20110930-3067 FERC PDF (Unofficial) 09/30/2011

136 FERC ¶ 61,245
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Energy Corporation
Progress Energy, Inc.

Docket No. EC11-60-000

ORDER ON DISPOSITION OF JURISDICTIONAL FACILITIES AND MERGER

(Issued September 30, 2011)

1. On April 4, 2011, pursuant to sections 203(a)(1) and 203(a)(2) of the Federal Power Act[1] (FPA) and Part 33 of the Commission's regulations,[2] Duke Energy Corporation (Duke Energy), and Progress Energy, Inc. (Progress Energy) (together, with their public utility subsidiaries, Applicants) filed an application for the approval of a transaction pursuant to which Progress Energy will become a wholly-owned subsidiary of Duke Energy and the former shareholders of Progress Energy will become shareholders of Duke Energy (Proposed Transaction).[3] The Commission has reviewed the Merger

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

[2] 18 C.F.R. § 33, *et seq.* (2011).

[3] *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). Concurrently with the Merger Application, Duke Energy and Progress Energy filed two related applications for approval of a Joint Dispatch Agreement (JDA) (Docket No. ER11-3306-000) and a Joint Open Access Transmission Tariff (Joint OATT) (Docket No. ER11-3307-000). Pursuant to the JDA, "Duke Energy Carolinas, LLC and Progress Energy Carolinas, Inc. will jointly dispatch their generation fleets in order to operate their systems more economically for the benefit of their customers." Merger Application at 1. Pursuant to the Joint OATT, "Applicants

(continued…)

20110930-3067 FERC PDF (Unofficial) 09/30/2011

Application under the Commission's Merger Policy Statement.[4] The Commission finds that the Proposed Transaction, as currently proposed, results in significant screen failures in the horizontal market power analysis and will thereby have an adverse effect on competition. The proposed transaction is thus conditionally authorized, subject to Commission approval of market power mitigation measures, including but not limited to membership in a Regional Transmission Organization (RTO), implementation of an independent coordinator of transmission (ICT) arrangement, generation divestiture, virtual divestiture, and/or transmission upgrades, as discussed further below. If Applicants wish to proceed with the merger they are directed to make a compliance filing within 60 days of the date of this order proposing mitigation that would be sufficient to remedy the screen failures identified below. After providing an opportunity for comments from interested parties, the Commission will issue a subsequent order indicating whether the proposed mitigation is sufficient.

I. Background

A. Description of the Parties

1. Duke Energy

2. Duke Energy, a Delaware corporation, is a public utility holding company headquartered in North Carolina.[5] Together with its subsidiaries, Duke Energy has both regulated and unregulated utility operations. Duke Energy states that it supplies,

---

will provide transmission service in the Carolinas and in Florida at non-pancaked rates." *Id.* at 1. The JDA and Joint OATT will be addressed in a separate order issued at a later date.

[4] *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). *See also FPA Section 203 Supplemental Policy Statement*, 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 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).

[5] Merger Application at 4.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

delivers, and processes energy for customers in the United States and some international markets. Duke Energy's regulated utility operations consist of its US-franchised electric and gas segment, which serves approximately four million customers located in five states in the Southeast and Midwest regions of the United States, representing a population of approximately 11 million people.[6] This segment consists of regulated generation, electric and gas transmission and distribution systems.

3. Duke Energy owns approximately 27,000 megawatts (MW) of generating capacity and has a service area of approximately 50,000 square miles. The company's subsidiaries also sell electricity at wholesale to incorporated municipalities and to public and private utilities, and its gas operations include regulated natural gas transportation and distribution with approximately 500,000 customers located in southwestern Ohio and northern Kentucky.[7]

a. Duke Energy Operating Companies

4. Duke Energy has four subsidiaries that are regulated electric utility operating companies: Duke Energy Carolinas, LLC (Duke Energy Carolinas), Duke Energy Indiana, Inc. (Duke Energy Indiana), Duke Energy Ohio, Inc. (Duke Energy Ohio), and Duke Energy Kentucky, Inc. (Duke Energy Kentucky) (collectively, the Duke Energy Operating Companies).[8] The Duke Energy Operating Companies and their jurisdictional affiliates[9] are authorized to sell power at market-based rates, with the exception of sales within the Duke Energy Carolinas balancing authority area (BAA). Only Duke Energy Ohio operates in a state that has adopted retail competition.[10]

5. Duke Energy Carolinas, a wholly-owned subsidiary of Duke Energy, is a vertically-integrated electric utility that generates, transmits, distributes, and sells electricity to approximately 2.4 million customers within its franchised service territory in North Carolina and South Carolina. Retail service provided by Duke Energy Carolinas is subject to the jurisdiction of the North Carolina Utilities Commission (North Carolina Commission) and the Public Service Commission of South Carolina (South Carolina

[6] *Id.* at 5.

