124 FERC ¶ 61,019
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.

PNM Resources, Inc. Docket No. EC08-71-000
PNM Merger Sub LLC
Public Service Company of New Mexico
NewCorp Resources Electric Cooperative, Inc.

ORDER AUTHORIZING MERGER AND DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued July 7, 2008)

1. PNM Resources, Inc. (PNM Resources), PNM Merger Sub LLC (PNM Merger Sub), Public Service Company of New Mexico (PNM), and NewCorp Resources Electric Cooperative, Inc. (NewCorp) (collectively, Applicants) filed an application seeking authorization under section 203 of the Federal Power Act (FPA)[1] for an indirect disposition of jurisdictional facilities. Applicants characterize the acquisition as a "wires only" transaction that involves no disposition of electric generating assets and only involves companies in separate interconnections.

2. The Commission has reviewed the application under the Commission's Merger Policy Statement.[2] As discussed below, we will authorize the merger as consistent with the public interest.

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[1] 16 U.S.C. § 824b (2006).

[2] *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). *See also FPA Section 203 Supplemental Policy Statement*, 72 Fed. Reg. 42,277 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008) (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

(continued…)

I. Background

A. Description of the Parties

1. PNM Resources and Related Entities

3. PNM Resources is a holding company of energy and energy-related businesses. It primarily owns stock in its subsidiaries and does not own or operate any Commission-jurisdictional facilities. The subsidiaries include PNM, described below, as well as others, the most significant of which own and operate transmission and distribution in Texas within the Electric Reliability Council of Texas (ERCOT).

4. PNM Resources created PNM Merger Sub as its subsidiary to implement the proposed transaction. PNM Merger Sub presently owns no material assets, but will merge with Cap Rock Holding. After the proposed transaction, Cap Rock Holding will survive and PNM Merger Sub will no longer exist.

5. PNM generates, transmits, and sells electricity at wholesale. In addition, PNM provides state-jurisdictional retail electric service to customers across New Mexico. PNM also transmits, distributes, and sells natural gas.[3] It distributes natural gas to most of the major communities in New Mexico. PNM's retail electric and gas operations are regulated by the New Mexico Public Regulation Commission (New Mexico Commission).

6. PNM has a market-based rate tariff on file with the Commission. It owns or leases generating facilities with a combined nameplate rating of approximately 2,407 MW and approximately 3,342 circuit miles of electric transmission lines – all located within New Mexico and Arizona – over which it provides service under an open access transmission tariff (OATT). These transmission lines are interconnected with lines owned by utilities that serve customers in Arizona, Colorado, New Mexico, Utah, and Texas.

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). *See also Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264 (2008).

[3] In addition, PNM owns approximately 1,544 miles of natural gas transmission mains and approximately 11,453 miles of natural gas distribution lines (including both distribution mains and service lines) over which it provides open-access gas transportation service pursuant to New Mexico law. However, it states that in a related transaction it is proposing to dispose of its natural gas distribution and transportation assets to a subsidiary of Continental Energy Systems LLC, an indirect parent of NewCorp.

2. NewCorp and Related Entities

7. NewCorp, a Texas electric cooperative corporation, owns only transmission and has a single member and customer, Cap Rock Energy Corporation (Cap Rock Energy). NewCorp owns a looped transmission system consisting of 305 circuit miles of 138 kV transmission lines and sixteen substations. It is a public utility company and transmitting utility subject to the Commission's jurisdiction. This system is interconnected with that of Southwestern Public Service Company (Southwestern PSC) at NewCorp's Jones and Vealmoor substations in West Central Texas. NewCorp provides transmission services to Cap Rock Energy's Stanton and Lone Wolf divisions in West Texas under an OATT on file with the Commission. NewCorp does not sell power to Cap Rock Energy or to any other entity. It has been granted a waiver of the requirement to comply with the Commission's OASIS requirements, as well as with the Commission's Standards of Conduct.[4]

8. Cap Rock Energy, an indirect wholly-owned subsidiary of Cap Rock Holding, provides electric distribution services to approximately 36,000 end use customers in twenty-eight counties in Texas. It has over 11,000 miles of distribution lines and owns no generation. The Stanton and Lone Wolf divisions are in the Permian Basin area of West Texas, within the Southwest Power Pool (SPP) regional reliability council region. Cap Rock Energy purchases all of its capacity and energy requirements for Stanton and Lone Wolf from Southwestern PSC, and obtains transmission service from NewCorp. Cap Rock Energy also has two other divisions, Hunt Collin and McCulloch, which are in ERCOT.

