ORDER AUTHORIZING MERGER OF JURISDICTIONAL FACILITIES AND
ACQUISITION OF SECURITIES

(issued April 4, 2018)

1. On November 22, 2017, pursuant to sections 203(a)(1)(A) and 203(a)(2) of the
   Federal Power Act (FPA)\(^1\) and part 33 of the Commission’s regulations,\(^2\) Dynegy Inc.
   (Dynegy) and its public utility subsidiaries and Vistra Energy Corp. (Vistra) (together,
   Applicants) filed an application (Application) requesting authorization for a transaction
   whereby Dynegy will merge with and into Vistra, with Vistra being the surviving
   corporation (Proposed Transaction).

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2. We have reviewed the Proposed Transaction under the Commission’s Merger Policy Statement.\(^3\) As discussed below, we authorize the Proposed Transaction as consistent with the public interest.

I. **Background**

A. **Description of Applicants**

1. **Dynegy**

3. Applicants state that Dynegy is a utility holding company. Through its public utility subsidiaries,\(^4\) Dynegy controls approximately 27,000 megawatts (MW) of electric generation and produces and sells electric energy, capacity, and ancillary services in U.S. markets. Applicants state that Dynegy does not own or control any traditional franchised utilities with captive customers. Applicants note that, other than its interest in Electric Energy, Inc. (Electric Energy),\(^5\) Dynegy does not own or control any transmission facilities other than facilities interconnecting its generation facilities to the grid.\(^6\)


\(^4\) Application at Ex. B-1.

\(^5\) Dynegy indirectly owns an 80 percent equity stake in Electric Energy. Electric Energy owns six parallel generation tie lines, which are approximately eight miles long. Because the lines could be used by an unaffiliated third party for transmission service, the Commission has required Electric Energy to file an open access transmission tariff (OATT). Id. at 3.

\(^6\) Id. at 2.
2. **Vistra and its Affiliates**

   a. **Vistra**

4. According to Applicants, Vistra is the ultimate parent company of, and conducts its principal operations through, Vistra Asset Company, LLC (Vistra Asset) and Vistra Asset’s subsidiaries. TXU Energy Retail Company LLC, a wholly owned subsidiary of Vistra Asset, operates as a competitive retail electric provider solely in Electric Reliability Council of Texas (ERCOT).\(^7\)

5. Applicants state that Vistra has approximately 18,000 MW of generation capacity located in ERCOT (Vistra Generation Facilities). Vistra has subsidiaries that are involved with inputs to electricity generation. For example, Forney Pipeline, LLC owns an intrastate pipeline segment located in Kaufman County, Texas, for supplying gas to certain Vistra Generation Facilities. In addition, Luminant Mining Company LLC owns and operates several lignite coal mines that are operated solely to supply coal to certain of the Vistra Generation Facilities in ERCOT.\(^8\)

   b. **Apollo Management Holdings, L.P.**

6. Applicants assert that certain investment funds that are managed by affiliates of Apollo Management Holdings, L.P. (together with Apollo Global Management, LLC and its other subsidiaries, Apollo) own approximately 12.4 percent of the outstanding voting shares of Vistra. Applicants state that Apollo does not own or control, directly or indirectly, any relevant generation assets and is no longer a public utility holding company.\(^9\)

   c. **Brookfield Asset Management, Inc.**

7. Applicants state that Brookfield Asset Management, Inc. (Brookfield) is the ultimate parent of Brookfield Asset Management Private Institutional Capital Adviser (Canada), L.P., which owns or controls the right to vote approximately 15.5 percent of

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\(^7\) *Id.* at 3-5.

