121 FERC ¶ 61,069
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Great Plains Energy Incorporated Kansas City Power & Light Company Aquila, Inc. Black Hills Corporation	Docket Nos. EC07-99-000 EL07-75-000

ORDER AUTHORIZING DISPOSITION AND
ACQUISITION OF JURISDICTIONAL FACILITIES AND
GRANTING PETITION FOR DECLARATORY ORDER

(Issued October 19, 2007)

1. On May 25, 2007, Great Plains Energy Incorporated (Great Plains Energy), Kansas City Power & Light Company (KCP&L), Aquila, Inc. (Aquila), and Black Hills Corporation (Black Hills) (collectively, Applicants) filed an application under section 203 of the Federal Power Act (FPA)[1] requesting Commission authorization for the disposition and acquisition of jurisdictional facilities resulting from a two-step transaction. In this transaction: (1) Aquila will sell its electric utility assets in Colorado and its non-jurisdictional gas utility assets in Colorado, Kansas, Nebraska and Iowa to Black Hills (Black Hills Acquisition); and (2) immediately thereafter, a subsidiary of Great Plains Energy will merge into Aquila, making Aquila a wholly-owned subsidiary of Great Plains Energy (Great Plains Energy Acquisition). Applicants also request a declaratory order stating that one of the elements of the transaction, a distribution of proceeds from Aquila to Great Plains Energy, will not be a payment of funds properly included in a capital account contrary to FPA section 305(a). In this order, the Commission authorizes the proposed transaction as consistent with the public interest and as otherwise meeting the requirements of section 203. The Commission further grants Applicants' petition for a declaratory order.

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[1] 16 U.S.C. § 824b (2000), as amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594 (2005) (EPAct 2005).

I. Background

A. Description of the Applicants

1. Great Plains Energy and KCP&L

2. Great Plains Energy is a public utility holding company, as defined by the Public Utility Holding Company Act of 2005, with four direct subsidiaries: KCP&L; KLT Inc.; Innovative Energy Consultants Inc.; and Great Plains Energy Services Inc. Great Plains Energy does not own any significant assets other than the stock of its subsidiaries and does not operate any jurisdictional facilities.

3. KCP&L is a vertically integrated utility that generates, transmits, distributes and sells electricity. It has an obligation to serve all loads within its franchised territory in Missouri and Kansas. KCP&L owns approximately 4,200 megawatts (MWs) of electric generation capacity in its control area. It has transferred functional control of its transmission facilities to a regional transmission organization (RTO), Southwest Power Pool, Inc. (SPP). The majority of the transmission over KCP&L's transmission facilities is conducted by SPP under its Open Access Transmission Tariff (OATT).

2. Aquila

4. Aquila is an integrated electric and natural gas utility with electric utility companies in Missouri and Colorado, and natural gas local distribution companies in Colorado, Iowa, Nebraska, and Kansas. Aquila's Missouri electric companies, which include the Missouri Public Service and St. Joseph Light & Power, operate as a single control area (Missouri Electric). Missouri Electric owns approximately 1,700 MWs of generation in Missouri and Kansas to serve load in Missouri.[2] Missouri Electric has been incorporated into the SPP regional OATT as a single rate zone, and its transmission is under the functional control of SPP. Network service is provided through Aquila's OATT and point-to-point service is provided through SPP's regional tariff.[3] The

[2] Applicants state that the generation will be transferred to Great Plains Energy's control when Aquila is acquired by Great Plains Energy. Application at 7.

[3] The Midwest Independent Transmission System Operator, Inc. (MISO) provides security coordination for the Missouri Electric operations under MISO's Transmission and Energy Markets Tariff. SPP's functional control of Aquila's Missouri transmission is on an interim basis, with the permanent commitment subject to approval by the Missouri Commission. Applicants note that Aquila is in the process of conducting comparative cost-benefit studies of membership in SPP and MISO.

Missouri Electric is subject to regulation by the Missouri Public Service Commission (Missouri Commission).

5. Aquila also owns approximately 100 MWs of generation in Colorado that will be transferred to Black Hills. Aquila operates its Colorado electric utility within the Public Service Company of Colorado (PSCO) control area. Applicants state that there is no direct interconnection between Aquila's Colorado electric utility system and its Missouri Electric system.[4] Point-to-point and network transmission services in Colorado are provided by Aquila's Colorado electric operations under its separate OATT.[5]

6. Additionally, Aquila's gas utilities own natural gas retail distribution facilities in Colorado, Iowa, Kansas, and Nebraska. According to the Applicants, Aquila's gas facilities are not used to supply natural gas to any generating facility.[6]

7. Aquila also has energy activities carried out by Aquila Merchant Services, Inc. and its affiliates (Aquila Merchant). Aquila states that it has substantially exited this business and that none of its affiliates currently engage in any sales or purchases of electric energy or capacity.[7]

3. Black Hills

8. Black Hills is a public utility holding company that conducts its electric and gas utility business through two wholly-owned utility operating company subsidiaries, Black Hills Power, Inc. (Black Hills Power) and Cheyenne Light, Fuel and Power Company (Cheyenne Light). Black Hills conducts its wholesale energy production and marketing business through its wholly-owned subsidiary, Black Hills Energy, Inc. (Black Hills Energy). Black Hills also owns a centralized business services subsidiary, Black Hills Service Company, LLC (Black Hills Service), which provides services such as accounting, legal, human resources, and information technology services. Black Hills Service also administers money pools for Black Hills' utility and non-utility business.

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[4] *Id.* at 9.

[5] Aquila's OATT for its Colorado facilities is on filed with the Commission as Aquila, Inc., FERC Electric Tariff, Fourth Revised Volume No. 25.

[6] *Id.*

[7] *Id*. at 6.

9. Black Hills Power is an electric generation, transmission and distribution utility that provides retail electric service to customers in South Dakota, Wyoming and Montana. It has approximately 435 MWs of generating capacity in South Dakota and Wyoming that is used to serve retail and wholesale customers. The capacity is also used to make off-system wholesale electric capacity and energy sales. Black Hills Power also owns and operates approximately 480 miles of 69 kV lines and owns or jointly owns approximately 494 miles of 23 kV lines in South Dakota, Wyoming, Nebraska, and Montana.

10. Cheyenne Light is a combination electric and natural gas utility that serves retail customers in and around Cheyenne, Wyoming. It does not serve any wholesale or transmission customers, so it is not regulated by the Commission.