9. Cap Rock Holding owns no significant assets other than Cap Rock Energy. It is not a public utility, but is a holding company under the FPA, as amended by EPAct 2005.[5] Cap Rock Holding is a direct subsidiary of Continental Energy Systems LLC, a privately held company that provides natural gas distribution services to approximately 410,000 customers in Alaska and Michigan through its subsidiary SEMCO Energy, Inc.

B. Description of the Merger

10. PNM Resources will acquire the entire ownership interest of Cap Rock Holding for $202.5 million, subject to certain adjustments. Applicants state that after the proposed transaction: (i) Cap Rock Holding, and its wholly-owned subsidiaries Cap Rock Energy and NewCorp, will become wholly-owned subsidiaries of PNM Resources,

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[4] Application at 6, *citing Nat'l Fuel Gas Supply Corp.*, 116 FERC ¶ 61,048, at P 60-74 (2006); *Northern States Power Co.*, 76 FERC ¶ 61,250, at 62,297 (1996).

[5] Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1261 *et seq.*, 119 Stat. 594 (2005).

(ii) Cap Rock Energy and NewCorp will continue to be wholly-owned subsidiaries of Cap Rock Holding, and (iii) Cap Rock Energy and NewCorp will continue to operate as they do today.

II. Notice of Filing and Responsive Pleadings

11. Notice of the application was published in the *Federal Register*, 73 Fed. Reg. 21,927 (2008), with interventions and protests due on or before May 2, 2008. Pioneer Natural Resources USA, Inc. (Pioneer), filed a timely motion to intervene. Occidental Permian Ltd. and Occidental Power Marketing, L.P. (Occidental) filed a timely motion to intervene and protest. On May 16, 2008, Applicants filed an answer to Occidental's protest. On May 21, Occidental filed an answer to Applicants' answer.

12. Occidental asserts that it is a major consumer of electricity as a result of its oil and gas operations in Texas and New Mexico and is a retail customer of Cap Rock Energy and Texas-New Mexico Power Company (Texas-New Mexico Power), which is a wholly-owned subsidiary of PNM Resources. In addition, Occidental affiliates are retail customers of Cap Rock Energy and Texas-New Mexico Power as well as transmission customers of PNM. Further, Occidental states that it or its affiliates may request transmission service from NewCorp in the future.

13. Applicants argue that Occidental should not be permitted to intervene because it is not a jurisdictional transmission customer of any of the Applicants and that Occidental has not identified an interest that will be directly affected by this proceeding. Even if rates would otherwise be affected, Applicants argue that ratepayers are protected by their "hold harmless" commitment, described below, as well as by future section 205 proceedings. Applicants also assert that Occidental's interest in the proceeding is speculative, because it is neither a wholesale ratepayer nor a transmission customer of PNM or NewCorp, and that any Occidental affiliate that has an interest in the proceeding should intervene on its own behalf. Moreover, Applicants contend that Occidental raises no issues of merit that should be considered in a section 203 proceeding.

14. Occidental responds that it has interests that are affected by the transaction, including that it is a retail customer of Texas-New Mexico Power, which is a wholly owned subsidiary of Cap Rock and PNM, and it may request transmission from NewCorp in the future.

III. Discussion

A. Procedural Issues

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the timely, unopposed motion to intervene of Pioneer serves to make it a party to this proceeding. Further, Occidental has shown that it has an interest

in the proceeding because, as a customer of Cap Rock Energy, its rates could be affected when Cap Rock Energy becomes a wholly-owned subsidiary of PNM. Therefore, under Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), we grant Occidental's motion to intervene.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Applicants' and Occidental's answers because they have provided information that assisted us in our decision-making process.

