139 FERC ¶ 61,194
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Energy Corporation Progress Energy, Inc.	Docket No. EC11-60-004
Carolina Power & Light Company	Docket No. ER12-1339-000 Docket No. ER12-1340-000 Docket No. ER12-1341-000
Duke Energy Carolinas, LLC	Docket No. ER12-1342-000 (Not consolidated)

ORDER ACCEPTING
REVISED COMPLIANCE FILING, AS MODIFIED,
AND POWER SALES AGREEMENTS

(Issued June 8, 2012)

1. On March 26, 2012, Duke Energy Corporation (Duke Energy) and Progress Energy, Inc. (Progress Energy) (together, with their public utility subsidiaries, Applicants) filed a revised compliance filing[1] in accordance with the Commission's December 14, 2011 order[2] rejecting Applicants' previously filed compliance proposal.[3] Concurrently with the March 26 Compliance Filing, Applicants filed four related power

[1] *Revised Compliance Filing of Duke Energy Corporation and Progress Energy, Inc.*, Docket No. EC11-60-004 (March 26, 2012) (March 26 Compliance Filing).

[2] *Duke Energy Corp.*, 137 FERC ¶ 61,210 (2011) (Compliance Order), *rehearing pending*.

[3] *Compliance Filing of Duke Energy Corporation and Progress Energy, Inc.*, Docket No. EC11-60-001 (October 17, 2011) (October 17 Compliance Filing).

sales agreements pursuant to section 205 of the Federal Power Act (FPA).[4] This order accepts the March 26 Compliance Filing and the four power sales agreements subject to Applicants revising their mitigation proposal as described in further detail below.

I. Background

2. On April 4, 2011, pursuant to sections 203(a)(1) and 203(a)(2) of the FPA[5] and Part 33 of the Commission's regulations,[6] Applicants filed an application for the approval of a transaction pursuant to which Progress Energy would become a wholly-owned subsidiary of Duke Energy and the former shareholders of Progress Energy would become shareholders of Duke Energy (Proposed Transaction).[7]

3. Subsequent to the filing of the Merger Application, the Director of the Division of Electric Power Regulation-West issued a request for additional information from

[4] 16 U.S.C. § 824d (2006). As described in further detail below, Applicants propose that the four power sales agreements serve as interim mitigation while the transmission expansion projects proposed as permanent mitigation are completed. In addition to being filed for approval under section 205 of the FPA, the four power sales agreements were included as attachments to the March 26 Compliance Filing. *Master Power Purchase and Sale Agreement between Carolina Power & Light, d/b/a Progress Energy Carolinas, Inc. and EDF Trading North America, LLC*, Docket No. ER12-1339-000 (March 26, 2012); *Master Power Purchase and Sale Agreement between Carolina Power & Light Company, d/b/a Progress Energy Carolinas, Inc. and Cargill Power Markets, LLC*, Docket No. ER12-1340-000 (March 26, 2012); *Master Power Purchase and Sale Agreement between Carolina Power & Light d/b/a Progress Energy Carolinas, Inc. and Morgan Stanley Capital Group Inc.*, Docket No. ER12-1341-000 (March 26, 2012) (PEC-Morgan Stanley Filing); and *Power Purchase and Sale Agreement between Duke Energy Carolinas, LLC and Cargill Power Markets, LLC*, Docket No. ER12-1342-000 (March 26, 2012) (collectively, Power Sales Agreement Filings). In this order, the Commission refers to Carolina Power & Light, a subsidiary of Progress Energy, as Progress Energy Carolinas.

[5] 16 U.S.C. §824b(a)(1) and (a)(2) (2006).

[6] 18 C.F.R. Part 33 (2011).

[7] *Application for Authorization of Disposition of Jurisdictional Assets and Merger under Sections 203(a)(1) and 203(a)(2) of the Federal Power Act*, Docket No. EC11-60-000 (Apr. 4, 2011) (Merger Application).

Applicants.[8] In the August 2011 Information Request, Applicants were directed to provide additional analyses and information that was not provided in the Merger Application.[9] Among other things, the August 2011 Information Request directed Applicants to produce a set of prices based on EQR data, and, using those prices, conduct a DPT of the base case and two price sensitivities (a 10 percent price increase and a 10 percent price decrease) for the Duke Energy Carolinas, Progress Energy Carolinas-East, and Progress Energy Carolinas-West Balancing Authority Areas (BAA).[10] In response to the August 2011 Information Request, Applicants submitted a DPT based on EQR data (August 29 DPT) as directed.[11]

4. The Commission reviewed the Merger Application pursuant to the Commission's Merger Policy Statement[12] and found that, in the absence of appropriate mitigation, the

[8] Request for Additional Information, Docket No. EC11-60-000 (Aug. 22, 2011) (August 2011 Information Request).

[9] As noted in the Commission's initial order on the Merger Applicants, Applicants did not provide a Delivered Price Test (DPT) based on prices derived from Electric Quarterly Reports (EQR) data with the Merger Application. The DPT submitted with the Merger Application was based on system lambda price proxies (Merger Application DPT). *Duke Energy Corp.*, 136 FERC ¶ 61,245, at P 47 (2011) (Merger Order), *rehearing pending.* DPTs are used to determine the pre- and post-transaction market shares from which the market concentration or Herfindahl-Hirschman Index (HHI) change can be calculated. In this order, the terms DPT, Competitive Analysis Screen, and Appendix A Analysis are used interchangeably.

[10] As explained in the Merger Order, Applicants focused their analysis on these BAAs. *See* Merger Order, 136 FERC ¶ 61,245 at P 37.

[11] Answer of Duke Energy Corporation and Progress Energy, Inc. to Request for Additional Information, Docket No. EC11-60-000 (Aug. 29, 2011, corrected Aug. 30, 2011) (Applicants August 29 Answer). Although the August 29 DPT differs from the Merger Application DPT with respect to the source of the forecasted 2012 prices, Applicants adjusted both the system lambda and EQR prices used in the Merger Application and August 29 DPTs, respectively, by a common natural gas price forecast.

[12] *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*, 72 Fed. Reg. 42,277 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement). *See also Revised Filing Requirements Under Part 33 of the*

(continued…)

Proposed Transaction could be expected to result in adverse effects on competition in both the Duke Energy Carolinas and the Progress Energy Carolinas-East BAAs.[13] The Commission thus conditionally authorized the Proposed Transaction subject to Commission approval of market power mitigation measures. The Commission explained that these mitigation measures could include, but were not limited to: "joining or forming a [Regional Transmission Organization (RTO)], implementation of an independent coordinator of transmission (ICT) arrangement, generation divestiture, virtual divestiture, and proposals to build new transmission to provide greater access to third party suppliers."[14] The Commission stated that if Applicants wished to proceed with the Proposed Transaction, they were directed to make a compliance filing within 60 days of the Merger Order proposing mitigation that would be sufficient to remedy the screen failures discussed in the Merger Order.[15]

5. Applicants responded to the Merger Order by proposing mitigation. Specifically, in the October 17 Compliance Filing, Applicants submitted a mitigation proposal that they stated adopted the virtual divestiture option listed in the Merger Order (Prior Mitigation Proposal). Applicants explained that the Prior Mitigation Proposal consisted of a "must offer" obligation for Applicants to "sell specific quantities of energy at cost-based rates to entities that serve load, directly or indirectly" in the Duke Energy Carolinas and Progress Energy Carolinas-East BAAs.[16]

6. According to Applicants, the product that they proposed to offer for sale, referred to as AEC Energy, replicated the Available Economic Capacity (AEC) product analyzed by the Commission in the August 29 DPT and would be offered to be sold pursuant to Applicants' existing cost-based tariffs and under standard and reasonable terms for sales

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Commission's Regulations, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000) (Order No. 642), *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).

[13] Merger Order, 136 FERC ¶ 61,245 at PP 1, 117.

[14] Merger Order, 136 FERC ¶ 61,245 at P 146.

[15] Merger Order, 136 FERC ¶ 61,245 at P 145. The Commission explained that after providing an opportunity for comments from interested parties, it would issue a subsequent order indicating whether the proposed mitigation was sufficient.

[16] October 17 Compliance Filing at 3.

of this type of product.[17] Applicants proposed that the must offer obligation apply in the Duke Energy Carolinas BAA in the summer and winter seasons, and in the Progress Energy Carolinas-East BAA in the summer season.[18] Applicants stated that the AEC Energy would be offered on a day-ahead basis, and eligible purchasers would be limited to entities ultimately serving load located in the Duke Energy Carolinas and Progress Energy Carolinas-East BAAs. In addition, the energy purchased would be required to sink in the Duke Energy Carolinas and Progress Energy Carolinas-East BAAs.[19] Applicants proposed to offer the AEC Energy at the "forecasted average incremental cost (after serving retail and wholesale native load and existing (as of the date the merger closes) firm obligations) of [Applicants] plus [ten percent]."[20] Finally, Applicants proposed to engage an independent monitoring entity to ensure that they were in compliance with the Prior Mitigation Proposal and that the Prior Mitigation Proposal last for a term of eight years.

7. In the Compliance Order, the Commission rejected the Prior Mitigation Proposal, finding that it did not "remedy the Proposed Transaction's adverse effects on competition, including screen failures, identified in the Merger Order."[21] The Commission continued to find that the Proposed Transaction, as initially submitted by Applicants and supplemented by the Prior Mitigation Proposal, would have an adverse effect on competition. The Commission stated that the Proposed Transaction remained "conditionally authorized, subject to Commission approval of market power mitigation measures that remedy the screen failures identified in the Merger Order."[22] The Commission concluded that until Applicants corrected the adverse effects of the Proposed Transaction, the Commission could not unconditionally authorize it.

[17] October 17 Compliance Filing at 3.

[18] October 17 Compliance Filing at 3.

[19] October 17 Compliance Filing at 5-6.

[20] October 17 Compliance Filing at 5.

[21] Compliance Order, 137 FERC ¶ 61,210 at P 66.

[22] Compliance Order, 137 FERC ¶ 61,210 at P 66.

8. As discussed in further detail below, the March 26 Compliance Filing contains Applicants' revised proposal for mitigating the screen failures identified by the Commission in the Merger Order.[23]

II. Notice of Filings and Responsive Pleadings

A. March 26 Compliance Filing

9. Notice of the March 26 Compliance Filing was published in the *Federal Register*, 77 Fed. Reg. 20,016 (2012), with comments due on or before April 25, 2012.

10. On January 23, 2012, Richard Bickel; Apalachicola Area Historical Society, Inc.; Dr. Helen E.A. Tudor; Tom Brocato; George Cloon; Leon Bloodworth; Michael and Catherine Bailey; Robert Lindsley, and Susan Buzzett Clementson (collectively, Apalachicola Intervenors) filed a motion to intervene and protest of the Proposed Transaction.[24]

11. On April 6, 2012, Richard Allen and fifty-one others filed protests generally opposing the Proposed Transaction. Donald and Barbara Lilenfeld filed similar protests on May 3, 2012.

12. On April 10, 2012, the Director of the Division of Electric Power Regulation-West issued a request for additional information from Applicants.[25]

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[23] Applicants' newly proposed mitigation is referred to in this order as the Revised Mitigation Proposal.

[24] Apalachicola Intervenors, Amended Motion to Intervene and Protest of the Merger Between Duke Power and Progress Energy, Docket Nos. EC11-60-001, ER12-115-000, ER12-116-000, ER12-118-000, ER12-119-000, ER12-120-000, ER11-3306-000, and ER11-3307-000 (not consolidated) (Jan. 23, 2012) (Apalachicola Protest). On February 13, 2012, Apalachicola Intervenors filed the Second Amended Motion to Intervene and Protest of the Merger Between Duke Power and Progress Energy in the same dockets as the Apalachicola Protest. The two motions appear to be identical and Apalachicola Intervenors do not explain how the two motions differ, if at all.

[25] Request for Additional Information, Docket No. EC11-60-004 (Apr. 10, 2012) (April 2012 Information Request).

13. On April 13, 2012, Applicants filed a response to the April 2012 Information Request.[26] Notice of Applicants April 13 Information Request Answer was published in the *Federal Register*, 77 Fed. Reg. 24,481 (2012), with comments due on or before April 25, 2012.

14. On April 16, 2012, April 30, 2012, and May 7, 2012, Robert McManus filed comments regarding the Revised Mitigation Proposal.

15. On April 20, 2012, the City of Orangeburg, South Carolina (City of Orangeburg), filed a motion to consolidate Docket No. EC11-60-004, the Revised Mitigation Proposal docket, and the Power Sales Agreement Filings dockets, Docket Nos. ER12-1339-000, ER12-1340-000, ER12-1341-000, ER12-1342-000.[27] On the same day, City of Orangeburg filed comments on the Revised Mitigation Proposal.[28]

16. On April 25, 2012, the Florida Municipal Power Agency (FMPA),[29] and the Cities of New Bern and Rocky Mount, North Carolina (City of New Bern)[30] filed protests

[26] Answer of Duke Energy Corporation and Progress Energy, Inc., Docket No. EC11-60-004 (Apr. 13, 2012) (Applicants April 13 Information Request Answer).

[27] Motion to Consolidate of the City of Orangeburg, South Carolina, Docket Nos. EC11-60-004, ER12-1339, ER12-1340-000, ER12-1341-000, and ER12-1342-000 (not consolidated) (April 20, 2012) (City of Orangeburg Motion to Consolidate).

[28] Comments of the City of Orangeburg, South Carolina on Applicants' Second Mitigation Proposal and Request for Relief or, in the Alternative, Request for Hearing, Docket No. EC11-60-004 (April 20, 2012) (City of Orangeburg Comments on Revised Mitigation Proposal).

[29] FMPA Protest of Duke Energy and Progress Energy Revised Compliance Filing, Docket No. EC11-60-004 (Apr. 25, 2012) (FMPA Protest of Revised Mitigation Proposal).

[30] Protest of the Cities of New Bern and Rocky Mount, North Carolina Concerning Applicants' Revised Compliance Filing, Docket No. EC11-60-004 (Apr. 25, 2012), as corrected by Errata to Protest of the Cities of New Bern and Rocky Mount, North Carolina Concerning Applicants' Revised Compliance Filing (Apr. 25, 2012), EC11-60-004 (collectively, City of New Bern Protest of Revised Mitigation Proposal).

regarding the Revised Mitigation Proposal. The Electric Power Supply Association (EPSA) also filed comments April 25, 2012.[31]

17. On May 1, 2012, Applicants filed an answer to the protests.[32] On May 4, 2012, City of Orangeburg filed an answer to Applicants May 1 Answer.[33] On May 7, 2012, Public Staff-North Carolina Utilities Commission (North Carolina Commission Staff) filed an answer in opposition to the City of Orangeburg May 4 Answer.[34] On May 9, 2012, Applicants filed a supplement to their May 1 Answer.[35] On May 11, 2012, City of Orangeburg filed a supplement to its May 4 answer.[36] On May 14, 2012, City of New Bern filed a motion to strike portions of Applicants May 1 Answer and Applicants May 9 Supplement.[37]

B. The Power Sales Agreement Filings

18. Notices of the Power Sales Agreement Filings were published in the *Federal Register*, 77 Fed. Reg. 20,016 (2012), with comments due on or before April 16, 2012.

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[31] Comments of the Electric Power Supply Association, Docket No. EC11-60-004 (Apr. 25, 2012) (EPSA Comments on Revised Mitigation Proposal).

[32] Answer of Duke Energy Corporation and Progress Energy, Inc,, Docket Nos. EC11-60-004, ER12-1339-000, ER12-1340-000, ER12-1341-000, and ER12-1342-000 (not consolidated) (May 1, 2012) (Applicants May 1 Answer).

[33] Answer of the City of Orangeburg, South Carolina to the Answer of Duke Energy Corporation and Progress Energy, Inc., EC11-60-004 (May 4, 2012) (City of Orangeburg May 4 Answer).

[34] Answer of the Public Staff-North Carolina Utilities Commission in Opposition to Comments and Requests for Relief of the City of Orangeburg, South Carolina Regarding Applicants' Revised Compliance Filing, Docket No. EC11-60-004 (May 7, 2012) (North Carolina Commission Staff May 7 Answer).