11. Black Hills Energy, a wholly-owned subsidiary of Black Hills, conducts Black Hills' wholesale energy production and marketing business. Black Hills Energy's subsidiaries are engaged in power production, oil and gas exploration and production, coal mining, and energy marketing and transportation. Black Hills Energy's power production business, Black Hills Generation, Inc. (Black Hills Generation), has 978 MW of generating capacity in Colorado, Nevada, Wyoming, California, and Idaho. Black Hills Generation owns three generating facilities within the PSCO control area, with a total generating capacity of 450 MWs. Black Hills Energy sells the entire output of each plant to PSCO under tolling agreements that expire in 2012.

B. <u>The Proposed Transaction</u>

12. The proposed transaction involves two acquisitions: (1) the Black Hills Acquisition, in which Aquila will sell its electric utility assets in Colorado and its natural gas utility assets in Colorado, Iowa, Kansas and Nebraska to Black Hills; and (2) the Great Plains Energy Acquisition, in which Aquila and its remaining assets (consisting primarily of its Missouri electric utility assets) will be acquired by Great Plains Energy through a merger. Under the Applicants' agreements, each step of the proposed transaction is contingent upon the other.

13. The Black Hills Acquisition is itself a two-part transaction with a total base compensation of $ 940 million in cash. First, Aquila will transfer ownership of its Colorado electric utility assets, including its transmission facilities, to Aquila Colorado Electric Opco, LP (Electric Opco), a newly formed, wholly-owned subsidiary of Aquila. At the same time, Aquila will transfer ownership of its non-jurisdictional Colorado gas utility assets to Aquila Colorado Gas Opco, LP (Gas Opco), also a newly formed, wholly-owned subsidiary of Aquila. Second, Aquila will transfer ownership of Electric Opco, Gas Opco, and its non-jurisdictional natural gas utility assets in Iowa, Kansas and Nebraska to Black Hills, which will hold them through wholly-owned subsidiaries.

14. After the Black Hills Acquisition, Gregory Acquisition Corporation, a wholly-owned subsidiary of Great Plains Energy formed to carry out the proposed transaction, will merge into Aquila, and Aquila will become a wholly-owned subsidiary of Great Plains Energy. Upon consummation of the Great Plains Energy Acquisition, the shareholders of Aquila and Great Plains Energy are expected to own approximately 27 percent and 73 percent, respectively, of the combined company's outstanding common stock. The total consideration to Aquila shareholders will be about $1.7 billion, with approximately $677 million of this amount to be paid in cash and the remainder in Great Plains Energy common stock.[8] Applicants note that a substantial portion of the proceeds from the Black Hills Acquisition, with additional cash from Great Plains Energy, will be used by Great Plains Energy to pay the $677 million cash portion of the merger.[9] The remainder of the proceeds from the Black Hills Acquisition is expected to be used to retire some of Aquila's outstanding debt and to fund certain of Aquila's ongoing operations.

15. After the proposed transaction, KCP&L and Aquila will be separate, wholly-owned subsidiaries of Great Plains Energy. The Applicants state that each company will continue to operate as a separate control area, and the two companies' generation facilities will not be jointly dispatched.[10] Great Plains Energy says that it will be able to achieve operational synergies as a result of more efficient procurement practices and elimination of positions over time due to economies of scale and changes in processes and technologies.

II. Notice, Interventions, and Protests

16. Notice of the section 203 filing was published in the *Federal Register,* 72 Fed. Reg. 31,572 (2007), with comments, protests, or interventions due on or before July 24, 2007. Notice of the petition for a declaratory order was published in the *Federal Register*, 72 Fed. Reg. 36,440 (2007), with comments, protests, or interventions due on or before July 24, 2007.

[8] As consideration for the combined transaction, each of Aquila's shareholders will receive $1.80 in cash and 0.0856 of a share of Great Plains Energy common stock for each share of Aquila stock that it owns.

[9] Application at 16.

[10] *Id*. at 17.

17. A timely motion to intervene was filed by the Board of Public Utilities of Kansas City, Kansas (BPU). Notices of intervention or timely motions to intervene and protests were filed by: Dogwood Energy LLC (Dogwood); City of Independence, Missouri (Independence); the Attorney General of the State of California, the California Electricity Oversight Board, and the Public Utilities Commission of the State of California (collectively, California State Parties). A motion to intervene out-of-time was filed by Missouri Joint Municipal Electric Utility Commission (Missouri Joint Municipal Commission). On August 8, 2007, Applicants filed an answer. On August 23, 2007, California State Parties filed a response to Applicants' answer.

III. Discussion

A. Procedural Matters

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Also, given the early stage of this proceeding, the lack of undue prejudice or delay and its interest, we find good cause to grant, under Rule 214, the untimely motion to intervene of Missouri Joint Municipal Commission.

19. Rule 213(a) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a) (2007), prohibits answers to protests, unless otherwise permitted by the decisional authority. We will accept the Applicants' answer because it has provided information that assisted us in our decision-making process. However, we are not persuaded to accept California State Parties' answer, and therefore, will reject it.

B. Section 203 Application

1. Standard of Review

20. Section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest. Under the Commission's regulations, its analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.[11] Section 203 also

[11] *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996) (Merger Policy Statement), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,341 (June 19, 1997), 79 FERC ¶ 61,321 (1997); *see also Revised Filing Requirements*

(continued)

requires the Commission to ensure that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."[12] The Commission's regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.[13]

2. <u>Effect on Competition</u>

a. <u>Applicants' Analysis</u>

i. <u>The Black Hills Acquisition</u>

21. Applicants state that the Black Hills Acquisition will have no horizontal effect because Black Hills' acquisition of Aquila's Colorado assets will not lead to any increase in concentration of control over generation in the PSCO control area, the relevant geographic market.[14] Applicants assert that Aquila's generation is only two percent of the generation in the PSCO control area, and that Black Hills' generating facilities in the PSCO control area are committed to PSCO through long-term tolling agreements through 2012 that give PSCO the authority to dispatch those facilities.[15]

Under Part 33 of the Commission's Regulations, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001); *see also Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

[12] 16 U.S.C. § 824b(a)(4) (2000), *amended by* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982-83 (2005) (EPAct 2005).

[13] 18 C.F.R. § 33.2 (2007).

[14] The only control area in which Aquila and Black Hills both own generation is the control area of PSCO. Exhibit J-1, Direct Testimony and Exhibits of William H. Hieronymus, at 5 (Dr. Hieronymus Testimony).

