

143 FERC ¶ 61,062
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.

FirstEnergy Service Company
Allegheny Energy Supply Company, LLC
Monongahela Power Company

Docket No. EC13-43-000

ORDER AUTHORIZING DISPOSITION AND ACQUISITION
OF JURISDICTIONAL FACILITIES

(Issued April 23, 2013)

1. On November 16, 2012, FirstEnergy Service Company, a wholly-owned subsidiary of FirstEnergy Corp. (FirstEnergy), on behalf of FirstEnergy's indirect subsidiaries Allegheny Energy Supply Company, LLC (AE Supply) and Monongahela Power Company (Mon Power) (collectively, Applicants), filed a joint application under section 203(a)(1) of the Federal Power Act (FPA).¹ Applicants request Commission authorization for restructuring transactions to realign the ownership of certain generating facilities within the FirstEnergy holding company system (Proposed Transaction).
2. The Commission has reviewed the Proposed Transaction under the Commission's Merger Policy Statement.² As discussed below, we will authorize the Proposed Transaction under section 203(a)(1) as consistent with the public interest.

¹ 16 U.S.C. § 824b(a)(1) (2006).

² See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). See also *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008). See also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642 FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). See also *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200

(continued ...)

I. Background

A. Description of the Parties

1. Mon Power

3. Mon Power, a direct subsidiary of Allegheny Energy, Inc. (Allegheny Energy), and an indirect subsidiary of FirstEnergy, is a franchised public utility with captive customers that engages in the generation, transmission, distribution, and sale of electricity in northern West Virginia. The Commission has granted Mon Power authorization to sell capacity, electric energy, and ancillary services at wholesale at market-based rates and pursuant to certain cost-based tariffs and agreements. In addition, Mon Power has a contractual obligation to provide the Potomac Edison Company (Potomac Edison), another FirstEnergy subsidiary, with power to meet its West Virginia load obligations. Mon Power has turned over the functional control of its transmission assets to PJM Interconnection, L.L.C. (PJM). Mon Power currently owns a 20.54 percent interest in the Harrison Power Station, a 1,984 MW pulverized coal electric generating facility located in Haywood, West Virginia along the West Fork River, and its associated interconnection facilities, materials, supplies, and fuel (the Harrison Facility).³ It also owns a 7.69 percent interest in the Pleasants Power Station, a 1,300 MW pulverized coal electric generating facility located in Willow Island, West Virginia along the Ohio River, and associated interconnection facilities, material, supplies, and fuel (Pleasants Facility).⁴

2. AE Supply

4. AE Supply is a market-regulated merchant utility that develops, owns, and operates electric generating facilities and markets power in competitive wholesale and retail markets on its own behalf and through its subsidiaries. AE Supply and its subsidiaries own and operate approximately 7,015 megawatts (MW) of generation in PJM. AE Supply buys and sells energy, capacity, and ancillary services in wholesale markets pursuant to its market-based rate authority. AE Supply does not own or control transmission or distribution facilities other than limited interconnection facilities

(2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

³ The Harrison Facility's interconnection facilities include three 19.5 kV/500 kV generator step-up transformers.

⁴ The Pleasants Facility's interconnection facilities include two 25 kV/500 kV generator step-up transformers.

connected to its generation. AE Supply owns a 79.46 percent interest in the Harrison Facility and a 92.31 percent interest in the Pleasants Facility.

B. Proposed Transaction

5. Pursuant to the Proposed Transaction, Mon Power will purchase AE Supply's 79.46 percent ownership interest in the Harrison Facility and become the sole owner of the Harrison Facility (Harrison Acquisition). Also pursuant to the Proposed Transaction, Mon Power will sell its 7.69 percent interest in the Pleasants Facility to AE Supply and AE Supply will become the sole owner of the Pleasants Facility (Pleasants Sale). Applicants state that, at the time of closing, Mon Power will pay the lower of market value or AE Supply's book value for AE Supply's interest in the Harrison Facility, and AE Supply will pay the higher of market value or book value for Mon Power's 7.69 percent interest in the Pleasants Facility.⁵ Applicants contend that eliminating their fractional shares of these facilities will facilitate more efficient internal reporting and decision-making.