[35] Supplement to Answer of Duke Energy Corporation and Progress Energy, Inc., Docket No. EC11-60-004 (May 9, 2012) (Applicants May 9 Supplement).

[36] Supplemental Answer of City of Orangeburg, South Carolina, Docket No. EC11-60-004 (May 11, 2012) (City of Orangeburg May 11 Supplement).

[37] Motion of the City of New Bern and Rocky Mount to Strike or Disregard Portions of Applicants' Answer and Supplement and Accompanying Exhibits, Docket No. EC11-60-004 (May 14, 2012) (City of New Bern Motion to Strike).

19. Timely motions to intervene in Docket Nos. ER12-1339-000, ER12-1340-000, ER12-1341-000, ER12-1342-000 were filed by North Carolina Electric Membership Corporation; the Attorney General of the State of North Carolina and North Carolina Commission Staff; City of Orangeburg; and Carolina Electric Membership Corporations (Carolina EMCs).[38]

III. Procedural Matters

20. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2011), we will grant Apalachicola Intervenors' motion to intervene in the compliance proceeding in Docket No. EC11-60-004. That intervention, however, is limited to Docket No. EC11-60-004 and all future subdockets and does not provide party status with respect to the root docket.[39]

21. With respect to City of Orangeburg's request to consolidate Docket No. EC11-60-004 with the Power Sales Agreement Filings dockets, the Commission declines to do so. As City of Orangeburg notes, in general the Commission consolidates matters only if a trial-type hearing is required to resolve common issues of law and fact, and consolidation will ultimately result in greater administrative efficiency.[40] In this case, we conclude that consolidating this proceeding with the Power Sales Agreement Filings proceedings is not appropriate because there are no issues relating to the Proposed Transaction or the Revised Mitigation Proposal that need to be set for a trial-type evidentiary hearing.

22. We also deny the requests that the Commission set the Revised Mitigation Proposal for hearing.[41] The parties making this request have not demonstrated that there are issues of material fact in dispute that require an evidentiary hearing.[42]

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[38] The Carolina EMCs include Blue Ridge Electric Membership Corporation, Rutherford Electric Membership Corporation, Piedmont Electric Membership Corporation, and Haywood Electric Membership Corporation.

[39] *See, e.g., PJM Interconnection, L.L.C.*, 134 FERC ¶ 61,048, at P 6 (2011). While the Commission grants Apalachicola Intervenors' motion to intervene, their complaints are unrelated to the Proposed Transaction.

[40] *See, e.g., Startrans IO, L.L.C.*, 122 FERC ¶ 61,253, at P 25 (2003); *In re: Terra-Gen Dixie Valley*, 132 FERC ¶ 61,215, at P 44, n.74 (2010).

[41] *See, e.g.*, City of Orangeburg Motion to Consolidate at 4 ("…in the event that the Commission does not summarily reject the [Revised Mitigation Proposal] and grant [City of] Orangeburg the relief sought in the merger docket, the [Power Sales

(continued…)

23. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answers that have been filed because they have provided information that assisted us in our decision-making process.

IV. The March 26 Compliance Filing

A. The Revised Mitigation Proposal

24. As described in further detail below, the Revised Mitigation Proposal consists of permanent and interim mitigation. According to Applicants, the Revised Mitigation Proposal "provides for permanent structural mitigation in the form of seven transmission expansion projects that fully address the concerns raised by the Commission in the Merger Order."[43] The interim mitigation, which will remain in place for approximately three years while the seven transmission expansion projects are completed, consists of firm sales of capacity and energy pursuant to four power sales agreements with identified buyers (Power Sales Agreements).

1. Permanent Mitigation

25. According to Applicants, the seven transmission expansion projects they are proposing as permanent mitigation will increase transmission import capability into the Duke Energy Carolinas and Progress Energy Carolinas-East BAAs (Transmission Expansion Projects). Applicants note that the Commission identified transmission expansion as an acceptable form of mitigation in the Merger Order, and that the Commission has accepted proposals to mitigate market power through transmission expansion in other cases. Applicants claim that the Transmission Expansion Projects will increase the Simultaneous Transmission Import Limit (SIL) for the Duke Energy Carolinas BAA by 2,440 MW in the summer and 1,930 MW in the winter, and for the Progress Energy Carolinas-East BAA by 2,225 MW in the summer and 1,225 MW in the

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Agreements] and the Revised Mitigation Proposal present questions that are appropriate subjects of discovery and a hearing."), FMPA Protest of Revised Mitigation Proposal at 4 ("…the Commission…should order hearings and discovery and other appropriate procedures").

[42] *See FirstEnergy Corp.*, 133 FERC ¶ 61,222 at P 55 (no hearing is required where no issues of material fact have been identified, even in the presence of market screen failures).

[43] March 26 Compliance Filing at 1.

winter.[44] Applicants note that based on preliminary estimates, the total cost of the Transmission Expansion Projects is projected to be approximately $110 million.[45] Applicants summarize the Transmission Expansion Projects as follows:

Table 1. Transmission Expansion Projects Proposed by Applicants

Project	BAA	Estimated Cost	Time to Construct
Antioch 500/230 kV substation: replace two existing transformers with larger capacity transformers.	Duke Energy Carolinas	$50 million	3 years
Lilesville-Rockingham 230 kV Line: construct new third line.	Progress Energy Carolinas-East	$15.7 million	2 years
Roxboro-E Danville 230 tie: add a series reactor to one Roxboro-E Danville 230 kV line and revise operating procedures.[46]	Progress Energy Carolinas-East	$6.6 million	2 years
Reconductor Kinston Dupont-Wommack 230 kV Line 6-1590 MCM.	Progress Energy Carolinas-East	$18 million	2 years

[44] Applicants also state that the Transmission Expansion Projects will result in increased Available Transfer Capacity (ATC) on paths into the Duke Energy Carolinas and Progress Energy Carolinas-East BAAs. March 26 Compliance Filing at 7.

[45] March 26 Compliance Filing at 8. Applicants state that the preliminary cost estimates are subject to change but that their commitment to build the projects is not affected by any changes in the cost estimates. March 26 Compliance Filing at n.6.

[46] According to Applicants, this project requires the cooperation of American Electric Power, and the Person-Halifax and Wake-Carson projects require the cooperation of Dominion Virginia Power. Applicants state that they have discussed these projects with both companies and that they have entered into memoranda of understanding with them under which both companies have agreed to negotiate binding agreements to undertake the projects. Applicants expect to negotiate and complete binding agreements with American Electric Power and Dominion Virginia Power during the pendency of the Commission's review to ensure the completion of the projects. March 26 Compliance Filing at n.7.

Project	**BAA**	**Estimated Cost**	**Time to Construct**
Person-Halifax 230 kV Line: reconductor Dominion Virginia Power portion of line (20.04 Miles).[47]	Progress Energy Carolinas-East	$16 million	2.5 years
Wake-Carson 500 kV Line: replace existing wave traps with 4000 amp wave traps at both terminals and rework protective relaying.[48]	Progress Energy Carolinas-East	$1.5 million	<2 years
Durham-E. Durham 230 kV line: uprate CT Ratio to 3000 amps.	Progress Energy Carolinas-East	$0.5 million	< 2 years

26. In addition to the Transmission Expansion Projects, Applicants are accelerating the in-service date of Progress Energy Carolinas' already-planned Greenville-Kinston Dupont 230kV Line from 2017 to 2015. Applicants explain that although this line does not, by itself, provide any increase in the Duke Energy Carolinas or Progress Energy Carolinas-East SILs, it is necessary for this line to be in service by 2015 for the last four projects listed in Table 1 to increase the SIL of the Progress Energy Carolinas-East BAA.[49]

27. Applicants assert that, in some of its prior cases involving transmission expansion as mitigation of merger-related market power, "the Commission has required that merger applicants demonstrate 'whether or not the proposed upgrade was foreseeable and reasonably certain.'"[50] According to Applicants, the Commission has held that if an upgrade is foreseeable and reasonably certain to be constructed without the merger, it may not be counted as merger-related market power mitigation. Applicants state that none of the Transmission Expansion Projects is "currently included in either of the Applicants' Transmission Plans," and that while some of the projects have been studied in the past as part of the regional planning process, "there is currently no plan to construct

[47] *See* n.46, *supra*.

[48] *See* n.46, *supra*.

[49] March 26 Compliance Filing at 9.

[50] March 26 Compliance Filing at 9 (*quoting Oklahoma Gas & Electric Co.*, 105 FERC ¶ 61,297, at P 32 (2003) (*OG&E-NRG McClain I*)).

any of them" absent the merger.[51] Applicants conclude that it is not foreseeable and reasonably certain that, absent the Proposed Transaction, the Transmission Expansion Projects would be constructed in the next two to three years.

28. In further support of the Transmission Expansion Projects, Applicants provide the post-transmission expansion DPT results for the Duke Energy Carolinas and Progress-Energy Carolinas-East BAAs for the base case and two price sensitivities discussed in the Merger Order.[52] Applicants state that their analysis demonstrates that the Transmission Expansion Projects "completely mitigate the screen failures in the [Duke Energy Carolinas] BAA identified by the Commission in the Merger Order."[53] Applicants claim that "in most periods, including all periods where there previously were screen failures, the expansion results in a significant *de-concentration* of the market as compared to the pre-merger concentration" in the base case and the price sensitivities.[54] With respect to the Progress Energy Carolinas-East BAA, Applicants state that the Transmission Expansion Projects eliminate the screen failures identified by the Commission in all three market price scenarios (i.e., the base case and two price sensitivities) except for a failure in the base case during the Summer Off-Peak season/load period. During this season/load period, Applicants state that there is an HHI increase of 101 in a moderately concentrated market.[55]

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[51] March 26 Compliance Filing at 10.

[52] March 26 Compliance Filing at 10. *See also* March 26 Compliance Filing, Tables 1 and 2.

[53] March 26 Compliance Filing at 11.

[54] March 26 Compliance Filing at 11 (emphasis in original).

[55] As noted in the Merger Order, 136 FERC ¶ 61,245 at n.316, in the Merger Policy Statement the Commission explained that:

> …mergers in moderately concentrated markets (with an HHI greater than or equal to 1,000 but less than 1,800) that produce an HHI increase over 100 points potentially raise significant competitive concerns. Mergers in highly concentrated markets (with an HHI of more than 1,800) that produce an HHI increase over 50 points potentially raise significant competitive concerns; if the change in HHI exceeds 100 points it is presumed likely to create or enhance market power.

29. Applicants argue that the screen failure in the Progress Energy Carolinas-East BAA in the Summer Off-Peak season/load period does not raise competitive concerns. Applicants state that the Commission has previously held that "SIL increases greater than the amount of competitive supplies lost due to the merger fully restore the competitive options available to wholesale customers in the BAAs and therefore provide adequate mitigation."[56] Applicants claim that the Transmission Expansion Projects meet this standard. According to Applicants, under the analyses of the Duke Energy Carolinas and Progress Energy Carolinas-East BAAs the Commission relied on in the Merger Order, the largest amount of Progress Energy capacity delivered to the Duke Energy Carolinas BAA was 318 MW in the summer. By comparison, Applicants state that the increase in "'rival capacity' (i.e., the amount of increased capacity not allocated to Duke Energy)" in the Duke Energy Carolinas BAA due to the Transmission Expansion Projects is between 1,900 MW and 2,400 MW in the summer.[57] Based on these increases, Applicants assert that the increases in access to competing supply during the summer are from approximately six to eight times greater than the amount of Progress Energy AEC available to wholesale customers in the Duke Energy Carolinas BAA prior to the Proposed Transaction. Similarly, Applicants state that the analysis relied on by the Commission in the Merger Order also showed at most 543 MW of Duke Energy AEC delivered into the Progress Energy Carolinas-East BAA in the summer, but that the Transmission Expansion Projects would increase access to rival capacity in the summer from 1,300 MW to 2,100 MW. Based on this range of increases, Applicants conclude that the increases in access to competing supply in the Progress Energy Carolinas-East BAA are approximately two to four times greater than the amount of Duke Energy supplies potentially lost as a competitive alternative as a result of the Proposed Transaction.

30. Applicants also assert that the single remaining off-peak screen failure does not represent a systematic market power concern. Noting that the Commission has long recognized that screen failures do not always represent a valid competitive concern, Applicants argue that because the Transmission Expansion Projects will increase import capability by more than four times the amount of competitive supplies lost as a result of the Proposed Transaction, the Transmission Expansion Projects will eliminate any concern that the Proposed Transaction will increase Applicants' ability to withhold

[56] March 26 Compliance Filing at 12 (*citing Oklahoma Gas & Electric Co.*, 108 FERC ¶ 61,004, at P 32 (2004) (*OG&E-NRG McClain II*); *Oklahoma Gas & Electric Co.*, 124 FERC ¶ 61,239, at P 49 (2008) (*OG&E-Redbud*)).

[57] March 26 Compliance Filing at 13.

output to drive up market prices.[58] Further, Applicants emphasize that the screen failure occurs in the Summer Off-Peak season/load period and only in the base case. According to Applicants, the Commission has held in the past that no competitive concerns were raised even when there were three screen failures occurring in off-peak periods, in contrast to the single failure here, because of the difficulty of withholding the baseload generation that operates in off-peak conditions.[59] Applicants also note the "very small" size of the screen failure and claim that it would be eliminated if Duke Energy supplied only 5 MW less of generation capacity to the Progress Energy Carolinas-East market.

31. Although Applicants conclude that the single failure in the Summer Off-Peak season/load period does not represent a valid competitive concern, they propose "stub mitigation" that would go into effect only if the Commission determines that such mitigation is required.[60] Specifically, if the Commission deems it necessary, Applicants propose to "establish a transmission set-aside of 25 MW of firm transmission capacity from the Duke Energy Carolinas BAA to the Progress Energy Carolinas-East BAA" in the Summer Off-Peak season/load period (Stub Mitigation). Neither Applicants nor any of their affiliates would be able to reserve the 25 MW set-aside on a firm basis.[61] In addition, Applicants state that they have engaged Potomac Economics as an Independent Monitor (Independent Monitor) to monitor compliance with the Stub Mitigation and to file periodic reports with the Commission detailing Applicants' compliance with the proposal.[62]

32. Applicants explain that "[t]he intent of the transmission set-aside alternative is to create the equivalent of a firm transmission right that will be reflected as being unavailable to the Applicants in the allocation of [transmission] capacity from the [Duke Energy Carolinas] BAA to the [Progress Energy Carolinas-East] BAA when performing the competition analysis."[63] Since the Stub Mitigation would prevent Applicants from

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[58] March 26 Compliance Filing at 14-15 (*citing* Supplemental Policy Statement, FERC Stats. & Regs. §31,253 at P 60).

[59] March 26 Compliance Filing at 15 (*citing FirstEnergy Corp.*, 133 FERC ¶ 61,222 at PP 49-50).

[60] March 26 Compliance Filing at 16.

[61] March 26 Compliance Filing at 16.

[62] March 26 Compliance Filing at 18.

[63] March 26 Compliance filing at 16.

entering into firm reservations for the capacity subject to the set-aside, Applicants assert that, for purposes of performing the DPT, it would not be appropriate to allocate any of the set-aside import capacity to Applicants. Instead the capacity would be allocated *pro rata* among all potential suppliers that are unaffiliated with Applicants.[64] Under the Stub Mitigation, after the completion of the Transmission Expansion Projects, Applicants would "set aside 25 MW of import capacity on the [Duke Energy Carolinas] to [Progress Energy Carolinas-East] interface"[65] subject to the following restrictions at all times:

1. If new third party firm transmission reservations are greater than or equal to the 25 MW set-aside amount, then the Applicants may reserve on a firm basis up to the then posted available firm transmission capacity.