\(^8\) *Id.*

\(^9\) *Id.* at 6 (citing *inter alia* Apollo Management VI, L.P., Notice of Material Change in Facts and Termination of Holding Company Status and Waiver, Docket No. PH16-11-000, *et al.* (filed Aug. 9, 2016)).
the outstanding voting shares of Vistra, and of entities authorized to make Commission-
jurisdictional sales of energy, capacity, and ancillary services at market-based rates.\textsuperscript{10}

8. Applicants note that Brookfield is affiliated with a variety of inputs to generation, including Lodi Gas Storage LLC, which owns and operates an intrastate natural gas storage facility; Rockpoint Gas Storage Partners L.P., which owns and operates two intrastate natural gas storage facilities; Tres Palacios Gas Storage LLC, which owns and operates an interstate natural gas storage facility; and Natural Gas Pipeline of America (NGPL), in which Brookfield holds an upstream minority interest. Applicants also explain that Brookfield is affiliated with Smoky Mountain Transmission, LLC (Smoky Mountain), which owns 86 miles of transmission lines connected to the Duke Energy Carolinas, LLC transmission system and to the Tennessee Valley Authority transmission system; Texas Competitive Electric Holdings, an electric distribution company located in ERCOT; and the Wind Energy Transmission Texas, LLC transmission project, also located in ERCOT.\textsuperscript{11}

9. Applicants assert that neither Apollo nor Brookfield, or any investment funds or entities controlled by them, owns 10 percent or more of the outstanding voting securities of any entity that owns or controls, or otherwise controls, directly or indirectly, any U.S. electric generation, transmission or distribution facilities, any natural gas storage, transportation or distribution facilities, or any physical coal supply sources, or has ownership of, or control over access to, facilities for the transportation of coal supplies, or other essential inputs to electric generation in the U.S., except as discussed above.\textsuperscript{12}

\begin{itemize}
\item[d. \textit{Oaktree Capital Group LLC}]\vspace{0.1cm}
\end{itemize}

10. Applicants state that Oaktree Capital Group LLC (Oaktree) is a global investment management firm. Oaktree currently owns approximately 11.8 percent of the outstanding voting shares of Vistra and approximately 6.4 percent of the outstanding voting shares of Dynegy. However, prior to closing the Proposed Transaction, Applicants represent that Oaktree will reduce its ownership or control of the combined company by selling the number of its shares of Vistra’s common stock and/or Dynegy’s common stock such that it will own less than 10 percent of the outstanding shares of the combined company’s common stock following consummation of the Proposed Transaction. Thus, Applicants state that, as of the closing of the Proposed Transaction, Oaktree will own and control less than 10 percent of the outstanding voting shares of Vistra’s common stock.

\textsuperscript{10} \textit{Id.}\vspace{0.1cm}

\textsuperscript{11} \textit{Id.} at 6 n.15.\vspace{0.1cm}

\textsuperscript{12} \textit{Id.} at 7, Ex. B-2.
Accordingly, Applicants explain that they have excluded Oaktree’s generation holdings from the Competitive Analysis Screens they have conducted in support of this Application.¹³

**B. Proposed Transaction**

11. Applicants explain that the terms and conditions of the Proposed Transaction are set forth in the Merger Agreement and that, under the terms of the Merger Agreement and at the effective time of the Proposed Transaction, each eligible share of Dynegy common stock will automatically be converted into the right to receive 0.652 shares of Vistra common stock. As a result of the Proposed Transaction, all eligible Dynegy shares converted into shares of Vistra common stock will cease to exist in accordance with the terms of the Merger Agreement.¹⁴

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


13. On February 5, 2018, Applicants filed a supplement (Supplement) to their Application. Notice of the Supplement was published in the *Federal Register*, 83 Fed. Reg. 6548 (2018), with interventions and protests due on or before February 26, 2018. None were filed.

**III. Discussion**

**A. Procedural Matters**

14. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2017), the timely, unopposed motions to intervene serve to make the entities that filed them parties to the proceeding.

¹³ *Id.* at 7.

¹⁴ *Id.* at 8.


¹⁶ Dynegy, Inc., Motion for Leave to Answer and Answer (filed Feb. 5, 2018) (Applicants Answer).
15. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2017), 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. **FPA Section 203 Standard of Review**

16. 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. 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. FPA section 203(a)(4) also requires the Commission to find that the proposed transaction “will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.” 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.

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17 16 U.S.C. § 824b(a)(4) (2012). Approval of the Proposed Transaction is also required by other regulatory agencies pursuant to their respective statutory authorities before the Proposed Transaction may be consummated. See Application at Ex. L. Our findings under FPA section 203 do not affect those agencies’ evaluation of the Proposed Transaction pursuant to their respective statutory authorities.