B. Standard of Review under Section 203

17. Section 203(a)(4) requires the Commission to approve a transaction if it determines that it will be consistent with the public interest. The Commission's analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.[6] Section 203 also requires the Commission to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."[7] The Commission's regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.[8]

C. Analysis under Section 203

1. Effect on Competition – Horizontal Market Power

a. Applicants' Analysis

18. Applicants state that the proposed transaction is a wires-only transaction that does not involve the disposition of any generating assets. Cap Rock Holding and its subsidiaries neither own nor control any generating facilities or generating capacity. They buy all of the electricity needed to serve their retail customers from others. Further, Applicants state that neither Cap Rock Holding nor any of its subsidiaries engages in wholesale sales of electricity in interstate commerce. As a result, Applicants argue the

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[6] *See* Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

[7] 16 U.S.C. § 824b(a)(4) (2006).

[8] 18 C.F.R. § 33.2(j) (2008).

proposed transaction does not involve a combination of entities that now compete in common wholesale electric power markets and will not result in any change in market concentration for wholesale capacity or energy.[9]

19. In addition, Applicants state that the jurisdictional assets owned or controlled by PNM Resources are geographically remote from those being acquired through the proposed transaction. As explained above, PNM owns jurisdictional assets in New Mexico and Arizona, all of which are in the Western Interconnection. The jurisdictional assets owned by NewCorp, the only jurisdictional assets over which control will change as a result of the proposed transaction, are in the Eastern Interconnection and are not interconnected with those owned or controlled by PNM.

20. Applicants contend that a detailed, quantitative analysis (an Appendix A analysis) is not required in order to establish that the proposed transaction will have no adverse competitive effects. The Commission's regulations require that applicants perform a Competitive Analysis Screen if "as a result of a proposed transaction, a single corporate entity obtains ownership or control over the generating facilities of previously unaffiliated merging entities."[10]

b. Protests

21. Occidental contends that Applicants did not identify horizontal competition issues in the Application. It argues that in past years, Cap Rock has made wholesale sales of electricity when it purchased power in excess of its own needs and sold that extra power to wholesale customers in the market. Even if such sales were not made in recent years, Occidental states that the Experimental Sales Rider tariff, which made such sales possible, is still in effect. Occidental requests that if the Commission does not reject the application, we set it for an evidentiary hearing.

[9] The Commission has recognized that wires-only transactions should not raise competitive concerns. *See* Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,903 (recognizing that there is no need for a Competitive Analysis Screen when a transaction only involves a disposition of transmission facilities); *DTE Energy Co.*, 97 FERC ¶ 61,330, at 62,572 (2001) ("anticompetitive effects are unlikely to arise in a transaction that only involves a disposition of transmission facilities").

[10] 18 C.F.R. § 33.3(a)(1) (2008); *see also Sunbury Generation, LLC*, 108 FERC ¶ 61,160 (2004) (approving transaction without the submission of a Competitive Analysis Screen).

c. Commission Determination

22. We find that the proposed transaction does not raise horizontal market power concerns and that Occidental did not raise any issue of material fact that requires an evidentiary hearing. The sales made under Cap Rock's Experimental Sales Rider were made several years ago.[11] Further, we rely on Applicants' representation that "neither Cap Rock Holding nor any of its subsidiaries engages in wholesale sales of electricity in interstate commerce."[12]

2. Effect on Competition – Vertical Market Power

a. Applicants' Analysis

23. Applicants state that the Commission's concern with regard to vertical market power generally arises when the combined entity could restrict potential downstream competitors' access to upstream supply markets or increase potential competitors' costs. They say that those circumstances are not present here. Applicants contend that because the electric transmission facilities owned by both PNM and NewCorp are subject to OATTs on file with the Commission, they will not be able to use their control of transmission assets in a manner that could harm competition.

24. Moreover, Applicants note that NewCorp does not own any natural gas pipelines or control any capacity on any natural gas pipelines, and that PNM is proposing to dispose of its natural gas assets,[13] which are fully regulated by the New Mexico Commission. Further, PNM's natural gas assets do not interconnect with any electric generating facilities interconnected with NewCorp's transmission lines. Accordingly, following consummation of the proposed transaction, PNM and NewCorp will have neither the incentive nor the ability to restrict natural gas deliveries to generating facilities that compete with PNM.

b. Protests and Comments

25. Occidental asserts that PNM has exclusive access to NewCorp's system through control of Blackwater Station, and that the Commission should consider the resulting market power implications. Occidental notes a provision in an "Agreement for

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[11] Applicants note in their answer that "[Occidental] acknowledge[s] that 'it does not appear that such sales have been made in recent years.'" Applicants' answer at 12, *citing* Occidental's response at 14.

[12] Application at 9.

[13] Application at 4 n.6, 11 n.29. The Application refers to PNM's plan to sell its natural gas assets, but does not describe a particular transaction.

Wholesale Full Requirements Electric Power Service to Cap Rock Energy Corporation," which states: "Under no circumstances shall [NewCorp] connect [Southwestern PSC's] lines through [NewCorp's] or Cap Rock Energy's lines with any other supplier of electric power and energy without (a) the prior written approval of [Southwestern PSC] …" Occidental contends that this provision gives Southwestern PSC veto power over any potential interconnection to the New Corp system, which is a barrier to competition. Occidental also notes that Applicants did not mention this issue in their Application and asserts that the Commission should investigate further. It argues that if the Commission does not reject the application, we should set it for an evidentiary hearing.

26. Occidental also notes that NewCorp has been granted waivers from compliance with the Commission's OASIS requirements, as well as with the Commission's Standards of Conduct. Occidental argues that continued waivers are inappropriate because they undermine attempts by other parties to obtain transmission on the NewCorp system and thus are barriers to competition. Occidental requests that the Commission revoke NewCorp's OASIS and Standard of Conduct waivers.

c. Applicants' Answer

27. Applicants respond that the Blackwater intertie is not a barrier to entry because it is subject to open access requirements under the OATT and because it was constructed to support native load service obligations and enhance the capacity available to the market.[14] They describe the provision in the Southwestern PSC contract as "commonplace" and necessary for protecting the integrity of the balancing authority function maintained by Southwestern PSC. Applicants state that this issue should be addressed in another proceeding, not in this case. Further, Applicants contend that NewCorp still only serves one customer, Cap Rock Energy, and that the circumstances upon which the Commission granted its original waiver have not changed; therefore, Applicants argue, NewCorp does not need to maintain an OASIS site.

d. Occidental's Answer

28. Occidental replies that, even though Applicants operate Blackwater Station under a Joint OATT, Applicants will still have exclusive control of capacity across the intertie, resulting in practical anticompetitive concerns. Occidental further states that Applicants do not refute its argument regarding Cap Rock Energy's ability to make wholesale sales of electricity in interstate commerce, but instead attempt to brush off the argument. Applicants also fail to refute the argument regarding Southwestern PSC's ability to

[14] *Pub. Serv. Co of N.M. Texas-New Mexico Power Co.*, 111 FERC ¶ 61,177, at P 21 (2005) (finding that PNM and Texas-New Mexico Power are obligated to provide open access over the Blackwater and Eddy County interties).

exercise its veto over potential interconnections to the NewCorp system. Occidental challenges Applicants' assertion that the circumstances on which the waiver for an OASIS site was based have not changed, arguing that this merger is itself a change in circumstances.

e. Commission Determination

29. In mergers combining electric generation assets with inputs to generating power (such as natural gas, transmission, or fuel), competition can be harmed if a merger increases the merged firm's ability or incentive to exercise vertical market power in wholesale electricity markets. For example, by denying rival firms access to inputs or by raising their input costs, a merged firm could impede entry of new competitors or inhibit existing competitors' ability to undercut an attempted price increase in the downstream wholesale electricity market. Here, as discussed below, Applicants have shown that the proposed transaction does not raise these concerns. Occidental has not raised any material issue of fact that requires an evidentiary hearing.

30. First, with regard to Blackwater station, we have previously found that PNM and Texas-New Mexico Power are obligated to provide open access over the Blackwater and Eddy County interties.[15] The proposed transaction does nothing to diminish this obligation. Moreover, the two interties remain subject to PNM's OATT. As the Commission has previously found in another case, "[w]e find that the proposed transaction does not increase any ability the Applicants have to abuse their ownership of transmission facilities to give themselves an advantage in energy markets because [Applicants'] transmission system is operated under a Commission-approved OATT, which ensures open access to the transmission system …."[16]

31. Second, we decline to rescind NewCorp's waiver of the OASIS requirements. As we recently reaffirmed, "the waiver should continue until 'an entity evaluating its transmission needs complains that it cannot get the information necessary to complete its evaluation.'"[17] Occidental fails to show that it has been unable to evaluate the availability of transmission and states only that such a situation could arise in the future. Mere speculation does not provide the Commission a basis on which to rescind NewCorp's waiver of the OASIS requirements. Further, the Commission has applied a similar standard regarding waivers from Standards of Conduct.[18]

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[15] *Id.*

[16] *Id.*; *see also Entergy Gulf States, Inc.*, 121 FERC ¶ 61,182, at P 71 (2007).

[17] *NewCorp Resources Cooperative, Inc.*, 122 FERC ¶ 61,201, at P 16 (2008) (quoting *Northern States Power Co.*, 76 FERC ¶ 61,250, at 62,297 (1996)).

[18] *FPL Energy Oliver Wind, LLC*, 123 FERC ¶ 61,246, at P 10 n.14 (2008).

3. Effect on Rates

a. Applicants' Analysis

32. Applicants state that the merger will have no adverse effect on rates. First, PNM's wholesale electricity customers take service under contracts that contain either fixed rates or formula rates that will be unaffected by the proposed transaction. In addition, Applicants argue that under its OATT, PNM is unable to pass through the costs related to the proposed transaction to its transmission customers, and it is unable to change its rates charged for transmission service without filing an application with the Commission under section 205 of the FPA. Therefore, all of PNM's transmission customers are shielded from any rate effects of the proposed transaction.

33. Applicants further state that NewCorp only provides jurisdictional service to Cap Rock Energy, so no ratepayer protection mechanisms are needed. Under NewCorp's OATT, it is unable to pass on any transaction-related costs to any current or future transmission customers, and it is unable to change its transmission rates without filing an application with the Commission under section 205.

34. In addition to making these arguments, PNM and NewCorp also commit to hold transmission customers harmless from any increase in transmission rates "that results from costs related to the proposed transaction" for five years to the extent that such costs exceed savings related to the transaction.[19] Applicants state that this hold harmless commitment, however, is not a rate freeze and would not preclude changes in transmission rates attributable to costs not related to the proposed transaction.

35. Applicants further argue that after the transaction, PNM and NewCorp will continue to provide jurisdictional transmission service under their individual OATTs. The continued use of separate OATTs is consistent with Commission policy because PNM's and NewCorp's transmission systems do not interconnect (and, in fact, are in separate interconnections). Also, consistent with Commission precedent, upon closing of the proposed transaction, PNM and NewCorp commit to not charge pancaked rates to customers scheduling transmission service across both companies' operating systems.[20] They will submit before closing revised OATTs that eliminate rate pancaking for a single transaction using transmission services across both companies' facilities.

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[19] Application at 14.

[20] *See, e.g., UtiliCorp United Inc.*, 94 FERC ¶ 61,216 (2001); *CP&L Holdings, Inc.*, 92 FERC ¶ 61,023, at 61,051, 61,060 (2000).

b. Protest

36. Occidental argues that Applicants' hold harmless commitment would not protect ratepayers against adverse rate effects. First, Applicants have not quantified the acquisition premium, provided any basis on which the premium associated with the transaction could be found prudent, or provided any demonstrable benefits to ratepayers. Occidental contends that regardless of the five year duration of the hold harmless commitment, the recovery of transaction-related costs must be justified in the form of offsetting benefits, with the burden on Applicants to justify their recovery. Second, Occidental states that the five year limitation on recovery of transaction costs will simply result in deferred recovery of those costs. Third, Occidental contends that Applicants have failed to specify what portion of the purchase price is allocable to NewCorp assets as opposed to Cap Rock Energy assets. Finally, Occidental questions how Applicants will determine which costs are allocated to the transaction and which are not, and therefore establish which costs must be excluded from rates. Occidental states that savings resulting from the transaction should be flowed through to ratepayers and argues that the hold harmless commitment by Applicants will not protect ratepayers.

37. Occidental also raises the issue of how PNM Resources' bond-level credit rating will affect transmission rates, noting that on March 10, 2008, Fitch Ratings downgraded PNM Resources' issuer default rating from BBB- to BB+, and its short-term issuer default rating to B from F3. Occidental states that this "junk status" will affect PNM Resources' borrowing costs and must not be allowed to adversely affect the rates for transmission service charged by NewCorp and Cap Rock Energy.

38. Occidental asserts that PNM and NewCorp's pledge to eliminate "rate pancaking" for customers scheduling transmission service across both companies' operating systems will, in practice, create a rate preference for PNM because the PNM and NewCorp transmission systems are indirectly connected through the Blackwater Station. Moreover, Occidental argues that PNM and NewCorp will recover less in transmission costs than if separate transmission rates were charged and will therefore increase rates charged to other ratepayers on the system. Occidental argues that if the Commission does not reject the application, we should set it for an evidentiary hearing.

c. Answers

39. Applicants respond that they have not sought approval of any proposed transaction-related costs in rates in this proceeding. Moreover, Applicants argue that, in the past, the Commission has approved identical "hold harmless" commitments. They further assert that the Commission should not consider speculative arguments regarding the effect of their ratings. Applicants also assert that the elimination of "rate pancaking"

will not be discriminatory and is in compliance with Commission precedent.[21] Occidental's claims are speculative and, if those issues arise in the future, Applicants contend that the Commission will be better able to address them in a section 205 or 206 proceeding.

40. In its answer, Occidental reiterates its arguments that PNM's junk bond rating will affect future rates and that elimination of rate pancaking in this case will yield discriminatory results.

d. Commission Determination

41. We accept Applicants' commitment to hold transmission and wholesale customers harmless from costs related to the transaction.[22] The Merger Policy Statement explains that such a commitment is effective ratepayer protection, in that ratepayers are protected from any adverse rate effects resulting from the merger.[23] The Commission has also approved similar hold harmless commitments, including provisions that apply for five years.[24]

42. Regarding Occidental's assertions that PNM's credit rating will affect rates, we find that Applicants' above-noted hold harmless commitment will provide protection for customers. Moreover, this argument is speculative.

43. Contrary to Occidental's implication, Applicants are not required to apply a rate freeze and may propose rate increases under section 205 filings.[25] We also note that Applicants are not required to quantify benefits from the transaction. As we explained in the Merger Policy Statement, we no longer analyze the balance of costs against benefits in deciding whether a merger will adversely affect rates; instead, ratepayer protection

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[21] Applicants' answer at 10.

[22] Applicants' answer at 8 (applying hold harmless agreement to rates generally).

[23] Merger Policy Statement, Order No. 592, FERC Stats. & Regs. ¶ 31,044 at 68,603 (finding that an acceptable general hold harmless commitment "will protect wholesale customers from any adverse rate effects resulting from the merger for a significant period of time following the merger").

[24] *See e.g., Consumers Energy Co.*, 118 FERC ¶ 61,143 at P 33-34, *order on clarification*, 120 FERC ¶ 61,091 (2007); *Duke Energy Corp.*, 113 FERC ¶ 61,297, at P 117, 121 (2005).

[25] *PSI Energy, Inc.*, 108 FERC ¶ 61,250, at P 13 (2004).

mechanisms are the best way to protect customers from rate increases due to a transaction.[26] As stated above, we will hold Applicants to their hold harmless commitment.

44. We also accept Applicants' proposal to eliminate rate pancaking, and note that Occidental can raise any issues pursuant to its rights under FPA section 206 or when the tariff is filed under section 205.

45. We find that Occidental has not raised any issue of material fact that requires an evidentiary hearing.

4. Effect on Regulation

a. Applicants' Analysis

46. Applicants assert that the merger will not diminish the Commission's jurisdiction or affect the jurisdiction of federal regulatory authorities.[27] In addition, the transaction requires approval of the Public Utilities Commission of Texas (Texas Commission). Therefore, Applicants assert the proposed transaction will have no adverse effect on state regulation.

b. Commission Determination

47. We find that neither state nor federal regulation will be impaired by the proposed merger. The Commission's review of a merger's effect on regulation is focused on ensuring that the merger does not result in a regulatory gap at the federal or state level.[28] The merger will not create a regulatory gap at the federal level, because the Commission will retain its regulatory authority over the merged companies. In the Merger Policy Statement, the Commission stated that it ordinarily will not set the issue of the effect of a merger on state regulatory authority for a trial-type hearing where a state has authority to act on a merger. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission stated that it may set the issue for hearing, and that it will address such circumstances on a case-by-case basis.[29] We note that no party alleges that regulation would be impaired by the proposed transaction, and no state commission has requested that the Commission address the issue of the effect on state regulation.

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[26] *See* Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

[27] Application at 16.

[28] Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

[29] *Id*. at 30,125.

5. Cross-subsidization

a. Applicants' Analysis

48. Applicants submit that the transaction will not result in: (i) any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional facilities, and an associate company; (ii) 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; (iii) 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 (iv) 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 services agreements subject to review under sections 205 and 206 of the FPA.[30]

b. Commission Determination

49. Based on the statements in paragraph 47, we find that the transaction will not result in cross-subsidization, or the pledge or encumbrance of utility assets for the benefit of an associate company.[31] We note that no party has argued otherwise.

6. Waiver

50. Applicants request waiver of Exhibit D and Exhibit F,[32] as well as various accounting requirements in section 33.5 of the Commission's regulations.[33]

51. Occidental urges the Commission to deny these waiver requests, arguing that many of its questions could have been answered by compliance with the requirements of which Applicants seek waiver.

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[30] Application at 18. Applicants also argue that they qualify for two safe harbors. We need not address those arguments because the representations are adequate, as noted below.

[31] *See* 18 C.F.R. § 33.2(j)(1)(ii)(2008).

[32] 18 C.F.R. § 33.2(c)(4)(2008) (Exhibit D); 18 C.F.R. § 33.2(c)(6)(2008) (Exhibit F).

[33] 18 C.F.R. § 33.5 (2008).

52. Applicants answer that they have shown good cause for granting the requested waivers, and that they have proven their case without providing the information. Further, Applicants contend that no accounting entries are needed because the public utilities that are parties to the Application are at the holding company level, and the systems involved are not interconnected and have no operational interfaces affecting operational costs.

53. Occidental responds that many important matters were left unaddressed by Applicants in their filings and that they may be explained if the requested waivers are not granted.

54. The Commission finds that the information sought in Exhibits D and F is provided in the text of the application, so additional information in a formal Exhibit D and F is not required.[34] Further, Applicants' request for a waiver of the requirement to provide proposed accounting entries will be granted. No accounting entries are proposed to be recorded on the books and records of the public utilities that are the parties to the application. The transaction will be accounted for at the holding company level, and the holding companies are not required to follow the Commission's Uniform System of Accounts. However, should the holding company subsequently push down any of the transaction costs to PSNM or NewCorp, we direct these companies to make filings with the Chief Accountant providing full particulars concerning their accounting for this transaction.

7. Expedited Consideration

55. Applicants request approval of the transaction by June 10, 2008, "consistent with the Commission's regulations, which provide that the Commission will provide expedited review of applications that are uncontested, do not involve mergers, and are consistent with Commission precedent."[35] Applicants provide no specific reason why the Application must be approved by that date.

56. Occidental contends that Applicants' request for expedited consideration should be denied because the Application is contested and is inconsistent with Commission precedent and therefore does not qualify for expedited treatment. Moreover, Occidental asserts that the proposed transaction could not be consummated at an early date even if the Commission met Applicants' proposed June 10 deadline, because the Texas and New Mexico Commissions must also consider the transaction.

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[34] Application at 23, 24.

[35] Application at 2, *citing* 18 C.F.R. § 33.11(b) (2008).

57. Because the Application was protested, and the Commission required time to consider the arguments made by Applicants and protestors, the request for expedited consideration is denied.

The Commission orders:

(A) The proposed merger and disposition of jurisdictional facilities is hereby authorized, as discussed in the body of this order.

(B) Applicants must inform the Commission of any change in circumstances that would reflect a departure from the facts the Commission relied upon in granting the application.

(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 merger.

(G) Applicants shall notify the Commission within 10 days of the date that the merger and disposition of jurisdictional facilities have been consummated.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.