2. If new third party firm transmission reservations[66] are less than the 25 MW set-aside amount, then the Applicants shall not reserve on a firm basis any more than the amount of transmission capacity then posted as available on that path for that time which exceeds: (a) 25 MW; less (b) the sum of all new firm third party transmission reservations.[67]

33. Applicants state that they will not claim any kind of native load or other priority over the 25 MW of set-aside capacity, but that, to the extent that the 25 MW of capacity is not reserved by third parties on a firm basis, Applicants and all other market participants will be able to use the capacity in the Summer Off-Peak season/load period on a non-firm basis under the same first-come, first-served rules.[68]

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[64] March 26 Compliance Filing at 16-17.

[65] March 26 Compliance Filing at 17.

[66] Applicants state: "[r]eferences to new third party transmission reservations in this paragraph do not include the amount of existing firm reservations that have been made by third parties and that already have been allocated to third parties under the Competitive Analysis Screen" performed by Applicants' witness. March 26 Compliance Filing at n.13.

[67] March 26 Compliance Filing at 17.

[68] Applicants note that a third party could always reserve import capacity on the set-aside portion of the interface on a firm basis and displace any non-firm use of the set-aside portion of the interface by Applicants. March 26 Compliance Filing at 17.

34. Applicants assert that the Stub Mitigation "is appropriate for treating the interface capacity as unavailable to Applicants" for purposes of the Competitive Analysis Screen.[69] Applicants explain that since they would not be able to make a firm reservation for the capacity that would be set aside, third parties will be entitled to use the entire 25 MW of transmission capacity to deliver their own supplies into the Progress Energy Carolinas-East BAA. Thus, for purposes of the Competitive Analysis Screen, Applicants claim that it is appropriate to allocate the 25 MW of import capacity set aside pursuant to the Stub Mitigation *pro rata* among third parties, and not to Applicants. Applicants state that all remaining unreserved capacity would continue to be allocated on a *pro rata* basis to all parties, including Applicants.[70]

35. In conclusion, Applicants note that although the Commission's regulations do not directly address their set-aside proposal, 18 C.F.R. § 33.3(c)(4)(i)(D)(2), which applies to the allocation of capacity to internal interfaces (as opposed to the allocation of capacity between BAAs, which is the case here), specifically permits merger applicants that have "'committed a portion of the interface capacity to third parties' to avoid the Commission's otherwise applicable rule that all of the capacity of internal interface be allocated to the applicants."[71] Applicants argue that committing a portion of the interface capacity to third parties should similarly allow them to avoid the otherwise applicable rule that the unreserved capacity be allocated *pro rata*.[72] According to Applicants, the Stub Mitigation eliminates the Summer Off-Peak season/load period screen violation in the Progress Energy Carolinas-East BAA.[73]

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[69] March 26 Compliance Filing at 17-18.

[70] March 26 Compliance Filing at 18.

[71] March 26 Compliance Filing at 18 (*quoting* 18 C.F.R. § 33.3(c)(4)(i)(D)(2)).

[72] Applicants note that the Commission has accepted the use of redispatch commitments to affect the way that transmission capacity allocations are modeled in merger-related competition analyses. March 26 Compliance Filing at n.14 (*citing OGE-NRG McClain II*, 108 FERC ¶ 61,004 at P 34, *Ameren Services Co.*, 101 FERC ¶ 61,202 at P 32).

[73] March 26 Compliance Filing at 19.

2. Interim Mitigation

36. As noted above, Applicants state that it will take from two to three years to construct and place into service the Transmission Expansion Projects.[74] Applicants recognize "that interim mitigation will be required until such time" as the Transmission Expansion Projects are placed into service.[75] Accordingly, Applicants propose "firm sales of capacity and energy" pursuant to the four Power Sales Agreements as interim mitigation (Interim Mitigation Proposal).[76] Applicants assert that the Interim Mitigation Proposal satisfies the concerns that the Commission described in the Compliance Order, and that the firm energy and capacity sales proposed in the March 26 Compliance Filing are "materially different" from those proposed in the Prior Mitigation Proposal.[77]

37. Applicants explain that they have entered into the Power Sales Agreements with Cargill Power Markets, LLC (Cargill), EDF Trading North America, LLC (EDF Trading), and Morgan Stanley Capital Group, Inc. (Morgan Stanley).[78] Applicants describe the material provisions of the Power Sales Agreements, which use "the industry-standard EEI form, as modified by the [Power Sales Agreements],"[79] as follows:

- Applicants will sell energy "on a firm basis in all hours of those seasons when mitigation is required" and in sufficient amounts to fully mitigate the screen failures identified in the Merger Order.[80]

- In the Duke Energy Carolinas BAA, Applicants will sell 150 MW in the Summer Peak season/load period; 300 MW in the Summer Off-Peak season/load period;

[74] March 26 Compliance Filing at 5.

[75] March 26 Compliance Filing at 19.

[76] March 26 Compliance Filing at 19.

[77] March 26 Compliance Filing at 19.

[78] March 26 Compliance Filing at 20.

[79] March 26 Compliance Filing at 20.

[80] March 26 Compliance Filing at 20.

25 MW in the Winter Peak season/load period; and 225 MW in the Winter Off-Peak season/load period.[81]

- In the Progress Energy Carolinas-East BAA, Applicants will sell 325 MW in the Summer Peak season/load period and 500 MW in the Summer Off-Peak season/load period.[82]

- Applicants will sell the energy on a "must take" basis: the buyers "must take the full contract amounts of energy in all hours, subject to interruption only on *force majeure* grounds."[83] Any interruption of deliveries of energy by Duke Energy Carolinas or Progress Energy Carolinas will result in payment of liquidated damages unless that interruption is excused on *force majeure* grounds.[84]

- The energy sold by Applicants will be sold at a specified price "based on a fixed heat rate and the natural gas price reported in *Platts Gas Daily* for Transco Zone 5."[85] The heat rates will be differentiated between on-peak and off-peak periods and are "based on the heat rates of units that will address the screen failures."[86] The heat rates will be 10.0 MMBtu/MWh for the Summer Peak season/load period; 7.0 MMBtu/MWh for the Summer Off-Peak season/load period; 8.95 MMBtu/MWh for the Winter Peak season/load period; and 7.0 MMBtu/MWh for the Winter Off-Peak seasons/load period.

- The capacity prices, which include negative prices (i.e., in some seasons/load periods, Applicants will pay buyers to take capacity), were "negotiated between

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[81] March 26 Compliance Filing at 20. Cargill will purchase all of the energy and capacity sold in the Duke Energy Carolinas BAA.

[82] March 26 Compliance Filing at 20. In the Progress Energy Carolinas-East BAA, Cargill will purchase 100 MW in both the Summer Peak and Summer-Off Peak season/load periods; EDF Trading will purchase 100 MW in both the Summer Peak and Summer Off-Peak seasons/load periods; and Morgan Stanley will purchase 125 MW and 300 MW in the Summer Peak and Summer-Off Peak seasons/load periods, respectively.

[83] March 26 Compliance Filing at 20. As discussed in further detail below, Applicants have revised the standard *force majeure* clause that would ordinarily apply.

[84] March 26 Compliance Filing at 21.

[85] March 26 Compliance Filing at 20.

[86] March 26 Compliance Filing at 20.

> Applicants and the purchasers, at prices that are well below [Duke Energy Carolinas'] and [Progress Energy Carolinas'] cost-based capacity prices."[87]

- There are no restrictions on the use of energy by the purchasers after it is purchased.[88]

- The sales pursuant to the Power Sales Agreements will commence after the merger has closed. The terms of Progress Energy Carolinas' Power Sales Agreements will extend through August 31, 2014; the terms of Duke Energy Carolinas' Power Sales Agreements will extend through February 28, 2015.

38. Applicants claim that the terms of the Power Sales Agreements address the Commission's concerns with the Prior Mitigation Proposal that the Commission identified in the Compliance Order. Applicants explain that in the Compliance Order, the Commission found that the Prior Mitigation Proposal did not transfer control over the capacity necessary to mitigate the screen failures identified in the Merger Order. According to Applicants, the Interim Mitigation Proposal addresses this issue in two ways. First, by identifying the purchasers and entering into contracts with them prior to filing their proposal, Applicants claim that they have addressed the Commission's concern that Applicants would have difficulty finding a purchaser.[89] Second, Applicants state that the "must take" feature of the Power Sales Agreements ensures that the energy will be purchased subject only to the occurrence of *force majeure* events and will be beyond their control. Applicants argue that their analysis demonstrates that the sales to Cargill, EDF Trading, and Morgan Stanley will resolve all of the screen failures, and that they have thus addressed the Commission's concern in the Compliance Order that Applicants assumed that two new market entrants would purchase the AEC Energy that they proposed to offer for sale.[90]

39. Applicants also assert that the interim mitigation proposal addresses other specific shortcomings of the Prior Mitigation Proposal that the Commission identified in the Compliance Order. First, Applicants state that the Compliance Order criticized the restrictions on eligible purchasers in the Prior Mitigation Proposal that required the sales to be used to serve load in the Duke Energy Carolinas and Progress Energy Carolinas-

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[87] March 26 Compliance Filing at 20.

[88] March 26 Compliance Filing at 20.

[89] March 26 Compliance Filing at 21.

[90] March 26 Compliance Filing at 22.

East BAAs. Applicants state that the interim mitigation proposal contains no such restrictions.[91] Second, to address the uncertainty as to the availability of energy under the Prior Mitigation Proposal, Applicants state that under the Interim Mitigation Proposal "the energy will be made available in all hours in which it is required to be sold."[92] Third, in response to the lack of detail provided in the Prior Mitigation Proposal regarding the price of the energy to be sold, Applicants have fixed the price of capacity in the Power Sales Agreements and state that the price of energy is easily calculable based on the specified heat rate and the published natural gas price index.

40. Fourth, Applicants explain that, in response to the lack of detail in the Prior Mitigation Proposal regarding the provisions that would have allowed Applicants to interrupt deliveries, the Power Sales Agreements specify that any interruption of deliveries of energy by Duke Energy Carolinas or Progress Energy Carolinas will result in the payment of liquidated damages unless that interruption is excused on specified *force majeure* grounds. Fifth, Applicants state that although the Compliance Order found that Applicants did not justify the eight-year term of sales under the Prior Mitigation Proposal, the Interim Mitigation Proposal addresses this issue by providing that the interim sales will be made until the Transmission Expansion Projects are placed in service. Sixth, to address the finding in the Compliance Order that Applicants did not provide enough detail about the independent monitor, Applicants explain that they have executed a contract with Potomac Economics to be the Independent Monitor of the proposed sales and have included the agreement as an attachment to the March 26 Compliance Filing.[93] Finally, Applicants state that, by identifying the purchasers prior to filing the interim mitigation proposal, the Commission's concern in the Compliance Order that Applicants failed to provide for the sale of AEC Energy regardless of the price offered by purchasers has been mooted.

41. Applicants explain that they have structured the duration of the Power Sales Agreements so that extending them or entering into new Power Sales Agreements should be unnecessary. Applicants have "estimated that all of the transmission projects…can be completed within three years which is approximately June 1, 2015, the commencement of the Summer Period when mitigation is required under the Merger Order."[94] According to

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[91] March 26 Compliance Filing at 22.

[92] March 26 Compliance Filing at 22.

[93] *See* March 26 Compliance Filing, Exhibit D: Executed Contract with Potomac Economics to Perform Compliance Monitoring (Monitoring Agreement).

[94] March 26 Compliance Filing at 23.

Applicants, the Power Sales Agreements will extend through the last seasons/load periods where mitigation is necessary before the Transmission Expansion Projects are "projected to take effect."[95] Acknowledging the possibility that the transmission projects may not all be placed in service prior to June 1, 2015, Applicants state that they will either renew or enter into new Power Sales Agreements with alternate purchasers "on materially the same terms and conditions" if the Transmission Expansion Projects are not placed into service by that date.[96]

3. Independent monitoring of Revised Mitigation Proposal

42. Applicants explain that once the Proposed Transaction is completed, two aspects of the Revised Mitigation Proposal will be subject to monitoring by the Independent Monitor.[97] First, Potomac Economics will monitor whether the Power Sales Agreements remain in effect prior to the completion of the Transmission Expansion Projects and, if any of the agreements has been terminated or expires prior to completion of the Transmission Expansion Projects, Potomac Economics will monitor whether such agreement has been replaced with a new agreement under materially the same terms and conditions. Second, to the extent that the Commission requires Applicants to implement the Stub Mitigation, Potomac Economics will monitor Applicants' compliance with the transmission set-aside requirements. As noted above, Applicants include, as an attachment to the March 26 Compliance Filing, a copy of the executed contract with Potomac Economics.

4. Applicants' response to April 2012 Information Request

43. In the April 2012 Information Request, Applicants were directed to provide additional analyses and information. Specifically, Applicants were instructed to provide modified seasonal benchmark models for the 2011/2012 seasons that incorporated the Transmission Expansion Projects, and the Managing and Utilizing System Transmission (MUST) study results for those revised benchmark models. Applicants were further instructed to give a detailed narrative of any changes to the seasonal benchmark models other than the seven proposed Transmission Expansion Projects and the Greenville-Kinston Dupont 230 kV line. Applicants were instructed that if the SIL values resulting from the modified seasonal benchmark models differed from the SIL values provided in the March 26 Compliance Filing, Applicants should provide new DPT studies

[95] March 26 Compliance Filing at 23.

[96] March 26 Compliance Filing at 24.

[97] March 26 Compliance Filing at 24.

incorporating those new values. Applicants were also required to answer questions regarding the impacts of the Transmission Expansion Projects on transmission capability from PJM to the Progress Energy Carolinas-East BAA.

44. On April 13, 2012, Applicants submitted the requested modified seasonal benchmark models and MUST studies. Applicants also provided modified DPT results based on the revised seasonal benchmark models (April 13 DPT) and responses to the questions regarding the impacts of the Transmission Expansion Projects on transmission capability from PJM Interconnection, L.L.C. (PJM) to the Progress Energy Carolinas-East BAA.

B. Comments and Protests

45. City of Orangeburg argues that the Revised Mitigation Proposal does not constitute "proper mitigation" because Applicants are not divesting themselves of control over their system generation resources pursuant to the Power Sales Agreements, and because the proposal provides for the "indefinite provision of interim mitigation measures" in violation of the Merger Policy Statement.[98] Additionally, City of Orangeburg challenges the mitigation allegedly provided by the Transmission Expansion Projects because the Commission "can have no assurance prior to the consummation of the merger that the Applicants will have secured all of the approvals necessary to construct the requisite upgrades."[99]

46. In its comments, City of Orangeburg also advances and reiterates several arguments related to certain state regulatory conditions that City of Orangeburg claims have interfered with and continue to interfere with the Commission's jurisdiction and both the Prior and Revised Mitigation Proposals.[100] According to City of Orangeburg,

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[98] City of Orangeburg Comments on Revised Mitigation Proposal at 2-3.

[99] City of Orangeburg Comments on Revised Mitigation Proposal at 4 (*citing* Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,121).

[100] Duke Energy and Progress Energy are both subject to certain existing state regulatory conditions that were imposed by the North Carolina Commission during previous mergers. Among other things, these conditions require the companies to provide notice to the North Carolina Commission before granting native load priority to new wholesale customers and to serve their Retail Native Load Customers in North Carolina with the lowest-cost power before making sales to customers that are not Retail Native Load Customers. In addition, the state reserves the right to assign, allocate and make *pro forma* adjustments with respect to the revenues and costs associated with wholesale contracts for retail ratemaking purposes. The companies have proposed

(continued…)

pursuant to the state regulatory conditions, the North Carolina Commission "claims authority to determine the customers to whom [Duke Energy Carolinas and Progress Energy Carolinas] can sell and provide firm wholesale power."[101] City of Orangeburg asserts that, because the North Carolina Commission has not granted the Power Sales Agreements customers native load status, Applicants have had to tailor the Power Sales Agreements to "not run afoul of the [North Carolina Commission's] determination that their respective retail load and [North Carolina Commission] designated wholesale 'native' load is entitled to service priority ahead of all other sales," including sales under the Power Sales Agreements.[102] Thus, according to City of Orangeburg, the Power Sales Agreements actually provide for transmission contingent sales of "interruptible surplus energy,"[103] not firm sales of energy. Reiterating arguments it has made in several previously filed pleadings,[104] City of Orangeburg argues that the North Carolina Commission's efforts to decide wholesale service rights is beyond that commission's jurisdiction and violates the Constitution and federal law.[105] City of Orangeburg notes that its request for declaratory relief regarding the state regulatory conditions remains pending before the Commission. City of Orangeburg also states, that in this proceeding, the Commission did not reach the substance of City of Orangeburg's arguments concerning the state regulatory conditions, holding that they are irrelevant to the Commission's evaluation of the Proposed Transaction, and that it has sought rehearing.[106]

47. Citing to the Merger Order, City of Orangeburg notes that the Commission rejected the Prior Mitigation Proposal because the proposed virtual divestiture did not transfer control of Applicants' generation. City of Orangeburg asserts that the same flaw

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similar conditions for the Proposed Transaction at the state level. These conditions are referred to in this order as the state regulatory conditions.