2. Analysis of the Proposed Transaction

a. Effect on Horizontal Competition

i. Applicants’ Analysis

17. Applicants state that the Proposed Transaction will not have an adverse effect on horizontal competition. Applicants note that there is no overlap in generation capacity between Dynegy and Vistra subject to Commission jurisdiction because Vistra’s generation and related transmission is located in the ERCOT market. However, when taking into account generation capacity owned by Brookfield, Applicants identify five markets where Dynegy, Vistra, and their affiliates will have overlapping generation capacity: (1) California Independent System Operator Corporation (CAISO); (2) ISO New England, Inc. (ISO-NE); (3) Midcontinent Independent System Operator, Inc. (MISO); (4) New York Independent System Operator, Inc. (NYISO); and (5) PJM. Accordingly, Applicants analyze these markets, including relevant submarkets, as the relevant geographic markets.\(^\text{21}\)

18. For each market except CAISO, Applicants analyze the Proposed Transaction’s effect on competition with respect to energy, capacity, and certain ancillary services. Applicants specifically performed Delivered Price Tests, also referred to as an Appendix A analysis or Competitive Analysis Screen,\(^\text{22}\) and analyzed the Proposed Transaction using both the Available Economic Capacity (AEC) and Economic Capacity

\(^{21}\) Application at 9-10.

\(^{22}\) The Delivered Price Test, or Competitive Analysis Screen, is used to determine the pre- and post-transaction market shares from which the change in market concentration, or the Herfindahl-Hirschman Index (HHI), can be derived. 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, 138 FERC ¶ 61,109 (2012) (affirming the Commission’s use of the thresholds adopted in the Merger Policy Statement).
(EC) easures. Applicants also performed plus and minus 10 percent price sensitivities.

(a) CAISO

19. Applicants assert that the Proposed Transaction will result in a de minimis overlap of Applicants’ generation capacity in the CAISO market. Applicants explain that, in CAISO, of the approximately 70,000 MW of installed generation capacity, Vistra is affiliated with 886 MW of generation and Dynegy owns 1,185 MW of generation, which will result in Applicants obtaining a 2.96 percent market share following the Proposed Transaction. When taking into account long-term commitments of Vistra affiliates, Applicants represent that they will have an installed capacity market share of 2.16 percent.

(b) ISO-NE

20. Based on the results of the Delivered Price Test, Applicants believe that the Proposed Transaction does not raise any competitive concerns in the ISO-NE energy market. Applicants state that, under the EC measure, the Proposed Transaction would result in HHI increases across all season/load periods ranging from 30 to 66 points in an unconcentrated market. Under the AEC measure, Applicants state that the Proposed Transaction would result in HHI increases ranging from 40 to 90 points in an

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23 Each supplier’s “Economic Capacity” is the amount of capacity that could compete in the relevant geographic 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.

24 A sensitivity analysis is designed to test whether the results of the model change significantly due to small changes in key parameters of the model. Results that are not sensitive to changes in key parameters of the model are considered “robust.” For example, the results of the Delivered Price Test can be affected by changes in the assumed market price or input prices such as fuel costs. Duke Energy Corp., 113 FERC ¶ 61,297, at P 26 n.9 (2005) (citing Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,891-31,8992).

unconcentrated market. Applicants explain that the price sensitivity analyses are not materially different.\textsuperscript{26}

21. Applicants also contend that the Proposed Transaction does not raise any competitive concerns in the ISO-NE Forward Capacity Market, as conducted through Forward Capacity Auctions. Applicants state that, for the Forward Capacity Auction for the 2020-2021 capacity obligation period, ISO-NE modeled Northern New England (NNE) as an export zone and Southeast New England (SENE) as an import zone, as well as Rest-of-Pool. Applicants note that there is no overlap in the SENE capacity zone because Dynegy is the only Applicant with affiliated generation in that capacity zone. Based on the approximately 40,000 MW of qualified capacity in the Forward Capacity Auction for 2020-2021, Applicants calculate that, after consummation of the Proposed Transaction, they would be affiliated with 12.1 percent of qualified capacity in the Rest-of-Pool capacity zone and approximately 11 percent of qualified capacity in the NNE capacity zone, representing HHI changes of 64 points and 60 points, respectively.\textsuperscript{27}