[15] Dr. Hieronymus Testimony at 6.

22. Applicants also argue that the Black Hills Acquisition does not create or enhance vertical market power. First, Black Hills does not own or control transmission assets in Colorado, other than what is necessary to connect its Colorado merchant generation to the electric grid. While Aquila has transmission in Colorado, it is not a control area operator.[16] Additionally, Applicants conclude that, because Black Hills' Colorado generation is under long-term contract to PSCO, the transaction creates no new incentive to use control over transmission to disadvantage rivals. Therefore, they assert that the transaction does not cause any transmission-related vertical market power issues.[17]

23. Second, they argue that there is no issue of vertical market power arising from their natural gas assets. Applicants state that Black Hills will not acquire gas transportation facilities that provide gas to electric generators in the PSCO control area market.[18] Because Black Hills does not have any natural gas transportation contract rights in the PSCO control area, its acquisition of the Aquila gas distribution assets will not lead to increased concentration in the ownership of gas transportation contract rights in that market. Further, although Black Hills is acquiring Aquila's natural gas distribution assets in Kansas, Iowa, and Nebraska, it does not own or control any generation facilities in those markets.[19]

24. Applicants did not include a competitive screen analysis for the Black Hills Acquisition. They argue that because the Black Hills Acquisition will not cause an adverse impact on competition, under 18 C.F.R. § 33.3(a)(2), a competitive screen analysis for the Black Hills Acquisition is not necessary.

ii. <u>The Great Plains Energy Acquisition</u>

25. Applicants state that it conducted a horizontal competitive analysis screen for the Great Plains Energy Acquisition. It contends that no market power concerns are raised by Great Plains Energy's acquisition of Aquila's Missouri Electric assets. They note that the horizontal effect resulting from the combination of KCP&L and Aquila generation in

[16] Aquila's Colorado transmission is subject to an OATT. The OATT will remain in place after the transaction, and Black Hills will use it to continue to provide open access transmission service.

[17] Application at 28.

[18] *Id.*

[19] *Id.* at 29.

Missouri and Kansas is small. Based on Dr. Hieronymus' competitive analysis, both KCP&L and the Missouri Electric have no uncommitted capacity and little Available Economic Capacity (AEC) available to compete in the wholesale market.[20] Further, Applicants note that the Commission's competitive analysis screen is passed for AEC in all relevant geographic destination markets, including first-tier markets for KCP&L or Missouri Electric and the SPP market.[21]

26. Under the Economic Capacity (EC) measure, Applicants state that Dr. Hieronymus' analysis shows that there are some screen violations in both the KCP&L and Missouri Electric markets. However, they argue that this should not raise any market power concerns because the proposed transaction passes all screens under the AEC measure of capacity. Applicants claim that the Commission has held that AEC is the relevant measure of competition when there is no retail access and no prospects for retail access in the foreseeable future.[22] They also note that there are no EC screen violations in any first-tier markets or in the SPP market analysis.[23]

27. Applicants also assert that the Great Plains Energy Acquisition creates no vertical market power issues. Specifically, they state that there are no issues related to transmission because the Great Plains Acquisition creates no incremental opportunities for KCP&L or Aquila to exercise market power.[24] Applicants note that KCP&L's and Aquila's electric transmission systems are under the functional control of the SPP and that their customers take service under the SPP OATT. Additionally, they state that Applicants exercise no unique control over generating sites that could restrict entry by

[20] KCP&L has about 585 MWs and Missouri Electric has about 100 MWs of AEC. Applicants note that the "combination of these two small amounts of AEC should not have any real competitive impact in any relevant geographic market." *Id.* at 22.

[21] *Id.* at 25.

[22] *Id.*, citing *Westar Energy, Inc.*, 115 FERC ¶ 61,228, at P 72 (2006); *National Grid, plc.*, 117 FERC ¶ 61,080 P 27-28 (2006); *Nevada Power*, 113 FERC ¶ 61,265 at P 15 (2005).

[23] Application at 26.

[24] Dr. Hieronymus Testimony at 4.

other suppliers. Neither KCP&L nor Aquila owns any natural gas transportation assets or LDCs.[25]

b. Protests

28. Independence is not opposed to the proposed transaction, but is concerned that it could harm Independence with regard to transmission and interconnection capacity. It states that the Applicants do not address the effect that coordinated operations of the merged companies would have on the availability of transmission for others to use.[26] Without such an analysis, Independence asserts that it is impossible to evaluate how the combined companies' operations will affect the level of available transmission capacity for third parties.[27] It states that its primary access to the outside electrical world is through its physical interconnections with KCP&L and Aquila. If the transaction is approved, its access to third party suppliers will be almost exclusively across the merged companies' transmission system. Therefore, Independence asserts that it will need market access with sufficient interconnection and transmission capacity; without such access, it may become a captive customer.[28] Therefore, Independence urges the Commission to have a hearing to fully explore transmission and interconnection availability.[29]

29. Additionally, Independence claims that joint dispatch of generation will affect generation costs and available transmission capacity. It argues that the Applicants have not foreclosed the possibility of joint dispatch of KCP&L's and Aquila's generations at any time after the merger is consummated.[30] The Applicants provide no analysis of the

[25] *Id.* at 5.

[26] Independence Protest at 1-2.

[27] *Id.* at 6.

[28] *Id.* at 17.

[29] Independence notes that Applicants' market power screening study and Dr. Hieronymus' testimony state that the Applicants have little AEC because nearly all of their installed capacity is committed to serving native load. Thus, it is concerned that a scarcity may already exist. *Id.* at 8.

[30] *Id.* at 12. The application states that following the merger, KCP&L and Aquila "will continue to operate as separate control areas, and the two companies' generation facilities will not be jointly dispatched." Application at 17.

effects of joint dispatch and provide no proposed mitigation measures to address any such impacts. Therefore, Independence argues that the Commission should either: (1) require an analysis of the effects of joint generation dispatch, including the effect on generation costs and the impacts on available transmission capacity; or (2) condition approval on a commitment by the Applicants to not engage in joint dispatch for at least five years, and thereafter to only engage in joint dispatch upon a finding by the Commission that the joint dispatch is consistent with the public interest.[31] Independence contends that without a record supporting these issues, the Commission cannot reasonably conclude that the proposed transaction will not harm competition.

30. Further, Independence argues that Applicants' market power screening study is unreliable and based on faulty assumptions. Independence argues that Applicants' study understates their AEC by omitting KCP&L's 465 MW and Aquila's 153 MW ownership interest in Iatan 2,[32] presently under construction and slated for commercial operation in 2010.[33] The study also fails to account for KCP&L's termination of the Montrose contract in 2011, which would add 90 MWs to the merged companies' resources. Further, Independence asserts that while Independence is recognized as a Tier 1 utility and a relevant geographic market, the application has no discussion of Independence or how it may be affected by the merger.[34]

c. <u>Applicants' Answer</u>

31. In response to Independence's assertions about the availability of transmission and interconnection capacity, Applicants state that the Commission does not require section 203 applicants to analyze the impact of a merger on available transmission or interconnection capacity other than to require applicants to provide service under an OATT to address vertical market power concerns.[35] Additionally, Applicants argue that Independence's concern about any joint dispatch in the future is based on speculation,

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[31] Independence Protest at 12-13.

[32] Iatan 2 is a large, base load, coal-fired generating plant. *Id.* at 4.

[33] Independence states that the omission of Iatan 2 is significant because Iatan 2 is expected to add about 618 MWs of generating capacity to the merged companies' resources. *Id.* at 14.

[34] *Id.* at 16.

[35] Applicants Answer at 10.

with no evidence that joint dispatch will decrease its access to transmission. Regardless, Applicants contend that if the merged company decides to pursue joint dispatch, Independence's interest will be protected through other proceedings. If KCP&L and Aquila engage in joint dispatch, they will need to designate each other's generation facilities as network resources. The appropriate RTO would then evaluate those designations to ensure that existing transmission rights would not be adversely affected.[36] Applicants also assert that if Independence wants to protect future transmission arrangements, it can do so by making a firm transmission reservation. Further, they state that joint dispatch could be put into effect only through an operating agreement between KCP&L and Aquila, and after the Commission determines that the terms and conditions of that agreement are just and reasonable. Independence would be able to raise its concerns in any such proceeding.[37]

32. Additionally, Applicants challenge Independence's claims about the market power screening study. They state that Dr. Hieronymus' analysis is based on expected conditions in 2008, which is consistent with the Commission's policy that merger analysis should be as "forward looking as practicable."[38] Merger analysis that relies on forecasts beyond one year has less predictive value because it relies more on "speculation about future transmission loading, market conditions, generation additions and retirements, transmission upgrades, and load growth."[39] Applicants contend that it is unreasonable to include generating capacity anticipated to be available in 2010 and 2011, as Independence asserts, because by that time numerous other transmission and generation facilities will have been brought into service in the relevant markets. Therefore, Applicants argue that it would be inappropriate for Dr. Hieronymus' analysis to include the proposed KCP&L capacity additions without also including changes in other relevant variables.[40] Applicants claim that Independence wants the analysis to look at the long-term effects of the proposed transaction and asks the Commission to examine

[36] *Id.*

[37] *Id.* at 10-11.

[38] *Id.* at 12 and n. 9.

[39] *Id*. at 12.

[40] *Id*. at 12-13.

some, but not all, of the factors that might affect the long-term effects of the transaction.[41] This would provide a distorted forecast.[42]

33. Applicants state that Independence's claim that Dr. Hieronymus did not analyze the merger's effect on competition in the Independence market is incorrect. They state that Dr. Hieronymus did analyze the Independence market, both before the transaction and after it, and that his testimony shows that the competitive analysis screen in the Independence market is readily passed in all time periods for both AEC and EC, indicating that no further analysis is required.[43]

d. Commission Determination

34. We find that the Applicants have shown that the proposed transaction will not adversely affect competition. Regarding the horizontal combination of generation capacity, Applicants' analysis shows that for all relevant geographic markets, there are no screen failures for AEC, the relevant measure in this case, indicating that it is unlikely that the transmission will harm competition.[44] In addition, the Black Hills Acquisition will not result in the consolidation of generating assets in any relevant market. Given that the proposed transaction does not materially increase the merged firm's market share or market concentration, we conclude that it is not likely to create or enhance Applicants' ability to exercise market power in any wholesale electricity markets. Regarding the vertical combination of upstream transmission and natural gas assets with downstream generating capacity, Applicants have shown that the proposed transaction will not create or enhance the ability or incentive to use control of upstream assets to harm competition in downstream wholesale electricity markets. We reach this conclusion because: (1) Applicants' transmission facilities will be operated pursuant to an OATT, thus

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[41] *Id.* at 13.

[42] Dr. Hieronymus concluded that "because entry into long-term markets here is not constrained, the transaction will not have long-term adverse competitive effects." Dr. Hieronymus Testimony at 53.

[43] Applicants Answer at 14, citing Application, Exhibits J-8 at 4 and J-9 at 4.

[44] *See, e.g., Nevada Power*, 113 FERC ¶ 61,265 at P 15 (2005), where the Commission stated that "[b]ecause of Nevada Power's significant native load obligation, with no foreseeable prospect of that obligation being lifted, we agree that Available Economic Capacity is the more relevant measure in the Nevada Power market and, therefore, should be given more weight."

ensuring that they cannot be used to frustrate competition in wholesale electricity markets; and (2) there is no overlap between Applicants' natural gas transportation assets and downstream electric generation capacity in any relevant wholesale market. We discuss the specific issues raised by protestors below.

35. Independence argues that Applicants fail to show that Independence will not be affected by decreased transmission availability. However, it does not offer any evidence that less transmission will be available to it. Applicants' transmission system is subject to a Commission-approved OATT, which ensures open access to the transmission system.

36. Independence's argument that the Commission cannot reasonably conclude that proposed transaction presents neither horizontal nor vertical market power issues without analyzing the possibility of joint dispatch of KCP&L's and Aquila's generation is misplaced. First, our analysis focuses on merger-related effects on competition, and there is no evidence in the record that KCP&L and Aquila plan to engage in joint economic dispatch following the merger. Second, even if KCP&L and Aquila do pursue a joint economic dispatch agreement, Applicants have shown that the merger will not adversely affect competition. Regarding horizontal market power, Applicants' analysis shows that the combination of KCP&L's and Aquila's generation will not materially increase market concentration using the AEC measure, indicating that the merger will not harm competition in the relevant market; thus, even if Applicants do engage in joint dispatch, the merger will not create or enhance the ability to exercise market power. Further, if KCP&L and Aquila do pursue a joint dispatch agreement, they will need to file an operating agreement with the Commission, at which time Independence will have the opportunity to participate in the proceeding and protect its interests. Therefore, we will not require a further analysis of the effect of joint dispatch or condition section 203 approval on Applicants not engaging in joint dispatch, as proposed by Independence.

37. Regarding merger-related increases in vertical market power, we are not persuaded by Independence's argument. Applicants' transmission facilities are currently and will continue to be operated pursuant to an OATT, thus ensuring that they cannot be used to frustrate competition in wholesale electricity markets.

38. We reject Independence's argument that Applicants should have included planned generation capacity additions in 2010 and 2011 in their analysis. By that time, market conditions will have changed due to numerous other transmission and generation facilities being brought into service in the relevant markets. Thus, any analysis of

competition so far out in the future would be highly speculative.[45] Applicants have included any known and measurable changes to market conditions in their analysis using 2008 as the test year, consistent with the Merger Policy Statement and the filing requirements in Order No. 642.[46]

39. Finally, we reject Independence's claim that Dr. Hieronymus did not analyze the merger's effect on competition in the Independence market. In fact, Dr. Hieronymus analyzed the effect of the transaction on competition in the Independence market, and his testimony shows that the competitive analysis screen in the Independence market is readily passed in all time periods for both AEC and EC, indicating no harm to competition.

3. Effect on Rates

a. Applicants' Analysis

40. Applicants contend that the transaction will not have any effect on rates.[47] Applicants state that the rates, terms, or conditions of any service subject to the Commission's jurisdiction will not change as a result of the Black Hills Acquisition. Black Hills will continue to serve Colorado utility customers under Aquila's tariffs, rate schedules, and contracts, including wholesale power purchase customers and transmission customers taking service over the Colorado transmission facilities that Black Hills will acquire from Aquila.[48] In addition, Black Hills commits to hold its Colorado utility customers harmless from transaction-related costs for five years after acquiring Aquila's Colorado utility assets. Black Hills will seek to recover transaction-related costs from Colorado utility customers through Commission-jurisdictional rates only when Black Hills can: (1) specifically identify the transaction-related costs it seeks to recover; and (2) demonstrate that those costs are exceeded by savings produced by the proposed transaction.[49]

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[45] *See, e.g., Oklahoma Gas and Electric Co.* 105 FERC ¶ 61,297 at P 42 (2003).

[46] *See supra* note 10.

[47] Application at 29.

[48] *Id.*

[49] *Id.* at 30.

41. Great Plains Energy also commits to hold its wholesale requirements and transmission customers harmless from any cost increase resulting from the transaction. KCP&L and Aquila will not seek to include merger-related costs in their wholesale requirements rates or transmission revenue requirements for five years after the transaction is consummated unless there are offsetting merger-related savings at least equal to these costs.

b. <u>Protests</u>

42. Independence challenges Applicants' claim that the proposed transaction will not affect rates. It is not clear which, if either, RTO will serve as the transmission provider for the merged company.[50] Independence states that the rates charged to customers will vary depending on the RTO because the costs of participating in SPP and MISO are different, i.e. cost-benefit analysis, administrative costs, and cost allocation for transmission upgrades are different under MISO and SPP structures. Accordingly, Independence asserts that the Commission should condition the Applicants' proposed transaction on Applicants' full participation in a single RTO. Dogwood raises similar arguments[51] and requests the Commission to condition its approval of the proposed merger transaction upon Aquila's commitment to become a member of SPP within three months of the transaction's consummation.

43. California State Parties argue that the proposed transaction can adversely affect ratepayers in California by frustrating the recovery of more than $55 million in potential ratepayer refunds. They note that ratepayers in the California Independent System Operator Corporation (CAISO) and California Power Exchange Corporation (PX) markets were charged unjust and unreasonable rates during the 2000-01 California energy crisis.[52] To address the excessive charges paid by these ratepayers, the

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[50] Independence notes that according to Dr. Hieronymus' testimony, SPP has functional control of Aquila's Missouri operations, but on an interim basis, and Aquila is seeking membership in SPP and MISO. Independence Protest at 9-10.

[51] According to Dogwood, while the Applicants indicate that Aquila's Missouri transmission facilities are under SPP's operational control, Aquila's predecessor, Utilicorp United, Inc. previously announced in a compliance filing that it intends to join MISO. Dogwood states that Aquila is listed as a transmission owner member on both MISO's and SPP's website. Dogwood Protest at 4.

[52] California State Parties Protest at 10, *citing San Diego Gas & Elec. Co.*, 93 FERC ¶ 61,121 at 61,349-61,350 (2000).

Commission has required refunds.[53] According to the California State Parties, Aquila Merchant's potential refund liability is more than $55 million.[54] They assert that the Applicants have provided no assurances that the money will be available post-merger to satisfy Aquila Merchant's refund liability. Additionally, the proposed merger would require Aquila Merchant to obtain the consent of Great Plains Energy to enter into any settlement with damages exceeding $20 million even before the merger is finalized.[55] Therefore, California State Parties seek assurances that the Applicants will preserve existing monetary reserves and collateral and set aside additional funds, if necessary, to cover Aquila Merchant's refund liability.[56] Without such assurances or conditions, the California State Parties argue that the merger would impair their ability to negotiate refund recovery. Therefore, they argue that without the assurances or conditions, the proposed transaction will not be in the public interest and should be rejected, or in the alternative, set for hearing.[57]

c. Applicants' Answer

44. Applicants assert that arguments about RTO participation should be rejected because the Commission does not require RTO participation as a condition of approval for a transaction in either its Merger Policy Statement or its Merger Regulations, and has approved mergers without requiring RTO participation.[58] Applicants state that Aquila has recently completed a study to determine the costs and benefits of RTO participation. It plans to file an application with the Missouri Commission to request approval to join an RTO soon. Applicants argue that any steps KCP&L or Aquila may take toward

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[53] *Id.*, *citing San Diego Gas & Elec. Co.*, 93 FERC ¶ 61,121 at 61,349-61,350 (2000); *see also Cal. ex rel. Lockyer v. FERC,* 383 F.3d 1006 (9th Cir. 2004).

[54] California State Parties claim that Aquila Merchant's refund liability as a seller, including interest, is about $55 million. As a buyer, Aquila Merchant is expected to be a net refund recipient of more than $23 million, with interest.

[55] *Id.* at 7 & n. 6. The interim operating covenant requires written consent of Great Plains Energy before Aquila or its subsidiaries may enter into any settlement that exceeds $20 million.

[56] *Id*. at 12.

[57] *Id.* at 12-13.

[58] Applicants Answer at 8, *citing Duke Energy Corp.*, 113 FERC ¶ 61,297 (2005).

changing their RTO memberships would require Commission approval, and that in any such proceeding, parties can opine as to how such RTO participation will affect rates and customers' access to transmission.[59]

45. In regard to the California refund proceeding, Applicants contend that California State Parties are seeking an illegal subsidy. An assurance that Aquila Merchant, a separate legal entity, will be able to pay the refund liability constitutes a cross-subsidy from the Applicants for the benefit of Aquila Merchant, which is contrary to section 203. They argue that section 203 is designed to prevent such cross-subsidies, not to require them.[60]

46. Applicants assert that the issue concerns potential refunds to be paid by Aquila Merchant, not by Aquila. Conversely, the planned distribution that is addressed in the application is a distribution of proceeds from Aquila, not Aquila Merchant. Applicants maintain that the refund issue is outside the scope of the Commission's merger review authority and should be addressed in another proceeding or forum.[61]

47. With respect to Great Plains Energy's ability to veto a settlement reached in the refund proceeding, Applicants assert that the provision at issue is typical of other interim operating covenants and provides reasonable assurance that matters that affect Great Plains Energy will be completed only after consultation and written approval by Great Plains Energy. They state that such assurance is necessary because Great Plains Energy will "bear the ultimate economic consequence of any such settlement."[62]

d. **Commission Determination**

48. We agree with the Applicants and note that nothing in the application indicates that rates to customers will increase as a result of the transaction, and no customer argues otherwise. We find Applicants' five-year hold harmless commitment to be reasonable

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[59] *Id.* at 9.

[60] *Id.* at 4.

[61] *Id.* at 4-5.

[62] *Id.* at 7.

and consistent with Commission policy.[63] Therefore, we find that the proposed transaction will not adversely affect rates.

49. We will decline the protestors' request to condition our section 203 authorization on the Applicants joining a particular RTO. When necessary, the Commission conditions merger authorization in order to address specific, merger-related harm; but no such harm has been identified in this proceeding. Moreover, the Applicants' future RTO status is unclear at this time and therefore, there is no baseline against which to assess merger-related changes to rates.

50. Further, we find that the refund recovery issues raised by the California State Parties are outside the scope of this section 203 proceeding. We will not condition our section 203 approval in this proceeding on matters that should be addressed in another proceeding or forum. However, we note that, to the extent that Aquila has refund obligations under Commission order, our approval of this transaction does not free them from that obligation.[64]

4. <u>Effect on Regulation</u>

a. <u>Applicants' Analysis</u>

51. Applicants state that neither the Commission's nor the state commissions' regulation will be impaired as a result of the proposed transaction. They state that the Commission will continue to have jurisdiction over KCP&L, Aquila, and Aquila's Colorado utility business. Similarly, the transaction will not affect the regulatory status of Black Hills Power and Cheyenne Light. Applicants note that they are required to obtain approval of the transaction from the Missouri Commission, the Kansas Corporation Commission, and the Colorado Public Utilities Commission.[65]

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[63] *See, e.g., Sierra Pacific Power Co. and Nevada Power Co.*, 87 FERC ¶ 61,077 at 61,334, *reh'g denied*, 88 FERC ¶ 61,058 (1999); *Long Island Lighting Co.,* 82 FERC ¶ 61,129 at 61,463 (1998); *Wisconsin Electric Power Co., et al.*, 74 FERC ¶ 61,069 at 61,191-93 (1996), *reh'g denied*, 79 FERC ¶ 61,158 (1997).

[64] *See, e.g, First Energy Corp.,* 112 FERC ¶ 61,243, at P 24 (2005).

[65] Application at 31.

b. Commission Determination

52. Applicants have shown that the proposed transaction will have no adverse effect on federal or state regulation. The Commission's review of a merger's effect on regulation is focused on ensuring that a merger does not result in a regulatory gap at the federal or state level.[66] The transaction will not create a regulatory gap at the federal level, because the Commission will retain its regulatory authority over the merged companies. In the Merger Policy Statement, the Commission stated that it ordinarily will not set the issue of the effect of a merger on state regulatory authority for a trial-type hearing where a state has authority to act on a merger. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission stated that it may set the issue for hearing; and that it will address such circumstances on a case-by-case basis.[67] We note that no party alleges that regulation would be impaired by the proposed transaction, and no state commission has requested that the Commission address the issue of the effect on state regulation.

5. Cross-Subsidization

53. FPA section 203(a)(4), as amended by EPAct 2005, requires that the Commission find that a transaction will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company, unless that cross-subsidization, pledge or encumbrance will be consistent with the public interest. In Order Nos. 669, 669-A, and 669-B, the Commission established specific filing requirements requiring applicants to demonstrate that this requirement is met. This information is to be in Exhibit M of applications.

a. Applicants' Analysis

54. Applicants assert that the proposed transaction will not result in, at the time of the proposed transaction or in the future, cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company. Applicants state that the Black Hills Acquisition and the Great Plains Energy Acquisition will not result in: (1) any transfer of facilities between a traditional utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) any new issuances of securities by a traditional public utility associate company that has captive

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[66] Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

[67] *Id*. at 30,125.

customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; and (4) any new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under section 205 and 206 of the FPA. Further, Applicants and their affiliates disclose their existing pledges and encumbrances of utility assets, as required under Order No. 669-A and 18 C.F.R. § 33.2(j)(l).[68]

b. Commission Determination

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

6. Existing Contracts

56. BPU requests that if the Commission authorizes the proposed transaction, it do so on the condition that Applicants commit to honor all existing contracts, including the arrangement between BPU and Aquila.[69]

57. In the Applicants' answer, they state that after the consummation of the transaction, BPU will continue to have any rights that it currently has under its contracts with the Applicants, and the Applicants will continue to have whatever rights they currently have. Moreover, Applicants argue that BPU's request for such assurance does not belong in a 203 proceeding.[70]

58. Applicants' answer contains the specific assurances sought by BPU. Therefore, we will accept Applicants' assurances that BPU's rights and entitlements will not be

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[68] Application, Exhibit M.

[69] BPU is interconnected with KCPL and undertakes wholesale power transactions with both KCPL and Aquila for new loads locating in the Kansas City metropolitan area. BPU Protest at 3.

[70] Applicants Answer at 14.

affected by the proposed transaction. Also, we note generally that approval of a transaction under section 203 does not free the parties from any legal obligations they have.[71]

7. Accounting Matters

59. The application includes *pro forma* accounting entries showing Great Plains Energy's and Black Hills' proposed accounting treatment for the Black Hills Acquisition and the Great Plains Acquisition on the books of Aquila and Electric Opco. Additionally, the Applicants request the Commission to authorize deferral of the jurisdictional portion of the merger-related costs to achieve savings to the extent it is not otherwise deferred under generally accepted accounting principles (GAAP). They state that this is needed for their rate commitments. These deferred costs will be amortized over a five-year period beginning on the date of the merger and ending at the end of the hold harmless commitment.[72]

a. The Black Hills Acquisition

60. Black Hills provides three proposed accounting entries related to the sale and acquisition of Aquila's jurisdictional Colorado electric utility assets. In the first proposed accounting entry, Aquila records the sale of its investment in Electric Opco to Black Hills. The accounting entry proposes to recognize a gain on the sale by crediting Account 421.1, Gain on Disposition of Property. However, the Commission notes that Account 421.1 is intended to include a gain on the sale of utility property, not on the sale of an investment. The text to Account 421, Miscellaneous Operating Income, provides for the inclusion of gains on the disposition of investments. Accordingly, Aquila must record the gain on the sale of its investment in Electric Opco in Account 421.

61. The next accounting entry records the transfer of the Colorado electric utility assets and liabilities to Electric Opco's books at their historical cost. The final proposed accounting entry records the effect, on Electric Opco's books, of its acquisition by Black Hills. The proposed accounting entry debits Account 114, Electric Plant Acquisition Adjustment, and credits Account 211, Miscellaneous Paid-in Capital, to record the amount of the purchase price in excess of Electric Opco's book values. Black Hills' acquisition of Electric Opco will constitute a business combination, as it will acquire the equity interest in Electric Opco pursuant to the Partnership Interest Purchase

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[71] *See, e.g, First Energy Corp.*, 112 FERC ¶ 61,243 at P 24 (2005).

[72] Application at 30-31.

Agreement.[73] The Commission has previously stated that, in a business combination, the excess cost of the acquired company over the sum of the amounts assigned to all identifiable assets acquired and liabilities assumed is recorded as goodwill in Account 186.[74] Electric Opco shall therefore account for goodwill using Account 186, rather than Account 114.

62. The Applicants shall make their final accounting entries for the Black Hills Acquisition consistent with the Commission policies discussed herein, as outlined in the ordering paragraphs below.

b. <u>The Great Plains Acquisition</u>

63. Great Plains proposes to account for the acquisition of Aquila as a business combination using the purchase method of accounting. Great Plains' proposed accounting provides a list of purchase accounting journal entries to record goodwill pushed down to Aquila's books and to establish a new basis of accounting for Aquila. Great Plains recorded these purchase accounting journal entries through Account 114, Electric Plant Acquisition Adjustments.

64. For the purchase method of accounting in the Commission's Uniform System of Accounts (USofA),[75] the Commission has clarified that the cost of the acquired company allocated to plant assets, up to their fair value, in excess of depreciated original cost at the date of acquisition, is recorded as an acquisition adjustment in Account 114.[76] Additionally, the excess of the cost of the acquired company over the sum of the amounts assigned to all identifiable assets acquired and liabilities assumed is recorded as goodwill in Account 186. Great Plains Energy shall make its final accounting entries for the Great

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[73] Statements of Financial Accounting Standards No. 141, Business Combinations, states that a business combination occurs when an entity acquires net assets that constitute a business or acquires equity interests of one or more other entities and obtains control over that entity or entities.

[74] *See, e.g., PNM Resources, Inc.*, Docket No. AC06-17-000 (May 15, 2006) (unpublished letter order).

[75] 18 C.F.R. Part 101 (2007).

[76] *See, e.g., Transwestern Pipeline Company*, Docket No. AC03-50-000 (July 25, 2003) (unpublished letter order) and *Michigan Electric Transmission Company, LLC*, Docket No. AC03-9-000 (February 5, 2004) (unpublished letter order).

Plains Acquisition consistent with the Commission's accounting policies, as discussed above and outlined in the ordering paragraphs below.

c. **Deferral of Merger-Related Costs**

65. To defer the jurisdictional portion of the merger-related costs not otherwise deferred under GAAP, the costs must be recorded in Account 182.3, Other Regulatory Assets, consistent with the instructions of this account. The instructions to Account 182.3 provide, in part, that this account shall include specific expenses that would be included in net income determinations in one period under the general requirements of the USofA but for it being probable that such expenses will be included in a different period for purposes of developing rates. At this time, we cannot determine with certainty whether the costs at issue will ultimately be found to be recoverable in future rates. Therefore, the Applicants must assess all available evidence bearing on the likelihood of rate recovery of these costs in periods other than the period they would otherwise be charged to expense.[77] If based on such an assessment, it is determined that future rate recovery of the merger-related costs is probable, then, it is appropriate to defer the costs in Account 182.3. [78]

66. The instructions to Account 182.3 also require that amounts deferred in this account are to be charged to expense concurrent with the recovery of the amounts in rates. Therefore, we will not authorize the proposed five-year amortization of deferred merger-related costs at this time because this request is premature, and is more appropriately addressed in a future rate case for the ultimate recovery of the deferred costs in rates. [79] If rate recovery of all or part of the costs deferred in Account 182.3 is later disallowed, the disallowed amount shall be charged to Account 426.5, Other Deductions, in the year of disallowance.

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[77] *See, e.g., PJM Interconnection, LLC*, 109 FERC ¶ 61,012, at P 53-54 (2004), *order on reh'g*, 110 FERC ¶ 61,234 (2005)..

[78] The term "probable," as used in the definition of regulatory assets refers to that which can reasonably be expected or believed on the basis of available evidence or logic but is neither certain nor proved. *Revisions to Uniform System of Accounts to Account for Allowances under the Clean Air Amendments of 1990 and Regulatory-Created Assets and Liabilities and to Form Nos. 1, 1-F, 2 and 2-A*, Order No. 552, FERC Stats. & Regs. ¶ 30,967 (1993).

[79] *See, e.g., Allegheny Energy*, Docket No. AC06-8-000 (October 4, 2006) (unpublished letter order).

C. Petition for Declaratory Order Under Section 305(a)

1. Applicants' Analysis

67. Applicants request confirmation that FPA section 305(a) is not a bar for Great Plains Energy to use a portion of the proceeds that Aquila receives from the Black Hills Acquisition to pay the estimated $677 million cash to Aquila shareholders for the Great Plains Energy Acquisition. They state that Aquila's ratepayers and shareholders will benefit from the transaction because: (a) Aquila's currently negative retained earnings will be set to zero; (b) Aquila's debt rating is expected to improve to investment grade, primarily because of Great Plains Energy's corporate guarantees of Aquila's debt; (c) the cost of debt under two of Aquila's existing series of senior notes is expected to be reduced and Aquila should be able to refinance its other debt securities to lower interest costs, resulting in Aquila being left with additional capital for operating costs; and (d) Aquila shareholders will own shares in Great Plains Energy instead of in Aquila, which will offer those shareholders greater opportunities to receive dividend payments.

68. Applicants explain that: (1) the source of the payment will be clearly identified; the payment to Great Plains Energy will come from Black Hills as a result of the Black Hills Acquisition; (2) the amount that will be paid from the Black Hills Acquisition will not be excessive (Applicants argue that the payment is not a raid on corporate coffers, but rather is being made in order to pay Aquila's shareholders a portion of the cash paid by Black Hills for its purchase of the gas assets and Colorado electric utility assets); (3) the payment is not preferential because all of Aquila's shareholders will receive the same consideration for their shares as a result of the transaction; and (4) the transaction will not impair the financial strength of Aquila. They argue that the transaction as a whole is expected to benefit the financial health of Aquila. Applicants contend that Great Plains Energy expects to issue guaranties of existing and future Aquila debt and will support Aquila getting an investment grade credit rating.

69. Aquila and Great Plains Energy commit that the amount of cash distributed to Aquila shareholders will not exceed the lesser of (a) what is needed to pay the cash portion of the consideration to Aquila shareholders; or (b) the maximum amount that would still keep Aquila above the 35 percent equity to total capitalization ratio the Commission found acceptable in prior cases.[80]

[80] *FirstEnergy Corp.*, 115 FERC ¶ 61,269 (2006) (*FirstEnergy*).

2. **Commission Determination**

70. We will grant Aquila's petition because the concerns underlying section 305(a) of the FPA are not present here. Section 305(a) of the FPA reads:

> It shall be unlawful for any officer or director of any public utility to receive for his own benefit, directly or indirectly, any money or thing of value in respect of the negotiation, hypothecation, or sale by such public utility of any security issued or to be issued by such public utility, or to share in any of the proceeds thereof, or to participate in the making or paying of any dividends of such public utility from any funds properly included in capital accounts.[81]

71. The concerns underlying section 305(a) are that dividends could be paid from sources that are not clearly identified, that holding companies might pay excessive dividends on the securities of their operating companies, and that corporate officials might raid corporate coffers for their personal financial benefit.[82]

72. The Commission finds that the source of Aquila's proposed payment to Great Plains Energy has been clearly identified. Nothing indicates that the payment will be excessive or preferential. The payment will not harm shareholders because Aquila will have the same shareholders both before and after the payment. This is more a corporate restructuring with a one-time payment distribution involving the payment of cash plus shares of Great Plains Energy stock than like an ordinary payment of dividend. We accept Aquila's and Great Plains Energy's commitment that cash payment to Aquila shareholders will not exceed the lesser of (a) what is needed to pay the cash portion of the consideration to Aquila shareholders; or (b) the maximum amount that would still keep Aquila above the 35 percent equity to total capitalization ratio.[83]

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[81] 16 U.S.C. § 825d (a) (2000).

[82] *See Entergy Gulf States, Inc.*, 118 FERC ¶ 61,271 at P 9 (2007); *Entergy Louisiana Inc.*, 114 FERC ¶ 61,060 at P 12 (2006); *Exelon Corporation*, 109 FERC ¶ 61,172 at P 8 (2004); *ALLETE, Inc.*, 107 FERC ¶ 61,041 at P 10 (2004).

[83] *See, e.g.*, *FirstEnergy*, 115 FERC ¶ 61,269 at P 14. *Also see National Grid, plc,* 117 FERC ¶ 61,080 at P 83 (2006) and *Entergy Louisiana*, *Inc.*, 114 FERC ¶ 61,060 at P 7,13 (2006) where the applicants were not permitted to allow the proprietary capital ratio to fall below 30 percent.

73. For these reasons, and under the circumstances of this case, we will grant the petition and find that section 305(a) of the FPA is not a bar to Aquila's capital structure realignment.

The Commission orders:

(A) The proposed disposition of jurisdictional facilities is hereby approved, as discussed in the body of this order.

(B) Applicants' petition for declaratory order is hereby granted, as discussed in the body of this order.

(C) Applicants must inform the Commission of any change in circumstances that would reflect a departure from the facts the Commission relied upon in granting the petition.

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

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

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

(G) Applicants shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the proposed transaction.

(H) If the proposed transaction results in changes in the status or the upstream ownership of Applicants' affiliated qualifying facilities, if any, an appropriate filing for recertification pursuant to 18 C.F.R. § 292.207 shall be made.

(I) If Applicants seek to recover merger-related costs through their wholesale rates, they must submit an informational filing to the Commission that details how they are satisfying the hold harmless requirement. In particular, in such a filing, Applicants must: (1) specifically identify the merger-related costs they are seeking to recover; and (2) demonstrate that those costs are exceeded by the savings produced by the merger.

(J) Black Hills and Great Plains Energy shall submit their final accounting entries to the Commission within six months after the date on which the Black Hills Acquisition and the Great Plains Acquisition are consummated. The accounting submission shall provide: (1) the computation of excess purchase price over fair value; and (2) the computation and accounting for any goodwill and/or acquisition adjustments, as well as any final allocation of the purchase price to the public utility subsidiaries.

(K) Black Hills and Great Plains Energy shall provide all final accounting entries for the Black Hills Acquisition and the Great Plains Acquisition in accordance with Electric Plant Instruction No. 5 and Account 102, Electric Plant Purchased or Sold, of the Uniform System of Accounts. The accounting submission shall include narrative explanations describing the basis for the entries.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.