6. Applicants state that the Harrison Acquisition is the most cost-effective way for Mon Power to prudently and reliably serve its growing West Virginia load and meet its full requirements service obligation to Potomac Edison.⁶ Applicants also state that the Harrison Acquisition prudently manages Mon Power's market risk and provides the most cost-effective alternative for adding long-term capacity resources to Mon Power's portfolio.

7. Furthermore, Applicants state that the Proposed Transaction will result in a 1,189 MW net increase in unforced capacity for Mon Power, which will offset the 408 MW decrease it experienced in September 2012 as the result of the deactivation of

⁵ Applicants state that an independent valuation of the Harrison Facility shows that the fair market value of AE Supply's interest in the Harrison Facility, as of December 31, 2012, is \$1.333 billion, which is higher than AE Supply's book value, as of May 1, 2012, of \$1.164 billion. They further state that an independent valuation of the Pleasants Facility shows that the fair market value of Mon Power's interest in the Pleasants Facility, as of December 31, 2012, is \$73.3 million, "which is higher than Mon Power's book value, as of May 1, 2013 [sic], of \$48.0 million." Application at 10.

⁶ Applicants November 16, 2012 Transmittal Letter at 2 (Application); *see also* Exhibit M at M-8 ("Mon Power reviewed the competitive alternatives available and determined that the Proposed Transaction is the lowest cost alternative available to provide reliable, reasonably priced capacity and energy to Mon Power's customers").

three subcritical coal units.⁷ Additionally, Applicants state that the Proposed Transaction offers greater financial benefits for Mon Power's customers than available alternatives and will provide Mon Power with sufficient generation resources to meet its capacity requirements through 2018.⁸ Applicants assert that in the absence of the Harrison Acquisition, Mon Power would suffer an unforced capacity shortfall that "could result in Mon Power purchasing as much as 40% of its capacity needs from the market . . . , which would greatly increase [its] market risk and the exposure of [its] customers to market energy and capacity prices."⁹ Applicants thus assert that the Proposed Transaction "is the most cost-effective means of reliably fulfilling Mon Power's projected long-term energy and capacity needs."¹⁰

II. Notice of Filing and Responsive Pleadings

8. Notice of the application was published in the *Federal Register*, 77 Fed. Reg. 71,410 (2012), with interventions and protests due on or before December 7, 2012. The Public Service Commission of West Virginia (West Virginia Commission) filed a notice of intervention. Exelon Corporation filed a timely motion to intervene. The Consumer Advocate Division of West Virginia Public Service Commission (Consumer Advocate Division)¹¹ filed a timely motion to intervene and protest. West Virginia Energy Users Group, Duke Energy Ohio, Inc. (Duke Energy Ohio), and American Electric Power

⁷ Unforced capacity values are calculated by PJM every year and are used to determine PJM's Reliability Pricing Model (RPM) reliability requirements. Unforced capacity is what PJM procures to satisfy its RPM reliability requirements. Installed capacity values are higher than unforced capacity values because unforced capacity takes into account the probability of outages and derates a unit's capacity value from its installed capacity value based upon prior performance. *See generally* PJM Manual 18: PJM Capacity Market, Revision 16.

⁸ Application at 3. In Docket No. ES13-11-000, Mon Power is seeking authorization under section 204 of the FPA to issue and assume indebtedness in order to finance its acquisition of AE Supply's interest in the Harrison Facility. That matter is pending before the Commission.

⁹ *Id.* at 10.

¹⁰ *Id.* at 11.

¹¹ The Consumer Advocate Division states that it is an independent division of the West Virginia Commission that represents residential ratepayer interests in major rate proceedings and other related proceedings.

Service Corporation (AEPSC) filed untimely motions to intervene. On December 20, 2012, Applicants filed an answer to the Consumer Advocate Division's protest.

III. Discussion

A. Procedural Matters

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), 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) (2012), the Commission will grant West Virginia Energy Users Group's, Duke Energy Ohio's, and AEPSC's late-filed motions to intervene, given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), 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 the decision-making process.