22. Applicants assert that, in the most recent forward reserve market auction, supply offered for the 10-Minute Non-Spinning Reserves in Rest of System was 2.3 times the supply cleared. In addition, the supply offered for 30-Minute Operating Reserves in Rest of System was 1.8 times the supply cleared. Applicants note that the NEMA/Boston reserve zone cleared at a higher price, but none of Applicants’ generation is located in this zone. With respect to the regulation market, Applicants explain that, on average, the system has the capability to serve 10 times the regulation requirement without the largest regulation supplier. Based on the foregoing, Applicants believe that the Proposed Transaction raises no concerns in ISO-NE ancillary services markets.\textsuperscript{28}

\textbf{(c) MISO}

23. Based on the results of the Delivered Price Test, Applicants explain that the Proposed Transaction will not adversely affect competition in the MISO energy market. Under the EC measure, Applicants calculate that the Proposed Transaction will cause HHI changes ranging from 0 to 1 point across season/load periods in an unconcentrated market. Similarly, under the AEC measure, Applicants assert that the Proposed

\textsuperscript{26} Id., Ex. J at 5, 21-23.

\textsuperscript{27} Id., Ex. J at 23-24.

\textsuperscript{28} Id., Ex. J at 25-26.
Transaction will cause HHI changes ranging from 3 to 11 points across season/load periods in an unconcentrated market.29

24. In addition, Applicants submit that the Proposed Transaction will not adversely affect competition in the MISO Planning Reserve Auction Zone 4 where Dynegy’s generation capacity is located. Applicants explain that the only generation affiliated with Vistra in Zone 4 is California Ridge Wind, a 200 MW wind farm that is fully committed under long-term contract. Applicants state that the MISO System Wind Capacity Credit for the 2017-2018 Planning Year is 15.6 percent, which would credit California Ridge Wind with only 31 MW of capacity. Applicants argue that approximately 9,900 MW were offered in Zone 4 for the auction, and the approximately 31 MW of California Ridge Wind capacity represents approximately 0.3 percent of capacity offered, which Applicants contend is de minimis.30

(d) NYISO

25. Based on the results of the Delivered Price Test, Applicants contend that the Proposed Transaction does not raise any concerns in the NYISO energy market. Applicants state that, under the EC measure, the Proposed Transaction would result in HHI changes ranging from 10 to 20 points in a market that is unconcentrated across season/load periods. Under the AEC measure, the Proposed Transaction would result in HHI changes ranging from 33 to 61 points in an unconcentrated market. Applicants argue that the results of the price sensitivities are not materially different.31

26. Applicants also assert that the Proposed Transaction raises no concerns in the NYISO capacity market. Applicants note that capacity auctions currently include New York City, Long Island, zones G-J, and the ISO-wide New York Control Area (NYCA). Applicants explain that Vistra affiliates own about 20 MW of generation in capacity zones G through J, but the generation owned by Dynegy is only located in the NYCA zone. Based on NYISO Gold Book ratings, Applicants calculate that the Proposed

29 Supplement at 4-5.

30 Application, Ex. J at n.15. Applicants analyzed only the energy and capacity products in MISO.

Transaction will cause Applicants to hold a 4.6 percent market share, representing a 10 point increase in the HHI.\textsuperscript{32}

27. Applicants explain that NYISO operates ancillary services markets for regulation, spinning reserves, and non-spinning reserves. Applicants rely on a report of the NYISO market monitor and state that the amount of offers for ancillary services products normally far exceeds their requirements, which contributes to the competitiveness of the markets for these products. For example, the total amount of 10-minute spinning and non-spinning reserve capacity offered in Eastern New York averaged more than 4,000 MW, compared to the 1,200 MW requirement of 10-minute operating reserves for this region. Applicants conclude that the relative oversupply of ancillary services products indicates that the Proposed Transaction will not adversely affect competition in NYISO ancillary services markets.\textsuperscript{33}

\textbf{(e) \textsc{PJM}}

28. Based on the results of the Delivered Price Test, Applicants conclude that the Proposed Transaction does not raise any competitive concerns in the PJM energy market or any PJM submarkets. With respect to the RTO-wide market, Applicants state that, under the EC measure, the Proposed Transaction will cause HHI increases ranging from 2 to 6 points in an unconcentrated market. Under the AEC measure, Applicants determine that the Proposed Transaction would result in HHI increases ranging from 8 to 17 points in an unconcentrated market. Applicants argue that the results of the price sensitivities are not materially different.\textsuperscript{34}