[101] City of Orangeburg Comments on Revised Mitigation Proposal at 5.

[102] City of Orangeburg Comments on Revised Mitigation Proposal at 9.

[103] City of Orangeburg Comments on Revised Mitigation Proposal at 10.

[104] *See, e.g.* Motion to Intervene and Protest of the City of Orangeburg, South Carolina, Docket Nos. EC11-60-000, ER11-3306-000, ER11-3307-000 (not consolidated) (June 3, 2011).

[105] City of Orangeburg Comments on Revised Mitigation Proposal at 11-12.

[106] City of Orangeburg Comments on Revised Mitigation Proposal at 13-14.

exists with respect to the Interim Mitigation Proposal under the Revised Mitigation Proposal. Although Applicants claim that the Power Sales Agreements entail firm sales of capacity and energy and describe the product as "'Capacity and Firm (LD) Energy, as defined in Schedule P of the EEI Master Agreement,"[107] according to City of Orangeburg, the Commission has found that the sale of the EEI Master Agreement Firm (LD) product "'gives the purchaser only a right to receive energy and thus no rights that would allow the purchaser to control generation capacity.'"[108] Thus, according to City of Orangeburg, a purchase and sale of Firm LD under the base EEI Master Power Purchase and Sales Agreement does not entail a sale of capacity, and is simply a sale of energy.

48. City of Orangeburg further argues that the Power Sales Agreements actually include transformative modifications that convert the product being sold into an interruptible, non-firm product. City of Orangeburg states that, under the *pro forma* EEI Master Agreement, the purchaser's right to receive energy and the seller's obligation to provide energy is limited only by *force majeure* as that term is defined in the EEI Master Agreement.[109] City of Orangeburg explains, however, that rather than using the *force majeure* clause established in section 1.23 of the EEI Master Agreement, Applicants have "materially rewritten" the Power Sales Agreements' *force majeure* clause to excuse the buyer's performance "'if… transmission is unavailable or interrupted

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[107] City of Orangeburg Comments on Revised Mitigation Proposal at 17 (*quoting* March 26 Compliance Filing, Exhibit C: Executed Power Sales Agreements Provided as Interim Mitigation, Duke Energy Carolinas-Cargill Power Sales Agreement at 1 (Duke Energy Carolinas-Cargill Power Sales Agreement). The other Power Sales Agreements include identical language.

[108] City of Orangeburg Comments on Revised Mitigation Proposal at 17 (*quoting Integrys Energy Grp., Inc.*, 123 FERC ¶ 61,034, at P 11 (2008)).

[109] City of Orangeburg Comments on Revised Mitigation Proposal at 18. City of Orangeburg states that section 1.23 of the EEI Master Agreement defines "Force Majeure," in relevant part, as follows:

> an event or circumstance which prevents one Party from performing its obligations under one or more Transactions, which event or circumstances was not anticipated as of the date the Transaction was agreed to, which is not within the reasonable control of, or the result of the negligence of, the Claiming Party, and which, by the exercise of due diligence, the Claiming Party is unable to overcome or avoid or cause to be avoided.
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> City of Orangeburg Comments on Revised Mitigation Proposal at 18.

or curtailed for any reason, at any time, anywhere from the Delivery Point to the Buyer's proposed ultimate sink, regardless of whether transmission, if any, that Buyer is attempting to secure and/or has purchased for the Product is firm or non-firm.'"[110] As a consequence of these changes, City of Orangeburg asserts that Applicants have "fundamentally changed the nature of the product sold" into Transmission Contingent energy.[111] According to City of Orangeburg, the Commission has never held that the sale of transmission contingent energy entails a transfer of control over merging entities' generating resources and thus constitutes an acceptable form of mitigation. In addition, City of Orangeburg likens the virtual divestiture proposed in *Allegheny Energy, Inc.*, 84 FERC ¶ 61,223 (1998) (*Allegheny Energy*), which the Commission rejected because the lack of assured transmission service decreased the certainty that the output at issue would be sold, with the Power Sales Agreements, where no energy will be sold if buyers cannot secure transmission to the destination markets.[112]

49. City of Orangeburg also argues that buyers under the Power Sales Agreements will face the constant risk of product unavailability because Applicants may need their system resources to serve retail and wholesale native load. City of Orangeburg asserts that, to mitigate this uncertainty, the buyers may elect to market the energy purchased

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[110] City of Orangeburg Comments on Revised Mitigation Proposal at 19 (*quoting* March 26 Compliance Filing, Exhibit C, Duke Energy Carolinas-Cargill Power Sales Agreement at 5).

[111] City of Orangeburg Comments on Revised Mitigation Proposal at 19. Transmission Contingent energy is defined in Schedule P of the EEI Master Agreement as follows:

> "Transmission Contingent" means, with respect to a Transaction, that the performance of either Seller or Buyer (as specified in the Transaction) shall be excused, and no damages shall be payable…if the transmission for such Transaction is unavailable or interrupted or curtailed for any reason, at any time, anywhere from the Seller's proposed generating source to the Buyer's proposed ultimate sink, regardless of whether transmission, if any, that such Party is attempting to secure and/or has purchased for the Product is firm or non-firm.

City of Orangeburg Comments on Revised Mitigation Proposal at 20 (*quoting* definition of a Transmission Contingent product under Schedule P of the EEI Master Agreement).

[112] City or Orangeburg Comments on Revised Mitigation Proposal at 21.

under the Power Sales Agreements on a day-ahead or real-time basis. City of Orangeburg claims, however, that because the Power Sales Agreements will be operative during the winter and summer peak season, "there is every reason to believe" that the buyers "will in fact find themselves unable to secure transmission, or will have transmission curtailed or interrupted at times."[113] City of Orangeburg not only concludes that Applicants will retain complete control over their system resources, but that there are substantial opportunities for the buyers to avoid taking or paying for energy by simply identifying an ultimate sink where transmission service is unavailable. According to City of Orangeburg, Applicants fail to acknowledge or address the transmission contingent nature of the Power Sales Agreements,[114] and fail to show that the interim mitigation measures will transfer control of Applicants' generation and cure screen failures identified in the Merger Order.[115] City of Orangeburg also claims that Applicants have provided "no explanation" for the negative capacity prices in the Power Sales Agreements. City of Orangeburg asserts that having to pay buyers to take the transmission contingent surplus energy sold pursuant to the Power Sales Agreements "belies Applicants' claim of having engaged in a meaningful divestiture of system resources."[116]

50. City of Orangeburg also challenges Applicants' claims regarding the proposed Transmission Expansion Projects. According to City of Orangeburg, based on statements by Applicants to the North Carolina Commission, it is "unclear whether or when [the Transmission Expansion Projects] will ever be completed"[117] because Applicants have stated that implementation of the Revised Mitigation Proposal "depends on the resolution of acceptable state retail ratemaking treatment of the proposed transmission upgrades."[118] City of Orangeburg further asserts that Applicants fail to mention this contingency in the March 26 Compliance Filing, and, in fact, suggest that there are no impediments to Applicants constructing the Transmission Expansion Projects. City of Orangeburg

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[113] City of Orangeburg Comments on Revised Mitigation Proposal at 22.

[114] City of Orangeburg Comments on Revised Mitigation Proposal at 23.

[115] City of Orangeburg Comments on Revised Mitigation Proposal at 25.

[116] City of Orangeburg Comments on Revised Mitigation Proposal at 25.

[117] City of Orangeburg Comments on Revised Mitigation Proposal at 26.

[118] City of Orangeburg Comments on Revised Mitigation Proposal at 26 (*citing Duke Energy Carolinas, LLC's Advance Notice of Filing of Proposed Mitigation Plan at the Federal Energy Regulatory Commission*, Docket No. E-7, Sub 995 (Feb. 22, 2012)).

emphasizes that Applicants do not "guarantee to construct the proposed transmission upgrades and to do so by a set date."[119] This omission, City of Orangeburg argues, is unsurprising given Applicants' representations to the North Carolina Commission.

51. According to City of Orangeburg, Applicants are seeking Commission approval for the merger based on an alleged permanent solution that may never be completed or implemented, or which may be "materially altered" to satisfy the concerns of the North Carolina Commission.[120] City of Orangeburg expresses concern that the Commission has not received a commitment from Applicants that the Transmission Expansion Projects will be in service by a date certain and that, post-merger, the Commission "would have seemingly little ability to ensure the construction of the upgrades."[121] Based on these concerns, City of Orangeburg asserts that even assuming that the Power Sales Agreements are an adequate form of interim mitigation, Applicants' proposed renewal of the agreements and proposal to enter into similar replacement agreements do not "constitute a proper substitute for the proposed permanent solution of transmission upgrades."[122]

52. Finally, City of Orangeburg argues that the failings of the Revised Mitigation Proposal could be rectified if the Commission declared the state regulatory conditions illegal. City of Orangeburg asserts that although Applicants could sell capacity and energy in such a way as to virtually divest themselves of control over the requisite level of system resources necessary to cure the screen failures in the interim period, Applicants will not do so until they are "reasonably certain" that they will not be punished by the North Carolina Commission for entering into such sales.[123] City of Orangeburg urges the Commission to find that the North Carolina Commission lacks the authority to determine what Duke Energy Carolinas' and Progress Energy Carolinas' wholesale customers are native load customers "entitled to be served from their system resources on a basis equivalent to retail load."[124] City of Orangeburg states that the Commission should "exercise its authority under PURPA [the Public Utility Regulatory Policies Act] to

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[119] City of Orangeburg Comments on Revised Mitigation Proposal at 28.

[120] City of Orangeburg Comments on Revised Mitigation Proposal at 29-30.

[121] City of Orangeburg Comments on Revised Mitigation Proposal at 30.

[122] City of Orangeburg Comments on Revised Mitigation Proposal at 29.

[123] City of Orangeburg Comments on Revised Mitigation Proposal at 32.

[124] City of Orangeburg Comments on Revised Mitigation Proposal at 32.

supersede directly the [state regulatory conditions] and permit lawful coordination to effectuate the merger, the [Joint Dispatch Agreement], and any interim and permanent mitigation necessary to mitigate the screen failures, including the proposed transmission upgrades."[125]

53. According to City of New Bern, the four Power Sales Agreements "do not actually remove operational control of the generation that is supposed to be the subject of the [Power Sales Agreements]" from Applicants.[126] Like City of Orangeburg, City of New Bern notes that the four Power Sales Agreements involve net capacity payments to the buyers and that Applicants have customized the *force majeure* clause of the EEI Master Agreement to excuse non-performance if transmission beyond the delivery point is unavailable for "any reason."[127] City of New Bern argues that by altering the *force majeure* clause, Applicants have "engrafted" the definition of the term "Transmission Contingent" from Schedule P of the EEI Master Power Purchase and Sale Agreement onto the *force majeure* provision of the Power Sales Agreements.[128] According to City of New Bern, this change effectively "renders a nominally 'firm' transaction contingent on one or both of the Buyer's willingness to arrange, or the Seller's willingness to make available, transmission service."[129] City of New Bern asserts that this result is logical when viewed in conjunction with Applicants' statements to the North Carolina Commission. According to City of New Bern, Applicants have assured the North Carolina Commission that all retail and wholesale native load obligations will be served prior to any offers of energy made pursuant to the Power Sales Agreements, and that service to retail native load customers will not be impacted.[130]

54. City of New Bern also takes issue with the fact that the Power Sales Agreements do not prevent Applicants from buying back power from Cargill, Morgan Stanley, and EDF Trading. In this regard, City of New Bern asserts that the Commission has used "a

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[125] City of Orangeburg Comments on Revised Mitigation Proposal at 32.

[126] City of New Bern Protest of Revised Mitigation Proposal at 3.

[127] City of New Bern Protest of Revised Mitigation Proposal at 6.

[128] City of New Bern Protest of Revised Mitigation Proposal at 6.

[129] City of New Bern Protest of Revised Mitigation Proposal at 7.

[130] City of New Bern Protest of Revised Mitigation Proposal at 8 (*citing* March 26, 2012 Letter from Applicants to North Carolina Commission accompanying Revised Mitigation Proposal, NCUC Docket Nos. E-2, Sub 998 and E-7, Sub 986).

substantial buy-back penalty or premium" in other merger proceedings involving temporary divestitures to prevent merger applicants from undermining the effectiveness of mitigation proposals.[131] City of New Bern concludes that these terms of the Power Sales Agreements "are entirely inconsistent with the relinquishment of operational control" that the Commission requires before accepting a virtual divestiture proposal.[132]

55. In addition to the alleged flaws of the Power Sales Agreements, City of New Bern claims that Applicants may fail to complete the proposed transmission upgrades in which case their "woefully ineffective" interim mitigation proposal could become permanent.[133] City of New Bern agrees with City of Orangeburg that construction of the proposed transmission upgrades is contingent upon the "acceptable resolution" of "rate base treatment" by the North Carolina Commission,[134] and contends that the North Carolina Commission might not decide this issue until after the Commission has acted in this proceeding. City of New Bern asserts that the uncertainty surrounding this issue is an "unstated contingency" that undercuts Applicants' claim about the effectiveness or the proposed transmission upgrades.[135]

56. City of New Bern also challenges Applicants' proposed permanent mitigation. City of New Bern alleges that two of the proposed transmission upgrade projects – the Antioch transformer upgrade and the third Lilesville-Rockingham 230 kV Line – are "foreseeable and reasonably certain" to be constructed absent the merger and, therefore, ineligible for consideration as proposed mitigation.[136] According to City of New Bern, Applicants included these two upgrades in previous transmission plans that they "participated in developing."[137] City of New Bern contends that excluding these two projects from being considered as mitigation reduces Applicants' claimed SIL increase, and that a recalculation of market concentration levels shows "significant and severe

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[131] City of New Bern Protest of Revised Mitigation Proposal at 8 (*citing American Electric Power*, 90 FERC ¶ 61,242 (2000)).

[132] City of New Bern Protest of Revised Mitigation Proposal at 9.

[133] City of New Bern Protest of Revised Mitigation Proposal at 10.

[134] City of New Bern Protest of Revised Mitigation Proposal at 11-12.

[135] City of New Bern Protest of Revised Mitigation Proposal at 12.

[136] City of New Bern Protest of Revised Mitigation Proposal at 13 (*citing OG&E-NRG McClain I*, 105 FERC ¶ 61,297, at P 32 (2003)).

[137] City of New Bern Protest of Revised Mitigation Proposal at 13.

exceedance[s]" of the relevant market concentration thresholds.[138] Specifically, City of New Bern asserts that the HHI levels for the Duke Energy Carolinas BAA increase by 121 points in the Summer Off-Peak season/load period and 175 points in the Winter Off-Peak season/load periods; both of these seasons/load periods are highly concentrated. With respect to the Progress Energy Carolinas-East BAA, City of New Bern claims that the HHI increases by 189 points in the moderately concentrated Summer Off-Peak period. Based on this analysis, City of New Bern concludes that the proposed transmission upgrades do not provide acceptable mitigation.

