. OMPA's Answer

17. OMPA urges the Commission to reject both of Westar Energy's proposed mitigation options. It says that Westar Energy's Option One proposal not to use the Facility as a network resource during the winter "invites gaming and defeats structural mitigation of the market power concerns raised in the proceeding."[14] Westar Energy's Option Two proposal to limit its transmission upgrade obligation to an incremental 100 MW would create a bad precedent and is based upon a flawed reading of the *OG&E Compliance Order*.[15]

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[13] If Westar Energy's request for 225 MW of import capability provides 325 MW or more of transfer capability, Westar Energy would not be required to undertake additional transmission upgrades because the incremental 100 MW of ATC would have been created by the upgrades required by SPP to designate Spring Creek as a network resource.

[14] OMPA answer at 2.

[15] 115 FERC ¶ 61,350.

18. OMPA also says that Westar Energy's proposal not to use its network integration transmission service agreement during the winter is an entirely new proposal and does not address the competitive harms associated with the proposed acquisition. The remedy imposed in the Order, increased transmission transfer capability, is the type of "structural mitigation" that the Commission should use to remedy increased concentration from generation acquisition. The Commission relied on the increased transmission to reject OMPA's strategic bidding argument; without the transmission mitigation, OMPA's withholding strategy argument is unaddressed. OMPA states that Westar Energy is trying to replace a structural remedy with a behavioral one that would require continued policing, placing greater burdens on the Commission's resources. OMPA notes that Westar Energy's proposal appears to limit only Westar Energy's ability to use the Facility as a network resource in the winter, leaving Westar Energy free to access the Facility's output on a non-firm basis during that time.

19. Also with regard to Option One, OMPA states that Westar Energy ignores the fact that the transaction increases HHI in summer super peak 2 period by 230 in a market that is just shy of being moderately concentrated.[16] According to OMPA, there are similar concerns with AEC even if the Facility is not a designated network resource, where during winter super peak, the post-transaction market would have an HHI of 1,721 and an HHI change of 68.[17] The Commission's requirement for additional transmission would help address the increases in concentration, but Westar Energy's proposed behavior limit would not.

20. According to OMPA, Westar Energy's Option One proposal also would not address concerns about serious and systematic screen violations for economic capacity (EC).[18] Although the Commission found AEC is more relevant than EC, EC results are particularly relevant during the winter super peak period, a time when Westar Energy proposes not to commit the Facility's resources to native load use. Post-transaction EC concentration in the Westar Energy market ranges from 3,011 HHI to 4,174 HHI, with an increase ranging from 183 HHI to 281 HHI, the highest increase being during the winter super peak period. Increases of over 100 in highly concentrated markets create a

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[16] *Id.* at 5, *citing* the Merger Policy Statement at 68,601 n.33.

[17] Id.

[18] *Id.* "Economic capacity means the amount of generating capacity owned or controlled by a potential supplier with variable costs low enough that energy from such capacity could be economically delivered to the destination market…." 18 C.F.R. § 33.3(c)(4(i)(A) (2006).

presumption that a transaction is likely to create or enhance market power.[19] Again, the Commission's transmission condition would help mitigate the competitive harm, while the mitigation proposed by Westar Energy would not.

21. OMPA says that Westar Energy's Option One proposal also would eliminate interim cost-based mitigation provided for in the Order, which requires Applicants to offer peaking energy and/or capacity at incremental cost plus 10 percent for energy sales or an embedded "up to" rate reflecting the Facility's costs for capacity and energy sales for any interim period between the date the Facility is designated a network resource and Westar Energy completes any required transmission upgrades. Elimination of this interim mitigation diminishes the Commission's efforts to address the harmful impacts of the transaction; the Commission did not limit the interim mitigation to the winter super peak period.

22. OMPA argues that if the Commission accepts Westar Energy's Option One proposal, Westar Energy must follow the network resource designation/undesignation requirements in OATT §§ 30.2 and 30.3 consistent with SPP's practices for seasonal resource designations and must reflect SPP's practices for seasonal resources. Because Westar Energy would be able to call on the Facility as a secondary resource under OATT § 28.4 during the winter peak period, the Commission should require Westar Energy to bid the facility on a cost basis consistent with the interim mitigation required in the Order.

23. OMPA also urges the Commission not to accept Westar Energy's second mitigation proposal. It responds to Westar Energy's claim that there is no nexus between the mitigation the Commission had imposed and the harm. The Commission found harm to competition based on the increased size of Westar Energy, with a 42 percent market share and an associated 381 HHI increase in a highly concentrated market. The fact that the amount of incremental upgrades needed has not been firmly established does not make the Commission's remedy unrelated to the harm identified.

24. OMPA disputes Westar Energy's claim regarding uncertainties that impair Westar Energy's ability to determine whether to go forward with the transaction. Even if the Commission had ordered Westar Energy to divest generation, there likely would have still been uncertainties at this stage regarding buyers, purchase price, etc. All of these uncertainties could affect a company's evaluation of a proposed transaction, but this cannot prevent the Commission from imposing a divestiture condition on a transaction.

