

142 FERC ¶ 61,178
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

MACH Gen, LLC
New Harquahala Generating Company, LLC
Saddle Mountain Power, LLC

Docket Nos. EC13-11-000

New Harquahala Generating Company, LLC	ER10-1777-004
Sundevil Power Holdings, LLC	ER10-2983-003
Castleton Energy Services, LLC	ER10-2980-003
Castleton Power, LLC	ER10-2988-004
Thompson River Power, LLC	ER10-3310-003

ORDER DENYING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued March 7, 2013)

1. On October 12, 2012 MACH Gen, LLC (MACH Gen), New Harquahala Generating Company, LLC (New Harquahala), and Saddle Mountain Power, LLC (Saddle Mountain) (collectively, Applicants) filed an application pursuant to section 203(a)(1) of the Federal Power Act (FPA)¹ for MACH Gen to sell all of its outstanding membership interests in New Harquahala to Saddle Mountain (Proposed Transaction).² The Commission has reviewed the Proposed Transaction under the Commission's Merger Policy Statement.³ As discussed below, we will deny the

¹ 16 U.S.C. § 824b(a)(1) (2006).

² *Application for Authorization Under Section 203 of the Federal Power Act to Dispose of Jurisdictional Facilities and Request for Confidential Treatment*, Docket No. EC13-11-000 filed October 12, 2012 (Application).

³ *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. ¶ 31,044 (1996) (continued...)

Application as Applicants have not demonstrated that the Proposed Transaction will not have an adverse effect on competition.

2. Pursuant to section 205 of the FPA, Sundevil Power Holdings, LLC, Castleton Energy Services, LLC, Castleton Power, LLC, Thompson River Power, LLC, and New Harquahala also made a joint concurrent change in status filing in advance of the consummation of the Proposed Transaction. Because we are denying approval of the Proposed Transaction here, we find that the change of status filing is moot.

I. Background

A. Description of the Parties

1. New Harquahala

3. New Harquahala is a Delaware limited liability company and wholly-owned subsidiary of MACH Gen. New Harquahala owns the Harquahala Facility, a natural gas-fired, combined-cycle electric generating plant with a summer rating of approximately 1,054 megawatts (MW). The Harquahala Facility is located in the balancing authority area of Arizona Public Service Company (APS). The Harquahala Facility connects to the APS transmission system via a 22-mile, 500 kilovolt (kV) generation tie-line interconnection facility between the facility and the Hassayampa Switchyard. New Harquahala is an exempt wholesale generator (EWG) under the Public Utility Holding Company Act of 2005 (PUHCA),⁴ and is authorized by the Commission to charge market-based rates.⁵

2. MACH Gen

4. MACH Gen is a holding company that owns 100 percent of the interests in three generating companies: New Harquahala, New Athens Generating Company, LLC and

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).

⁴ *See New Harquahala Generating Co., LLC*, 103 FERC ¶ 62,146 (2003).

⁵ *See New Harquahala Generating Co., LLC*, Docket No. ER03-721-015 (Apr. 5, 2011) (delegated letter order).

Millennium Power Partners, L.P. MACH Gen is owned by financial institutions. New Athens owns a 927 MW gas-fired, combined-cycle electric generating facility in the New York ISO, Inc. market. Millennium owns a 326 MW gas-fired electric generating facility in Charlton, Massachusetts within the ISO-New England, Inc. footprint. Applicants state that none of the financial institutions that own more than a 10 percent interest in MACH Gen are affiliated with Saddle Mountain.⁶

3. Saddle Mountain

5. Saddle Mountain is a Delaware limited liability company formed to acquire the equity interests in New Harquahala. Saddle Mountain is a wholly-owned subsidiary of Wayzata Opportunities Fund II, L.P. (WOF II). WOF II is a private investment vehicle. Wayzata Investment Partners, LLC (Wayzata) is the investment manager of WOF II. Through Wayzata as a common fund manager, Saddle Mountain is affiliated with various other energy projects. Wayzata is also the fund manager for Wayzata Opportunities Fund, LLC (WOF I). WOF I and WOF II each own a 50 percent interest in Sundevil Power Holdings, LLC (Sundevil), which owns two of the four generating units at the Gila River natural gas-fired electric generating facility in Gila Bend, Arizona. The two units owned by Sundevil have a summer rating of approximately 1,167 MW (Gila River Facility). The Gila River Facility interconnects with the transmission grid in the APS balancing authority area (BAA).

6. Applicants state that Saddle Mountain is affiliated with Castleton Energy Center, LLC (CEC), which is a wholly-owned subsidiary of WOF I, and through its common fund manager, Wayzata, CEC owns Castleton Power, LLC (Castleton Power), which owns and operates an approximately 73 MW natural gas-fired electric generation facility located in Castleton-on-Hudson, New York and Castleton Energy Services, LLC (CES), which performs certain energy management services for the generation facility owned by Castleton Power. WOF II also owns Guadalupe Power Partners, LP (GPP). GPP owns and operates an approximately 1,000 MW combined-cycle generating facility located in Marion, Texas within the Electric Reliability Council of Texas. Wayzata Recovery Fund, LLC (WRF) also owns a majority of the equity interests in Thompson River Power, LLC (TRP). TRP owns and operates a 14 MW wood waste cogeneration facility located in Thompson Falls, Montana. Saddle Mountain is affiliated with GPP and TRP through its common fund manager, Wayzata.⁷

⁶ Application at 4.

⁷ Application at 5.

B. Description of Proposed Transaction

7. Applicants state that under the terms of the Purchase and Sale Agreement between MACH Gen and Saddle Mountain, MACH Gen will sell, and Saddle Mountain will purchase, 100 percent of the equity interests in New Harquahala. Upon consummation of the Proposed Transaction, Saddle Mountain will have acquired the Harquahala Facility, the related generation tie-line interconnection facilities, and New Harquahala's market-based rate tariff and associated books, records, and contracts. New Harquahala, with Saddle Mountain as its upstream parent, will continue to own the Harquahala Facility. The Harquahala Facility will be operated by a third-party operator and its output sold pursuant to the mitigation plan, as described below.⁸

II. Notice of Filing

8. Notice of the Application was published in the *Federal Register*, 77 Fed. Reg. 64,501 (2012), with interventions and protests due on or before December 11, 2012. On December 12, 2012, APS filed an untimely motion to intervene.

III. Discussion**A. Procedural Matters**

9. Given APS's interest in this proceeding, the early stage of the proceeding and the absence of undue prejudice or delay, we will grant APS's late-filed motion to intervene pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure.⁹

B. Analysis Under Section 203

10. Section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest.¹⁰ The Commission's analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.¹¹ Section 203(a)(4) also requires the Commission, before it approves a transaction, to find that the transaction "will not result

⁸ Application at 5-6.

⁹ 18 C.F.R. § 385.214(d) (2012).

¹⁰ 16 U.S.C. § 824b(a)(4) (2006).

¹¹ See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

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.”¹² The Commission’s regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or a pledge or encumbrance of utility assets.¹³

1. Effect on Competition

a. Horizontal Market Power

i. Applicants’ Analysis

11. Applicants state that absent any mitigation measures, the Proposed Transaction would result in the failure of the Commission’s screens for horizontal market power. Applicants propose mitigation measures and state that, with the mitigation measures in place, the Proposed Transaction does not increase horizontal market power.¹⁴

(a) Absent Mitigation

12. Applicants performed a delivered price test (DPT) for the APS balancing authority area (APS BAA) using both Economic Capacity (EC) and Available Economic Capacity (AEC), treating the Harquahala Facility and the portion of the Gila River Facility owned by Sundevil as located in the APS BAA. Applicants then calculated the Herfindahl-Hirschman Index (HHI)¹⁵ to determine market concentration. Applicants state that

¹² 16 U.S.C. § 824b(a)(4) (2006).

¹³ 18 C.F.R. § 33.2(j) (2012).

¹⁴ Application at 8.

¹⁵ 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 its screen and warrants further review. Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,129; *see also Analysis of*

(continued...)

absent mitigation, under the EC analysis, the market is both highly concentrated and the changes in HHI are above the Commission's threshold for seven of ten seasons/load periods.¹⁶ Applicants' results are summarized in the table below, with the seasons/load periods in which the Proposed Transaction would result in screen failures shown in bold.

Economic Capacity						
Period	Price	MW	Market Share	Market Size (MW)	HHI	HHI Change
Summer Super Peak 1	\$ 60	1,961	17%	11,271	4,494	151
Summer Super Peak 2	\$ 40	1,961	18%	10,679	4,359	169
Summer Peak	\$ 28	1,961	23%	8,637	3,653	258
Summer Off Peak	\$ 26	1,961	23%	8,525	3,600	265
Winter Super Peak	\$ 27	1,909	29%	6,544	4,341	426
Winter Peak	\$ 23	-	0%	3,663	2,223	-
Winter Off Peak	\$ 21	-	0%	3,652	1,436	-
Shoulder Super Peak	\$ 35	1,751	20%	8,744	3,618	201
Shoulder Peak	\$ 25	1,751	25%	7,001	2,866	313
Shoulder Off Peak	\$ 23	-	0%	4,727	1,526	-

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).

¹⁶ Application at 8.

13. Under the AEC analysis, the Proposed Transaction results in HHI changes exceeding 1,000 for seven of ten seasons. Applicants' results are summarized in the table below, with the seasons/load periods in which the Proposed Transaction would result in screen failures shown in bold.

Available Economic Capacity						
Period	Price	MW	Market Share	Market Size (MW)	HHI	HHI Change
Summer Super Peak 1	\$ 60	1,961	47%	4,169	2,514	1,106
Summer Super Peak 2	\$ 40	1,961	49%	4,033	2,677	1,182
Summer Peak	\$ 28	1,961	51%	3,853	2,962	1,295
Summer Off Peak	\$ 26	1,961	45%	4,383	2,471	1,001
Winter Super Peak	\$ 27	1,909	69%	2,777	5,049	2,364
Winter Peak	\$ 23	-	0%	2,067	1,675	-
Winter Off Peak	\$ 21	-	0%	2,528	1,627	-
Shoulder Super Peak	\$ 35	1,751	46%	3,841	2,450	1,040
Shoulder Peak	\$ 25	1,751	47%	3,753	2,499	1,089
Shoulder Off Peak	\$ 23	-	0%	3,169	1,262	-

14. Applicants state that, as a result of the numerous screen failures, mitigation is necessary to eliminate the possibility that New Harquahala and its affiliates would have market power following the Proposed Transaction.¹⁷

¹⁷ *Id.* at 9.

(b) **Mitigation Proposal**

15. Applicants propose a mitigation plan that they claim will transfer control over the Harquahala Facility at closing of the Proposed Transaction to an independent third party for purposes of assessing market power. Applicants specify that, simultaneous with the closing of the Proposed Transaction, New Harquahala will enter into an Energy Management Agreement (EMA) with Twin Eagle Resource Management, LLC (Twin Eagle) under which New Harquahala will relinquish control of all available capacity and of the authority to dispatch the Harquahala Facility to Twin Eagle on a rolling 12-month basis.¹⁸

16. Applicants also commit that New Harquahala will only enter into long-term agreements for energy or capacity from the Harquahala Facility that will commence at least one year after the date of execution of such long-term agreements and commit to submit any such long-term agreements to the Commission for approval prior to their commencement. Applicants state that, with these measures in place, New Harquahala will never control the Harquahala Facility because it will always be committed to a third party, that is, either to Twin Eagle pursuant to the EMA or to an unaffiliated third party pursuant to a long-term agreement.¹⁹

17. Applicants state that the responsibilities of Twin Eagle to New Harquahala as provided in the EMA include the economic dispatch, marketing, and execution of short-term transactions for capacity and related energy products, scheduling transmission, administering settlement and payment for its transactions, procuring fuel, and scheduling and tagging power.²⁰ Applicants explain that Twin Eagle will sell that capacity at its discretion and execute the resulting contracts, dispatch model and risk management parameters contained in the Energy Management Plan, Attachment A to the EMA.²¹ Applicants claim that based on the authority granted by the EMA, Twin Eagle will control the Harquahala Facility for market power purposes.²²

¹⁸ *Id.* at 9.

¹⁹ *Id.* at 10.

²⁰ *Id.*

²¹ *Id.* at 10-11.

²² *Id.* at 11.

18. Applicants state that, at its sole discretion and in compliance with the EMA, Twin Eagle will enter into short-term transactions relating to energy, capacity, ancillary services, power transmission capacity, fuel, and fuel transportation capacity. Applicants state that Twin Eagle can make sales using a variety of physical and financial instruments, including fixed price sales, swaps, heat rate products, power or fuel options, and physical index products. Twin Eagle will be responsible for meeting any reserve or ancillary services obligations.²³

19. Applicants further assert that, each day, Twin Eagle will create a daily marketing plan based on the available capacity at the facility (as communicated by the operations and maintenance operator²⁴), the generation cost for the day at various output levels, and Western Electric Coordinating Council protocols. Using this daily marketing plan and the risk management parameters, combined with any existing short-term transactions entered into by Twin Eagle, Twin Eagle will determine the best dispatch configuration of the facility, then procure the necessary fuel supply and transmission to most economically dispatch the facility. Applicants state that Twin Eagle's control of the capacity includes re-purchase of supply commitments if the dispatch model identifies that it is not economic to operate as well as real-time remedial action and optimization through market transactions to replace energy due to unplanned outages or uneconomic conditions at the Harquahala Facility. Twin Eagle will communicate the desired dispatch configuration to the operations and maintenance operator. Applicants state that New Harquahala will only have the right to audit daily marketing plans 30 days after the close of the most recent calendar quarter, at which time all information has been disclosed in the Electric Quarterly Reports.²⁵

20. Applicants state that Twin Eagle's control over the Harquahala Facility is further protected by the limited ability for New Harquahala to terminate the EMA. The EMA provides termination rights for events related to Twin Eagle's inability to perform in the following instances: insolvency or default; where either party undergoes a change in control or a change in status that might affect its ability to make sales at market-based rates; if the Commission determines that the mitigation is no longer necessary; or upon 60 days' prior written notice if New Harquahala has elected a successor energy

²³ *Id.*

²⁴ Applicants state that New Harquahala retains responsibility for operation and maintenance of the facility, which it intends to contract to a third party provider. *See id.* at 13-14.

²⁵ *Id.* at 11-12.

manager.²⁶ Applicants state that any energy manager selected to replace Twin Eagle is subject to approval by the Commission.²⁷

21. Applicants explain that the EMA provides certain parameters to guide Twin Eagle's sales and operation of the Harquahala Facility to avoid uneconomic dispatch. Specifically, under the EMA, New Harquahala establishes the facility's operating limits, dispatch and efficiency curves, and operating costs, all of which are factors within the dispatch model and Energy Management Plan. Any changes to these parameters will not take effect until the next fiscal quarter and may not eliminate or reduce Twin Eagle's control over the available capacity.²⁸

22. Applicants state that information provided by Twin Eagle to New Harquahala will be limited to summary revenue and expenses and forward commitment reports related to capacity commitments, market-to-market exposure and credit requirements.²⁹ Applicants state that New Harquahala will obtain this information only after the relevant purchases and sales have been settled, and such information will provide no benefit to New Harquahala other than for financial reporting, preparation of tax returns, settlement and audit support. According to Applicants, New Harquahala will not be provided any material, non-public information regarding sales and dispatch of the Harquahala Facility by Twin Eagle at a point when such information would provide a market advantage.³⁰

23. Applicants explain that New Harquahala generation data is available from a variety of publicly-available sources, including dispatch and generation output information that is available from day-ahead natural gas nominations on the El Paso Natural Gas Pipeline website. Applicants assert that the breadth and depth of information that is available to all market participants, coupled with the limitations on information flow from Twin Eagle to New Harquahala, means that New Harquahala and its affiliates will not possess market power by virtue of any possession of non-public information.³¹

²⁶ *Id.* at 13.

²⁷ *Id.* at 12.

²⁸ *Id.* at 13.

²⁹ *Id.* at 14.

³⁰ *Id.* at 15.

³¹ *Id.* at 16.

24. Applicants state that the EMA limits Twin Eagle's ability to engage in transactions to the short-term markets. New Harquahala can enter into long-term transactions (i.e., longer than one year) to sell all or a portion of the facility's capacity or energy, provided that such sales may commence no earlier than one year after execution and have been accepted by the Commission as a compliance filing to the Commission's approval of the Proposed Transaction.³²

25. Applicants state that, with the mitigation in place, there are no horizontal market power effects of the Proposed Transaction because all of the Harquahala Facility's capacity will either be under the control of Twin Eagle pursuant to the EMA for a forward rolling 12-month basis or committed under long-term agreements that the Commission has determined transfer control to the purchaser. Applicants state that under the mitigation plan, in the APS market, MACH Gen will shift from controlling 1,054 MW of capacity to 0 MW and Twin Eagle will shift from 0 MW to 1,054 MW and the change in HHI under both EC and AEC is zero. Therefore, Applicants conclude that the Proposed Transaction, as mitigated, does not raise horizontal market power concerns.

ii. Commission Determination

26. We find that Applicants have failed to show that the Proposed Transaction will not have an adverse effect on competition within the APS BAA.

27. We note first that the Proposed Transaction, absent mitigation, fails the Commission's screens by a wide margin within the APS BAA for multiple seasons. The Proposed Transaction, as Applicants note, would create a highly concentrated market under the AEC measure, and would lead to an HHI change of well over 100 in seven of ten seasons/load periods in a highly concentrated market in both the EC and AEC measures. The large DPT screen failures that Applicants present absent mitigation are indications of the ability to exercise market power.³³ This is of particular concern because the Harquahala Facility and the Gila River Facility (the two facilities that would be commonly-owned and controlled by Wayzata) operate using similar generation technology: combined-cycle natural gas-fired turbines. Under competitive conditions, each facility would have a similar dispatch cost and could be available at a similar point on the supply curve.

³² *Id.* at 17.

³³ We note Applicants' DPT contains some of the same shortcomings noted by the Commission in *Arizona Pub. Serv. Co.*, 141 FERC ¶ 61,154, at PP 28-29 (2012) and in *NRG Energy, Inc.*, 141 FERC ¶ 61,207, at P 63 (2012). These shortcomings do not impact the conclusion regarding the competitive impact of the Proposed Transaction.

28. Given the dramatic failures of the market screens caused by the Proposed Transaction, we must then consider whether the proposed mitigation measures are sufficient to mitigate the adverse effect on competition. As indicated above, Applicants claim that, under the proposed EMA, New Harquahala will relinquish control to Twin Eagle of all available capacity and authority to dispatch the Harquahala Facility on a rolling 12-month basis. Additionally, New Harquahala commits to only entering into long-term agreements for energy or capacity from the Harquahala Facility that will commence at least one year after the date of execution of such long-term agreements and commit to submit any such long-term agreements to the Commission for approval prior to their commencement. As we explain below, we find that these mitigation measures are inadequate to address the potential adverse competitive effects of the Proposed Transaction.

29. The crux of Applicants' argument is that, following closing of the Proposed Transaction, the proposed EMA would result in a complete transfer of control from New Harquahala to Twin Eagle, such that New Harquahala should not be considered to have control over the Harquahala Facility for purposes of the competition analysis. We disagree. When considering whether to grant authority for market-based rates, the Commission has stated that "energy management and comparable agreements do not necessarily convey unlimited discretion and control away from the entity that owns the plant."³⁴ Instead, "it is the totality of the circumstances that will determine which entity controls a specific asset."³⁵ We consider a similar analysis here in addressing whether the totality of the circumstances shows that the proposed EMA here conveys unlimited discretion and control to Twin Eagle such that the proposed mitigation sufficiently addresses the potential adverse impact on competition from the Proposed Transaction.³⁶

³⁴ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 197, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub nom. Pub. Citizen, Inc. v. FERC*, 133 S. Ct. 26 (2012).

³⁵ *Id.*

³⁶ The Commission has found in a previous section 203 proceeding that an EMA did not constitute a change of control from the owner of the facility to the energy manager based upon the provisions of the EMA at issue. See *Westar Energy, Inc.*, 115 FERC ¶ 61,228, at P 76 (2006). Applicants cite to *Acadia Power Partners, LLC*, 115 FERC ¶ 61,394 (2006). However, that proceeding involved a change in status filing pursuant to Order No. 652, and analyzed the
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30. Applicants have failed to demonstrate that the EMA transfers control of the Harquahala Facility from New Harquahala to Twin Eagle, and therefore the mitigation proposed by Applicants is insufficient to address the market power concerns raised by the Proposed Transaction. Importantly, under the proposed EMA, Twin Eagle must follow a detailed, proscribed methodology for dispatching the Harquahala Facility, from which methodology it has little discretion to deviate. The Application notes that under Section 3.1 of the proposed EMA, New Harquahala establishes the facility's operating limits, dispatch and efficiency curves, and operating costs.³⁷ Additionally, New Harquahala retains responsibility for operation and maintenance of the facility, and, as discussed below, it retains the right to enter into long-term contracts for sales from the plant.³⁸ Based on these factors, we find that New Harquahala retains a significant element of control over the Harquahala Facility.

31. Applicants state that, once the EMA is executed, the information about the Harquahala Facility to which New Harquahala will have access will be no different than the information available to any other market participant that can view Electric Quarterly Reports or that subscribes to Genscape.³⁹ We disagree. While New Harquahala, its parent, Saddle Mountain, and its affiliates under common control of Wayzata, including Sundevil, will have similar access to market information as other market participants, they will additionally have access to one type of relevant information to which no other market participant will have, namely, advance knowledge of the short-term marketing strategy of the generation output of the Harquahala Facility. In particular, because New Harquahala is dictating the Harquahala Facility's dispatch model through the EMA, New Harquahala (and, presumably, its affiliates) would have access to market information that may allow Sundevil (which would be under common control with New Harquahala) to be in a position to make anticompetitive sales sourced from the

EMA in the context of affiliate sales rather than its effect on competition. The EMA in that proceeding also was proposed in conjunction with additional restrictions on the parties involved, including limits on the length and price of sales. In addition, as an added protection from any potential for affiliate abuse, the Louisiana Public Service Commission stated it would institute an audit of the purchases and prices of any affiliate transactions. *See Acadia Power Partners, LLC*, 115 FERC ¶ 61,394 at PP 1, 5, and 9 (citing *Reporting Requirements for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005)).

³⁷ Application at 14.

³⁸ *Id.* at 13-14.

³⁹ Genscape is a software service that provides real-time data and estimates on generation prices and dispatch.

Gila River Facility in the APS BAA. Sundevil could thus unilaterally withhold output from the Gila River Facility or raise prices in the APS BAA. Sundevil has ownership and control of 1,167 megawatts of generation at the Gila River Facility. If the Proposed Transaction is approved, Sundevil would presumably have access to information as to the dispatch plan of the Harquahala Facility. Sundevil could then choose to withhold the plant, or dispatch energy at a higher price than would result from a competitive process, from its capacity at the Gila River Facility to maximize its overall profits. Notably, such a withholding strategy does not require any overt cooperation between Sundevil and Twin Eagle, as Twin Eagle would continue to operate under normal bidding parameters as specified in the EMA.

32. The provisions of the mitigation proposal relating to long-term contracts also do not address the competition concerns from the Proposed Transaction. New Harquahala's reserved right to market the capacity of the Harquahala Facility for long-term contracts is at odds with Applicants' claim that the Harquahala Facility should not be attributed to Saddle Mountain and its affiliates because the facility will be operated by an independent energy manager. If the facility can still be marketed for sales by New Harquahala, then it is still under New Harquahala's control to some degree and should properly be attributed to New Harquahala. Said another way, Applicants cannot credibly argue that the Harquahala Facility will be under someone else's control when New Harquahala reserves the right to control the facility itself for purposes of marketing it for long-term sales.

33. Because the Applicants have failed to show that the proposed mitigation is sufficient to mitigate the adverse effect on competition within the APS BAA, we deny approval of the Proposed Transaction.⁴⁰ However, our denial here is without prejudice to Applicants making a new filing that proposes mitigation that would be sufficient to remedy the screen failures identified above. We do not address the other factors of the merger analysis here, due to the fact that we have found that Applicants have failed to show that the Proposed Transaction will not have an adverse effect on competition.

The Commission orders:

(A) The Application is hereby denied, without prejudice, as discussed in the body of this order.

⁴⁰ In *Bluegrass Generation Co., L.L.C.*, 139 FERC ¶ 61,094 (2012), another generation asset acquisition cited by Applicants, the Commission conditionally accepted the proposed transaction, contingent upon further mitigation to address competitive screen failures. We deny the Application here, rather than conditionally accept, because, for example, the screen failures are not temporary as in *Bluegrass*.

(B) The change in status filing is dismissed as moot.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.