57. Finally, City of New Bern argues that Applicants' inclusion of the Stub Mitigation confirms its earlier observation that Applicants should treat this interface as internal to the merged company for purposes of analyzing market concentration.[139] City of New Bern reiterates that Applicants should have treated the interface as internal to the merged company because Applicants would otherwise be unable to operate pursuant to the Joint Dispatch Agreement proposed in Docket No. ER12-1338-000 without asserting and using the native load priority identified in the Commission's regulations.[140] City of New Bern concludes that Applicants' market concentration calculations are "fundamentally flawed" and that recalculation of these values with the correct treatment of the interface results in "pervasive and severe screen failures."[141]

58. FMPA protests the Revised Mitigation Proposal, arguing that it fails to ameliorate concerns about market power in peninsular Florida. FMPA takes issue with the Commission's conditional approval of the Proposed Transaction without investigating or taking action "to alleviate Florida market power," and states that it has filed for rehearing of the Commission's decision not to address this issue in the Merger Order.[142] According to FMPA, whether the Commission finds that the Revised Mitigation Proposal is consistent with the public interest as to Florida depends on the Commission's ruling on FMPA's pending rehearing request. Reiterating the arguments made in that pleading,[143]

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[138] City of New Bern Protest of Revised Mitigation Proposal at 14.

[139] City of New Bern Protest of Revised Mitigation Proposal at 15.

[140] City of New Bern Protest of Revised Mitigation Proposal at 16 (*citing* 18 C.F.R. § 33.3(c)(4)(i)(D)).

[141] City of New Bern Protest of Revised Mitigation Proposal at 17.

[142] FMPA Protest of Revised Mitigation Proposal at 2.

[143] FMPA claims, for example, that it has shown in its rehearing request that Florida Power Corporation, a subsidiary of Progress Energy, has "substantial

(continued…)

FMPA asserts that, despite the concerns it has raised the Commission has failed to make a "meaningful investigation" of potential merger impacts on Florida market power.[144] Because of the Commission's alleged failure to properly investigate these issues, FMPA asserts that Applicants have ignored transmission improvements into or within Florida and therefore the Revised Mitigation Proposal fails.[145] Consequently, FMPA asks the Commission to reject the Revised Mitigation Proposal and order "hearings and discovery and other appropriate procedures" to address the Florida market power issues.[146] FMPA also asks the Commission to order Applicants to mitigate their Florida market power by expanding the Florida interface, offering "other Florida transmission relief" and requiring "corrective base load and other power supply relief for Florida."[147]

59. EPSA argues that the Commission should reject the Revised Mitigation Proposal because it is an insufficient remedy to the Commission's market power concerns. EPSA contends that requiring Applicants to join an RTO appears to be the "easiest and least cost solution" to address the Commission's concerns,[148] and suggests that an ICT arrangement could also alleviate market power if structured and implemented properly.[149] Noting that many of the details relating to the viability and efficacy of the proposed permanent mitigation are based on non-public information, EPSA states that construction of the proposed transmission upgrades depends upon the resolution of various issues at the state level. Like City of New Bern, EPSA points out that resolution of these issues will not occur until after the Commission has acted upon the Revised Mitigation Proposal, and that such state actions may involve further conditioning that could render construction of the proposed transmission upgrades "unpalatable" to Applicants.[150]

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entitlements" to Florida-Georgia interface capacity from which the merged company will benefit, and that the merged company will have "increased dominance in nuclear and other baseload power." FMPA Protest of Revised Mitigation Proposal at 3.

[144] FMPA Protest of Revised Mitigation Proposal at 3.

[145] FMPA Protest of Revised Mitigation Proposal at 3.

[146] FMPA Protest of Revised Mitigation Proposal at 4.

[147] FMPA Protest of Revised Mitigation Proposal at 4.

[148] EPSA Comments on Revised Mitigation Proposal at 3.

[149] EPSA Comments on Revised Mitigation Proposal at 2.

[150] EPSA Comments on Revised Mitigation Proposal at 4.

60. In addition to the uncertainty surrounding these state level decisions, EPSA asserts that Applicants' proposal to construct the proposed transmission upgrades appears "fraught with the potential for delay."[151] EPSA notes, for example, that the proposal appears to have compressed a long-term transmission planning proposal into a three-year window.[152] In addition, EPSA contends that, among other things, obtaining materials, equipment, and construction crews, conducting training, weather delays, and local permit requirements could delay the construction of the proposed transmission upgrades.[153] EPSA also points out that several of the proposed transmission upgrades depend upon the acceleration of the Greenville-Kinston Dupont 230 kV line, and the cooperation of American Electric Power and Dominion Virginia Power. According to EPSA, these contingencies create further potential for delay.[154] EPSA echoes City of Orangeburg's concern that the Revised Mitigation Proposal does not include a commitment to complete the proposed transmission upgrades by a date certain, and that Applicants have structured the terms of the Interim Mitigation Proposal so that it may continue indefinitely.[155] EPSA concludes that, in contrast to joining an RTO, the proposed transmission upgrades solution does not address the Commission's concerns and resolve Applicants' market power with "the certainty necessary to justify approval" of the Revised Mitigation Proposal.[156]

61. In his April 16, 2012 comments, Mr. McManus argues that the Commission should not accelerate its review of the Revised Mitigation Proposal because that date will not negatively impact Applicants, their stakeholders, or their wholesale and retail customers.[157] Mr. McManus also argues that Applicants have not provided firm commitments to complete the Transmission Expansion Projects; that the negative capacity payments in the Power Sales Agreements are contrary to Commission precedent

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[151] EPSA Comments on Revised Mitigation Proposal at 5.

[152] EPSA Comments on Revised Mitigation Proposal at 4-5.

[153] EPSA Comments on Revised Mitigation Proposal at 5.

[154] EPSA Comments on Revised Mitigation Proposal at 6.

[155] EPSA Comments on Revised Mitigation Proposal at 5-6.

[156] EPSA Comments on Revised Mitigation Proposal at 8.

[157] Comments Regarding Revised Mitigation Proposal as Submitted by Duke Energy Corporation and Progress Energy, Inc. on March 26, 2012 at 3, 8, Docket No. EC11-60-000 (Apr. 16, 2012) (McManus April 16 Comments).

and will result in cost shifts; and that the Revised Mitigation Proposal may negatively impact retail native load customers.[158] In his April 30, 2012 comments, Mr. McManus claims that Applicants should be required to submit the Transmission Expansion Projects for review and approval by the North Carolina Transmission Planning Collaborative, and that Applicants should resubmit the Revised Mitigation Proposal and provide a guarantee that there will be no increase in costs over those associated with the Prior Mitigation Proposal.[159] Finally, Mr. McManus asserts that, when considering Applicants' merger commitments and obligations, the Commission should review and consider the post-merger efforts by Carolina Power & Light and Florida Power Corporation to fulfill the commitments and obligations those companies offered to resolve issues related to a prior merger.[160]

C. Applicants' answer to protests of the Revised Mitigation Proposal and responsive pleadings

62. In their answer, Applicants note that "no party with load in the [Duke Energy Carolinas] or [Progress Energy Carolinas-East] BAAs that actually is in the market to purchase or sell at wholesale" has protested the Revised Mitigation Proposal.[161] Applicants also address the various arguments raised by protestors asserting that uncertainty exists regarding the Transmission Expansion Projects. Specifically, Applicants state that, once the merger closes, they will be "absolutely and unequivocally committed to fulfilling *all* of the commitments they have made, including the commitment to construct the transmission projects that implement permanent mitigation."[162] In response to concerns that the construction of these projects depends upon obtaining favorable retail ratemaking treatment from the North Carolina

[158] Comments Regarding Revised Mitigation Proposal as Submitted by Duke Energy Corporation and Progress Energy, Inc. on March 26, 2012 at 8, Docket No. EC11-60-000 (Apr. 16, 2012) (McManus April 16 Comments).

[159] Comments Regarding Revised Mitigation Proposal as Submitted by Duke Energy Corporation and Progress Energy, Inc. on March 26, 2012 at 5, Docket No. EC11-60-000 (Apr. 30, 2012)

[160] Comments Regarding Revised Mitigation Proposal as Submitted by Duke Energy Corporation and Progress Energy, Inc. on March 26, 2012 at 3, Docket No. EC11-60-000 (May 7, 2012)

[161] Applicants May 1 Answer at 2.

[162] Applicants May 1 Answer at 3-4 (emphasis in original).

Commission, Applicants state that they will resolve this issue before the merger's closing.[163] Applicants state that resolution of that issue will not affect their commitment to construct the transmission upgrades once the merger closes.[164] Applicants state:

> The need to reach agreement on the retail rate treatment for the transmission projects will be satisfied before the [Proposed Transaction] closes. The Applicants' commitment to construct the transmission projects after the [Proposed Transaction] closes is completely unaffected by this need. Although the Applicants do not believe it to be necessary, they reaffirm here their commitment to construct the transmission expansion projects identified in their Mitigation Proposal after the [Proposed Transaction] closes.[165]

63. With regard to arguments about the completion date of the Transmission Expansion Projects, Applicants state that such projects "[b]y their very nature" are subject to circumstances and events outside of the project sponsor's control,[166] however, Applicants maintain that they anticipate no material delay to keep the transmission upgrades from going into service by the summer of 2015. Applicants also reiterate their commitment to keep interim mitigation in place until the transmission upgrades are complete, which Applicants claim provides "a substantial economic incentive" to finish the projects' construction on a timely basis.[167]

64. In addition to these assurances, Applicants commit to work "diligently towards completing the projects within the scope and time frame" laid out in the Revised Mitigation Proposal.[168] Applicants also express their willingness to expand the Independent Monitor's scope of work to include monitoring the extent to which Applicants "are pursuing the construction of the proposed projects within the scope and

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[163] Applicants May 1 Answer at 3, 8.

[164] Applicants May 1 Answer at 8.

[165] Applicants May 1 Answer at 8.

[166] Applicants May 1 Answer at 10.

[167] Applicants May 1 Answer at 11.

[168] Applicants May 1 Answer at 11.

time frame identified" and "reporting to the Commission when the projects have been completed and placed in service."[169]

65. On the issue of whether a transmission project can constitute "acceptable mitigation," Applicants explain that a project may do so if the project sponsor does not expect to place the project in service absent the merger. In contrast, a proposed transmission project should only "be included in the pre-merger analysis . . . if it is foreseeable and reasonably certain to be completed."[170] Applicants also point out that the Commission does not require merger applicants to include projects that the merging parties expect to construct "well beyond the time frame" of the DPT analysis.[171] Based upon these clarifications, Applicants dispute City of New Bern's allegations that certain of the transmission upgrades should not be considered valid mitigation by the Commission. While Applicants admit that the 2007, 2008, and 2009 annual North Carolina Transmission Planning Collaborative (NCTPC) transmission study reports describe the Antioch upgrade and the Lilesville-Rockingham 230 kV Line as "Planned" or "Underway,"[172] Applicants state that they commenced neither project and took both out of their plans. Applicants also note that none of the proposed transmission upgrades are included in the current NCTPC annual study report or in Duke Energy Carolinas' or Progress Energy Carolinas' internal transmission plans. Finally, Applicants observe that City of New Bern's testimony actually demonstrates that none of Applicants' proposed transmission upgrades would be placed in service in the next ten years, absent the merger.

66. Applicants also dispute City of New Bern's argument that Applicants should treat the interface between Duke Energy Carolinas and Progress Energy Carolinas as internal to the merged company. They argue that the purpose of the Stub Mitigation is to ensure that Applicants are unable to reserve import capacity on that external interface on a firm basis and that it is irrelevant to the question of whether to treat the interface as external or internal.[173]

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[169] Applicants May 1 Answer at 11.

[170] Applicants May 1 Answer at 13.

[171] Applicants May 1 Answer at 14.

[172] Applicants May 1 Answer at 14.

[173] Applicants May 1 Answer at 16.

67. Applicants also respond to the claims advanced by protestors regarding the *force majeure* clause in the Power Sales Agreements. Applicants state that the inclusion in the Power Sales Agreements of a modified version of the standard *force majeure* clause in the EEI Master Agreement is beneficial to the buyers and that the buyers consider the Power Sales Agreement sales to be "firm sales."[174] More specifically, Applicants explain that the *force majeure* clause only excuses the buyers' obligations to perform, and, even then, only under limited circumstances. Applicants state that this modification does not affect their obligation, as sellers, to deliver energy regardless of transmission constraints.[175] Additionally, Applicants contend that even if a buyer is unable to secure transmission from the delivery point to its proposed sink, it can choose to take delivery of the energy at the delivery point to sell to customers in the Duke Energy Carolinas or Progress Energy Carolinas-East BAAs or to customers located outside of the BAAs. Thus, the ability to invoke the *force majeure* clause is, according to Applicants, "entirely up to the buyers."[176] Furthermore, despite protestor allegations that sales pursuant to the Power Sales Agreement depend upon the sellers' willingness to make transmission capacity available, Applicants state that they have no discretion in this regard, as their Open Access Transmission Tariff (OATT) and the Commission's regulations require them to offer all available transmission capacity to third parties.[177] Moreover, Applicants state that in instances where Applicants could make a sale after a buyer exercises its *force majeure* rights, such sales would represent "increased sales" into the market that would "have the same pro-competitive effect as the sales Applicants make to the power marketers under the" Power Sales Agreements.[178]

68. In reply to protestor concerns regarding the negative capacity prices in the Power Sales Agreements, Applicants observe that the Compliance Order required Applicants "to

[174] Applicants May 1 Answer at 19. In its answer, Applicants included letters from Cargill and Morgan Stanley that express these buyers' support for this modification.

[175] Applicants May 1 Answer at 20-21.

[176] Applicants May 1 Answer at 22.

[177] Applicants disagree with City of Orangeburg's claim that Applicants will be able to interrupt deliveries under the Power Sales Agreements. Rather, they argue that they must be able to deliver energy every hour as required by the agreements to avoid the risk of paying "substantial damages." Applicants May 1 Answer at 25.

[178] Applicants May 1 Answer at 23.

sell all of the energy that is offered, regardless of the price of the bids."[179] Applicants explain that pursuant to the Power Sales Agreements, the buyers will have the absolute right to take capacity on a 24/7 basis absent a *force majeure* event. Applicants also state that the negative capacity payments constitute sunk costs that do not create an incentive for the buyers to invoke *force majeure* and that are "completely irrelevant" to the interim mitigation's effectiveness.[180]

69. Applicants also respond to concerns regarding their ability to repurchase the energy sold pursuant to the Power Sales Agreements. Applicants argue that City of New Bern has cited no Commission precedent to support its assertion that the Commission prohibits this practice, and that City of New Bern has misconstrued the precedent it relies on. Applicants also state that the Commission has never prohibited sales of energy back to merger applicants. Applicants explain that if buyers choose to sell the energy back to Applicants, they would do so at market prices that would "likely be different from the price under the [Power Sales Agreements]."[181] Applicants contend that any energy that they buy back "is not being withheld from the market but instead is being delivered into the market – a procompetitive result that is no different in effect than if the power marketers had sold the energy to a third party instead of to the Applicants."[182]

70. Finally, Applicants ask the Commission to reject City of Orangeburg's request that the Commission consolidate the merger proceeding in Docket No. EC11-60-000 with the Power Sales Agreements proceedings in Docket Nos. ER12-1339-000, ER12-1340-000, ER12-1341-000, and ER12-1342-000. Applicants reason that the merger proceeding and the Power Sales Agreements should be evaluated pursuant to the standards of FPA sections 203 and 205, respectively, and therefore should not be consolidated.[183]

71. In its answer, City of Orangeburg reiterates its earlier claim that the Power Sales Agreements do not constitute proper mitigation to cure the identified screen failures, asserting that the buyers will be able to utilize the modified *force majeure* provisions to

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[179] Applicants May 1 Answer at 24 (citing Compliance Order, 137 FERC ¶ 61,210 at P 81, n.147).

[180] Applicants May 1 Answer

[181] Applicants May 1 Answer at 27.

[182] Applicants May 1 Answer at 27.

[183] Applicants May 1 Answer at 28.