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[19] OMPA answer at 6, *quoting Merger Policy Statement* at 68,601 n.33.

25. According to OMPA, the Commission can clarify the transmission upgrade requirement to accommodate Westar Energy's concern that the time required for SPP to produce simultaneous import limits and incorporate them into a transmission request will take more time than the 30-day compliance time frame. Westar Energy may request an extension and the Commission can grant it. In the interim period, the interim mitigation provided for under the Order would apply once the Facility is designated as a network resource.

26. OMPA addresses Westar Energy's argument about the variable nature of data, which cites the Commission's recent order in *Oklahoma Gas & Electric Co.*, 115 FERC ¶ 61,350. According to OMPA, the Commission should clarify that Westar may rely upon the SPP simultaneous import limit results available when it makes its compliance filing; this approach is consistent with *OG&E*.

27. OMPA says that if the Commission modifies the Order to establish a 100 MW incremental transfer capability obligation, Westar Energy should not be allowed to condition or reduce the transmission upgrades required, as it currently proposes to do. Westar Energy's proposal is to add the increment of service "if it proves to be cost-effective."[20] If the Commission accepts Westar Energy's proposed 100 MW incremental upgrade approach, it must clarify that Westar Energy will not be permitted to undermine that.

D. Westar Energy's Reply

28. In its reply to OMPA's answer, Westar Energy states that, contrary to OMPA's assertion, the Commission does not require structural mitigation. Westar Energy also asserts that its proposal not to use network integration transmission service during the winter is not a behavioral remedy and does not require "policing." Compliance is verifiable through the filings that Westar Energy has offered to make within 45 days after the winter period ends each February. Westar Energy also states that competitive effects would occur only when the Facility's output is imported on a firm basis as a network resource, so it does not matter whether Westar Energy imports power from the Facility during the winter on a non-firm basis.

29. Westar Energy also attacks OMPA's argument that the proposed transaction raises competitive concerns during the summer peak period, during winter super peak even when the Facility is not designated as a network resource, and under the EC measure. The Commission has already rejected those arguments. The fact that a certain transaction

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[20] OMPA answer at 12, *quoting* Westar Energy at 10.

may be "just shy" of triggering a screen violation does not trigger further scrutiny or require mitigation.

30. Westar Energy also states that OMPA has not supplied any support for its claim that Westar Energy's proposed mitigation could undermine the interim mitigation required in the Order. Westar Energy responds that it has not asked the Commission for relief from the interim mitigation.

31. Westar Energy challenges OMPA's assertion that Westar Energy's Option One commitment not to use network integration transmission service during the winter season means that it must give up other tariff rights otherwise associated with network integration transmission service. OMPA does not cite any authority for its proposition that a transmission customer's rights change based on whether it uses network integration transmission services. In Order No. 888, the Commission found that "firm transmission customers, including network customers, should not lose their rights to firm capacity simply because they do not use the capacity for certain periods of time."[21] Therefore, the Commission should reject OMPA's proposed conditions.

32. In further defense of Option One, Westar Energy claims that OMPA's answer did not resolve Westar Energy's data availability and reliability problem. OMPA's argument that Westar Energy should rely on the SPP simultaneous import limit results available when it makes its compliance filing misses the point of Westar Energy's concerns. Transmission usage is constantly changing, and new reservations could prevent ATC associated with any Westar Energy transmission upgrades from being recognized because the capacity could have already been used by others. This creates the "moving target" problem. Westar Energy also clarifies that its statement that it will construct the incremental transmission upgrades "if they prove to be cost-effective," means it would construct the upgrades if it decides to go through with its plans to purchase the Facility.

[21] Westar Energy reply at 6, *quoting 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 at 31,693 (1996) *order on reh'g*, Order No. 888-A, 62 FR 12,274 (March 14, 1997), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,048 (1997), *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).

III. Commission Determination

A. Procedural Matters

33. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a request for rehearing unless otherwise ordered by the decisional authority. However, the Commission will accept OMPA's and Westar Energy's answers because they have provided information that assisted us in our decision-making process.

B. Analysis

34. In the May Order, we identified harm to competition in the Winter Super Peak period resulting from Westar Energy's increased capacity in its control area once the Facility is designated as a network resource. We imposed mitigation to address the increase in market concentration during that period. Now, Westar Energy has proposed an alternative Option One that also would mitigate any harm to competition.[22] Westar's proposal directly addresses the harm to competition identified in the May Order and is administratively feasible. In addition, we will be able to monitor Westar's compliance with the mitigation through the filings that Westar Energy has offered to make within 45 days after the winter period ends each February. Therefore, we will grant Westar Energy's request that its proposed Option One be approved.[23] We discuss the specific arguments below.