B. Standard of Review Under Section 203

11. Section 203(a)(4) of the FPA requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest. The Commission's analysis of whether a 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.¹² Section 203(a)(4) also requires the Commission to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."¹³ The Commission's regulations establish verification and informational requirements for Applicants that seek

¹² Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

¹³ 16 U.S.C. § 824b(a)(4) (2006).

a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.¹⁴

C. Analysis Under Section 203

1. Effect on Competition

a. Applicants' Analysis

12. Applicants state that the Proposed Transaction will not have an adverse effect on competition in PJM, the relevant geographic market, because the Proposed Transaction involves sales of generation facilities among subsidiaries in the same holding company system. Applicants state that the Commission has consistently held that internal corporate reorganizations, such as the Proposed Transaction, have no adverse effect on competition.¹⁵

13. Applicants assert that the Commission's regulations require the filing of a horizontal market power analysis only if, as a result of the proposed transaction, a single corporate entity obtains ownership or control over the generating facilities of previously unaffiliated merging entities. Applicants conclude that, because they are already affiliated, no horizontal market power analysis is required.¹⁶

14. Applicants state that no vertical market power analysis is necessary because the Proposed Transaction is internal to the FirstEnergy corporate family and will not result in a change of control over any entities that provide inputs to electricity products or electric generation products. Moreover, Applicants state that they "have turned over operational control of their transmission facilities to PJM, and wholesale transmission service over such facilities will continue to be provided pursuant to the rates and terms of the PJM Open Access Transmission Tariff (PJM Tariff)."¹⁷

¹⁴ 18 C.F.R. § 33.2(j) (2012).

¹⁵ Application at 13 (citing *Ameren Corp.*, 131 FERC ¶ 61,240, at P 18 (2010); *Cinergy Corp.*, 126 FERC ¶ 61,146, at P 32 (2009)).

¹⁶ *Id.* at 13-14.

¹⁷ *Id.* at 14.

b. Commission Determination

15. Applicants have shown that the Proposed Transaction does not raise any horizontal or vertical market power concerns. The Proposed Transaction involves an internal corporate reorganization, with no transfer of generating facilities outside the FirstEnergy corporate family. Therefore, the Proposed Transaction will not result in a change in market concentration. Also, the Proposed Transaction does not raise vertical market power concerns because Mon Power has turned over operational control of its transmission facilities to PJM.

2. Effect on Rates

a. Applicants' Analysis

16. Applicants state that the Proposed Transaction will not have an adverse impact on wholesale rates or transmission customers. Applicants reiterate that Mon Power has turned over functional control of its transmission assets to PJM, and no jurisdictional transmission rates will change as the result of the Proposed Transaction. Additionally, Applicants state that AE Supply makes all of its sales pursuant to its market-based rate tariff. Applicants further state that Mon Power has market-based rate authority to sell capacity, electric energy, and ancillary services and that Mon Power makes the majority of its sales pursuant to its market-based rate authority. Applicants state that sales at market-based rates would not be adversely affected by the Proposed Transaction because market-based rates are not adversely affected by changes in the seller's cost-of-service.¹⁸

17. Moreover, Applicants state that the Proposed Transaction will not adversely impact Mon Power's cost-based rates. They state that Mon Power provides reactive power and voltage control at stated rates pursuant to Schedule 2 of the PJM Tariff and that these rates will not change in the absence of Commission approval under section 205. Mon Power anticipates that it will file a future rate proceeding under section 205 together with AE Supply to update its reactive power and voltage control rates within the PJM Allegheny Power zone to reflect the change in generation asset ownership. Applicants expect this change to increase Mon Power's annual revenue requirement by \$2 million and decrease AE Supply's by the same amount.

18. Additionally, Mon Power makes wholesale sales to its affiliates, West Penn Power Co. and Potomac Edison, pursuant to its FERC Electric Tariff No. 1. Applicants state that these sales occur at a stated rate, with automatic adjustments for taxes and fuel. According to Applicants, a number of factors, including Mon Power's resource mix,

¹⁸ *Id.* at 15 & n.33 (citing *Cinergy Corp.*, 140 FERC ¶ 61,180, at P 41 (2012)).

affect fuel costs, and such costs may be higher or lower as a result of the Proposed Transaction. Applicants state that Mon Power's stated rate under this tariff will not change in the absence of Commission approval under section 205.

19. Finally, Applicants state that Mon Power provides capacity, energy, and ancillary services to Potomac Edison for Potomac Edison to serve its West Virginia customers pursuant to a Facilities Lease and Assignment Agreement and Full Requirements Power Purchase Agreement. Pursuant to these agreements, Mon Power charges a rate based on Potomac Edison's load ratio share of the total cost of serving the combined Mon Power and Potomac Edison load in West Virginia. Applicants state that, because the rates in these agreements are calculated based on formulaic processes, the Proposed Transaction may affect these rates. However, Applicants estimate that the Proposed Transaction will initially result in a decrease to Potomac Edison's annual costs under these agreements of approximately \$5 million, or about 2.5 percent.¹⁹

20. Applicants state that the Harrison Acquisition represents a least-cost solution to Mon Power's capacity needs, and therefore offers countervailing benefits to ratepayers to offset any potential rate increase.²⁰ In this regard, they assert that a rate increase is not inconsistent with the public interest when it results from a least-cost resource procurement to address a capacity shortfall resulting from the shutdown of uneconomic generation.²¹ Further, Applicants state that they have priced each component of the Proposed Transaction to protect Mon Power's captive customers, with the Harrison Acquisition taking place at the lower of market value or book value and the Pleasants

¹⁹ *Id.* at 16.

²⁰ *Id.* at 17 (citing *e.g.*, *Bluegrass Generation Co., L.L.C.*, 139 FERC ¶ 61,094, at P 41 (2012) (*Bluegrass Generation*); *ALLETE, Inc.*, 129 FERC ¶ 61,174, at PP 19-20 (2009); *Startrans IO, L.L.C.*, 122 FERC ¶ 61,307, at P 25 (2008); *Merger Policy Statement*, FERC Stats. & Regs. ¶ 31,044 at 30,123).

²¹ *Id.* (citing *Bluegrass Generation*, 139 FERC ¶ 61,094 at P 41). On November 16, 2012, Mon Power and Potomac Edison filed a Petition for Approval of a Generation Resource Transaction and Related Relief with the West Virginia Commission (West Virginia Petition). In the West Virginia Petition, Mon Power and Potomac Edison request authorization for a generation resource transaction that includes Mon Power's acquisition of the Harrison Facility in order to address a significant deficit in generating capacity available to serve Mon Power's and Potomac Edison's West Virginia customers. Mon Power and Potomac Edison are also seeking rate relief in the form of a temporary transaction surcharge. That proceeding is pending.

Sale taking place at the higher of market value or book value. Applicants state that the Proposed Transaction is the most cost-effective means of reliably fulfilling Mon Power's projected energy and capacity needs.²²

21. Applicants further state that AE Supply's book value for the Harrison Facility includes a purchase accounting adjustment of \$589.6 million, which was recorded in accordance with generally accepted accounting principles and purchase accounting methods at the time of the merger between FirstEnergy and Allegheny Energy. Mon Power acknowledges that this purchase accounting adjustment may not be included in Commission-jurisdictional cost-based rates unless authorized by the Commission. Therefore, Mon Power commits not to charge or recover this purchase accounting adjustment in Commission-jurisdictional rates without obtaining Commission authorization in a section 205 rate proceeding.²³

b. Protest and Answer

22. In its protest, the Consumer Advocate Division argues that the Proposed Transaction will significantly increase retail rates for Mon Power's and Potomac Edison's West Virginia customers. The Consumer Advocate Division states that, according to the West Virginia Petition, the Proposed Transaction will increase base rates for West Virginia customers by approximately \$192 million.²⁴ The Consumer Advocate Division states that the West Virginia Petition also claims that the Proposed Transaction will reduce the companies' expanded net energy costs by approximately \$129 million. Thus, according to the Consumer Advocate Division, the net retail rate impact of the Proposed Transaction would be an increase of approximately \$63 million while the temporary transaction surcharge is in effect. The Consumer Advocate Division argues that one of the primary reasons for the rate increase is the high book value that Mon Power will pay for AE Supply's interest in the Harrison Facility. The Consumer Advocate Division states that, less than two years ago, AE Supply recorded the book value of the Harrison plant at \$554,186,117. The Consumer Advocate Division maintains that Mon Power will now purchase AE Supply's interest in the Harrison Facility at a book value that is more than twice that amount. The Consumer Advocate Division further asserts that the impact on wholesale customers of any ruling from this Commission on the valuation issue "will pale in comparison with the effect on retail rates

²² *Id.* at 17 and Attachment 9 at 6.

²³ *Id.* at 17-18.