"game" the Power Sales Agreements and avoid taking the quantities of energy specified in the agreements.[184] City of Orangeburg also states that the HHI calculations that Applicants included with the March 26 Compliance Filing rely upon the "foundational assumption" that Applicants will sell the full amount of energy specified in the Power Sales Agreements "during every clock hour of the respective contract periods."[185] Hence, City of Orangeburg concludes that the HHI calculations rely upon a "faulty understanding" of the Power Sales Agreements.[186] City of Orangeburg also reasons that Applicants' interim mitigation proposal is inadequate to address the Commission's horizontal competition concerns because Applicants will maintain control over their system resources whenever the buyers "refuse" to take the offered energy due to transmission unavailability.[187]

72. City of Orangeburg also reiterates its claims that Applicants might not construct the Transmission Expansion Projects within the next ten years, as the North Carolina Commission could condition its approval of retail rate recovery for the proposed upgrades until they are necessary for "non-merger related system purposes."[188] Finally, City of Orangeburg argues, once again, that the scope of the mitigation is "constrained" by the state regulatory conditions. As support for its claim, City of Orangeburg points to the fact that Applicants May 1 Answer does not take issue with City of Orangeburg's allegations in this regard.[189] For this reason, City of Orangeburg reiterates its request that the Commission declare the State Regulatory Conditions to be illegal.[190]

73. North Carolina Commission Staff filed a response to City of Orangeburg's answer. In its answer, North Carolina Commission Staff takes no position "as to any aspect of the Revised Mitigation Proposal, including the nature of the service in the [Power Sales Agreements] and the degree of certainty as to whether the proposed transmission projects will be completed."[191] North Carolina Commission Staff argues, however, that the

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[184] City of Orangeburg May 4 Answer at 4.

[185] City of Orangeburg May 4 Answer at 6.

[186] City of Orangeburg May 4 Answer at 7.

[187] City of Orangeburg May 4 Answer at 11-15.

[188] City of Orangeburg May 4 Answer at 15.

[189] City of Orangeburg May 4 Answer at 17.

[190] City of Orangeburg May 4 Answer at 18.

[191] North Carolina Commission Staff May 7 Answer at 2.

Commission should reject City of Orangeburg's comments and answer because they do not demonstrate a nexus been the Proposed Transaction and City of Orangeburg's alleged harms. According to North Carolina Commission Staff, City of Orangeburg's pleadings concede that City of Orangeburg is focused on existing state regulatory conditions, which will "continue in effect regardless of whether Applicants' proposed merger is consummated."[192] North Carolina Commission Staff states that these state policies will remain unresolved regardless of whether Applicants elect to terminate their proposed merger and that the Commission made such a determination in the Merger Order.[193] For these reasons, North Carolina Commission Staff asserts that the Commission should not allow City of Orangeburg to renew the same arguments in this proceeding.

74. North Carolina Commission Staff also argues that the State Regulatory Conditions are lawful, as the North Carolina Commission has done nothing to dictate or limit the type of energy or capacity that Duke Energy Carolinas, Progress Energy Carolinas, or Applicants may include in a wholesale non-native load sales contract.[194] North Carolina Commission Staff further argues that the North Carolina Commission's policies "simply require franchised public utilities in North Carolina to comply with their fundamental obligation to provide safe, reliable, and adequate service to their captive retail native load customers" and that the North Carolina Commission clearly has jurisdiction to do so.[195]

75. Finally, in response to City of Orangeburg's statements regarding the uncertain nature of the proposed Transmission Expansion Projects, North Carolina Commission Staff states that the North Carolina Commission is the entity designated to authorize the siting and construction of transmission facilities in North Carolina, and that in exercising such authority, the North Carolina Commission has full authority to "to ensure that all facilities are needed by retail customers and their costs are just and reasonable."[196] For these reasons, North Carolina Commission Staff asks the Commission to reject City of Orangeburg's suggestions that "there is something unlawful or improper about the

[192] North Carolina Commission Staff May 7 Answer at 4.

[193] North Carolina Commission Staff May 7 Answer at 5-6 (*citing* Merger Order, 136 FERC ¶ 61,245 at P 147).

[194] North Carolina Commission Staff May 7 Answer at 11.

[195] North Carolina Commission Staff May 7 Answer at 12.

[196] North Carolina Commission Staff May 7 Answer at 15.

[North Carolina Commission] reviewing the transmission projects in the Revised Mitigation Proposal."[197]

76. In Applicants May 9 Supplement, Applicants state that since they filed their May 1 answer, they have reached a settlement with the North Carolina Commission Staff regarding retail rate recovery for the Transmission Expansion Projects. They also point out that EDF Trading has submitted a letter stating that: (1) the modified *force majeure* provision benefits EDF Trading; and (2) that it considers the sales pursuant to Power Sales Agreements to be "firm" sales of energy and capacity.[198]

77. Applicants also argue that City of Orangeburg's assertion that Power Sales Agreement buyers will only take as much energy as they wish demonstrates how the Power Sales Agreements provide effective mitigation. In support of this argument, Applicants state that because the buyers have a firm right to energy under the Power Sales Agreements, Applicants have no control over that capacity to withhold it from the market to raise energy prices. Applicants argue that the ability to withhold capacity from the market to raise energy prices is the hallmark of horizontal market power.[199] Applicants also state that because they cannot withhold this capacity, their DPT analysis rightly attributes this capacity to the buyers because "it is appropriate to attribute capacity in all hours to the entity that controls that capacity, even if the entity may not make sales in all hours."[200]

78. Finally, Applicants state that City of Orangeburg's insistence upon attacking the state regulatory conditions in every pleading undercuts the credibility of City of Orangeburg's other arguments. In this regard, Applicants point out that the Commission has already determined that the alleged harms associated with the State Regulatory Conditions "do not stem from the Proposed Transaction" and that City of Orangeburg is not located in the geographic markets where the Commission identified market power concerns.[201]

79. In response to Applicants May 9 Supplement, City of Orangeburg reasserts that Applicants will have full control over the operation of their system resources in all hours

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[197] North Carolina Commission Staff May 7 Answer at 15.

[198] Applicants May 9 Supplement at 2-3.

[199] Applicants May 9 Supplement at 3.

[200] Applicants May 9 Supplement at 4-5.

[201] Applicants May 9 Supplement at 5.

where the buyers fail to purchase the full amount of energy pursuant to the Power Sales Agreements.[202] City of Orangeburg also reiterates its request for the Commission to find the State Regulatory Conditions illegal.[203]

80. City of New Bern filed a motion to strike in response to Applicants May 1 Answer and Applicants May 9 Supplement. City of New Bern moves to strike the April 30, 2012 letter from Cargill and the May 1, 2012 letter from Morgan Stanley, which were attached as exhibits to Applicants May 1 Answer. City of New Bern also moves to strike the May 1, 2012 letter from EDF Trading and the May 8, 2012 joint press release, which were attached as exhibits to Applicants May 9 Supplement. According to City of New Bern, the letters contain "unverified statements by non-parties, made outside of this proceeding,"[204] and provide no basis for concluding that the signatories have personal knowledge of the negotiations of the Power Sales Agreements or the qualifications required to provide expert opinions on the agreements. City of New Bern contends that the press release is not admissible because it is not proof of anything other than Applicants' issuance of a press release.

D. Analysis of Revised Mitigation Proposal

81. As discussed in further detail below, the Commission accepts the Revised Mitigation Proposal, subject to certain revisions and conditions. In the Compliance Order, the Commission stated that "an acceptable mitigation proposal must remedy the screen failures identified in the Merger Order, and provide a [DPT] analysis supporting the new HHI values."[205] We find that the Revised Mitigation Proposal, as supplemented by Applicants April 13 Information Request Answer and Applicants May 1 Answer, and as revised below, meets these requirements.

82. In accepting the Revised Mitigation Proposal, the Commission notes that it has stated that "an up front, enforceable commitment to upgrade or expand transmission facilities [may] mitigate market power, because the constraint relieved by such an upgrade or expansion no longer would limit the scope of the relevant geographic market."[206] As the Commission has explained: "[the] long-term remedy of expanding

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[202] City of Orangeburg May 11 Answer at 2-6.

[203] City of Orangeburg May 11 Answer at 9.

[204] City of New Bern Motion to Strike at 3.

[205] Compliance Order, 137 FERC ¶ 61,210 at P 91.

[206] Merger Policy Statement, FERC Stats. & Regs ¶ 31,044 at 30,121.

transmission is one that the Commission has said can be an acceptable remedy to competitive harm."[207] In the March 26 Compliance Filing, Applicants commit to build seven proposed Transmission Expansion Projects. According to Applicants, three of the seven proposed Transmission Expansion Projects require the cooperation of American Electric Power and Dominion Virginia Power.[208] Applicants state that they have "discussed these projects with those two companies, and both have entered into memoranda of understanding under which these companies have agreed to negotiate binding agreements to undertake the projects."[209] According to Applicants, they "expect to negotiate and complete binding agreements with those companies during the pendency of the Commission's review period to ensure the completion of these projects."[210] In addition, Applicants explain that in order for four of the seven proposed Transmission Expansion Projects "to increase the SIL of the [Progress Energy Carolinas-East BAA] in the manner described" by Applicants' witness, the Greenville-Kinston Dupont 230kV Line must be in service by 2015.[211]

83. Applicants state that once the Proposed Transaction has closed, "Applicants will be absolutely and unequivocally committed to fulfilling *all* of the commitments they have made, including the commitment to construct the transmission projects that implement permanent mitigation."[212] As discussed in greater detail below, the Commission accepts Applicants' commitment to construct the transmission upgrades described in the March 26 Compliance Filing, and makes fulfillment of that commitment an express condition of this order and the Proposed Transaction. As noted above, Applicants have indicated that completion of some of the seven proposed Transmission Expansion Projects are dependent upon the completion of the Greenville-Kinston Dupont 230 kV Line and the cooperation of two other utilities with whom Applicants have entered into memoranda of understanding under which the two utilities have agreed to negotiate binding agreements to undertake certain transmission projects. The Commission expects Applicants to meet their commitment to build the seven proposed transmission upgrades irrespective of these contingencies. In order to provide assurance that Applicants are progressing towards

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[207] *OG&E-Redbud I*, 124 FERC ¶ 61,239 at P 50.

[208] March 26 Compliance Filing at 8, n.7.

[209] March 26 Compliance Filing at n.7.

[210] March 26 Compliance Filing at n.7.

[211] March 26 Compliance Filing at 9.

[212] Applicants May 1 Answer at 3-4.

completing the Transmission Expansion Projects in a timely manner, Applicants must provide the Commission within 15 days of the issuance of this order with copies all of the binding agreements needed to construct the Transmission Expansion Projects, which were to be negotiated with American Electric Power and Dominion Virginia Power.

84. Applicants have also indicated that it will take up to three years to complete the Transmission Expansion Projects. In order to track Applicants' progress regarding the transmission upgrades, the Commission will require the Independent Monitor to provide periodic reports on the status of the Transmission Expansion Projects every three months, with the first report due not later than the last day of the third full month after the Proposed Transaction is consummated and the final report due within 30 days after the last of the seven proposed transmission projects has been placed into service. In addition, Applicants must inform the Commission of any changes in circumstances that would reflect a departure from the facts that the Commission has relied upon in authorizing the Proposed Transaction, including facts related to its commitment to complete the Transmission Expansion Projects.

85. In the interim, pending completion of the Transmission Expansion Projects, Applicants propose to sell capacity and energy pursuant to the four Power Sales Agreements. The Commission accepts Applicants' proposed interim mitigation, as revised below, because it will mitigate the adverse competitive effects of the Proposed Transaction until the Transmission Expansion Projects are completed. Applicants, however, must revise certain elements of the Revised Mitigation Proposal, such as prohibiting themselves from having priority to repurchase the energy sold pursuant to the Power Sales Agreements, and increasing the Independent Monitor's oversight, as discussed below.

86. The Commission concludes that the combination of the interim sales and the commitment to build the proposed Transmission Expansion Projects, as revised below, will sufficiently mitigate the adverse competitive impacts of the Proposed Transaction identified in the Merger Order. Further, the Commission's authorization for Applicants to merge is expressly conditioned upon Applicants fulfilling their interim and permanent mitigation commitments. Applicants must notify the Commission within 15 days of the issuance of this order as to whether they accept the Commission's revisions to the Revised Mitigation Proposal.

1. The proposed permanent mitigation

87. Applicants have shown that, except for one season/load period discussed below, the seven proposed Transmission Expansion Projects mitigate the screen failures identified by the Commission in the Merger Order. Specifically, Applicants' supporting analysis for the Duke Energy Carolinas and the Progress Energy Carolinas-East BAAs demonstrates that for the base case and 10 percent price sensitivity scenarios, the proposed Transmission Expansion Projects will eliminate the adverse competitive effects

identified by the Commission in the Merger Order.[213] For example, in the Merger Order, the Commission found that, without mitigation, the Proposed Transaction would increase market concentration in the Summer Off-Peak and Winter Off-Peak season/load periods by significant amounts.[214] With respect to the Progress Energy Carolinas-East BAA, the Commission found that, without mitigation, the Proposed Transaction would increase the market concentration in the Summer Off-Peak periods by a significant amount.[215] The DPT results provided in Applicants April 13 Information Request Answer demonstrate

[213] In making its findings, the Commission relies on the information provided in Applicants April 13 Information Request Answer. Although the DPT results in that pleading are similar to the DPT results provided in the March 26 Compliance Filing, the Commission believes that the DPT in Applicants April 13 Information Request Answer provides a more accurate assessment of the impacts of the proposed Transmission Expansion Projects. Further, in Applicants April 13 Information Request Answer, Applicants provided details of seven changes to the modified seasonal benchmark models other than the seven proposed Transmission Expansion Projects and the Greenville-Kinston Dupont 230 kV line. Applicants April 13 Information Request Answer at 3-5. Applicants explain that "[n]one of these changes affect the SIL assumptions that were used in the Merger Application, as they do not affect the limit that determines the SILs prior to transmission expansion, but only the effectiveness of the expansion projects." Applicants April 13 Information Request Answer at 3. The Commission agrees that these changes do not affect the specific limits that determined the SILs prior to transmission expansion. Nevertheless, in order to achieve the benefits that Applicants claim will result from the seven Transmission Expansion Projects, the Commission expects Applicants to implement the changes referenced in Applicants April 13 Information Request Answer no later than the date that the last of the seven Transmission Expansion Projects are in service. *See* Applicants April 13 Information Request Answer at 4-5, (c)(i). Our authorization to merge is based upon these changes being implemented in this timeframe.

[214] Specifically, in the base case scenario for the Duke Energy Carolinas BAA, the Commission found that the Proposed Transaction would increase Applicants' market share to 62.4 percent in the Summer Off-Peak season/load period and 46.3 percent in the Winter Off-Peak season/load period. As the Commission noted, the HHIs would have increased by 529 and 299, respectively, if the Commission had approved the Proposed Transaction without mitigation. Merger Order, 136 FERC ¶ 61,245 at P 135, Table 1.

[215] Specifically, in the base case scenario for the Progress Energy Carolinas-East BAA, the Commission found that the Proposed Transaction would increase Applicants' market share to 45.4 percent in the Summer Off-Peak season/load period, and the HHI would increase by 894. Merger Order, 136 FERC ¶ 61,245 at P 135, Table 1.

that the proposed Transmission Expansion Projects adequately mitigate the adverse effects of the Proposed Transaction on competition. Applicants show that the Transmission Expansion Projects will decrease market concentration levels in the Duke Energy Carolinas BAA to below pre-merger levels in most season/load periods.[216] For example, Applicants' analysis shows that once the proposed Transmission Expansion Projects are completed, the market concentration levels in the Duke Energy Carolinas BAA for the Summer Off-Peak and Winter Off-Peak seasons/load periods will decrease by 1,046 and 547 points, respectively, from pre-merger levels.[217]

88. As Applicants note, the Revised Mitigation Proposal resolves all of the screen failures identified by the Commission in the Merger Order except for one failure in the Progress Energy Carolinas-East BAA during the Summer Off-Peak season/load period.[218] According to Applicants, this failure does not present a competitive concern. Applicants observe that the Commission has stated that where it encounters HHI screen failures, it will focus on a firm's ability and incentive to withhold output in order to drive up market prices, which Applicants claim they do not possess.[219] Applicants also argue that the single remaining failure does not represent a systematic market power concern.[220] Nevertheless, Applicants state that if the Commission deems it necessary, they will

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[216] Applicants April 13 Information Request Answer, Exhibit WHH-5 (Revised).