35. We will deny OMPA's rehearing requests regarding the amount of additional transmission capacity that would be needed to offset the harm to competition resulting from the transaction. In the May Order, we explained that for a moderately concentrated

[22] We note that, in order to be designated as a network resource by the SPP, Westar Energy would most likely have to fund upgrades to the transmission grid that will increase ATC from the Facility into Westar Energy's control area. While this new ATC would theoretically permit the Facility to sell into Westar Energy's control area even if it is not designated as a network resource, without the network resource designation it would have to compete with other suppliers for this limited ATC and would be assigned only a *pro rata* share. Applicants' analysis shows that in such a case the change in market concentration would be less than 100 HHI in a moderately concentrated market, indicating no competitive concerns (Application Exhibit W-1at 23).

[23] We leave it up to Westar Energy to decide whether to comply with the mitigation required in the May Order, or whether to follow Option One instead.

market, such as the Westar control area in the Winter Peak period, it is necessary to restore the market concentration to within 100 HHI of the pre-transaction market concentration. As we explained in Exelon, the HHI conveys information about the likelihood of both coordinated and unilateral exercises of market power.[24] As we noted in the May Order, the harm to competition here results not from the elimination of a competitor, but from the increased size of Westar Energy, which has a 42 percent market share, and the associated 381 HHI increase in a highly-concentrated market. Restoring the HHI to within screening tolerances of the pre-transaction level will mitigate the harm to competition in the relevant market by reducing Westar Energy's market share and lowering market concentration back to the moderate level.

36. We reject OMPA's argument that Westar Energy's Option One would invite gaming and not mitigate the market power concerns raised in this proceeding. First, within 45 days after the winter period ends, Westar Energy will make compliance filings showing that it has not used the Facility as a network resource during the winter. We rely on Westar Energy's commitment in finding that Option One adequately mitigates any harm to competition. Second, while structural methods are one way to mitigate harm to competition, they are not the only way. The critical factor in assessing the adequacy of a mitigation proposal is whether that proposal offsets the specific harm to competition identified in the analysis of the market. Here, Westar Energy's Option One addresses our concern that with the Facility designated as a network resource, combining Westar Energy's generation capacity located inside the control area with the entire Facility's capacity would result in an increase in market concentration that would harm competition. As shown in Applicants' analysis, with the Facility not used as a network resource, and thus not competing with rival generation for scarce transmission capacity, the change in market concentration is less than 100 HHI in a moderately concentrated market, indicating a lack of harm to competition.[25] In addition, as noted by both Westar Energy and OMPA, assessing the actual increase in ATC resulting from transmission upgrades can be difficult because of the varying nature of energy flows on the grid and use of different modeling methods.[26]

37. We deny Westar's request that we approve Option Two, which would add an additional 100 MWs of transfer capacity rather than the approximately 325 MWs

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[24] *Exelon Corp.*, 113 FERC ¶ 61,299 at P 59 (*Exelon*) (2005).

[25] Application Exhibit W-6 at 1.

[26] *See, e.g., Oklahoma Gas and Electric Company Order on Compliance,* 115 FERC ¶ 61,350 at P 30 (2006).

identified in the May Order. As discussed in the May Order, Westar Energy must increase transfer capacity by an amount that will allow sufficient competing supply to reduce the market concentration to within the screening tolerances set forth in the Merger Policy Statement.[27] Westar's proposed 100 MW expansion would not do that.

38. We reject OMPA's arguments regarding cost-based bidding for the interim period between consummation of the transaction and the completion of any necessary transmission upgrades. We will not require cost-based bidding under Option One because there will be no interim period. In addition, we clarify that the Order intended that cost-based bidding for the interim period is only in the winter period, because that was the only period where there was any competitive harm related to the transaction.[28]

39. We reject OMPA's arguments regarding the transaction's effect on concentration using economic capacity as the relevant measure. As we state in the May Order, available economic capacity is the more relevant measure in this case, given Westar Energy' significant native load obligation. OMPA has not presented any evidence that Westar Energy's native load commitment will be reduced and thus release its capacity to compete in wholesale markets.

<u>The Commission orders</u>:

(A) As discussed above, Westar Energy's request for clarification is granted with respect to its proposal to satisfy its mitigation responsibilities by committing not to use the Facility as a network resource during the Winter Super Peak period.

(B) As discussed above, Westar Energy's alternative proposal to satisfy its mitigation responsibilities by adding an additional 100 MWs of transfer capacity is denied.

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[27] May Order at P 81.

[28] We also reject OMPA's request that we clarify that Westar Energy must make a section 203 compliance filing within 30 days of any application to have more than 225 MW designated as a network resource. Under Option One, such a filing would not be necessary. In the event that Westar Energy chooses to abide by the mitigation in the original order, we believe our authority under sections 203(b) and 309 of the Federal Power Act is sufficient. *See* Order at P 79.

(C) As discussed above, OMPA's request for rehearing is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.