²⁴ Consumer Advocate Division Protest at P 9.

that could result from a [West Virginia Commission] ruling that adopts” the Commission’s order in this case.²⁵

23. While the Consumer Advocate Division acknowledges Applicants’ statement that Mon Power will not charge or recover the \$589.6 million purchase accounting adjustment in Commission-jurisdictional rates without approval from the Commission, it notes that Mon Power and Potomac Edison have “made no such commitment” in the West Virginia Commission Petition.²⁶ Moreover, the Consumer Advocate Division points out that the “base rate increase of \$192 million requested in the West Virginia Petition is calculated using the full amount of AE Supply’s purchase accounting adjustment.”²⁷

24. The Consumer Advocate Division argues that even though Mon Power “has committed to forego (for the time being) recovery of the purchase accounting write-up of” the Harrison Facility in the Commission proceeding, “the accounting entries reflect the transfer at the purchase accounting value.”²⁸ The Consumer Advocate Division states that Applicants will use any such Commission order as “proof” of the fairness of the Proposed Transaction. Accordingly, the Consumer Advocate Division asks the Commission, as a matter of comity, to refrain from issuing any ruling that would approve the Applicants’ proposed accounting entries reflected in Attachment 12 to the application prior to the entry of a final West Virginia Commission order, and that the Commission conduct a hearing on the issue of the accounting adjustment.

25. In their response to the Consumer Advocate Division, Applicants note that the West Virginia Commission itself, which has intervened in this proceeding, did not ask the Commission to defer its approval of the Proposed Transaction. Applicants state that the Commission has regularly issued orders approving transactions independent of state commission approval of the same transaction.²⁹ Applicants also state that there is no

²⁵ *Id.* P 11.

²⁶ *Id.* P 12.

²⁷ *Id.*

²⁸ *Id.* P 14.

²⁹ Applicants Answer at 3 (citing *Duke Energy Corp.*, 136 FERC ¶ 61,245 (2011) (approving transaction while settlements were pending before two state commissions); *Am. Elec. Power Serv. Corp.*, 130 FERC ¶ 61,013 (2010) (approving transaction prior to approval from Public Utility Commission of Texas)).

merit to the Consumer Advocate Division's suggestions that the West Virginia Commission can be "steamrolled" by the Commission or any utility, and asks the Commission to ignore these types of insinuations, as well as any other allegations made in the Consumer Advocate Division's protest. Finally, Applicants state that the Consumer Advocate Division's other concerns on purchase price accounting focus on retail ratemaking and will be addressed by the West Virginia Commission. Accordingly, Applicants state that there is no need for the Commission to address the purchase price accounting issue in this proceeding.

c. Commission Determination

26. We note that our analysis of rate effects under section 203 of the FPA differs from the analysis of whether rates are just and reasonable under section 205. Our focus here is on the effect that the Proposed Transaction will have on rates, whether that effect is adverse, and whether any adverse effect will be offset or mitigated by benefits that are likely to result from the transaction.³⁰ While it appears that the Proposed Transaction may have an effect on rates, we find that the Proposed Transaction will not have an adverse effect on rates, as discussed more fully below.

27. Applicants state that no jurisdictional transmission rates will change as a result of the Proposed Transaction, and no party has argued otherwise. Applicants state that AE Supply and Mon Power's market-based rate authority are unaffected by changes in the seller's cost of service.³¹ Applicants also state that Mon Power's cost-based rates will not be adversely impacted by the Proposed Transaction.³² Furthermore, Applicants state that upon approval of the Proposed Transaction, Mon Power and AE Supply will file an application under section 205 of the FPA to update their respective reactive power and voltage control rates within the PJM Allegheny Power zone to reflect the change in generation asset ownership. We note Applicants' expectation that this change will increase Mon Power's annual revenue requirement by \$2.0 million and decrease AE Supply's annual revenue requirement by the same amount.³³ For this reason, we find that this change will not have an adverse impact on ratepayers.

³⁰ See *ITC Midwest LLC*, 133 FERC ¶ 61,169, at P 23 (2010); *ALLETE, Inc.*, 129 FERC ¶ 61,174, at P 19 (2009); *Startrans IO, L.L.C.*, 122 FERC ¶ 61,307, at P 25 (2008); *ITC Holdings Corp.*, 121 FERC ¶ 61,229, at P 120 (2007).

³¹ Application at 15.

³² *Id.* at 15-16.

³³ *Id.* at 16.

28. We agree with Applicants that the Consumer Advocate Division's concerns pertain to retail ratemaking. The Commission's consideration of the effect on rates under section 203 does not concern a transaction's retail rate impacts unless a state specifically asks the Commission to consider such rate impacts.³⁴ The role of the relevant state commission is, among other things, to consider such effects.³⁵ We note that, while the West Virginia Commission has intervened in this proceeding, it has not asked us to scrutinize such effects here. We also note that our approval of the Proposed Transaction in this proceeding will neither dictate the outcome in the West Virginia proceeding nor prevent the West Virginia Commission from examining the Proposed Transaction's effects on retail rates. Moreover, we find no basis for the Commission to conduct a hearing on this matter. We will accept Mon Power's commitment not to charge or recover the purchase accounting adjustment in Commission-jurisdictional rates without obtaining Commission authorization in a proceeding under section 205, and the Commission makes no findings in this order regarding the reasonableness of the \$589.6 million purchase accounting adjustment.

3. Effect on Regulation

a. Applicants' Analysis

29. With respect to regulation, Applicants state that the Proposed Transaction will not diminish the regulatory authority of the Commission or any state commission, create a regulatory gap, or shift regulatory authority between the Commission and any state commission. Applicants state that, upon consummation of the Proposed Transaction, the Commission will continue to regulate Mon Power and AE Supply to the same degree as before the Proposed Transaction. Likewise, Mon Power and AE Supply will continue to be subject to the regulation of the relevant state commissions.

b. Commission Determination

30. We find that neither state nor federal regulation will be impaired by the Proposed Transaction. The Commission's review of a transaction's effect on regulation is focused

³⁴ See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,128.

³⁵ See *NSTAR Electric Co.*, 131 FERC ¶ 61,098, at P 26 (2010); *National Grid plc and Keyspan Corp.*, 117 FERC ¶ 61,080, at P 54 (2006); see also *Az. Pub. Serv. Co.*, 141 FERC ¶ 61,154, at P 41 (2012); *San Diego Gas & Elec. Co.*, 137 FERC ¶ 61,232, at P 32 (2011).

on ensuring that it does not result in a regulatory gap at the federal level or the state level. We find that the Proposed Transaction will not create a regulatory gap at the federal level, because the Commission will retain its authority over Applicants. The Commission stated 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 stated that it may set the issue for hearing, and that it will address such circumstances on a case-by-case basis.³⁶ We note that no party alleges that regulation would be impaired by the Proposed Transaction, and no state commission has requested that the Commission address the issue of the effect on state regulation.

4. Cross-Subsidization

a. Applicants' Analysis

31. Applicants state, based on facts and circumstances known to them or that are reasonably foreseeable, 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.³⁷ Applicants explain that, while the Proposed Transaction involves transfers of facilities between Mon Power, a traditional public utility that has captive customers, and AE Supply, a market-regulated associate company, such transfers will not result in cross-subsidization because the Proposed Transaction is “on terms similar to any other competitive alternatives available” and “will not adversely impact competition, rates, or regulation.”³⁸ Applicants further state that the Proposed Transaction does not involve: (1) any new 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

³⁶ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

³⁷ Applicants state that the Proposed Transaction falls within one of the “safe harbors” that the Commission has identified as unlikely to raise cross-subsidization concerns since the Proposed Transaction must be approved by the West Virginia Commission. Application at 18-19 (citing Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 16). Applicants state that they have filed an Exhibit M analysis “out of an abundance of caution.” *Id.* at 20.

³⁸ Exhibit M at M-4 (quoting *Ameren Energy Generating Co.*, 108 FERC ¶ 61,081, at P 12 (2004)).

an associate company;³⁹ (2) 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 facilities, for the benefit of an associate company; or (3) other than the Memorandum of Understanding between the parties, filed as Exhibit I, and certain other transaction documents, any new affiliate contracts between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities.

b. Commission Determination

32. Based on the facts presented in the application, we find that the Proposed Transaction will not result in cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company. We note that no party has argued otherwise.

D. Other Considerations

33. Information and/or systems connected to the bulk system involved in this transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to 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 cyber security standards. The Commission, North American Electric Reliability Corporation or the relevant regional entity may audit compliance with reliability and cyber security standards.

The Commission orders:

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

³⁹ As noted, supra n.[8], in a separate proceeding, Mon Power is seeking authorization under section 204 of the FPA to issue and assume certain indebtedness to finance its acquisition of the Harrison Facility. However, Applicants assert that these financial transactions are not for the benefit of an associate company. Exhibit M at M-5.

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

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

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

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

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.