29. Applicants state that the results of the Delivered Price Test for the 5004/5005 and AP South submarkets within PJM also indicate that the Proposed Transaction will not adversely affect competition in those energy markets. With respect to the 5004/5005


34 \textit{Id.}, Ex. J at 30-32.
market, Applicants state that the Proposed Transaction will result in a maximum HHI increase of 7 points under the EC measure and 16 points under the AEC measure. Regarding the AP South submarket, Applicants estimate that the Proposed Transaction will result in a maximum HHI increase of 5 points under the EC measure and 15 points under the AEC measure. Applicants argue that the results of the price sensitivities for both submarkets are not materially different.35

30. Applicants represent that the Proposed Transaction raises no concerns in the PJM capacity market. Applicants calculate that their post-transaction market share of unforced capacity in the RTO-wide market will be approximately 6.9 percent, with a corresponding HHI change of 6 points. In addition, Applicants state that they have overlapping generation in the Mid-Atlantic Area Council (MAAC) and PPL Locational Deliverability Areas, which cleared at a separate price from the RTO-wide market in the most recent Reliability Pricing Model auction. Applicants state that they will amass approximately 3 percent and 7 percent of unforced capacity in the MAAC and PPL Locational Deliverability Areas, respectively, with corresponding HHI changes of 4 and 6 points. Applicants argue that these small changes in market concentration indicate a lack of competitive concern.36

31. Applicants explain that PJM operates ancillary services markets for regulation, synchronized reserves, and supplemental reserves. Applicants note that reports by the PJM market monitor indicate that participant behavior and market performance in PJM’s regulation market were competitive in 2016. In addition, Applicants state that the ratio of hourly eligible supply of regulation to regulation demand was 1.31 for on-peak hours and 1.79 for off-peak hours, indicating substantial excess supply of regulation.37

32. Likewise, Applicants rely on reports by the PJM market monitor, which conclude that participant behavior and market performance have been deemed competitive for Tier 2 synchronized reserves. Specifically, the amount of offered and eligible synchronized reserves was 21,090 MW in the RTO Reserve Zone, of which 6,921 MW was available in the Mid-Atlantic Dominion Subzone, which was greater than the 1,450 MW of demand in the RTO Reserve Zone and Mid-Atlantic Dominion Subzone. PJM also operates a Day-Ahead Scheduling Reserve market to acquire its supplemental (30-minute) reserve requirements. Applicants assert that the average available hourly Day-Ahead Scheduling


36 Id., Ex. J at 33-34.

37 Id., Ex. J at 34-35.
Reserve was 34,776 MW, relative to average purchased MW of 4,997 MW. As such, Applicants believe there are no competitive concerns with respect to ancillary services.\(^\text{38}\)

### ii. Protest and Answer

33. Public Citizen argues that Applicants’ Competitive Analysis Screen is deficient because Applicants failed to properly account for generation owned by Dynegy’s major shareholder, Energy Capital Partners (ECP). Public Citizen states that ECP currently owns 14.88 percent of Dynegy’s stock, and ECP has applied for authorization to acquire Calpine Corp. Therefore, Public Citizen concludes that the generation assets of Dynegy’s owner, ECP, including assets as part of ECP’s proposed acquisition of Calpine Corp., must be included in the horizontal Competitive Analysis Screen.\(^\text{39}\)

34. Applicants, in their answer, argue there is no merit to Public Citizen’s protest and no basis for analyzing the competitive effects of the Proposed Transaction as though Vistra is affiliated with either ECP or Calpine. Applicants explain that ECP divested its shares in Dynegy and now owns 9.9 percent of Dynegy. In addition, Applicants explain that ECP will own less than 10 percent of the new post-transaction combined Vistra entity. In particular, Applicants believe that, considering ECP’s current ownership percentage of Dynegy common stock, ECP’s post-transaction ownership of the combined Vistra entity would be approximately 1.7 percent on a fully diluted basis. Applicants note that this is consistent with Commission thresholds.\(^\text{40}\)