[217] Applicants April 13 Information Request Answer, Exhibit WHH-5 (Revised). In the Duke Energy Carolinas BAA, for the Summer Off-Peak season/load period, Applicants calculate a pre-merger HHI of 3,434. Applicants show that once they complete the Transmission Expansion Projects, the HHI for the Summer Off-Peak season/load period will decrease to 2,388 (a difference of 1,046 points). For the Winter Off-Peak season/load period, Applicants calculate a pre-merger HHI of 1,963. Applicants show that once they complete the Transmission Expansion Projects, the HHI for the Winter Off-Peak season/load period will decrease to 1,416 (a difference of 547 points).

[218] During this season/load period, the post-merger HHI is 1,402, a 101 point increase over the pre-merger HHI. The market share in this period is 35.0 percent. Applicants April 13 Information Request Answer, Exhibit WHH-6 (Revised). As noted above, mergers in moderately concentrated markets (with an HHI greater than or equal to 1,000 but less than 1,800) that produce an HHI increase over 100 points potentially raise significant competitive concerns. *See* n.55, *supra.*

[219] March 26 Compliance Filing at 14-15.

[220] March 26 Compliance Filing at 14.

establish a transmission set-aside of 25 MW of firm transmission capacity, the Stub Mitigation, in order to remedy the remaining screen failure.[221]

89. The Commission accepts Applicants' proposal to implement the Stub Mitigation and conditions approval of the Proposed Transaction on Applicants abiding by that commitment. Applicants' August 29 DPT, which was the basis for the Commission's decision in the Merger Order, showed that the largest HHI change due to the Proposed Transaction occurred in the Progress Energy Carolinas-East BAA in the Summer Off-Peak season/load period in a highly concentrated market.[222] In that order, we noted that the screen violation was "severe."[223] Although the Revised Mitigation Proposal may reduce the degree of the screen failure, it fails to eliminate it. Accordingly, the Commission believes that the continued failure in the Progress Energy Carolinas-East BAA in the Summer Off-Peak season/load period warrants requiring Applicants to implement the Stub Mitigation they have voluntarily proposed.

90. While Applicants have demonstrated that the proposed Transmission Expansion Projects will remedy the adverse competitive effects of the Proposed Transaction, Applicants have explained that the proposed Transmission Expansion Projects will take up to three years to complete. Although Applicants have proposed interim mitigation to mitigate the adverse competitive effects of the Proposed Transaction while the Transmission Expansion Projects are being completed, the Commission finds it appropriate to monitor Applicants' progress towards completing the Transmission Expansion Projects. Accordingly, the Commission will accept Applicants' offer to "expand the scope of work" performed by the Independent Monitor to include:

> (a) monitoring the extent to which the Applicants are pursuing the construction of the proposed projects within the scope and time frame identified by [Applicants' witnesses] and reporting to the Commission if

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[221] Applicants state that the Stub Mitigation will "remain in effect unless and until the Commission rules in the future that it [is] no longer required." March 26 Compliance Filing at 17.

[222] *See* Merger Order, 136 FERC ¶ 61,245 at P 137, Table 1.

[223] *See* Merger Order, 136 FERC ¶ 61,245 at P 137 ("This HHI change is over 17 times greater than HHI changes that 'potentially raise significant competitive concerns," and almost nine times greater than HHI changes that are 'presumed likely to create or enhance market power.'").

this commitment is violated; and (b) reporting to the Commission when the projects have been completed and placed in service.[224]

91. In order to track Applicants' progress regarding the transmission upgrades, the Commission will require the Independent Monitor to provide periodic reports on the status of the transmission upgrades every three months, with the first report due not later than the last day of the third full month after the Proposed Transaction is consummated and the final report due within 30 days after the last of the seven proposed transmission projects has been placed into service.[225] If the Transmission Expansion Projects are not completed as Applicants commit, then Applicants will not have satisfied the commitments upon which the Commission is granting authorization to merge, and the Commission will require a further mitigation plan and steps to mitigate the screen failures, which might include virtual or physical divestitures, pursuant to our authority under sections 203(b) and 309 of the FPA.[226] The Commission may also issue any other supplemental orders as appropriate. Moreover, Applicants must inform the Commission of any change in circumstances that would reflect a departure from the facts that the Commission relied upon in authorizing the Proposed Transaction, including facts related to Applicants' commitment to complete the proposed Transmission Expansion Projects.[227] Consistent with Applicants' representations in the settlement they have reached with North Carolina Commission Staff,[228] the Commission will require Applicants to hold transmission and wholesale requirements customers harmless from the costs of the Transmission Expansion Projects in accordance with the hold harmless commitment, as set forth in the Merger Order.[229] In the Settlement Agreement with North Carolina Commission Staff, Applicants agreed:

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[224] Applicants May 1 Answer at 11.

[225] *See, e.g.*, *Ameren Services Co.*, 101 FERC ¶ 61,202, at 61,842 (2002).

[226] 16 U.S.C. § 824b(b) (2006); 16 U.S.C. § 825h (2006).

[227] *See OG&E-Redbud*, 124 FERC ¶ 61,239 at PP 50-51.

[228] Supplemental Agreement and Stipulation of Settlement, Docket Nos. E-2, Sub 998, and E-7, Sub 986 (May 8, 2012) (Settlement Agreement with North Carolina Commission Staff).

[229] Merger Order, 136 FERC ¶ 61,245 at P 147. In the Merger Application, Applicants stated that for the five-year hold harmless period, they would "not seek to include merger-related costs in their transmission revenue requirements…." Merger

(continued…)

> Duke Energy and Progress Energy have represented to the FERC in their Revised Mitigation Proposal that "there currently is no plan to construct any of [the proposed transmission projects] absent the Merger" and that "[i]t is clearly not foreseeable and reasonably certain that, absent the Merger, these projects would be constructed in the next two to three years, as the Applicants now propose." DEC and PEC have committed not to assign costs associated with Permanent Transmission Mitigation projects into their wholesale transmission rates until the later of the expiration of the five-year FERC hold harmless period or such time as they have received regulatory approval to assign those costs to their retail native loads, effective on the date they are first permitted to begin recovering those costs. Settlement Agreement with North Carolina Commission Staff at 5 (quoting March 26 Compliance Filing at 10).

92. As noted above, protestors challenge Applicants' commitment to construct the Transmission Expansion Projects. City of New Bern, for example, argues that Applicants have not actually committed to construct the Transmission Expansion Projects,[230] and that the proposed transmission upgrades "may never actually materialize."[231] City of New Bern also alleges that by making construction of the upgrades contingent upon acceptable resolution of state ratemaking issues, Applicants further increase the uncertainty about whether they will complete the Transmission Expansion Projects.[232] The Commission is satisfied that Applicants have addressed these concerns. Applicants have stated that:

> [t]he need to reach agreement on the retail rate treatment for the transmission projects will be satisfied before the [Proposed Transaction] closes. The Applicants' commitment to construct the transmission projects after the [Proposed Transaction] closes is completely unaffected by this need. Although the Applicants do not believe it to be necessary, they reaffirm here their commitment to construct the transmission expansion projects identified in [the Revised Mitigation Proposal] after the [Proposed

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Application at 33. The Commission notes that these costs include all of the costs related to the Transmission Expansion Projects, including those related to operating procedures.

[230] City of New Bern Protest of Revised Mitigation Proposal at 11.

[231] City of New Bern Protest of Revised Mitigation Proposal at 10.

[232] City of New Bern Protest of Revised Mitigation Proposal at 11.

> Transaction] closes. Once the [Proposed Transaction] closes, this commitment will not be conditioned in any way.[233]

93. Accordingly, if Applicants cannot reach an agreement with the North Carolina Commission on the retail rate treatment of the Transmission Expansion Projects, the Proposed Transaction will not close, and the impact of the Proposed Transaction on horizontal competition will become moot. The Commission considers Applicants' statements to be an unconditional commitment to build the proposed Transmission Expansion Projects if the Proposed Transaction closes. Thus, we reject protestors' assertions that Applicants have not made an unconditional commitment to complete the Transmission Expansion Projects once the Proposed Transaction closes.[234]

94. The Commission also disagrees with City of New Bern's claim that two of the proposed Transmission Expansion Projects do not satisfy the Commission's mitigation requirements. According to City of New Bern, replacement of the Antioch transformers and the construction of the third Lilesville-Rockingham 230 kV Line, the two upgrades that have the most significant impact on Applicants' SILs, are ineligible to be counted as mitigation based on Commission precedent because they are "foreseeable and reasonably certain changes in the regional market."[235] City of New Bern argues that because these two projects have appeared in NCTPC transmission plans on multiple occasions and are upgrades that "would usually be undertaken in the ordinary course of business by an efficient utility," they should not be considered as mitigation by the Commission.[236] City of New Bern asserts that once these projects are removed from the set of proposed transmission upgrades, the increases to Applicants' SILs are not as great, and the market concentration levels resulting from "crediting" the remaining five transmission upgrades show "significant and severe exceedance of the relevant market concentration thresholds."[237]

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[233] Applicants May 1 Answer at 8.

[234] For the same reasons, we dismiss EPSA's claim that the proposed projects are "fraught with the potential for delay." EPSA Comments on Revised Mitigation Proposal at 5.

[235] City of New Bern Protest of Revised Mitigation Proposal at 12-13 (citing *Oklahoma Gas & Elec. Co.*, 105 FERC ¶ 61,297, at P 32 (2003)).

[236] City of New Bern Protest of Revised Mitigation Proposal at 15.

[237] City of New Bern Protest of Revised Mitigation Proposal at 14.

95. Although City of New Bern has demonstrated that the Antioch transformer replacement and construction of the third Lilesville-Rockingham 230 kV Line have appeared in prior NCTPC transmission plans, the city's evidence also shows that these projects have been deferred into the future. City of New Bern notes that "[b]eginning with the 2008 NCTPC Report…replacement of the Antioch banks was no longer listed as a planned upgrade."[238] Specifically, "[the Antioch transformer replacement] was deferred from the 2013 timeframe…. The 2008 Study indicates that the upgrade will not be required until 2024, which is beyond the 10 year planning horizon."[239] Similarly, City of New Bern states that, according to the 2010 NCTPC Report, the third Lilesville-Rockingham 230 kV Line was "deferred beyond the ten-year planning horizon of the 2010 Plan."[240] Later in the same report, the project is listed as "Removed."[241]

96. The Commission notes that Applicants have explained that neither of the projects that City of New Bern challenges was "ever commenced" and that both were taken out of Applicants' transmission plans.[242] Applicants also state that the current NCTPC annual study report and Duke Energy Carolinas' and Progress Energy Carolinas' internal transmission plans do not include either of these projects. Accordingly, based on the evidence in the record, the Commission concludes that the Antioch transformer replacement and the third Lilesville-Rockingham 230 kV Line are not foreseeable and reasonably certain changes in the regional market and are therefore properly considered as mitigation for the Proposed Transaction.

2. The proposed interim mitigation.

97. Because the adverse competitive effects identified in the Merger Order will continue to exist during the construction of the Transmission Expansion Projects, Applicants have proposed to sell capacity and energy pursuant to the Power Sales

[238] City of New Bern Protest of Revised Mitigation Proposal, Exhibit No. NCC-1, Affidavit of Whitfield A. Russell at P 16 (Russell Aff.).

[239] City of New Bern Protest of Revised Mitigation Proposal, Exhibit No. NCC-1, Russell Aff. at P 16.

[240] City of New Bern Protest of Revised Mitigation Proposal, Exhibit No. NCC-1, Russell Aff. at P 22.

[241] City of New Bern Protest of Revised Mitigation Proposal, Exhibit No. NCC-1, Russell Aff. at P 22.

[242] Applicants May 1 Answer at 14.

Agreements as interim mitigation and to have the Independent Monitor monitor compliance with their commitments. The Commission concludes that the combination of the sales pursuant to the Power Sales Agreements and the Independent Monitor's oversight of those sales, as revised below, constitute effective mitigation that will be in place at the time the Proposed Transaction is consummated.

98. The Commission disagrees with protestors that argue that, by using a modified version of the *force majeure* clause that appears in the EEI Master Agreement, Applicants have transformed the Power Sales Agreements into transmission contingent agreements, and that that modification disqualifies the Power Sales Agreements as effective interim mitigation measures. Importantly, the modified *force majeure* clause does not excuse Applicants' obligation to deliver energy to buyers at the delivery points specified in the Power Sales Agreements. In addition, that provision does not give Applicants the right to interrupt deliveries to the buyers under the Power Sales Agreements in order to serve Applicants' retail and wholesale native load. Rather, as explained in Applicants May 1 Answer, the modified *force majeure* provision only excuses buyers' "obligation to perform, and even then only under very limited circumstances."[243] Further, Applicants are required to pay liquidated damages to buyers if Applicants fail to deliver, unless Applicants' failure is excused by *force majeure*. Accordingly, the Commission is not persuaded by City of Orangeburg's contention that buyers under the Power Sales Agreements will face the constant risk of product unavailability due to Applicants' need to use their system resources to serve retail and wholesale native load.

99. The Commission recognizes that in instances where transmission to a buyer's proposed sink is unavailable or interrupted, the Power Sales Agreements excuse both the buyer's and seller's failure to perform.[244] However, this alone does not disqualify the Power Sales Agreements from serving as interim mitigation where, as here, the ability to invoke *force majeure* due to transmission unavailability is entirely in the control of the buyer. Moreover, we are not convinced by protestors that the Power Sales Agreement buyers will have any financial incentives to engage in the kind of strategic behavior that protestors imagine simply to avoid the obligation to take energy at the delivery point, thereby leaving Applicants in control of the energy that would otherwise be sold pursuant to the Power Sales Agreements.

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[243] Applicants May 1 Answer at 18.

[244] *See, e.g.*, March 26 Compliance Filing, Exhibit C, Duke Energy Carolinas-Cargill Power Sales Agreement at 4 ("If ... Buyer will not take delivery of the full Quantity of Energy, then [Duke Energy Carolinas] shall be excused from its obligation to deliver the quantity of Energy").

100. The Commission also disagrees with City of Orangeburg that the Power Sales Agreements suffer from the same defects that the Commission found unacceptable in *Allegheny Energy*. In *Allegheny Energy*, the merging parties proposed, as a mitigation measure, to make short-term power sales from a specific generating station for an indeterminate period.[245] Those merging parties had not secured agreements with any buyers and had also not guaranteed that short-term transmission service would be available on the merged company's system to deliver the power to the buyer.[246] Under those circumstances, the Commission concluded that there were no assurances that the entire output of the generating station would be sold, and that other terms and conditions of the proposed sale made it likely that there would be limited demand for the output.[247] The Commission stated that it remained concerned that if part or all of the output of the generating station went unsold, the station's output would remain within the control of the applicants and they could withhold it from the market and thereby drive up electricity prices.[248]

101. Although the Prior Mitigation Proposal suffered from many of the flaws identified by the Commission in *Allegheny Energy*, the proposed Power Sales Agreements largely rectify those flaws. For example, Applicants have secured agreements with three specified buyers that have committed to take specified quantities of energy and capacity in specified hours, and under those agreements Applicants do not have any "recall" rights to the energy. Further, in this case the Power Sales Agreements are interim mitigation measures that will remain in place only until Applicants have completed the Transmission Expansion Projects. Moreover, as noted above, the terms of the Power Sales Agreements require Applicants to deliver energy to buyers at the specified delivery points and do not allow Applicants to avoid this obligation due to transmission unavailability up to the delivery points. Thus, we are satisfied that Applicants effectively will cede control of the capacity and energy to be sold under the Power Sales Agreements.

102. Even with these assurances, the Commission acknowledges concerns that the Power Sales Agreements may excuse buyers from purchasing the energy if transmission service from the delivery point to the buyer's proposed sink is unavailable, interrupted, or curtailed for any reason. Although Applicants have provided assurances that it is

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[245] *Allegheny Energy*, 84 FERC ¶ 61,223 at 62,067.

