

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

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

Union Power Partners, L.P.
Entergy Arkansas, Inc.
Entergy Gulf States Louisiana, L.L.C.
Entergy New Orleans, Inc.

Docket No. EC15-98-000

ORDER AUTHORIZING ACQUISITION AND DISPOSITION OF JURISDICTIONAL
FACILITIES

(Issued February 29, 2016)

1. On March 17, 2015, as amended on September 18, 2015, Union Power Partners, L.P. (Union Power), Entergy Arkansas, Inc. (Entergy Arkansas), Entergy Gulf States Louisiana (Entergy Gulf States),¹ and Entergy New Orleans, Inc. (Entergy New Orleans, and together with Entergy Arkansas and Entergy Gulf States, Purchasers) (collectively, Applicants) filed an application pursuant to section 203(a)(1) of the Federal Power Act (FPA)² requesting authorization for Union Power to sell and the Purchasers to acquire the Union Power Station and associated facilities and equipment (Proposed Transaction).³

¹ On October 1, 2015, Entergy Gulf States and its affiliate, Entergy Louisiana, LLC, concluded a transaction in which they combined substantially all of their respective assets and liabilities into a single successor public utility operating company, Entergy Louisiana Power, LLC, which subsequently was renamed Entergy Louisiana, LLC. The Commission authorized the transaction in *Entergy Gulf States Louisiana, L.L.C.*, 151 FERC ¶ 62,018 (2015), and Entergy Services, Inc. (Entergy Services) filed a notice of consummation in Docket No. EC15-47-000 on October 9, 2015. For purposes of this application, we will continue to refer to Entergy Gulf States.

² 16 U.S.C. § 824b(a)(1) (2012).

³ Applicants' original application was made on behalf of Union Power, Entergy Arkansas, Entergy Gulf States, and Entergy Texas, Inc. (Entergy Texas). *Joint Application for Transaction Authorization Pursuant to Section 203 of the Federal Power Act*, Docket No. EC15-98-000 filed March 17, 2015 (Application). In their Amendment, Applicants substituted Entergy New Orleans for Entergy Texas in the list of proposed
(continued...)

The Commission has reviewed the Proposed Transaction under the Commission's Merger Policy Statement.⁴ As discussed below, we authorize the Proposed Transaction as consistent with the public interest.

I. Background

A. Description of the Parties

1. Union Power

2. Applicants state that Union Power is a Delaware limited partnership and an exempt wholesale generator (EWG) authorized to make wholesale sales of energy, capacity, and ancillary services at market-based rates.⁵ Union Power is a wholly owned subsidiary of Entegra TC LLC (Entegra), a Delaware limited liability company. Other than Union Power, none of Entegra's subsidiaries owns or controls generation facilities in the Midcontinent Independent System Operator, Inc. (MISO) market or any market first-tier to MISO. Applicants state that, through certain funds controlled by Luminus Management, LLC (Luminus), which own interests exceeding 10 percent of Entegra's voting securities, Union Power has been assumed, for purposes of past market power analyses, to be affiliated with the following entities that own or control generation facilities in the MISO market: Carville Energy, LLC; Renaissance Energy, LLC; and

purchasers. *Amendment to Joint Application for Transaction Authorization Pursuant to Section 203 of the Federal Power Act*, Docket No. EC15-98-000 filed September 18, 2015 (Amendment).

⁴ See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). See also *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement). See also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC 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).

⁵ *Union Power Partners, L.P.*, 90 FERC ¶ 62,048 (2000) (granting EWG status); *Union Power Partners, L.P.*, Docket No. ER01-930-000, *et al.* (Mar. 20, 2001) (letter order granting market based rate authority).

Tilton Energy, LLC. Union Power is also affiliated with Trans-Union Interstate Pipeline, L.P., a natural gas company that owns and operates an interstate natural gas pipeline extending 41.7 miles.

3. Applicants state that the Union Power Station is a natural gas-fired electric generating facility located near El Dorado, Arkansas. The Union Power Station has four power blocks, each of which, according to Applicants, has been identified as having a capacity of 495 megawatts (MW). For purposes of the competition analysis provided in support of the Application, Applicants state that they have conservatively identified Union Power Station's seasonal net capacity rating as 505 MW per power block.⁶

2. Purchasers

4. Applicants state that Purchasers are each subsidiaries of Entergy Corporation,⁷ a holding company. Purchasers are affiliated with the other Entergy Operating Companies and other market-regulated power sales affiliates. Applicants state that Entergy Gulf States and Entergy New Orleans are parties to the Entergy System Agreement, a Commission-approved tariff that allocates among the participating Entergy Operating Companies the benefits and costs of coordinated operation of their generation and bulk transmission services. The Entergy Operating Companies are also transmission-owning members of MISO.

a. Entergy Arkansas

5. Applicants state that Entergy Arkansas is an Arkansas corporation and a direct subsidiary of Entergy Corporation. Entergy Arkansas is a public utility that provides electric generation, transmission, distribution, and electric power service to retail customers primarily in Arkansas. Entergy Arkansas has one small wholesale partial requirements customer to which it provides capacity and energy. Entergy Arkansas also makes wholesale sales of electric capacity, energy, and ancillary services in the MISO markets pursuant to a market-based rate wholesale power sales tariff on file with the Commission.

⁶ Application at 1-2.

⁷ Applicants state that Entergy Corporation is also parent to Entergy Texas and Entergy Mississippi, Inc. (Entergy Mississippi). According to Applicants, Entergy Arkansas, Entergy Gulf States, Entergy Mississippi, Entergy New Orleans, and Entergy Texas are vertically-integrated franchised public utilities. Collectively, they are referred to as Entergy Operating Companies. *Id.* at 3.

6. Entergy Arkansas currently purchases 495 MW of capacity and associated energy from one power block of the Union Power Station under a long-term tolling agreement that is scheduled to expire in 2017. Entergy Arkansas also owns and operates approximately 4,600 circuit miles of transmission lines and associated transmission substations and other equipment that are under MISO's functional control pursuant to the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff).

b. Entergy Gulf States

7. Applicants state that Entergy Gulf States is a Louisiana limited liability company and an indirect subsidiary of Entergy Corporation. Entergy Gulf States is a public utility that provides electric generation, transmission, distribution, and electric power service to retail and wholesale customers in Louisiana. Entergy Gulf States also engages in the local distribution of natural gas to customers in East Baton Rouge Parish in Louisiana.

8. Entergy Gulf States has a wholesale partial requirements service customer to which it provides capacity and energy pursuant to a cost-based rate schedule on file with the Commission. Entergy Gulf States also makes wholesale sales of electric capacity, energy, and ancillary services in the MISO markets pursuant to a market-based rate wholesale power sales tariff on file with the Commission. Entergy Gulf States owns and operates approximately 2,300 circuit miles of transmission lines and associated transmission substations and other equipment that are under MISO's functional control pursuant to the MISO Tariff.