### iii. Commission Determination

35. In analyzing whether a proposed transaction will adversely affect horizontal competition, the Commission examines the effects on concentration in the generation markets and whether the proposed transaction otherwise creates the incentive and ability to engage in behavior harmful to competition, such as withholding of generation.\(^\text{41}\)

36. Based on Applicants’ representations, and the results of Applicants’ Delivered Price Tests, we find that the Proposed Transaction will not have an adverse effect on horizontal competition in any of the markets or submarkets identified above. The results of Applicants’ Delivered Price Tests indicate that the Proposed Transaction will result in

\(^{38}\) Id., Ex. J at 35-36.

\(^{39}\) Public Citizen Protest at 1-2.

\(^{40}\) Applicants Answer at 3-4.

increases in market concentration that fall within the Commission’s thresholds. Additionally, Applicants’ representations regarding capacity and ancillary services markets indicate that the Proposed Transaction will not adversely affect competition in those markets.

37. We disagree with Public Citizen’s argument that Applicants are required to include either ECP or Calpine assets in their Competitive Analysis Screen. The Supplemental Policy Statement explains that:

[T]he Commission’s general policy . . . will be to presume that a transfer of less than 10 percent of a public utility’s holdings is not a transfer of control if: (1) after the transaction, the acquirer and its affiliates and associate companies, directly or indirectly, in aggregate will own less than 10 percent of such public utility; and (2) the facts and circumstances do not indicate that such companies would be able to directly or indirectly exercise a controlling influence over the management or policies of the public utility.

As Applicants note, on January 9, 2018, ECP divested its shares of Dynegy common stock and now owns 9.9 percent of Dynegy. As such, under the Commission’s regulations, Dynegy will not be affiliated with ECP, nor under its control, and we find that Applicants are not required to include either ECP or Calpine assets in their Competitive Analysis Screen.

b. Effect on Vertical Competition

i. Applicants’ Analysis

38. Applicants contend that the Proposed Transaction does not present any vertical market power concerns. Applicants state that the only transmission facilities owned or controlled by Applicants in Commission-jurisdictional markets are limited facilities necessary to interconnect the relevant generation to the grid, with two exceptions. These two exceptions, Smoky Mountain and Electric Energy, provide transmission service pursuant to Commission-approved OATTs.

39. Applicants further state that there are no issues related to fuel supplies or fuel delivery systems in Commission-jurisdictional markets. Applicants explain that affiliates


44 Application, Ex. J at 35-36.
of Brookfield have ownership interests in certain gas storage projects and NGPL, which has operations geographically proximate to markets where Applicants control generation. Applicants represent that NGPL does not deliver natural gas into any states in ISO-NE or NYISO, and the only states within PJM where NGPL delivers gas are Illinois and Indiana. Applicants argue that the transportation markets into the Midwest Region, which includes Illinois and Indiana, are served by multiple pipelines in addition to NGPL. Applicants determine that the market is not highly concentrated, as measured by pipeline capacity into the region.45

40. Additionally, Applicants state that there are no concerns related to barriers to entry. Applicants note that, according to ISO-NE, there is about 12,000 MW of active generation under study or construction in the interconnection queue as of August 2017. According to Applicants, NYISO has about 25,000 MW of generation in its interconnection queue, and there is more than 60,000 MW of generation in the active PJM interconnection queue, including 19,000 MW under construction.46

ii. Commission Determination

41. In analyzing whether a proposed transaction presents vertical market power concerns, the Commission considers the vertical combination of upstream inputs, such as transmission or natural gas, with downstream generating capacity. 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 an entity’s ability or incentive to exercise vertical market power in wholesale electricity markets. For example, by denying rival entities access to inputs or by raising their input costs, an entity created by a transaction could impede entry of new competitors or inhibit existing competitors’ ability to undercut an attempted price increase in the downstream wholesale electricity market.47

42. Based on Applicants’ representations, we find that the Proposed Transaction will not have an adverse effect on vertical competition. As described above, the only transmission facilities owned by Applicants or their affiliates are limited interconnection facilities, except for two affiliated entities that have OATTs on file with the Commission for their transmission facilities. Further, we find that neither Applicants nor their affiliates own or control inputs to electricity production such that Applicants’ affiliates would have the ability and incentive to limit access to such inputs as a result of the

Proposed Transaction. We further agree that the Proposed Transaction will not limit the ability to develop new sites for electric generation that could raise barriers to entry in any of the relevant geographic markets.

c. **Effect on Rates**

   i. **Applicants’ Analysis**

   43. Applicants state that the Proposed Transaction will not have an adverse impact on wholesale ratepayers or transmission customers. Applicants assert that none of Applicants or their affiliates currently has any wholesale requirements customers or transmission customers. While most of Applicants’ public utility affiliates have market-based rate authority and make their sales at negotiated rates, certain subsidiaries make sales at cost-based rates or under other schedules on file with the Commission. Applicants state that, although the Proposed Transaction will have no effect on the rates established under cost-based contracts, they nevertheless commit, on behalf of themselves and their public utility subsidiaries, to hold their cost-based rate customers harmless from Proposed Transaction-related costs for a period of five years absent a filing under FPA section 205 demonstrating that Proposed Transaction-related costs exceed related savings. With regard to transmission service provided by Applicants or their affiliates, Applicants state that such transmission service would be provided pursuant to Commission-approved OATTs or transmission service agreements with fixed cost-based rates rather than formula rates, and any proposed rate change would require Commission review and acceptance. Nonetheless, Vistra commits that neither it nor any of its affiliates will seek to recover any transaction or transition costs attributable to the Proposed Transaction through transmission rates for a period of five years, absent a filing under FPA section 205 demonstrating that transaction-related costs exceed related savings.

   ii. **Commission Determination**

   44. Based on Applicants’ representations and hold harmless commitment, we find that the Proposed Transaction will not have an adverse effect on rates. As noted by Applicants, any transmission service provided to third parties by Applicants or their affiliates currently has any wholesale requirements customers or transmission customers. While most of Applicants’ public utility affiliates have market-based rate authority and make their sales at negotiated rates, certain subsidiaries make sales at cost-based rates or under other schedules on file with the Commission. Applicants state that, although the Proposed Transaction will have no effect on the rates established under cost-based contracts, they nevertheless commit, on behalf of themselves and their public utility subsidiaries, to hold their cost-based rate customers harmless from Proposed Transaction-related costs for a period of five years absent a filing under FPA section 205 demonstrating that Proposed Transaction-related costs exceed related savings. With regard to transmission service provided by Applicants or their affiliates, Applicants state that such transmission service would be provided pursuant to Commission-approved OATTs or transmission service agreements with fixed cost-based rates rather than formula rates, and any proposed rate change would require Commission review and acceptance. Nonetheless, Vistra commits that neither it nor any of its affiliates will seek to recover any transaction or transition costs attributable to the Proposed Transaction through transmission rates for a period of five years, absent a filing under FPA section 205 demonstrating that transaction-related costs exceed related savings.

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48 Although Applicants do not identify what “negotiated rates” they are referring to, we assume that they are referring to their sales made pursuant to their market-based rate authority.


50 Application at 19-20.
affiliates is provided under Commission-approved OATTs pursuant to fixed cost-based rates that cannot be altered without Commission approval.

45. We accept Applicants’ commitment to hold cost-based rate and transmission customers harmless from costs related to the Proposed Transaction. Although Applicants state that they will not seek to recover costs related to the Proposed Transaction “for a period of five years absent a filing under FPA Section 205 demonstrating that merger-related costs exceed related savings,” we interpret their commitment to mean that Applicants will not seek to recover costs related to the Proposed Transaction for a period of five years absent a filing under FPA section 205 demonstrating that transaction-related costs are exceeded by transaction-related savings. We also interpret Applicants’ hold harmless commitment to apply to all transaction-related costs, including costs related to consummating the Proposed Transaction incurred prior to the consummation of the Proposed Transaction or in the five years after the Proposed Transaction’s consummation.52

46. 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 sections 203 and 205 of the FPA.53 Consistent with those clarifications, and given the commitment by Applicants to hold cost-based rate and transmission customers harmless from transaction-related costs, if Applicants 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 Applicants must make that filing in a new FPA section 205 docket54 and submit that same filing as a concurrent informational filing in this FPA section 203 docket.55 The Commission will notice the new FPA section 205 filing for public comment.

47. In the FPA section 205 proceeding, the Commission will determine, first, whether Applicants have demonstrated offsetting savings, supported by sufficient evidence, to

51 Id. at 20.


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

55 Upon receipt, the Commission will not act on or notice the concurrent informational filing.
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, Applicants 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. Applicants must show that the proposed rate is just and reasonable in addition to providing appropriate evidentiary support, such as reasonable documentation and estimates of the costs avoided, demonstrating that transaction-related costs have been offset by transaction-related savings in order to recover those transaction-related costs and comply with its hold harmless commitment. Those savings must be realized prior to, or concurrent with, any authorized recovery of transaction-related costs, and cannot be based on estimates or projections of future savings, but must be based on a demonstration of actual transaction-related savings realized by jurisdictional customers. The Commission will consider rates not to be “just and reasonable” if they include recovery of costs subject to a hold harmless commitment made in connection with an FPA section 203 application and if applicants fail to show offsetting savings due to the transaction.

The Commission will be able to monitor Applicants’ hold harmless commitment under its authority under section 301(c) of the FPA and the books and records provision of the Public Utility Holding Company Act of 2005 (PUHCA 2005), if applicable. 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**

Applicants state that the Proposed Transaction will not have an adverse effect on the effectiveness of federal or state regulation. According to Applicants, the Proposed Transaction will have no effect on the jurisdiction of either the Commission or any state

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


public utility commission over any of the Applicants or their affiliates, each of which will continue to be regulated by the Commission and by state commissions after the closing of the Proposed Transaction. 60

ii. Commission Determination

50. The Commission’s review of a transaction’s effect on regulation focuses on ensuring that it does not result in a regulatory gap. 61 As to whether a proposed transaction will have an effect on state regulation, the Commission explained in the Merger Policy Statement that it ordinarily will not set the issue of the effect of a proposed transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the proposed 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 circumstances on a case-by-case basis. 62 Based on Applicants’ representations, we find no evidence that either state or federal regulation will be impaired by the Proposed Transaction. Finally, we note that no party alleges that regulation, state or federal, would be impaired by the Proposed Transaction, and no state commission has requested that the Commission address the issue of the effect on state regulation.

e. Cross-Subsidization

i. Applicants’ Analysis

51. Applicants state that, because none of the Applicants or their affiliates owns or controls a Commission-jurisdictional traditional public utility that has captive customers, there can be no cross-subsidization concern from the Proposed Transaction. As such, Applicants explain that they are not required by 18 C.F.R. § 33.2(j)(1)(i) to list any existing pledges and encumbrances in Exhibit M. 63

52. Nevertheless, Applicants verify that the Proposed Transaction will not now, or in the future, result in: (1) any 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) any new

60 Application at 20-21.


62 Id.

63 Application at 22.
issuances of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) any new affiliate contracts between a non-utility associate company and a traditional public utility associate company that has captive customers or that own or provide transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the Federal Power Act.  

ii. Commission Determination

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

3. Other Considerations

54. Information and/or systems connected to the bulk system involved in this transaction may be subject to reliability and cybersecurity 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 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 American Electric Reliability Corporation, or the relevant regional entity may audit compliance with reliability and cybersecurity standards.

55. 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. The approval of the Proposed Transaction is based on such examination

64 Id. at Ex. M.

ability. In addition, applicants subject to PUHCA 2005 are subject to the record-keeping and books and records requirements of PUHCA 2005.

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

The Commission orders:

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

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

(C) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever not pending or 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) If Applicants seek to recover transaction-related costs through cost-based and transmission rates, they must make a new FPA section 205 filing and submit concurrently an informational filing in the instant FPA section 203 docket. In the FPA section 203 filing, Applicants must: (1) specifically identify the transaction-related costs they are seeking to recover; and (2) demonstrate that those costs are exceeded by the savings produced by the Proposed Transaction.

(I) Applicants shall notify the Commission of Oaktree’s ownership interest in Vistra as of the closing of the Proposed Transaction within 10 days of the date on which the Proposed Transaction is consummated.

By the Commission.

( SEAL )

Nathaniel J. Davis, Sr.,
Deputy Secretary.