[246] *Allegheny Energy*, 84 FERC ¶ 61,223 at 62,070.

[247] *Allegheny Energy*, 84 FERC ¶ 61,223 at 62,070.

[248] *Allegheny Energy*, 84 FERC ¶ 61,223 at 62,070-62,071.

unlikely that buyers will invoke *force majeure* due to transmission unavailability,[249] if the actual quantity of energy sold is less than the quantities of energy specified in the Power Sales Agreements, Applicants would effectively retain control over the energy, and therefore market concentration levels could remain high.

103. To address this remaining concern, the Commission requires that Applicants abide by the following. First, in Applicants May 1 Answer, Applicants state:

> the transmission contingency relieves the power marketers of their obligation to take delivery of energy only when transmission is not available to the marketers' proposed sink. Even then, the power marketers can always choose to take delivery of the energy at the Delivery Point and sell to a customer in the DEC or PEC BAAs, or to customers located outside of the BAAs, even if transmission is unavailable to a particular market. Applicants May 1 Answer at 21.

We direct Applicants that, in the context of the interim mitigation proposed here, Applicants cannot use control over their transmission systems to thwart sales under the Power Sales Agreements. This should minimize the instances in which buyers would be required to declare a force majeure event in order to not take possession of the power, thus undermining the proposed mitigation. Moreover, the Independent Monitor will report within 3 business days any hours in which buyers did not purchase the full amount of energy Applicants are required to deliver under the Power Sales Agreements.

104. Second, the Commission will condition acceptance of the Revised Mitigation Proposal upon Applicants not having any priority right over other potential buyers to re-purchase any of the energy and/or capacity sold by Applicants pursuant to the Power Sales Agreements. Third, Applicants must not enter into transactions with the counterparties to the Power Sales Agreements except on a spot (day-ahead or shorter) basis.

105. Fourth, as noted above, the energy price under the Power Sales Agreements is based on the natural gas price reported in Platts Gas Daily for Transco Zone 5. The Commission believes that, in the context of the Revised Mitigation Proposal and the Power Sales Agreements, basing the natural gas price on a more liquid pricing point than Transco Zone 5 would be more appropriate. According to data from Platts between January 2010 and the present there have only been 21 transactions on average per day at Transco Zone 5 whereas there have been 85 transactions on average per day, or four

[249] *See e.g.* Applicants May 1 Answer at 5, 20-21, Exhibit A.

times as many, at Transco Zone 4. The reduced liquidity at Transco Zone 5 is significant because it could enable a small number of transactions to affect the Transco Zone 5 price index. The Commission must be assured that the price index that is used as part of Applicants' mitigation is based on a sufficiently liquid trading hub because, if it is not, the result could be an adverse effect on competition. Accordingly, for the duration of the Power Sales Agreements, Applicants must either limit the price they pay for new purchases of natural gas at Transco Zone 5 to the index price or replace Transco Zone 5 with Transco Zone 4.

106. Finally, on each occasion when Applicants sell power under the Power Sales Agreements, Applicants must simultaneously post on their electronic bulletin boards the amount of power that was sold under the Power Sales Agreement(s) and for what duration. This requirement will provide transparency and notify interested parties that the buyers under the Power Sales Agreements may have power available to sell to third parties, and therefore reduce the likelihood that the three buyers under the Power Sales Agreements would need to sell the energy purchased under those agreements back to Applicants. These conditions are necessary to prevent Applicants from being able to effectively maintain control of the capacity and energy that would otherwise be sold under the Power Sales Agreements, which, if that occurred, would cause Applicants to fail the merger screens.

107. Applicants must also revise the Revised Mitigation Proposal to expand the scope of the Independent Monitor's duties to include monitoring the purchases made under the Power Sales Agreements on a daily, ongoing basis. Accordingly, in addition to the Independent Monitor's performance of the duties set out in the Monitoring Agreement provided with the March 26 Compliance Filing,[250] the Independent Monitor must also monitor the purchases under the Power Sales Agreements for: (1) hours in which buyers did not purchase the full amount of energy Applicants are required to deliver under the Power Sales Agreements; and (2) hours in which any buyer under the Power Sales Agreements sells to either Duke Energy Carolinas or Progress Energy Carolinas in the Duke Energy Carolinas and/or Progress Energy Carolinas BAAs an amount of energy or capacity equal to or more than five percent of the amount of energy purchased by the buyer under the Power Sales Agreement. The Independent Monitor must notify the Commission within 3 business days if, in any hour and for any reason, the actual purchases under the Power Sales Agreements are less than the quantities Applicants are required to deliver in those agreements. Applicants must notify the Independent Monitor within two business days, and the Independent Monitor must notify the Commission within three business days, if a buyer sells to either Duke Energy Carolinas or Progress

[250] *See* March 26 Compliance Filing, Exhibit D, Monitoring Agreement.

Energy Carolinas in the Duke Energy Carolinas and/or Progress Energy Carolinas BAAs an amount of energy or capacity equal to more than five percent of the amount of energy or capacity purchased by the buyer under the Power Sales Agreement. Such notification must include the date, hour, product name, quantity and price of such sale(s) to Applicants, as well as the quantity and price of the energy or capacity purchased by the buyer from Applicants during that/those same hour(s). These additional Independent Monitor functions will enable the Commission to detect any attempts by Applicants to circumvent the interim mitigation.

108. Applicants must also expand the scope of the reports the Independent Monitor is required to submit to the Commission pursuant to the Revised Mitigation Proposal.[251] In addition to the information that Applicants have proposed to include in those reports in the Monitoring Agreement, the Independent Monitor's reports must also: (1) document the quantities of energy and capacity purchased under the Power Sales Agreements; (2) document the amount of energy purchased by Duke Energy Carolinas and Progress Energy Carolinas from the Power Sales Agreement buyers; and (3) document when a buyer under a Power Sales Agreement invokes *force majeure* because transmission from the delivery point(s) under the Power Sales Agreement to buyer's proposed ultimate sink is interrupted or is not available in the Duke Energy Carolinas and Progress Energy Carolinas BAAs and in BAAs or markets that are first-tier to Duke Energy Carolinas and Progress Energy Carolinas. This additional information will enable the Commission to monitor whether Applicants are abiding by the terms of the interim mitigation.

109. Finally, protestors argue that the Commission should reject the Power Sales Agreements simply because they provide for negative capacity prices at certain times (i.e., Applicants will pay buyers to take capacity during certain time periods). We disagree with City of Orangeburg that these prices "[bely] Applicants' claim of having engaged in a meaningful divestiture of system resources."[252] As Applicants note, the Commission took issue with the Prior Mitigation Proposal because Applicants failed to demonstrate that they would relinquish control over the energy that they proposed to offer to sell.[253] The Commission did not prescribe a price range or particular price terms

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[251] *See* March 26 Compliance Filing, Exhibit D, Monitoring Agreement at 1.C.(1). Under section 1.C.(1) of the Monitoring Agreement, the Independent Monitor is required to submit, within 30 days following the conclusion of each winter and summer season, a report regarding Applicants' compliance or non-compliance with the interim mitigation proposal.

[252] City of Orangeburg Comments on Revised Mitigation Proposal at 25.

[253] Applicants May 1 Answer at 17.

and does not find that negative capacity prices in some time periods constitute sufficient justification to reject the proposed interim mitigation. Nevertheless, in order to protect Applicants' transmission and wholesale requirements customers from any losses that Applicants may incur under the Power Sales Agreements, the Commission will require Applicants to hold customers harmless from those losses in accordance with the hold harmless commitment, as set forth in the Merger Order.[254]

3. Other concerns

110. The Commission rejects City of Orangeburg's arguments pertaining to the state regulatory conditions for the same reasons that we did so in the Merger Order – namely, that City of Orangeburg has "failed to demonstrate that the alleged harms to competition stem from the Proposed Transaction."[255] The alleged harms that City of Orangeburg complains of are based on existing state regulatory policies, which are currently in place and will continue in effect regardless of whether the Proposed Transaction goes forward. Consequently, we will not address these arguments here.

111. FMPA also reiterates arguments that it has advanced in other pleadings, specifically in its request for rehearing of the Merger Order and in its original protest of the Merger Application. As before, FMPA's arguments focus on the Commission's determination in the Merger Order that "Duke Energy and Progress Energy have demonstrated that they do not conduct business in the same geographic market in Florida."[256] The March 26 Compliance Filing, however, pertains entirely to the Commission's competitive concerns with regard to the Carolinas markets. Accordingly, we will not address FMPA's arguments here, but will address them on rehearing of the Merger Order.

112. Finally, the Commission declines to require Applicants to join an RTO, as EPSA advocates.[257] In both the Merger Order and the Compliance Order, the Commission explained that possible mitigation proposals could include, but were not limited to, forming or joining an RTO.[258] The Commission explained that it would review any

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[254] *See* Merger Order, 136 FERC ¶ 61,245 at P 147.

[255] Merger Order, 136 FERC ¶ 61,245 at P 147.

[256] Merger Order, 136 FERC ¶ 61,245 at P 151.

[257] EPSA Comments on Revised Mitigation Proposal at 3.

[258] Merger Order, 136 FERC ¶ 61,245 at P 145; Compliance Order, 137 FERC ¶ 61,210 at P 4.

proposal by Applicants to ensure that "the Proposed Transaction, as mitigated, will not result in an adverse effect on competition and is consistent with the public interest."[259] The Commission finds that, as conditioned above, the Revised Mitigation Proposal accomplishes this objective.

4. Conclusion

113. For the reasons stated above, the Commission finds, pursuant to the Merger Policy Statement, related regulations, and precedent, that the Proposed Transaction, as initially submitted by Applicants, as supplemented by the Revised Mitigation Proposal, Applicants April 13 Information Request Answer and Applicants May 1 Answer, and as revised herein, will not have an adverse effect on competition. If Applicants elect to accept the Commission's revisions to the Revised Mitigation Proposal, Applicants should notify the Commission within 15 days of the issuance of this order. In summary, our acceptance of the Revised Mitigation Proposal is subject to the following modifications:

- Applicants must place the proposed Transmission Expansion Projects into service by June 1, 2015.

- Within 15 days of the issuance of this order, Applicants must provide the Commission with copies of all of the binding agreements needed to construct the Transmission Expansion Projects that were to be negotiated with American Electric Power and Dominion Virginia Power.

- Applicants must implement their Stub Mitigation proposal.

- The Independent Monitor must provide periodic reports on the status of the transmission upgrades every three months, with the first report due not later than the last day of the third full month after the Proposed Transaction is consummated and the final report due within 30 days after the last of the seven proposed transmission projects has been placed into service.

- Applicants must hold transmission and wholesale requirements customers harmless from the costs of the Transmission Expansion Projects in accordance with the hold harmless commitment set forth in the Merger Order.

- Applicants cannot use control over their transmission systems to thwart sales under the Power Sales Agreements.

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[259] Merger Order, 136 FERC ¶ 61,245 at P 146.

- Applicants must not have any priority right over other potential buyers to re-purchase any of the energy and/or capacity sold by Applicants pursuant to the Power Sales Agreements.

- For so long as the interim mitigation measures shall remain in place, Applicants must not enter into transactions with the counterparties to the Power Sales Agreements except on a spot (day-ahead or shorter) basis.

- For the duration of the Power Sales Agreements, Applicants must either limit the price they pay for new purchases of natural gas at Transco Zone 5 to the index price or replace Transco Zone 5 with Transco Zone 4.

- On each occasion when Applicants sell power under the Power Sales Agreements, Applicants must simultaneously post on their electronic bulletin boards the amount of power that was sold under the Power Sales Agreement(s) and for what duration.

- The Independent Monitor must monitor the purchases under the Power Sales Agreements for (1) hours in which buyers did not purchase the full amount of energy Applicants are required to deliver under the Power Sales Agreements; and (2) hours in which any buyer under the Power Sales Agreements sells to either Duke Energy Carolinas or Progress Energy Carolinas in the Duke Energy Carolinas and/or Progress Energy Carolinas BAAs an amount of energy or capacity equal to or more than five percent of the amount of energy or capacity purchased by the buyer under the Power Sales Agreement.

- The Independent Monitor must notify the Commission within three days if, in any hour and for any reason, the actual purchases under the Power Sales Agreements are less than the quantities offered in those agreements.

- Applicants must notify the Independent Monitor within two business days, and the Independent Monitor must notify the Commission within three business days if a buyer sells to either Duke Energy Carolinas or Progress Energy Carolinas in the Duke Energy Carolinas and/or Progress Energy Carolinas BAAs an amount of energy or capacity equal to or more than five percent of the amount of such energy or capacity purchased by the buyer under the Power Sales Agreement. Such notification must include the date, hour, product name, quantity, and price of such sale(s) to Applicants, as well as the quantity and price of the energy or capacity purchased by the buyer from the Applicants during that/those same hour(s).

- In addition to the information required under section 1.C.(1) of the Monitoring Agreement, the Independent Monitor must also: (1) document the quantities of energy and capacity purchased under the Power Sales Agreements; (2) document the amount of energy purchased by Duke Energy Carolinas and Progress Energy Carolinas from the counterparties to the Power Sales Agreements; and

(3) document when a buyer under a Power Sales Agreement invokes *force majeure* because transmission from the delivery point(s) under the Power Sales Agreement to buyer's proposed ultimate sink is interrupted or is not available in the Duke Energy Carolinas and Progress Energy Carolinas BAAs and in BAAs or markets that are first-tier to Duke Energy Carolinas and Progress Energy Carolinas.

- Applicants must hold transmission and wholesale requirements customers harmless from losses that Applicants may incur under the Power Sales Agreements in accordance with the hold harmless commitment set forth in the Merger Order.

V. The Power Sales Agreements

114. In addition to proposing that the four Power Sales Agreements serve as interim mitigation while they complete and put into operation the Transmission Expansion Projects, Applicants also filed the Power Sales Agreements for acceptance under section 205 of the FPA. The terms and conditions of the Power Sales Agreements are described in further detail above,[260] but for every Power Sales Agreement, Applicants state that the parties to the agreements have "expressly waived their right to unilaterally seek from [the Commission] a change in the [agreement] pursuant to Section 205 or 206 of the Federal Power Act."[261] Applicants explain that, consistent with *NRG Power Mktng., LLC v. Me. Pub. Utils. Comm'n*, 130 S.Ct. 693 (2010), "the standard of review for changes to the charges, terms and conditions" of the agreements proposed a "Party, a non-Party, or the [Commission] acting *sua sponte* shall be the 'public interest' standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956)."[262]

115. The Power Sales Agreements appear to be just and reasonable, and have not been shown to be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, the Commission accepts the Power Sales Agreements effective

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[260] *See* PP 34-39, *supra*.

[261] *See e.g., Master Power Purchase and Sale Agreement between Carolina Power & Light d/b/a Progress Energy Carolinas, Inc. and Morgan Stanley Capital Group, Inc.*, Transmittal Letter at 4, Docket No. ER12-1341-000 (March 26, 2012).

[262] *Master Power Purchase and Sale Agreement between Carolina Power & Light d/b/a Progress Energy Carolinas, Inc. and Morgan Stanley Capital Group, Inc.*, Transmittal Letter at 4, Docket No. ER12-1341-000 (March 26, 2012).

on the date the Proposed Transaction is consummated, and directs Applicants to submit a compliance filing within ten days of the consummation of the Proposed Transaction revising the effective date of the Power Sales Agreements.

The Commission orders:

(A) The March 26 Compliance Filing is accepted, as modified, as discussed in the body of this order. Applicants are directed to notify the Commission within 15 days of the issuance of this order as to whether they accept the Commission's revisions to the Revised Mitigation Proposal.

(B) The Power Sales Agreements are hereby accepted for filing, effective on the date the Proposed Transaction is consummated, as discussed in the body of this order.

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

(D) Applicants must submit a compliance filing within ten days of the consummation of the Proposed Transaction revising the effective date of the Power Sales Agreements.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary