

149 FERC ¶ 61,079
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Nevada Power Company
Las Vegas Cogeneration Limited Partnership
Las Vegas Cogeneration II, LLC

Docket No. EC14-84-000

ORDER CONDITIONALLY AUTHORIZING ACQUISITION
AND DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued October 29, 2014)

1. On May 2, 2014, as clarified on June 30, 2014, August 6, 2014, and September 10, 2014, Nevada Power Company (Nevada Power), Las Vegas Cogeneration Limited Partnership (LV Cogen I), and Las Vegas Cogeneration II, LLC (LV Cogen II) (collectively, Applicants) filed an application (Application) under section 203(a)(1) of the Federal Power Act (FPA).¹ Applicants request authorization for a transaction in which Nevada Power would acquire a 50 MW operating natural gas-fired combined cycle electric generation plant from LV Cogen I, and acquire a 224 MW operating natural gas-fired combined cycle electric generation plant from LV Cogen II (jointly, LV Cogen Units) (Proposed Transaction).
2. The Commission has reviewed the Proposed Transaction under the Commission's Merger Policy Statement.² As discussed below, we will conditionally authorize the Proposed Transaction as consistent with the public interest.

¹ 16 U.S.C. § 824b (2012).

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 *Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253

(continued...)

I. Background

A. Description of the Applicants

1. Nevada Power

3. Applicants state that Nevada Power is a wholly-owned subsidiary of NV Energy, Inc. (NV Energy). NV Energy owns two public utility subsidiaries, Sierra Pacific Power Company (Sierra Pacific) and Nevada Power. NV Energy is a subsidiary of Berkshire Hathaway Energy Company.³

4. Applicants state that Sierra Pacific and Nevada Power service a combined 45,592 square mile service territory in the State of Nevada, and together serve approximately 1.2 million customers. Nevada Power provides retail and wholesale transmission service in southern Nevada, and is regulated by the Public Utilities Commission of Nevada (Nevada Commission) and the Commission. In addition, Nevada Power operates the balancing authority area in Nevada for both Nevada Power and Sierra Pacific (NV Energy BAA).⁴ Nevada Power serves about 859,000 retail residential, commercial and industrial customers, with a peak load of 5,854 MW in 2013. Nevada Power additionally makes wholesale sales under agreements on file with the Commission or under terms of its Commission-granted market-based rate authority. Nevada Power operates approximately 1,959 miles of high voltage transmission lines (60 kilovolts (kV) to 500 kV). Nevada Power provides open access transmission service under the terms of the Nevada Power Company and Sierra Pacific Power Company Open Access Transmission Tariff (NV Energy OATT).⁵

(2007), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008). *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).

³ Application at 1-2.

⁴ *Id.* at 2, n.5. According to Applicants, the Nevada Power and Sierra Pacific transmission systems were recently interconnected, and they currently comprise the NV Energy BAA in Nevada.

⁵ *Id.* at 2-3.

2. LV Cogen I and II

5. Applicants state that LV Cogen I is a limited partnership that is a wholly-owned subsidiary of Desert Arc I, LLC and Desert Arc II, LLC (collectively, Desert Arc). Applicants add that LV Cogen II is a limited liability company that is a wholly-owned subsidiary of SWG Nevada, LLC. The Desert Arc entities and SWG Nevada, LLC, in turn, are wholly-owned subsidiaries of SWG Nevada Holdings, LC, which is a wholly-owned subsidiary of Southwest Generation Operating Company (Southwest Operating), a Delaware limited liability company. Southwest Operating is a wholly-owned subsidiary of Southwest Generation Holding Company II, LLC (Southwest Holding), which is also a Delaware limited liability company. Southwest Holding, in turn, is a wholly-owned subsidiary of Southwest Generation Parentco, LLC (Southwest Parentco).⁶

6. Applicants state that LV Cogen I's sole electric generation facility is a 50 MW unit located in Las Vegas, Nevada, which is interconnected with the Nevada Power transmission system. The LV Cogen I unit commenced operation in June 1994 and sold its output from 1994 through December 2007 to Nevada Power as a Qualifying Facility (QF) under the terms of a QF Power Purchase Agreement approved by the Nevada Commission. According to Applicants, in 2008, Nevada Power began purchasing (and is obligated to continue purchasing) energy and capacity from LV Cogen I under the terms of a 10-year summer tolling agreement.⁷

7. Applicants state that LV Cogen II is an exempt wholesale generator. LV Cogen II's sole electric generation facility is a 224 MW generating unit, also located in Las Vegas, NV, which commenced operation in January 2003 and is interconnected to Nevada Power's transmission system. From January 2004 through December 2013, Nevada Power purchased capacity and energy from LV Cogen II pursuant to the terms of a tolling agreement. For the summer of 2014, Nevada Power entered into a short-term tolling power purchase agreement with LV Cogen II for up to 224 MW of capacity and energy, and agreed to suspend the provisions of its tolling agreement with LV Cogen I for the same time period. According to Applicants, LV Cogen II may dispatch up to 224 MW of energy or capacity in lieu of the capacity under the tolling agreement with LV Cogen I when called upon by Nevada Power during the summer.⁸ Applicants state that

⁶ *Id.* at 3-4.

⁷ *Id.* at 3.

⁸ *Id.* at 4.

both LV Cogen I and LV Cogen II hold market-based rate authority and have market-based rate tariffs on file with the Commission.⁹

3. Southwest Parentco

8. Applicants state that Southwest Parentco is a limited liability company, which is managed by a Board of Directors appointed by members of the limited liability company. Those members are: (i) Utilities of Australia International Pty Ltd. as trustee of UTA International 4 Trust (Trust 4); (ii) Utilities of Australia International Pty Ltd. as trustee of UTA International 5 Trust (Trust 5); (iii) TIF|2 Trust - TIF International 1 Pty Ltd. as trustee of TIF International 2 Trust TIF Australia (Trust 2); (iv) TIF International 1 Pty Ltd. as trustee of TIF International 3 Trust (Trust 3); (v) IIF BH Investment LLC (IIF); and (vi) SWG Management, LLC (collectively, Parentco Members).¹⁰

9. Applicants state that Trust 2 and Trust 3 are wholly-owned by The Infrastructure Fund (Infrastructure Fund), which is also an open-ended Australian investment fund. Applicants state that LV Cogen I and LV Cogen II understand that Infrastructure Fund's investment in Southwest Parentco is its only investment in a United States electric energy infrastructure project.¹¹ Applicants state that Trust 4 and Trust 5 are wholly-owned by Utilities Trust of Australia (Utilities Trust), which is also an open-ended Australian investment fund. Applicants state that LV Cogen I and LV Cogen II understand that Utilities Trust's investment in Southwest Parentco, is its only investment in a United States electric energy infrastructure project.¹²

10. According to Applicants, Hastings Funds Management Limited (Hastings) manages and controls both Utilities Trust and Infrastructure Fund. Applicants state that LV Cogen I and LV Cogen II understand that Hastings interest in Southwest Parentco is its only United States electric energy infrastructure project.¹³ Applicants state that

⁹ *Id.* at 9. Applicants state that the market-based rate tariffs of LV Cogen I and LV Cogen II will be cancelled shortly after consummation of the Proposed Transaction.

¹⁰ *Id.* at 4.

¹¹ *Id.* at 4-5.

¹² *Id.* at 5.

¹³ *Id.*

SWG Management, LLC holds less than one percent of the voting interests in Southwest Parentco.¹⁴

11. According to Applicants, IIF is a Delaware limited liability company and a wholly-owned subsidiary of IIF US Holding LP (IIF Holding), a Delaware limited partnership. Applicants state that IIF US Holding GP, LLC, a Delaware limited liability company, is the general partner of IIF Holding. Applicants state that neither IIF Holding nor IIF US Holding GP, LLC or its affiliates engage in the power generation business.¹⁵

B. Proposed Transaction

12. Applicants state that Nevada Senate Bill 123 was enacted in 2013 by the Nevada Legislature and signed by the Governor on June 11, 2013. Under that law, Nevada Power is required to file with the Nevada Commission an emissions reduction and capacity replacement action plan (Emission Reduction Plan) that included a schedule for retiring or eliminating at least 800 MW of coal-fired generation by December 31, 2019. Included in that schedule is a requirement for 300 MW to be retired by December 31, 2014, and an additional 250 MW to be retired by December 31, 2017. Nevada Power is also required to construct or acquire 350 MW of generating capacity from renewable facilities, and 550 MW of generating capacity from other electric generating plants.

13. As part of Nevada Power's Emission Reduction Plan, filed on May 1, 2014, with the Nevada Commission, Nevada Power proposed the retirement of Reid Gardner Generating Station Units 1, 2, and 3 (Reid Gardner Units) by December 31, 2014; the retirement of Reid Gardner Unit 4 by December 31, 2017; and the disposition of Nevada Power's 11.3 percent ownership interest in the Navajo Generating Station by December 31, 2019. Nevada Power also requested Nevada Commission approval for the acquisition of the LV Cogen Units.

14. In this Application, Applicants seek authorization for Nevada Power to acquire two gas-fired combined-cycle units with a collective capacity of approximately 274 MW from LV Cogen I and II. According to Applicants, the purchase price is \$129,920,000. Applicants state that the purchase is being made in order to obtain sufficient capacity to serve Nevada Power's native load obligations in light of the retirement of the Reid Gardner Units. Applicants state that, while Nevada Power has historically purchased both energy and capacity from the LV Cogen Units, because Nevada Power's current agreements with LV Cogen consists of summer-only tolling agreements, they treat the

¹⁴ *Id.*

¹⁵ *Id.*

LV Cogen Units as merchant capacity (not attributed to Nevada Power) in the market concentration analysis. Applicants state that, following the Proposed Transaction, Southwest Parentco will no longer control or be affiliated with the LV Cogen Units.

II. Notice of Filing and Responsive Pleadings

15. Notice of the Application was published in the *Federal Register*, 79 Fed. Reg. 27,293 (2014), with interventions and protests due on or before May 23, 2014. On May 8, 2014, the Commission issued an errata notice extending the comment period to July 1, 2014. A notice of intervention and comments were filed by the Nevada Commission. The Nevada Commission states that it takes no position on whether the Commission should approve the Proposed Transaction. On June 30, 2014, Applicants filed a clarification to the Application, with respect to the effect of the Proposed Transaction on rates. On July 2, 2014, Calpine Corporation filed a motion to intervene out-of-time. On August 6, 2014, and September 10, 2014, Applicants submitted supporting files underlying the Simultaneous Import Limitation (SIL) study relied upon in Applicants' market concentration analysis.

III. Discussion

A. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the notice of intervention filed by the Nevada Commission serves to make it a party to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2014), the Commission will grant Calpine Corporation's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

B. Authorization of Proposed Transaction Under Section 203

1. Standard of Review Under Section 203

17. Section 203(a)(4) of the FPA requires the Commission to approve a transaction if it finds that the transaction "will be consistent with the public interest."¹⁶ The Commission's analysis of whether a transaction is consistent with the public interest generally involves the consideration of three factors: (1) the effect on competition;

¹⁶ 16 U.S.C. § 824b(a)(4) (2012).

(2) the effect on rates; and (3) the effect on regulation.¹⁷ Section 203(a)(4) 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.”¹⁸ 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.¹⁹

2. Effect on Horizontal Competition

a. Applicants’ Analysis

18. Applicants argue that the Proposed Transaction will not have an adverse impact on horizontal competition. Applicants state that Proposed Transaction is part of NV Energy’s Emission Reduction Plan filed with the Nevada Commission in accordance with Nevada Senate Bill 123. Under Nevada Senate Bill 123, NV Energy must retire at least 300 MW of coal-fired generating capacity by the end of 2014, retire at least an additional 250 MW of coal-fired generating capacity by the end of 2017, and retire at least an additional 250 MW of coal-fired generating capacity by the end of 2019. Applicants state that, under the Proposed Transaction, NV Energy proposes to (1) retire the Reid Gardner Units (298 MW, summer rating); and (2) acquire the two LV Cogen Units (a combined 270 MW).²⁰

19. Applicants analyzed the horizontal market power effects arising from the combination of generation assets owned by Nevada Power and Sierra Pacific with those of LV Cogen I and II. Applicants performed a delivered price test (DPT) for the NV Energy BAA using both Economic Capacity and Available Economic Capacity. Applicants state that their quantitative analysis focuses on Available Economic Capacity, the measure that is most relevant in the context of non-restructured markets.²¹ Nevada

¹⁷ See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

¹⁸ 16 U.S.C. § 824b(a)(4) (2012).

¹⁹ 18 C.F.R. § 33.2(j) (2014).

²⁰ Application, Attachment 1 at 3.

²¹ *Id.*

Power calculated the increase in the Herfindahl-Hirschman Index (HHI)²² to determine the change in market concentration due to the Proposed Transaction. The relevant markets for the Proposed Transaction are the NV Energy BAA, where NV Energy owns generation and where the generation facilities owned by LV Cogen are located, and markets that are first-tier to the NV Energy BAA.²³

20. According to Applicants, the analysis demonstrates that the Proposed Transaction passes the merger screens for Available Economic Capacity in the NV Energy BAA in all 10 time periods usually considered: Summer Super-Peak 1 (S_SP1); Summer Super-Peak 2 (S_SP2); Summer Peak (S_P); Summer Off-Peak (S_OP); Winter Super-Peak (W_SP); Winter Peak (W_P); Winter Off-Peak (W_OP); Shoulder Super-Peak (SH_SP); Shoulder Peak (SH_P); and Shoulder Off-Peak (SH_OP). Applicants derive HHI changes ranging from 0 points to 97 points in either unconcentrated or moderately concentrated markets. Applicants state that there is no net increase in Available Economic Capacity of NV Energy because the capacity of the Reid Gardner Units to be retired is greater than the capacity of the LV Cogen Units. Thus, the increase in NV Energy's market share, and corresponding HHI changes, is due to the shrinkage in market size resulting from the retirement of the Reid Gardner Units. Likewise, according to Applicants, the analysis demonstrates that the Proposed Transaction passes the merger

²² The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are considered to be unconcentrated; markets in which the HHI is greater than or equal to 1,000 but less than 1,800 points are considered to be moderately concentrated; and markets in which the HHI is greater than or equal to 1,800 points are considered to be highly concentrated. In a horizontal merger, an increase of more than 50 HHI points in a highly concentrated market or an increase of 100 HHI points in a moderately concentrated market fails the relevant screen and warrants further review. Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,129; *see also Analysis of Horizontal Market Power under the Federal Power Act, (Order Reaffirming Commission Policy and Terminating Proceeding)*, 138 FERC ¶ 61,109 (2012) (affirming the Commission's use of the thresholds adopted in the Merger Policy Statement).

²³ Application, Attachment 1 at 2. NV Energy's first-tier markets are the PacifiCorp East BAA, the Bonneville Power Administration BAA, the California Independent System Operator, Inc. market, the Idaho Power Company BAA, the Los Angeles Department of Water & Power BAA, and the Western Area Power Administration-Lower Colorado BAA.

screens for Available Economic Capacity in all time periods in all of NV Energy's first-tier markets.²⁴

21. Applicants state that the base-case results are similar to the price sensitivity case results (plus 10 percent and minus 10 percent of base-case prices), with the exception of a single 104 point HHI change in the winter peak period in the plus 10 percent case. With that sole exception, which Applicants characterize as a non-systematic result, there are, according to Applicants, no screen failures for Available Economic Capacity in the NV Energy BAA. Likewise, according to Applicants, there are no screen failures in any of the first-tier markets.²⁵

22. Applicants state that, depending on the timing of the Commission's action on this Application, and the Nevada Commission's consideration of the Emissions Reduction Plan, it is possible that the Applicants will close the sale of the LV Cogen Units to Nevada Power a short period of time before the Reid Gardner Units are retired. Specifically, Applicants note that, if the Commission approves the Proposed Transaction on the schedule requested – i.e. by October 28, 2014 – the closing will precede the Reid Gardner Units retirement by less than two months. Applicants state that, consistent with Commission precedent, Nevada Power does not believe that any additional action is necessary to mitigate this short period of overlap.²⁶

23. Applicants nonetheless conducted a separate sensitivity analysis of the Shoulder and Winter seasons to illustrate the market concentration impact of Nevada Power owning the LV Cogen Units before the Reid Gardner Units are retired. Applicants' analysis shows no screen failures in the Shoulder period (November), and two screen failures in the Winter period (December). Applicants argue that the Winter screen failures do not indicate systematic market concentration problems for several reasons. First, they occur during a low load period when the market is only moderately concentrated. Second, they are confined to December, the only Winter month during which both the LV Cogen Units and the Reid Gardner Units would be in the market under Nevada Power's control, and the month the Reid Gardner Units would be retired. Third, the larger LV Cogen II unit ran very infrequently during the October-December time period in 2013, suggesting this overlap period presents very little risk to the market. Finally, the nature of the screen failures is similar to those found in *Arizona Public*

²⁴ Application, Attachment 1 at 3-5.

²⁵ *Id.*

²⁶ *Id.* at 12-13.

Service Co., where the Commission did not require mitigation for the pre-retirement two-month period of concern.²⁷

24. Applicants state that, even though they believe that these screen failures should not be considered material, if the Commission finds the Proposed Transaction would result in an adverse impact on competition for this brief period of overlap, NV Energy will commit to sell any economic output of the LV Cogen Units off-system during the month of December (the only time there would otherwise be a screen failure), so it cannot be used to exercise market power in the NV Energy BAA. Applicants propose to terminate such treatment when the Reid Gardner Units are retired.²⁸

25. Applicants argue that there are additional factors that should lead the Commission to conclude the Proposed Transaction will not result in an adverse impact on horizontal market concentration. First, Applicants maintain that their merger screen analysis is conservative because the LV Cogen Units were under contract to Nevada Power until very recently, so the Proposed Transaction does not eliminate a competitor. Applicants state that the capacity associated with the LV Cogen Units was attributed to Nevada Power in many recent section 203 and market-based rate filings, with one recent exception. Nonetheless, because the LV Cogen II power purchase agreement expired at the end of 2013, Applicants treat the LV Cogen Units' capacity as attributed to Nevada Power only after the Proposed Transaction.²⁹

26. Second, Applicants note that, in the recent order approving Nevada Power's acquisition of the interest in Reid Gardner Unit No. 4 that it did not already own, the Commission found that Nevada Power lacked the ability or the incentive to exercise market power, in part based on Nevada Power's obligation to fully credit any profits from wholesale sales to retail customers through a fuel adjustment clause, thus removing any incentive for Nevada Power to raise prices.³⁰ Applicants state that Nevada Power also

²⁷ *Id.* at 13-14 (citing *Arizona Public Service Co.* 141 FERC ¶ 61,154 (2012)).

²⁸ *Id.* at 14.

²⁹ *Id.* at 12. The exception Applicants cite is the recent application for the indirect acquisition of NV Energy by MidAmerican Energy Holding Company in Docket No. EC13-128, where the capacity of LV Cogen II was not attributed to Nevada Power because the horizontal analysis used a 2014 test year, after the termination of the power purchase agreement.

³⁰ Application at 12 (citing *Nevada Power Co.*, 145 FERC ¶ 61,022, at P 28 (2013)).

lacks market-based rate authority in the NV Energy BAA, and thus cannot charge market rates in an effort to seek a price increase through the exercise of market power. Applicants state that these factors, taken together, demonstrate that Nevada Power does not have the *ability* and *incentive* to withhold output in order to drive up the market price.³¹

27. Third, Applicants argue that, because NV Energy is a significant net buyer of energy, it lacks the incentive to induce higher market prices. Applicants state that, in the period 2011-2013, Nevada Power and Sierra Pacific Power derived 30 to 50 percent of their energy from purchased power (both long- and short-term purchases). Applicants continue that the overwhelming share of electricity sold from generation controlled by NV Energy is used to serve its retail and wholesale requirements customers. Retail sales alone account for about 85 percent of each utility's total sales in 2011-2013.³²

b. Commission Determination

28. In analyzing whether a transaction will adversely affect competition, the Commission examines the effects on concentration in the generation markets or whether the transaction otherwise creates an incentive and ability to engage in behavior harmful to competition, such as withholding of generation (horizontal concerns). In this case, the Commission determines that the Proposed Transaction, as conditioned below, will not have an adverse effect on competition.

29. The Commission's regulations require the submission of a "horizontal Competitive Analysis Screen if, as a result of the proposed transaction, a single corporate entity obtains ownership or control over the generating facilities of previously unaffiliated merging entities."³³

30. We are unable to confirm the DPT results because of erroneous and/or incomplete information in the DPT related to the SIL study, including: (1) contingency results submitted by Applicants as part of their DPT analysis for the winter season that show unaddressed overloads and voltage criteria violations and which, if valid, could result in a lower First-Contingency Incremental Transfer Capability; (2) Applicants did not monitor flows within Southern California Edison in the study of Nevada Power and Sierra Pacific; and (3) Applicants' seasonal benchmark case and final case for the spring season have

³¹ *Id.* (citing *Nevada Power Co.*, 145 FERC ¶ 61,022 at P 29).

³² *Id.*, Attachment 1 at 24.

³³ 18 C.F.R. § 33.3(a)(1) (2014).

different load values, while the load should be the same in both cases because the generation shift methodology was used.

31. Moreover, in performing its DPT analysis, Applicants only considered one constraint, the aggregate SIL values into the NV Energy BAA, and failed to consider physical constraints from individual first-tier areas into the NV Energy BAA. The Merger Policy Statement requires applicants to select potential suppliers based on their ability “to reach the market both economically and physically.”³⁴ Further, as the Commission has stated, “[t]he key to incorporating transmission limitations into the merger analysis is to include each supplier in the relevant market only to the extent of the transmission capability available to them. This would be calculated as the combination of the available transmission capability and any firm transmission rights held by the supplier that are not committed to long-term transactions.”³⁵ Because Applicants’ analysis simply assigns shares of simultaneous transmission import capability to uncommitted generation capacity in aggregated first-tier BAAs to determine how much uncommitted generation capacity can enter the NV Energy BAA, Applicants’ study does not satisfy the requirements of the Merger Policy Statement.³⁶ All of the above flaws in Applicants’ DPT prevent proper evaluation of the results of the analyses. Therefore, we are unable to rely on Applicants’ DPT analysis.³⁷

³⁴ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,130.

³⁵ *Id.* at 30,132-30,133.

³⁶ Applicants cite *NRG Energy, Inc.*, 141 FERC ¶ 61,207 (2012) (*NRG Energy*). Applicants misunderstand the Commission’s actions in *NRG Energy*. In that proceeding, the Commission simply reiterated its conclusions in Order No. 697 regarding the proper allocation of simultaneous transmission import capability. *Id.* P 63 n.112 (citing *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at n.361 & P 375 (2007)). The Commission accepted applicants’ study in *NRG Energy* based on the particular circumstances of that case, where “a large amount of uncommitted generation in the particular study areas negate[d] the [oversimplified *pro rata* allocation methodology] flaw in [a]pplicants’ model.” *Id.* P 64. The Commission did not implement a new policy in *NRG Energy* on the calculation or allocation of SILs that disregards the physical transfer limitations of the grid.

³⁷ We remind Nevada Power of the importance of submitting complete and accurate data and analysis under section 203.

32. The Commission has stated that under certain circumstances applicants can address market conditions beyond the change in HHI, such as demand and supply elasticity, ease of entry and market rules, as well as technical conditions, such as the types of generation involved.³⁸ In the Supplemental Policy Statement, the Commission stated that in horizontal mergers, under certain circumstances the Commission's analysis focuses on the effect on the merged firm's *ability* and *incentive* to withhold output in order to drive up the market price.³⁹

33. While Applicants' analysis is not without deficiencies, as discussed above, Applicants have provided evidence specific to the Proposed Transaction which indicates that, with appropriate mitigation, there will not be an ability and incentive to withhold output. First, Nevada Power is required to fully credit any profits from wholesale sales to retail customers through a fuel adjustment clause. As the Commission found in *Nevada Power Co.*,⁴⁰ this reduces the incentive for Nevada Power to raise prices. The requirement to credit retail customers with profits from wholesale sales reduces the incentive to exercise market power because the seller will not receive any benefit from the additional revenue received from manipulating market prices.

34. Second, NV Energy is a significant net buyer of energy, having derived 30 to 50 percent of its energy from purchased power in the period 2011-2013, again demonstrating that it lacks the incentive to induce higher market prices. The net result of Nevada Power's purchase of the LV Cogen Units, combined with the state-mandated retirement of 300 MW of coal-fired capacity by the end of calendar year 2014, with relative lower dispatch costs, is to decrease NV Energy's Available Economic Capacity by roughly 30 MW. Thus, the net result of the Proposed Transaction is to *increase* NV Energy's reliance on purchased power. In effect, the Proposed Transaction *decreases* any incentive that Nevada Power might now have to exercise horizontal market power. Likewise, the net result of the Proposed Transaction is to reduce NV Energy's Available Economic Capacity, therefore decreasing the amount of capacity it has available to withhold in a conjectured attempt to exercise horizontal market power. The effectiveness of this mitigating factor relies upon the retirement of the Reid Gardner Units, which Applicants state will occur by December 31, 2014. Taken together, Applicants have shown that, based on these factors, once the Reid Gardner Units have retired, the transaction will not have an adverse effect on competition.

³⁸ See Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,897; *Duke Energy Corp.*, 136 FERC ¶ 61,245, at P 126 (2011).

³⁹ *Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 at P 60.

⁴⁰ *Nevada Power Co.*, 145 FERC ¶ 61,022 at P 28.

35. However, Applicants have not made a sufficient showing that, prior to the retirement of the Reid Gardner Units, the transaction will not have an adverse effect on competition. We note that Applicants offered interim mitigation for the period during which the Commission is concerned about market power, which Applicants identified as the month of December 2014. Based on the analysis above, we have concerns about market power from the time the transaction is consummated until the Reid Gardner Units are retired. For this reason, we condition our approval of the transaction on Applicants' proposed interim mitigation method to sell any economic output of the LV Cogen Units off-system for the period between the closing of the Proposed Transaction and the retirement of the Reid Gardner Units.⁴¹ Based on the unique circumstances of this case, we find that, as conditioned, the Proposed Transaction will not have an adverse impact on horizontal market power.

3. Effect on Vertical Competition

a. Applicants' Analysis

36. Applicants maintain that the Proposed Transaction will have no adverse effect on vertical market power. Applicants state that the Proposed Transaction is narrowly focused on generation plants to replace the retirement of the Reid Gardner Units and does not include any other transmission assets or other inputs to electricity generation such as fuel supply or transportation facilities or new sites for generation. Thus, no change in control over electric transmission assets will occur as a result of the Proposed Transaction. Further, Nevada Power operates its transmission system pursuant to NV Energy OATT on file with the Commission. Applicants maintain that the Commission has held that having such a tariff on file adequately mitigates any transmission market power.⁴²

b. Commission Determination

37. As the Commission has previously found, transactions that combine electric generation assets with inputs to generating power (such as natural gas, transmission, or fuel) can harm competition if the transaction increases a firm's ability or incentive to exercise vertical market power in wholesale electricity markets. For example, by denying

⁴¹ Although Applicants state that this mitigation method is proposed to resolve screen failures only in December 2014, we are not basing our condition here on the DPT analysis presented by Applicants. As such, we require that the interim mitigation method be applied for the entire period following the closing of the Proposed Transaction until the retirement of the Reid Gardner Units.

⁴² Application at 14-15.

rival firms access to inputs or by raising their input costs, a firm created by the transaction could impede entry of new competitors or inhibit existing competitors' ability to undercut an attempted price increase in the downstream wholesale electricity market.⁴³

38. The Commission finds that the Proposed Transaction does not raise any vertical market power concerns. The Proposed Transaction does not involve any transmission assets (other than limited interconnection facilities) or other inputs to electricity generation such as fuel supply or transportation facilities or new sites for generation. Thus, no change in control over electric transmission assets will occur as a result of the Proposed Transaction, and the Proposed Transaction will not increase Nevada Power's ability to erect barriers to entry.

4. Effect on Rates

a. Applicants' Analysis

39. Applicants state that the Proposed Transaction will have no adverse impact on the rates, terms, or conditions of jurisdictional transmission services. Applicants state that neither the NV Energy OATT nor any other Nevada Power transmission service agreement includes formula rates, so the Proposed Transaction will not have any automatic effect on wholesale transmission rates. Applicants state that any subsequent filing to revise those rates to recover the cost of the LV Cogen Units will be fully subject to Commission review and approval. Applicants note that, although the addition of the LV Cogen Units to Nevada Power's resource portfolio could conceivably impact the calculation of system incremental costs under the cost-based and coordination tariffs in any given hour, the Commission has found in similar situations that such changes do not amount to an adverse effect on rates under section 203.⁴⁴ Applicants argue that any increases in the system incremental costs resulting from the inclusion of the LV Cogen Units in the Nevada Power generating fleet are likely to be offset, in whole or in part, by the near-simultaneous retirement of the Reid Gardner Units.⁴⁵

40. With respect to the effect of the Proposed Transaction on rates, in its June 30 Clarification, Nevada Power states that it has no wholesale requirements customers, captive or otherwise and, thus, none whose contracts would be adversely affected by the

⁴³ *Duke Energy Corp.*, 136 FERC ¶ 61,245 at P 160.

⁴⁴ June 30 Clarification at n. 1 (citing *Bluegrass Generation, L.L.C.*, 139 FERC ¶ 61,094, at P 41 (2012)).

⁴⁵ Application at 15-16.

Proposed Transaction. In addition, Nevada Power sells power only at market-based rates outside the NV Energy BAA. Nevada Power also maintains a cost-based tariff and coordination tariff that will not change as a result of the Proposed Transaction. The cost-based and coordination tariffs contain fixed demand charges and other fixed components, as well as a variable component based on system incremental costs, neither of which can be changed without an FPA section 205 filing. Therefore, Applicants state that the Commission can conclude that the Proposed Transaction will not have an adverse impact on wholesale rates.⁴⁶

b. Commission Determination

41. We find that that the Proposed Transaction will not have an adverse effect on wholesale rates, because Nevada Power has no wholesale requirements customers, and Nevada Power sells power only at market-based rates outside the NV Energy BAA. With respect to transmission rates, neither the NV Energy OATT nor any other Nevada Power transmission service agreement includes formula rates, so the Proposed Transaction will not have any automatic effect on wholesale transmission rates. We note that no party has argued that the Proposed Transaction will have an adverse impact on rates.

5. Effect on Regulation

a. Applicants' Analysis

42. According to Applicants, the Proposed Transaction will not have an adverse impact on regulation, at either the federal or state level. Nevada Power will remain subject to the Commission's jurisdiction under the FPA. Moreover, Nevada Power will continue to be subject to regulation by the Nevada Commission and approval of the Proposed Transaction is also contingent on obtaining the necessary Nevada Commission approval of Nevada Power's Emission Reduction Plan. Thus, Applicants submit that the Proposed Transaction will have no adverse effect on regulation.⁴⁷

b. Commission Determination

43. 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

⁴⁶ June 30 Clarification at 1.

⁴⁷ *Id.* (citing Order No. 669, FERC Stats. & Regs. ¶ 31,200 at P 167).

level.⁴⁸ 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 Nevada Power after the Proposed Transaction is consummated. We note that no party has argued otherwise.

6. Cross-Subsidization

a. Applicants' Analysis

44. With respect to cross-subsidization, Applicants state that the Proposed Transaction falls into the safe harbor for transfers that are bona-fide, arm's length, bargained-for exchanges. Applicants thus submit that the Proposed Transaction poses no concerns with respect to cross-subsidization.⁴⁹

45. Nonetheless, Applicants verify that the Proposed Transaction will not now or in the future result in: (1) transfers of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) new issuances of securities by traditional public utility associate companies that have captive customers or that own or provide transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) new pledges or encumbrances of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) new affiliate contracts between non-utility associate companies and traditional public utility associate companies that have captive customers or that own or provide transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review pursuant to FPA sections 205 and 206.⁵⁰

b. Commission Determination

46. Based on the representations made by Applicants, we find that the Proposed Transaction will not result in cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company. We note that no party has argued otherwise.

⁴⁸ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

⁴⁹ Application, at Exh. M.

⁵⁰ *Id.*

7. Other

47. Information and/or systems connected to the bulk power system involved in the Proposed Transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to FPA section 215. Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information databases, and operating systems. If affiliates, personnel or investors are not authorized for access to such information and/or systems connected to the bulk power system, a public utility is obligated to take the appropriate measures to deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, and the like, must comply with all applicable reliability and cyber security standards. The Commission, North American Electric Reliability Corporation, or the relevant regional entity may audit compliance with reliability and cyber security standards.

48. 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.⁵¹ The foregoing authorization may result in a change in status. Accordingly, Applicants are advised that they must comply with the requirements of Order No. 652. In addition, Applicants shall make appropriate filings under section 205 of the FPA to implement the proposed transactions.

The Commission orders:

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

(B) Applicants must inform the Commission within 30 days of any material change in circumstances that departs from the facts the Commission relied upon in conditionally authorizing the Proposed Transaction.

(C) The foregoing authorization is without prejudice to the authority of the Commission or any other body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or other matter whatsoever now pending or which may come before the Commission.

⁵¹ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

(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) Nevada Power shall account for the Proposed Transaction in accordance with Electric Plant Instruction No. 5 and Account 102, Electric Plant Purchased or Sold, of the Uniform System of Accounts. Nevada Power shall submit final accounting entries within six months of the date that the Proposed Transaction is consummated, and the accounting submission shall provide all the accounting entries and amounts related to the Proposed Transaction along with narrative explanations describing the basis for the entries.

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.