9. Applicants state that Entergy Gulf States and its affiliate, Entergy Louisiana, LLC, concluded a transaction in which they combined substantially all of their respective assets and liabilities into a single successor public utility operating company, Entergy Louisiana Power, LLC, which subsequently was renamed Entergy Louisiana, LLC. Applicants state that Entergy Louisiana, LLC has assumed Entergy Gulf States' obligations with respect to the acquisition of the Union Power Station.

c. Entergy New Orleans

10. Applicants state that Entergy New Orleans is a Louisiana corporation and a direct subsidiary of Entergy Corporation. Entergy New Orleans is a public utility that provides electric generation, transmission, distribution, and electric power service to retail and wholesale customers in and around New Orleans. Entergy New Orleans provides retail electric service to approximately 167,000 customers and also engages in the local distribution of natural gas to customers in New Orleans.

11. Entergy New Orleans owns generating and transmission facilities and makes wholesale sales of electric capacity, energy, and ancillary services under tariffs and rate schedules on file with FERC. Entergy New Orleans currently does not serve any

wholesale requirements customers. Entergy New Orleans owns or controls (through long-term power purchase agreements) approximately 1,200 MW of generating capacity.

B. MISO-SPP Dispute

12. In 2004, the Commission accepted a Joint Operating Agreement to better coordinate power flows and improve seams management between MISO and Southwest Power Pool, Inc. (SPP) (MISO-SPP JOA).⁸

13. On January 28, 2014, SPP filed a complaint against MISO under sections 206 and 306 of the Federal Power Act (FPA)⁹ in which it sought a Commission order finding that MISO is violating the MISO-SPP JOA and the SPP Open Access Transmission Tariff (SPP Tariff), and requiring MISO to compensate SPP under the SPP Tariff for MISO's use of the SPP transmission system for real-time energy transfers between MISO Midwest and MISO South following the integration of the Entergy Operating Companies¹⁰ into MISO on December 19, 2013 (SPP Complaint).¹¹

14. Concurrent with the SPP Complaint, SPP filed an unexecuted service agreement to assess MISO charges for MISO's use of the SPP transmission system as a result of MISO's real-time energy transfers between the MISO Midwest and MISO South regions (SPP Service Agreement).¹²

15. On February 18, 2014, MISO filed a complaint against SPP under sections 206 and 306 of the FPA, alleging that the SPP Complaint and SPP's filing of the SPP Service Agreement violate the MISO-SPP JOA and SPP's Tariff, and seeking a Commission

⁸ See *Sw. Power Pool, Inc.*, 109 FERC ¶ 61,008 (2004), *reh'g denied*, 110 FERC ¶ 61,031 (2005).

⁹ 16 U.S.C. §§ 824e, 825e (2012).

¹⁰ Entergy Arkansas, Inc. (Entergy Arkansas); Entergy Gulf States Louisiana, L.L.C.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; and Entergy Texas, Inc.

¹¹ Southwest Power Pool, Inc., Complaint and Request for Fast Track Processing and Motion to Consolidate, Docket No. EL14-21-000 (filed Jan. 28, 2014).

¹² Southwest Power Pool, Inc., Submission of Unexecuted Non-Firm Point-to-Point Transmission Service Agreement, Docket No. ER14-1174-000 (filed Jan. 28, 2014).

order requiring SPP to cease sending invoices to MISO and to nullify the invoices already sent (MISO Complaint).¹³

16. On March 28, 2014, the Commission issued an order¹⁴ that, *inter alia*, addressed the SPP Complaint, the SPP Service Agreement, the MISO Complaint, and the MISO-SPP JOA Remand,¹⁵ which also involved the MISO and SPP dispute over the terms of the MISO-SPP JOA. In the MISO-SPP JOA Order, the Commission accepted for filing the SPP Service Agreement, suspended it for a nominal period, and made it effective January 29, 2014, subject to refund. In addition, the Commission consolidated the four proceedings and established hearing and settlement judge procedures.

17. In order to limit its exposure to charges under the SPP Service Agreement, MISO proposed the Sub-Regional Power Balance Constraint to limit intra-regional flows, i.e., those flows between MISO Midwest and MISO South, to the 1,000 megawatt (MW) contract path limit between MISO Midwest and MISO South, rather than allowing flows up to the limit established in the Operations Reliability Coordination Agreement (ORCA).¹⁶ On June 10, 2014, the Commission conditionally accepted MISO's proposal

¹³ Midcontinent Independent System Operator, Inc., Complaint and Motion to Consolidate, Docket No. EL14-30-000 (filed Feb. 18, 2014).

¹⁴ *Sw. Power Pool, Inc.*, 146 FERC ¶ 61,231 (2014) (MISO-SPP JOA Order).

¹⁵ *Sw. Power Pool, Inc. v. FERC*, 736 F.3d 994 (D.C. Cir. 2013). The Court remanded to the Commission its interpretation of section 5.2 of the MISO-SPP JOA which involves contract path sharing.

¹⁶ Entergy Arkansas, Ameren Corporation, and Associated Electric Cooperative, Inc. (Associated Electric) are parties to an interconnection agreement under which they share the capacity of the 500/345 kV transformers on a high-voltage interconnection. The direct contiguous tie capability between Entergy Arkansas and Ameren is approximately 1,000 MW of the 1,500 MW total capability of the interconnection (i.e., the 1,000 MW contract path limit). The ORCA provides agreed upon transmission limits to address reliability and loop flow concerns among MISO and neighboring entities. *See Midcontinent Indep. Sys. Operator, Inc.*, 145 FERC ¶ 61,032 (2013). On April 15, 2015, the Commission issued an order approving MISO's proposal under the ORCA to increase the transmission limits between MISO Midwest and MISO South to 3,000 MW. *Midcontinent Indep. Sys. Operator, Inc.*, Docket No. ER15-1141-000 (Apr. 15, 2015) (delegated letter order).

to establish the Sub-Regional Power Balance Constraint and the Sub-Regional Power Balance Constraint Demand Curve, effective April 12, 2014.¹⁷

18. On July 16, 2014, MISO submitted proposed revisions to the Sub-Regional Power Balance Constraint to include an additional Demand Curve to reflect potential charges under the SPP Service Agreement for intra-regional flows in excess of 1,000 MW (Hurdle Rate Filing).¹⁸ Specifically, MISO's proposed additional demand curve would add a "hurdle" to the economic dispatch in the day-ahead and real-time market (Hurdle Rate). This would allow intra-regional flows to exceed the 1,000 MW contract path limit between MISO Midwest and MISO South when the incremental savings from allowing the flows exceed the transmission charges under the SPP Service Agreement.¹⁹ The Hurdle Rate would apply until the ORCA limit is reached, at which point a second Demand Curve would apply.²⁰

19. On October 13, 2015, the Settlement Parties²¹ filed a settlement agreement, which would resolve all issues set for hearing in the MISO-SPP JOA Order (Settlement Agreement). The Settlement Agreement provides for MISO to make a fixed payment to SPP and the Joint Parties to settle all claims for the period between January 29, 2014, the effective date of the SPP Service Agreement, and February 1, 2016, the proposed implementation date of the Settlement Agreement. Additionally, the Settlement Agreement provides for the withdrawal of the SPP and the MISO Complaints, as well as the SPP Service Agreement, within 40 days after a final, unreviewable Commission order accepting or approving the Settlement Agreement. The Settlement Agreement also

¹⁷ *Midcontinent Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,194 (2014). Prior to the implementation of the Sub-Regional Power Balance Constraint and the Sub-Regional Power Balance Demand Curve in Schedule 28B, MISO managed intra-regional flows using a multi-transmission element proxy flowgate approach.

¹⁸ MISO July 16, 2014 Hurdle Rate Filing, Vannoy Test. at 3.

¹⁹ *Id.* at 4.

²⁰ *Id.* at 6-7.

²¹ In addition to MISO and SPP, Associated Electric, Southern Company Services, Inc., on behalf of Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company, the Tennessee Valley Authority, Louisville Gas and Electric Company and Kentucky Utilities, PowerSouth Energy Cooperative, and NRG Energy, Inc. (NRG) are parties to the Settlement Agreement. The parties to the Settlement Agreement outside of MISO, SPP, and NRG are collectively referred to as the Joint Parties.

provides that SPP will withdraw its petition for review of the Commission's orders in Docket No. ER13-948-000, *et al.* to the U.S. Court of Appeals for the District of Columbia, Case No. 14-1053. Finally, the Settlement Agreement also supersedes the ORCA, providing that the flows from MISO Midwest to MISO South will be limited to 3,000 MW (Regional Directional Transfer Limit).

20. In accordance with the Settlement Agreement, MISO also filed, on October 13, 2015, proposed revisions to its Tariff to remove the Hurdle Rate, effective February 1, 2016. MISO stated that, because the SPP Service Agreement will be withdrawn and the Settlement Agreement provides terms and conditions for MISO to pay SPP and the Joint Parties for transmission capacity when MISO exceeded the 1,000 MW contract path between MISO Midwest and MISO South, there is no longer any need to constrain its economic dispatch so that transfers above the 1,000 MW contract path limit only occur when production cost savings exceed SPP Service Agreement charges. On January 21, 2016, the Commission issued orders approving the Settlement Agreement and accepting removal of the Hurdle Rate.²²

II. Description of the Proposed Transaction

21. Applicants state that in June 2014, Union Power made an unsolicited offer to Entergy Corporation to sell one, two, or all four of the Union Power Station's power blocks. Applicants state that Entergy's internal review indicated that the Purchasers were projected to have a growing capacity deficit following the 2015-2016 planning year.²³ Applicants also state that the Purchasers determined that the cost of purchasing the Union Power Station power blocks was significantly lower than the cost of constructing new combined cycle gas turbine generating capacity.

22. Applicants explain that the Proposed Transaction is structured as the sale of all four power blocks at the Union Power Station and related assets, including, among other things, generator interconnection facilities and natural gas interconnection facilities; associated real estate interests; specified gas transportation contracts; water supply, intake, treatment and discharge systems; air permits; emissions allowances; administrative buildings; and other assorted assets. In addition to the Union Power Station power block or blocks it will acquire, each Purchaser also will acquire an undivided pro rata interest in common assets that are not specific to any individual power block.

²² *Sw. Power Pool, Inc.*, 154 FERC ¶ 61,021 (2016) (Settlement Agreement Order); *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,023 (2016).

²³ *Id.* at 12.

23. Applicants state that the Proposed Transaction contemplates four distinct purchases of Union Power Station power blocks and related assets, one by Entergy New Orleans, one by Entergy Arkansas, and two by Entergy Gulf States, with the possibility that Entergy Gulf States may succeed to the rights of Entergy New Orleans or Entergy Arkansas under limited defined circumstances. Applicants state that Purchasers will acquire the Union Power facilities for an aggregate purchase price of \$948 million, subject to adjustments.

III. Notice of Filing

24. Notice of the Application was published in the *Federal Register*, 80 Fed. Reg. 15,779 (2015), with interventions and protests due on or before May 18, 2015. A notice of intervention was filed by the Arkansas Public Service Commission (Arkansas Commission). Motions to intervene out-of-time were filed by American Electric Power Service Corp., Omaha Public Power District, Arkansas Electric Cooperative Corp., Associated Electric Cooperative., Kansas City Power & Light Co. and KCP&L Greater Missouri Operations Co., Southern Company Services, Inc., the Empire District Electric Co., and the Louisiana Public Service Commission (Louisiana Commission).

25. On May 28, 2015, the Commission issued a letter (First Data Request) to Applicants requesting additional information regarding the Application. Entergy Services responded on behalf of Applicants on June 30, 2015. Notice of the response was published in the *Federal Register*, 80 Fed. Reg. 42,798 (2015), with comments due August 14, 2015. On August 14, 2015, Kansas City Power & Light Company, KCP&L Greater Missouri Operations Company, Associated Electric Cooperative, Inc., Southern Company Services, Inc., and the Empire District Electric Company (together, Entergy Export Customers) filed a limited protest in reply to Applicants' response. On August 31, 2015, Applicants filed a request for leave to respond and reply to Entergy Export Customers' filing.

26. On September 18, 2015, Applicants filed an Amendment to the Application, addressing the substitution of Entergy New Orleans for Entergy Texas as a Purchaser and providing supplemental information on the Proposed Transaction. Notice of the Amendment was published in the *Federal Register*, 80 Fed. Reg. 57,802 (2015), with comments due October 9, 2015. No comments were submitted.

27. On November 24, 2015, the Commission issued a letter (Second Data Request) to Applicants requesting additional information regarding the Proposed Transaction. Entergy Services responded on behalf of Applicants on December 7, 2015. Notice of the response was published in the *Federal Register*, 80 Fed. Reg. 77,334 (2015), with comments due January 6, 2016. No comments were received.

28. On January 4, 2016, the Louisiana Commission filed a resolution asking for prompt Commission action on the Application. The Arkansas Commission and New Orleans City Council filed comments in support.

IV. Discussion

A. Procedural Matters

29. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2015), the Commission will grant the late-filed motions to intervene given the parties' interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

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

B. Substantive Matters

1. Standard of Review Under FPA Section 203

31. FPA section 203(a)(4) requires the Commission to approve proposed dispositions, consolidations, acquisitions, or changes in control if the Commission determines that the proposed transaction will be consistent with the public interest.²⁴ The Commission's analysis of whether a proposed transaction is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.²⁵ FPA section 203(a)(4) also requires the Commission to find that the proposed transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-

²⁴ 16 U.S.C. § 824b(a)(4). Approval of the Proposed Transaction is also required by other regulatory agencies pursuant to their respective statutory authority before the Proposed Transaction may be consummated. *See* Application Section VI.I. Our findings under FPA section 203 do not affect those agencies' evaluations of the Proposed Transaction pursuant to their respective statutory authorities.

²⁵ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

subsidization, pledge, or encumbrance will be consistent with the public interest.”²⁶ The Commission’s regulations establish verification and informational requirements for entities that seek a determination that a proposed transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.²⁷

2. Analysis of the Proposed Transaction

a. Effect on Horizontal Competition

i. Applicants’ Analysis

32. Applicants state that the Proposed Transaction will have no adverse effect on horizontal competition. Applicants analyze the effect of the Proposed Transaction on competition in the MISO market, which Applicants state is the only market in which both the Purchasers and their affiliates and Union Power conduct business.²⁸ Applicants state that a simplified “2AB” analysis²⁹ demonstrates that the Proposed Transaction would result in an increase in the Herfindahl Hirschman Index (HHI)³⁰ of approximately 25

²⁶ 16 U.S.C. § 824b(a)(4).

²⁷ 18 C.F.R. § 33.2(j).

²⁸ Application at 21.

²⁹ If A equals the market share of buyers and their affiliates and B equals the market share of the entities being acquired, one may approximate the HHI change resulting from Transaction as $(A + B)^2 - (A^2 + B^2) = A^2 + B^2 + 2AB - (A^2 + B^2) = 2AB$. *Horizontal Merger Guidelines*, 57 Fed. Reg. at 41,558, n. 18 (1992).

³⁰ 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).

points. Applicants conclude that this change in the HHI is not indicative of market power concerns regardless of the post-transaction HHI.³¹

33. According to Applicants, given the results of the 2AB analysis, no analysis of the Proposed Transaction under Appendix A of the Merger Policy Statement should be required; nevertheless, out of an abundance of caution, Applicants performed a Delivered Price Test analysis of the effect of the Proposed Transaction on competition in the MISO market. Under the Economic Capacity³² measure, Applicants determined that the Proposed Transaction would result in HHI increases for the 10 time periods studied ranging from zero to 26 points in an unconcentrated market.³³ Under the Available Economic Capacity measure, Applicants determined that the Proposed Transaction would result in HHI increases ranging from zero to 27 points in an unconcentrated market.³⁴ Applicants contend that the results of both the Economic Capacity and Available Economic Capacity analyses confirm that the Proposed Transaction will not have an adverse effect on horizontal competition in the MISO market. Applicants state that the Proposed Transaction also passes the Delivered Price Test screening criteria under price sensitivity analyses of plus and minus 10 percent relative to base price levels.³⁵

34. Applicants state that their choice of the MISO market as the relevant geographic market is appropriate and consistent with Commission precedent. All of the generating capacity that the Entergy Operating Companies own is located within the MISO market, as is the Union Power Station; therefore the only area in which Applicants' generation overlaps is the MISO market. According to Applicants, the Commission has established

³¹ Application at 21 (citing *Merger Policy Statement*, FERC Stats. & Regs. ¶ 31,044 at 30,134 (finding that a transaction is unlikely to have adverse competitive effects if the post-transaction market is unconcentrated “regardless of the change in HHI”; if the post-transaction market is moderately concentrated and the HHI increase is less than 100 points; or if the post-transaction market is highly concentrated and the HHI increase is less than 50 points).

³² Each supplier's “economic capacity” is the amount of capacity that could compete in the relevant market given market prices, running costs, and transmission availability. “Available economic capacity” is based on the same factors but subtracts the supplier's native load obligation from its capacity and adjusts transmission availability accordingly.

³³ *Id.* at 22.

³⁴ *Id.*

³⁵ *Id.*

that regional transmission operators and independent system operators with organized markets, such as MISO, are the default relevant geographic markets for market power analyses unless the Commission has specifically determined that a sub-area within the RTO is a separate market. Applicants state that the Commission has not previously determined the existence of a submarket within MISO or in the area in which Applicants' generation overlaps. Applicants therefore argue that the MISO market is the relevant geographic market for analysis of the Proposed Transaction.³⁶

ii. First Data Request and Applicants' Response

35. In the First Data Request, the Commission directed Applicants to provide, *inter alia*: (1) data on the number of hours where there were binding constraints between MISO as it existed before December 2013 (MISO Midwest) and the southern region of MISO (MISO South), consisting of the Entergy Operating Companies and certain other investor-owned, municipal and cooperative utility systems, which became members of MISO in December 2013; (2) data on whether there was price separation between MISO Midwest and MISO South; (3) evidence concerning any other considerations that the Commission might take into account in determining whether or not MISO South is a submarket of MISO; and (4) a Delivered Price Test sensitivity study for the MISO South market.³⁷

36. Furthermore, the Commission requested that Applicants perform and submit Delivered Price Tests for the MISO market that include the following corrections: (1) revise the delivered costs of competitors to include maximum transmission rates; (2) use the most recent Simultaneous Transmission Import Limit values submitted by MISO; (3) exclude generating units that have been canceled or that will not be in service during the study period, and provide a list of excluded generation units; and (4) provide data to corroborate the results of their Delivered Price Tests.

37. In their response to the First Data Request, Applicants argue that MISO South is not a submarket and that, even if MISO South were a submarket, the Proposed Transaction would not raise horizontal competition concerns in that submarket. With respect to the relevant geographic market, Applicants provide data on the number of hours during which the Sub-Regional Power Balance Constraint was binding for the time period April 2014 to May 2015 in both the Day-Ahead and Real-Time markets. Applicants classify periods in which the Sub-Regional Power Balance Constraint was binding as result of the Hurdle Rate as a "generation dispatch related constraint" and

³⁶ *Id.* at 22-23.

³⁷ First Data Request at 2-3.

binding as a result of the ORCA as a transmission-related constraint.³⁸ Using this nomenclature, Applicants conclude that “the data for transmission constraints from MISO Midwest into MISO South...show the existence of occasional, non-systematic, transmission constraints into MISO South; they do not consistently correspond with historical peaks or other competitively significant times.”³⁹

38. Furthermore, Applicants contend that “the constraints, such as they might be, do not cause MISO South prices to increase.”⁴⁰ Specifically, Applicants compare prices in Arkansas, where the Union Power Station is located, to prices in MISO Midwest, as measured by the Indiana Hub. Applicants state that their analysis demonstrates that there were only two time periods in the year 2014 when the average Arkansas hub price was higher than the average Indiana hub price, both of which were off-peak periods where the Delivered Price Test screen is passed both for the MISO market and for the MISO South region.

39. According to Applicants, this case is comparable to the Wisconsin Energy – Integrys merger where the Commission declined to characterize the Wisconsin and Upper Michigan System (WUMS) as a separate submarket. The Commission found that “WUMS prices tend to be lower than MISO prices, which supports Applicants’ contention that excess generation exists in WUMS.”⁴¹ Consequently, Applicants in this proceeding opine that “generally lower prices in MISO South...support a conclusion that adequate or excess generation exists in the MISO South region and that generators in MISO Midwest can compete with generation from MISO South.”⁴²

40. Applicants state that their updated Delivered Price Test analysis for the MISO market, after correcting for certain errors, shows no screen violations in the base case or in either of the price sensitivities. Applicants further state that their Delivered Price Test analysis for the MISO South region demonstrates that there are no screen failures in the base case or negative 10 percent price sensitivity. However, Applicants find 3 screen violations in the plus 10 percent price sensitivity. Applicants note that in one of the time

³⁸ First Data Request Response at 2.

³⁹ *Id.* at 5.

⁴⁰ *Id.*

⁴¹ *Wisconsin Energy Corp. and Integrys Energy Group, Inc.*, 151 FERC ¶ 61,015 at P 36 (2015) (Wisconsin Energy), citing *NRG Energy Holdings, Inc.*, 146 FERC ¶ 61,196, at P 80 (2014); *Exelon Corp.*, 138 FERC ¶ 61,167, at P 32 (2012).

⁴² First Data Request Response at 5.

periods where there is a screen violation, the Entergy Operating Companies have a 0 percent market share and thus no market power.⁴³ Applicants argue that the other two screen violations are not systematic violations or indicative of any market power issues.

iii. Protest of Entergy Export Customers

41. The Entergy Export Customers filed a limited protest (Limited Protest) seeking findings that (1) Applicants' analysis is deficient; and (2) the MISO South and MISO Midwest markets are separate relevant geographic markets because of the existence of the Sub-Regional Power Balance Constraint. Alternatively, the Entergy Export Customers request that the Commission state that any determination in this docket that MISO is a single market is limited to the market power analysis of this transaction and is without prejudice to the factual, legal, and policy issues contested in the ongoing proceedings in Dockets Nos. EL15-66-000 and EL14-19-000 and Docket Nos. ER14-1174-000, *et al.*⁴⁴

42. Specifically, the Entergy Export Customers allege that Applicants fail to state how, if at all, the 1,000 MW tie between MISO Midwest and MISO South was modeled in the submitted price separation analysis. Entergy Export Customers contend that it is counterintuitive that there would be no price separation if the 1,000 MW tie had been appropriately modeled as a constraint on transmission. The Entergy Export Customers further assert that "a single, unconstrained MISO market...is a fiction; rather, the two distinct MISO regions represent two geographically distinct markets tenuously combined by a thin physical tie."⁴⁵

iv. Applicants' Answer to Protest

43. In their answer, Applicants state that the Commission's action on the Application in this proceeding does not require the Commission to resolve issues before it in other proceedings. Applicants state that their analyses submitted in this proceeding have assessed the competitive impacts of the Proposed Transaction in the MISO market as a whole as well as in MISO South, so the Commission can approve the Proposed Transaction regardless of whether the relevant market, for section 203 analytical purposes, is MISO as a whole or MISO South. Accordingly, Applicants maintain that it is not necessary for the Commission to direct Applicants to provide further explanation of

⁴³ Dr. Arenchild Affidavit at 7.

⁴⁴ Limited Protest of Kansas City Power & Light Company, KCP&L Greater Missouri Operations Company, Associated Electric Cooperative, Inc., Southern Company Services, Inc. and the Empire District Electric Company at 1-2.

⁴⁵ *Id.* at 3.

how they modeled MISO Midwest-MISO South transmission constraints or for the Commission to reach conclusions about alternative market regions that would implicate issues in other contested proceedings. Applicants add that if the Commission does reach a conclusion about whether MISO as a whole or MISO South is the relevant market for purposes of analyzing the competitive effects of the Proposed Transaction here, Applicants do not object to the Entergy Export Customers' proposed alternative relief in the form of a Commission statement that such factual finding is not binding on the outcome of the other contested proceedings.⁴⁶

v. **Applicants' Second Amendment**

44. On September 18, 2015, Applicants submitted a second amendment (Second Amendment) to their filing. This amendment reflects the substitution of Entergy New Orleans for Entergy Texas as one of the Purchasers. Applicants state that subsequent to the filing of the Joint Application, Entergy New Orleans replaced Entergy Texas as a purchaser of Power Block 1. Applicants state that for the purposes of the Proposed Transaction and the Second Amendment, Entergy New Orleans is a Purchaser and Applicant, and Entergy Texas is no longer a Purchaser or Applicant.⁴⁷

45. Applicants argue that application of the facts considered in the Commission's recent order in *Osprey Energy*⁴⁸ confirms that the Proposed Transaction presents no competitive concerns. Applicants state that, in *Osprey Energy*, the acquiring utility represented that it needed to increase its generating capacity to meet projected native load and a required reserve margin. Applicants present data which shows that the Entergy Operating Companies will remain 893 MW short in Planning Year 2016/2017 and 1,458 MW short in Planning Year 2017/2018, after considering the generation capacity obtained in the Proposed Transaction.⁴⁹

46. Applicants state that in the absence of the Proposed Transaction, the Entergy Operating Companies will need to acquire alternative generation resources in one of three ways: (1) buy other generating units similar to the Union Power Project; (2) enter into wholesale power purchase contracts for a similar amount of generating capacity; or (3) build a similar amount of generating capacity. Applicants submit that all of these three options would result in Delivered Price Test results that would be essentially the

⁴⁶ Applicants' Answer at 3.

⁴⁷ Second Amendment at 3.

⁴⁸ *Osprey Energy Center, LLC*, 152 FERC ¶ 61,066 (2015) (Osprey Energy).

⁴⁹ Second Amendment, Arenchild Affidavit at 4.

same as those for the Proposed Transaction (although no Delivered Price Test analysis would be required for the second and third options). Also, as in *Osprey Energy*, Applicants conclude that the Proposed Transaction is the least-cost solution and the higher cost alternatives would not result in a material (or any) difference in market concentration.⁵⁰ Purchasers will acquire the Union Power Station for a purchase price of \$479/kW (kilowatt), which Applicants assert is a better resource option for Purchasers' retail customers than construction of a new generating facility.

47. Applicants state that in *Osprey Energy*, the Commission took note of the obligation of the purchaser, Duke Energy Florida, Inc. (Duke Florida), to credit back to retail customers gains from short-term wholesale sales below a three-year average level of sales and 80 percent of gains from wholesale off-system sales above the three-year average. According to Applicants, the Commission concluded that such obligation would limit the incentive to make wholesale sales at elevated prices. Applicants state that each of the Entergy Operating Companies has a similar obligation. The only difference is that the Entergy Operating Companies' crediting obligations are even more stringent than those of Duke Florida in that each Entergy Operating Company is required to credit, through retail rate mechanisms approved by retail regulators, 100 percent of the net revenue from wholesale sales of capacity and energy received by each Entergy Operating Company to retail customers. Applicants argue that these mechanisms eliminate any incentive for the Entergy Operating Companies to increase wholesale prices in MISO or in the MISO South sub-region.⁵¹

48. Applicants present a revised Delivered Price Test analysis for the MISO South market in light of the Entergy Operating Companies' decision to permanently retire one of their generating facilities, Little Gypsy Unit 1, effective as of June 1, 2015. Applicants thus removed Little Gypsy Unit 1's 238 MW of generating capacity from their Delivered Price Test analysis, as well as other deactivated, mothballed, and retired units. Applicants state that there are no screen violations in the sensitivity analysis using base case prices and the price sensitivity when prices are decreased 10 percent. Applicants state that in this further sensitivity, the only time periods when there are screen violations are for the summer off-peak and winter super-peak season/load periods when prices are increased by 10 percent. Applicants submit that the failure in the summer off-peak period does not indicate any competitive concern because the Entergy Operating Companies have a 0 percent market share during the period and thus no ability to raise wholesale prices.⁵²

⁵⁰ *Id.*, Arenchild Affidavit at 5-6.

⁵¹ *Id.* at 10.

⁵² *Id.* at 7-9.

49. Regarding the price sensitivity test screen failure in the winter super-peak period, Applicants argue that it is noteworthy that the post-transaction HHI (1,016) for this period is just barely over the threshold for a moderately concentrated market (i.e., HHI between 1,000 and 1,800). Applicants further contend that while the winter super-peak is nominally a “peak” period in the Delivered Price Test, in reality there is significant available capacity to respond to any attempt to exercise market power. For these reasons, Applicants submit that this isolated screen failure should not be considered indicative of competitive concerns.⁵³

vi. Second Data Request and Applicants’ Response

50. In the Second Data Request, the Commission directed Applicants to provide, *inter alia*: (1) historical data on the number of hours where there were binding transmission constraints between MISO Midwest and MISO South and any corresponding price separation; (2) prospective estimates of the extent to which the Regional Directional Transfer Limit of 3,000 MW from MISO Midwest to MISO South would result in binding transmission constraints; (3) a corrected SIL study for MISO South; and (4) an updated Delivered Price Test study for the MISO South region, assuming the Settlement Agreement were to be approved.⁵⁴

51. As directed, Applicants submitted data on the number of hours during which there were binding transmission constraints between MISO Midwest and MISO South. Applicants’ workpapers reveal that from December 19, 2013 to April 11, 2014, there were binding constraints between MISO Midwest and MISO South in the Midwest to South direction in approximately 26 percent of hours in the Day-Ahead market and 22 percent of hours in the Real-Time market, while there were binding constraints in the South to Midwest direction in approximately 18 percent of hours in the Day-Ahead market and 4 percent of hours in the Real-Time market. However, Applicants emphasize that the prospective estimates of binding transmission constraints between the two

⁵³ *Id.* at 9.

⁵⁴ The Settlement Agreement, *inter alia*, provides the terms and conditions under which MISO will provide compensation for flows on Southwest Power Pool, Inc.'s system or the Joint Parties' systems which result from flows above the 1,000 MW contract path to the Regional Directional Transfer Limit between MISO Midwest and MISO South. Settlement Agreement Order, 154 FERC ¶ 61,021 at P 2. The Joint Parties refers collectively to Associated Electric Cooperative, Inc., Alabama Power Company, Georgia Power Company, Gulf Power Company and Mississippi Power Company, by and through their agent Southern Company Services, Inc., the Tennessee Valley Authority, Louisville Gas and Electric Company and Kentucky Utilities Company, PowerSouth Energy Cooperative.

regions, based on a PROMOD simulation model developed by MISO, show that the constraint would bind in the Midwest to South direction in only 2.8 percent of annual hours.⁵⁵

52. Applicants perform another Delivered Price Test for the MISO South region and find two screen failures in the plus 10 percent price sensitivity analysis. Applicants argue that the screen failures are immaterial to establish the existence of systematic screen failures in the MISO South sub-region.⁵⁶ Applicants also argue that the implementation of the Settlement would eliminate the Hurdle Rate.

vii. Commission Determination

53. As discussed below, we find that the Proposed Transaction will not have an adverse effect on horizontal competition in the MISO market, which we conclude is the relevant geographic market for purposes of analyzing the effect of the Proposed Transaction. We find that the MISO market is the relevant geographic market because we find substantial evidence that implementation of the Settlement Agreement will eliminate the Hurdle Rate that had previously limited flows between MISO Midwest and MISO South. Since the Entergy Export Customers' allegation that MISO South and MISO Midwest are separate relevant geographic markets is based on the existence of the Hurdle Rate, and the Commission accepted the removal of the Hurdle Rate, the Entergy Export Customers' argument is now moot.

54. After correcting errors in Applicants' Delivered Price Test, we obtained results that are not materially different from the results Applicants reached. Applicants' Delivered Price Test and price sensitivity analyses demonstrate that the Proposed Transaction passes the market power screens in all time periods and load conditions under both the Economic Capacity and Available Economic Capacity measures in the MISO market. For the Economic Capacity measure in the base case, the HHI changes resulting from the Proposed Transaction range from zero to 24 points in an unconcentrated market. For the Available Economic Capacity measure in the base case, the HHI changes resulting from the Proposed Transaction range from zero to 27 points in an unconcentrated market. The price sensitivity analyses yield similar results. Because the Proposed Transaction passes the market power screens in all time periods and load conditions under both the Economic Capacity measure and the Available Economic

⁵⁵ Second Data Request Response at 6. PROMOD is a generator and portfolio modeling system that provides nodal locational marginal price forecasting and transmission analysis.

⁵⁶ *Id.* at 15.

Capacity measure, we find that the Proposed Transaction will not have an adverse effect on horizontal competition in the MISO market.

b. Effect on Vertical Competition

i. Applicants' Analysis

55. Applicants state that the Proposed Transaction will not have an adverse impact on vertical market power. According to Applicants, the Proposed Transaction does not involve any electric transmission facilities, other than facilities used to interconnect generating facilities with the transmission grid, or any upstream inputs to electricity products, other than facilities used to interconnect generating facilities with the transmission grid, or any upstream inputs to electricity products, and therefore presents no vertical market power concerns. Applicants state that while the Entergy Operating Companies own electric transmission facilities, those facilities are under MISO's operational control, and service is available over those facilities on an open-access basis pursuant to the MISO Tariff, which the Commission has recognized as sufficient to mitigate vertical market power by a transmission provider and its affiliates in a particular market.⁵⁷

56. Applicants further state that the Proposed Transaction will not give Applicants the ability to erect barriers to entry. Applicants maintain that the Entergy Operating Companies do not have dominant control over power plant sites for new capacity development in relevant markets.⁵⁸

57. Applicants add that Entergy Texas and Entergy Gulf States directly or indirectly own certain intrastate natural gas transportation and storage facilities. Specifically, Applicants state that Entergy Texas owns the Spindletop Gas Storage Facility (Spindletop Facility), which is located in Orange and Jefferson Counties, Texas, in the MISO market. The Spindletop Facility consists of two natural gas caverns, above ground electric compression and withdrawal facilities, leaching facilities (including brine and fresh water pipelines, disposal equipment and brine storage wells), an electrical substation, and approximately 23 miles of intrastate pipeline that connects to Entergy Texas' electric generation facilities and to other intrastate and interstate pipelines located in Southeast Texas. Applicants state that Varibus, L.L.C., a wholly-owned subsidiary of Entergy Gulf States, owns the Varibus Intrastate Pipeline, consisting of 29 miles of intrastate pipeline

⁵⁷ Application at 24.

⁵⁸ *Id.* at 25.

which supply natural gas to the Nelson and Willow Glen generating units. Applicants argue that there are abundant alternatives for generators to receive gas supplies in the region.⁵⁹

58. Applicants note that Purchasers do not control coal supplies or barges and rail cars used for the transportation of coal supplies, except rail cars leased solely to deliver fuel for their coal-fired generating plants.⁶⁰

59. Applicants conclude that the Purchasers do not have the ability to erect barriers to entry.

ii. Commission Determination

60. We find that the Proposed Transaction will not have an adverse effect on vertical competition in the MISO market. As Applicants note, the Proposed Transaction does not involve any electric transmission facilities, other than facilities used to interconnect generating facilities with the transmission grid, or any upstream inputs to electric products. Additionally, Applicants state that the transmission facilities owned by the Entergy Operating Companies are under MISO's functional control and MISO provides open access transmission service over those facilities pursuant to the MISO Tariff. While Applicants acknowledge that Energy Texas and Entergy Gulf States directly or indirectly own certain intrastate natural gas transportation and storage facilities, Applicants state that there are abundant alternatives for generators to receive gas supplies in the region. Therefore, based on Applicants' representations and because the Proposed Transaction does not result in the combination of generation with either upstream or downstream inputs, we conclude that the Proposed Transaction will not have an adverse effect on vertical competition.

c. Effect on Rates

i. Applicants' Analysis

61. Applicants assert that the Proposed Transaction will not have an adverse effect on rates for the Entergy Operating Companies' wholesale ratepayers or transmission customers taking service on transmission facilities owned by the Entergy Operating Companies. Applicants state that the only transmission facilities included in the Proposed Transaction are limited generator interconnection facilities associated with the

⁵⁹ *Id.*

⁶⁰ *Id.* at 26.

Union Power Station.⁶¹ Applicants state that those limited facilities are not integrated with the transmission grid and will not be included in the Purchasers' transmission revenue requirements. In addition, Applicants commit that Purchasers' wholesale requirements customers and transmission customers will not be affected by the Proposed Transaction. Specifically, Applicants commit that Purchasers will not seek to include transaction-related costs in excess of transaction savings in their cost-based energy and/or capacity wholesale requirements rates or transmission revenue requirements used to establish rates for Commission-jurisdictional transmission services for a period of five years after the Proposed Transaction is consummated.⁶²

62. On April 1, 2015, as amended October 8, 2015, Entergy Services, as agent for the Purchasers, filed for Commission approval under section 205 of the FPA for acquisition adjustments related to the Proposed Transaction in Docket Nos. ER15-1437-000 and ER15-1437-001. On January 14, 2016, Entergy Services filed a notice of withdrawal of the application. Entergy Services stated that the Commission approved a settlement agreement terminating the System Agreement as of August 31, 2016, and that under the terms of that settlement agreement, there will not be a post-termination bandwidth calculation under the System Agreement with respect to any cost incurred by any Entergy Operating Company after December 31, 2015.⁶³ Accordingly, Entergy Services stated that the relief requested in Docket No. ER15-1437-001 is no longer necessary.

ii. Commission Determination

63. We find that the Proposed Transaction will not have an adverse effect on rates. We accept Applicants' representation that the Proposed Transaction will not have an adverse effect on rates for the Purchasers' wholesale ratepayers or transmission customers taking service on transmission facilities owned by the Purchasers. We accept Purchasers' commitment to hold wholesale requirements customers and transmission customers harmless from costs related to the Proposed Transaction. We interpret Purchasers' hold harmless commitment to apply to all transaction-related costs, including costs related to consummating the Proposed Transaction and transition costs, incurred prior to the consummation of the Proposed Transaction, or in the five years after the Proposed Transaction's consummation.

⁶¹ Application at 27.

⁶² *Id.*

⁶³ See *Entergy Services, Inc.*, Docket No. ER15-75-000, *et al.* (Letter Order issued December 29, 2015), 153 FERC ¶ 61,347 (2015).

64. The Commission has established that, where applicants make hold harmless commitments in the context of FPA section 203 transactions, in order to recover transaction-related costs, applicants must demonstrate offsetting benefits at the time they apply to recover those costs. The Commission has clarified its procedures for recovery of such costs under FPA sections 203 and 205.⁶⁴ Consistent with those clarifications, and given the commitment by Purchasers to hold wholesale power and transmission customers harmless from transaction-related costs, if Purchasers seek to recover transaction-related costs incurred prior to the consummation of the Proposed Transaction or in the five years after the consummation of the Proposed Transaction, then Purchasers must make that filing in a new FPA section 205 docket⁶⁵ and submit that same filing as a concurrent information filing in this FPA section 203 docket.⁶⁶ The Commission will notice the new FPA section 205 filing for public comment.

65. In the FPA section 205 proceeding, the Commission will determine first, whether Purchasers have demonstrated offsetting savings, supported by sufficient evidence, to customers served under Commission jurisdictional rate schedules such that recovery of transaction-related costs is consistent with the hold harmless commitment and, second, whether the resulting new rate is just and reasonable in light of all the other factors underlying the proposed new rate. In the FPA section 205 filing, Purchasers must: (1) specifically identify the transaction-related costs they are seeking to recover, and (2) demonstrate that those costs are exceeded by the savings produced by the Proposed Transaction. Purchasers must show that the proposed rate is just and reasonable in addition to providing appropriate evidentiary support, such as reasonable documentation and estimates of the costs avoided, demonstrating that transaction-related costs have been offset by transaction-related savings in order to recover those transaction-related costs and comply with their hold harmless commitment. Those savings must be realized prior to, or concurrent with, any authorized recovery of transaction-related costs, and cannot be based on estimates or projections of future savings, but must be based on a demonstration of actual transaction-related savings realized by jurisdictional customers.⁶⁷ The Commission will consider rates not to be “just and reasonable” if they include recovery

⁶⁴ *Exelon Corp.*, 149 FERC ¶ 61,148, at PP 106-109 (2014).

⁶⁵ The Commission will not authorize the recovery of transaction-related costs in an annual informational filing under existing formula rates.

⁶⁶ Upon receipt, the Commission will not act on or notice the concurrent informational filing.

⁶⁷ *See Audit Report of National Grid, USA*, Docket No. FA09-10-000 (Feb. 11, 2011) at 55; *see also Ameren Corp.*, 140 FERC ¶ 61,034, at PP 36-37 (2012).

of costs subject to a hold harmless commitment made in connection with an FPA section 203 application and if applicants fail to show offsetting savings due to the transaction.⁶⁸

66. The Commission will be able to monitor Purchasers' hold harmless commitment under its authority under section 301(c) of the FPA⁶⁹ and the books and records provision of the Public Utility Holding Company Act of 2005.⁷⁰ Moreover, the commitment is fully enforceable based on the Commission's authority under section 203 of the FPA.

d. Effect on Regulation

i. Applicants' Analysis

67. Applicants state that the Proposed Transaction will not have any adverse effect on the effectiveness of retail or federal regulation. With respect to retail regulation, Applicants state that Purchasers require approval for the Proposed Transaction from their retail regulators and have filed for the necessary approvals. Applicants assert that, following completion of the Proposed Transaction, each Purchaser will remain under the regulatory oversight of its retail regulator in the same manner as it is currently subject to retail regulation. Applicants further assert that Purchasers will remain under the Commission's regulatory oversight in the same manner as they currently are subject to Commission regulation.

ii. Commission Determination

68. We find no evidence that either state or federal regulation will be impaired by the Proposed Transaction. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap at the federal or state level.⁷¹ We find that the Proposed Transaction will not create a regulatory gap at the federal level. As to regulation at the state level, the Commission explained in the Merger Policy Statement that it ordinarily will not set the issue of the effect of a transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the transaction. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission may set the issue for hearing and it will address such

⁶⁸ *Exelon Corp.*, 149 FERC ¶ 61,148 at P 107.

⁶⁹ 16 U.S.C. § 825(c) (2012).

⁷⁰ 42 U.S.C. § 16452 (2012).

⁷¹ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

circumstances on a case-by-case basis.⁷² No state has requested that the Commission address the effect of the Proposed Transaction on state regulation.

e. **Cross-Subsidization**

i. **Applicants' Analysis**

69. Applicants state that the Proposed Transaction falls within the scope of the safe harbor for transactions involving only non-affiliates. Specifically, Applicants assert that the Proposed Transaction involves a transfer of assets between public utilities and a non-affiliate.⁷³

70. Additionally, Applicants verify that the Proposed Transaction will not result in, now or in the future, cross-subsidization of a non-utility associate company or a pledge or encumbrance of utility assets for the benefit of an associate company, including: (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 service agreements subject to review pursuant sections 205 and 206⁷⁴ of the FPA.

ii. **Commission Determination**

71. Based on the representations in the Application, we find that the Proposed Transaction will not result in inappropriate cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company. Specifically, based on Applicants' representations in Exhibit M of the Application, we find that Applicants have demonstrated that the Proposed Transaction does not raise concerns regarding

⁷² *Id.* at 30,125.

⁷³ Application at 29.

⁷⁴ 16 U.S.C. § 824e (2012).

inappropriate cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company.

72. When a controlling interest in a public utility is acquired by another company, whether a domestic company or a foreign company, the Commission's ability to adequately protect public utility customers against inappropriate cross-subsidization may be impaired unless it has access to the acquirer's books and records. Section 301(c) of the FPA gives the Commission authority to examine the books and records of any person who controls, directly or indirectly, a jurisdictional public utility insofar as the books and records relate to transactions with or the business of such public utility. In addition, Purchasers are subject to the record-keeping and books and records requirements of PUHCA 2005. The approval of the Proposed Transaction is based on such ability to examine books and records.

V. Accounting Issues

73. As mentioned above, the Proposed Transaction contemplates four distinct purchases of Union Power Station power blocks and related assets, one by Entergy New Orleans, one by Entergy Arkansas, and two by Entergy Gulf States, with the possibility that Entergy Gulf States may succeed to the rights of Entergy New Orleans or Entergy Arkansas under limited defined circumstances. Applicants state that Purchasers will acquire the Union Power facilities for an aggregate purchase price of \$948 million, subject to adjustments.

74. Purchasers provided proposed accounting entries for the Proposed Transaction as an attachment to the March 17, 2015 application, as amended on September 18, 2015. Purchasers state that the Union Power Station was first devoted to public service at the date it first began commercial service in 2003, and represent that they have reconstructed the original cost of the facilities and additions based on the available records and have recalculated the accumulated depreciation based on the reconstructed original cost.

75. Purchasers' proposed accounting entries clear the respective purchase of the Union Power facilities through Account 102, Electric Plant Purchased or Sold. Purchasers' proposed accounting entries record the estimated original cost in Account 101, Electric Plant in Service and related accumulated depreciation of the acquired assets in Account 108, Accumulated Provision for Depreciation of Electric Utility Plant on their respective books. Additionally, Purchasers' proposed accounting entries collectively record an aggregate acquisition adjustment of approximately \$69 million in Account 114, Electric

Plant Acquisition Adjustments on their respective books, for the amount paid in excess of the estimated depreciated original cost of the assets purchased.⁷⁵

76. Purchasers' proposed accounting for the acquired assets is found to be in compliance with Electric Plant Instruction No. 5, Electric Plant Purchased or Sold, and the instructions for Account 102.⁷⁶

VI. Other Considerations

77. 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.⁷⁷ To the extent that a transaction authorized under FPA section 203 results in a change in status, sellers that have market-based rates are advised that they must comply with the requirements of Order No. 652.

78. Information and/or systems connected to the bulk system involved in the Proposed Transaction may be subject to reliability and cybersecurity standards approved by the Commission pursuant to FPA section 215.⁷⁸ Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information database, and operating systems. If affiliates, personnel or investors are not authorized for access to such information and/or systems connected to the bulk power system, a public utility is obligated to take the appropriate measures to deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, etc., must comply with all applicable reliability and cybersecurity standards. The Commission, North America Electric Reliability Corporation or the relevant regional entity may audit compliance with reliability and cybersecurity standards.

⁷⁵ On April 1, 2015, as supplemented on October 8, 2015, ESI, acting as agent for Energy Arkansas, Entergy Gulf States and Entergy New Orleans filed for accounting approval in Docket No. AC15-70 to record the amortization expenses related to the acquisition in Account No. 406, Amortization of Electric Plant Acquisition Adjustments. Approval for the proposed accounting is pending in Docket No. AC15-70.

⁷⁶ 18 C.F.R. pt. 101 (2015).

⁷⁷ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

⁷⁸ 16 U.S.C. § 824o (2012).

The Commission orders:

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

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

(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 other matter whatsoever now pending or which may come before the Commission.

(D) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

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

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

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

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

(I) If Purchasers seek to recover transaction-related costs through their transmission or wholesale requirements rates, they must make a new FPA section 205 filing and submit concurrently an informational filing in the instant FPA section 203 docket. In the FPA section 205 filing, Purchasers must: (1) specifically identify the

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.