[7] *Id.* at 5.

[8] *Id.* at 5.

[9] Exhibit B-1 of the Merger Application contains a list of Duke Energy's affiliates that have been granted market-based rate authority by the Commission.

[10] Merger Application at 6.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

Commission). Duke Energy Carolinas is authorized to sell energy, capacity and ancillary services at market-based rates outside of the Duke Energy Carolinas BAA.[11]

6. Duke Energy Indiana, a wholly-owned indirect subsidiary of Duke Energy, is a vertically-integrated utility that generates, transmits, distributes, and sells electricity to approximately 780,000 customers within its franchised service territory in central, north central and southern Indiana.[12] Duke Energy Indiana is authorized to sell wholesale power at market-based rates and is regulated by the Indiana Utility Regulatory Commission.

7. Duke Energy Ohio, an indirect wholly-owned subsidiary of Duke Energy, is a combination electric and gas public utility company that generates, transmits, distributes and sells electricity at retail and wholesale, and distributes and sells natural gas at retail in southwestern Ohio. Duke Energy Ohio's electric and natural gas distribution operations are regulated by the Public Utilities Commission of Ohio (Ohio Commission), and, under Ohio's restructuring statute, its retail customers have the legal right to purchase power from Competitive Retail Electric Service providers.[13] Duke Energy Ohio has market-based rate authority and has received waiver of the Commission's affiliate restrictions. Duke Energy Ohio is also the direct parent of Duke Energy Kentucky.

8. Duke Energy Kentucky, which operates in northern Kentucky, generates, transmits, distributes, and sells electricity, and sells and transports natural gas. Duke Energy Kentucky's retail electric operations are subject to the jurisdiction of the Kentucky Public Service Commission. Duke Energy Kentucky has been authorized to sell wholesale power at market-based rates.

9. Applicants note that Duke Energy Ohio and Duke Energy Kentucky have proposed to withdraw their transmission assets from the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) and join PJM Interconnection, L.L.C. (PJM) as of January 1, 2012. As a result of this change, approximately 5,000 MW of generation owned by these operating companies will "move" from Midwest ISO to PJM, where Duke Energy currently owns some capacity.[14]

---

[11] *Id.*

[12] *Id.* at 6-7.

[13] *Id.* at 7.

[14] *Id.* at 8

20110930-3067 FERC PDF (Unofficial) 09/30/2011

b. Commercial Power

10. Duke Energy's commercial power segment owns, operates, and manages power plants primarily located in the Midwest region of the United States, in the Midwest ISO and PJM footprints. The commercial power segment owns and operates a generation portfolio of approximately 7,550 net MW of power generation, excluding wind assets.[15] The commercial power segment also includes Duke Energy's "unregulated Midwestern generation reporting unit."[16]

11. Duke Energy Retail Sales, LLC (Duke Energy Retail Sales), an indirect, wholly-owned subsidiary of Duke Energy, serves retail electric customers in Ohio. Duke Energy Retail Sales owns no generation or transmission facilities but engages in the purchase and sale of physical and financial positions in the wholesale power market in support of its retail sales effort.

12. The commercial power segment also includes Duke Energy Generation Services, Inc. (Duke Energy Generation Services), a non-regulated affiliate of Duke Energy and on-site energy solutions and utility services provider. Duke Energy Generation Services has approximately 735 MW of wind power in commercial operation (as of December 31, 2009), more than 5,000 MW of wind energy projects in the "development pipeline," and has committed more than $1 billion to its wind power business since its launch in 2007.[17] Duke Energy Generation Services also builds, owns, and operates electric generation for large energy consumers, municipalities, utilities, and industrial facilities. Duke Energy Generation Services manages 6,300 MW of power generation at 21 facilities in the United States and has also created solar photovoltaic, biomass, energy storage, and commercial transmission businesses.

c. Diamond Acquisition Corporation

13. Diamond Acquisition Corporation (Merger Sub) is a North Carolina corporation and a wholly-owned subsidiary of Duke Energy. Merger Sub was formed for the purpose

---

[15] *Id.* Duke Energy's unregulated Midwest generating reporting unit includes approximately 4,000 MW of coal-fired generation plants that currently are dedicated to Duke Energy Ohio customers, and approximately 3,600 MW of gas-fired generation located in Ohio, Pennsylvania, Illinois, and Indiana that serve unregulated energy markets in the Midwest. *Id.* at 9.

[16] *Id.* at 8.

[17] *Id.* at 9.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

of effecting the Proposed Transaction, and has not conducted any activities other than those incidental to its formation and the matters contemplated in the merger agreement by and among Duke Energy, Progress Energy, and Merger Sub.[18]

d. Duke Energy International, LLC

14. Duke Energy International, LLC owns, operates, and manages power generation facilities and engages in sales and marketing of electric power and natural gas outside of the United States. The international segment of Duke Energy owns, operates or has substantial interests in approximately 4,000 net MW of generation.[19]

2. Progress Energy

15. Progress Energy is a North Carolina corporation and is headquartered in that state. Together with its subsidiaries, Progress Energy owns approximately 22,000 MW of generation capacity. Progress Energy owns, directly and indirectly, all of the common stock of its two major electric subsidiaries and varying percentages of other non-regulated subsidiaries.[20] Progress Energy's two major electric utility subsidiaries, Carolina Power & Light Company, d/b/a Progress Energy Carolinas, Inc. (Progress Energy Carolinas), and Florida Power Corporation, d/b/a/ Progress Energy Florida, Inc. (Progress Energy Florida) (together, the Progress Energy Operating Companies), serve approximately 3.1 million customers in the Carolinas and Florida. The Progress Energy Operating Companies are authorized to sell power at market-based rates, with the exception of sales within their respective BAAs in the Carolinas and sales within Peninsular Florida.[21] Neither of the Progress Energy Operating Companies operates in states that have implemented retail competition, and the companies are subject to the

---

[18] The Agreement and Plan of Merger sets forth the terms and conditions of the Proposed Transaction (Merger Agreement). Applicants included the Merger Agreement in Exhibit I to the Merger Application.

[19] Merger Application at 10.

[20] *Id.* at 10.

[21] Under the current tariff, neither Progress Energy Florida nor Progress Energy Carolinas have market-based rate authority for sales inside the Progress Energy Carolinas BAAs or inside Peninsular Florida. Peninsular Florida is defined as the state of Florida except the area in the western panhandle served by the Southern Company. *Carolina Power & Light Company* (128 FERC ¶61,053) (2009) and *Florida Power Corporation*, 133 FERC ¶ 61,131 (2005).

20110930-3067 FERC PDF (Unofficial) 09/30/2011

rules and regulations of the North Carolina Commission, the South Carolina Commission, and the Florida Public Service Commission (Florida Commission).[22]

16. Progress Energy Carolinas is a vertically-integrated electric utility organized in North Carolina. The company's retail service area covers approximately 34,000 square miles and includes much of the eastern half of North Carolina, the northeastern quadrant of South Carolina, and the Asheville area in western North Carolina. Progress Energy Carolinas maintains more than 70,000 miles of distribution and transmission lines providing service to approximately 1.5 million customers.[23]

17. Progress Energy Florida is a vertically-integrated electric utility organized in Florida. The company's retail service area covers about 20,000 square miles in central Florida, including metropolitan St. Petersburg, Clearwater, and the greater Orlando area. Progress Energy Florida maintains more than 35,000 miles of distribution and transmission lines serving approximately 1.6 million customers.[24]

B. Description of Proposed Transaction

18. Applicants explain that, under the terms of the Merger Agreement, subject to regulatory approvals and the satisfaction of certain obligations of the parties, Merger Sub will merge with and into Progress Energy and each share of Progress Energy common stock will be cancelled and converted into the right to receive 2.6125 shares of Duke Energy common stock, subject to certain adjustments. Applicants state that Progress Energy will be the surviving corporation of the merger between it and Merger Sub, and will become a wholly-owned subsidiary of Duke Energy. The former shareholders of Progress Energy will become shareholders of Duke Energy.[25]

19. According to Applicants, Duke Energy will assume approximately $12.2 billion in Progress Energy net debt. Following completion of the Proposed Transaction, officials anticipate Duke Energy shareholders will own approximately 63 percent of the combined

[22] *Id.* at 11.

[23] *Id.*

[24] *Id.*

[25] According to Applicants, based on the closing price of Duke Energy common stock on the New York Stock Exchange on January 7, 2011, the last trading day before the public announcement of the Merger Agreement, Progress Energy shareholders would receive a value of approximately $46.48 per share, or $13.7 billion in total equity value. Merger Application at 12.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

company, and Progress Energy shareholders will own approximately 37 percent on a fully diluted basis.[26]

II. Notice of Filing and Responsive Pleadings

20. Notice of the Merger Application was published in the *Federal Register*, 76 Fed. Reg. 21,733 (2011), with interventions and protests due on or before April 25, 2011.[27] The comment date was subsequently extended to June 3, 2011.[28]

21. Notices of intervention were filed by the Ohio Commission, the North Carolina Commission, and the Florida Commission.[29]

22. Timely motions to intervene were filed by North Carolina Electric Membership Corporation; Public Works Commission of the City of Fayetteville, North Carolina; Exelon Corporation; Southern Companies;[30] South Carolina Office of Regulatory Staff; the Orlando Utilities Commission (Orlando Commission); EnergyUnited Electric Membership Corporation; North Carolina Municipal Power Agency Number 1; Office of the Ohio Consumers' Counsel; Dominion Resources Services, Inc.; Reedy Creek Improvement District; Old Dominion Electric Cooperative; Nucor Steel-South Carolina; Hoosier Energy Rural Electric Cooperative, Inc.; Piedmont Municipal Power Agency; ElectriCities of North Carolina, Inc.; North Carolina Eastern Municipal Power Agency; South Carolina Electric & Gas Company; Seminole Electric Cooperative, Inc.; Capital Power Corporation; South Carolina Public Service Authority; Indiana Municipal Power Agency; and Central Electric Power Cooperative, Inc.

---

[26] Merger Application at 12.

[27] Several intervenors filed comments which address all three dockets, the Proposed Transaction, the JDA (Docket No. ER11-3306-000), and the Joint OATT (Docket No. ER11-3307-000). In this proceeding, we address only those arguments pertaining to the Proposed Transaction.

[28] Errata Notice Extending Comment Date (Issued Apr. 6, 2011), Docket No. EC11-60-000.

[29] On June 16, 2011, the Florida Commission also filed a Notice of a Florida Public Service Commission Order. The order, dating from 2006, concerns the Grid Florida RTO proposal.

[30] Southern Companies includes Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Southern Power Company.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

23. Motions to intervene out-of-time were filed by Steel Producers;[31] Tampa Electric Company; Florida Power & Light Company; and East Kentucky Power Cooperative, Inc.

24. Timely motions to intervene and comments were filed by Blue Ridge Paper Products, Inc., d/b/a Evergreen Packaging (Evergreen Packaging); Duke Wholesale Customer Group;[32] the Attorney General of the State of North Carolina and the Public Staff-North Carolina Utilities Commission (jointly, North Carolina Consumer Agencies); Electric Power Supply Association (EPSA); American Public Power Association (APPA); Carolina Electric Membership Corporations (Carolina EMCs);[33] and the City of Tallahassee, Florida (City of Tallahassee).[34]

[31] Steel Producers consists of Nucor Steel-Indiana and Steel Dynamics, Inc.

[32] The Duke Wholesale Customer Group includes the Greenwood Commissioners of Public Works of the City of Greenwood, South Carolina; the City of Concord, North Carolina; the City of Kings Mountain, North Carolina; the Town of Due West, South Carolina; the Town of Prosperity, North Carolina; the Town of Forest City, North Carolina; the Town of Highlands, North Carolina; the Town of Dallas, North Carolina; the Lockhart Power Company, and the Western Carolina University.

[33] The Carolina EMCs include Blue Ridge Electric Membership Corporation, Rutherford Electric Membership Corporation, Piedmont Electric Membership Corporation, and Haywood Electric Membership Corporation. Motion to Intervene and Comments of Blue Ridge Electric Membership Corporation, Rutherford Electric Membership Corporation, Piedmont Electric Membership Corporation and Haywood Electric Membership Corporation.

[34] On April 20, 2011, Ronald Pritchard filed a letter in this proceeding. In that letter, Mr. Pritchard complains of his treatment by Progress Energy as a retail customer of that company and generally criticizes both Progress Energy and Duke Energy. The Commission notes that under the FPA, retail matters are not within the Commission's jurisdiction. Further, Mr. Pritchard's criticisms are unrelated to the Proposed Transaction.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

25. Comments were filed by North Carolina Electric Membership Corporation;[35] EnergyUnited Electric Membership Corporation; and North Carolina Eastern Municipal Power Agency.[36]

26. Timely motions to intervene and protests were filed by City of Orangeburg, South Carolina (City of Orangeburg), and the Cities of New Bern and Rocky Mount, North Carolina (City of New Bern). The Florida Municipal Power Agency (FMPA) filed a timely motion to intervene and request for Commission order, and also filed a separate protest. The Orlando Commission filed a protest.

27. Applicants filed an answer to FMPA's request for a Commission order[37] and an answer to the protests.[38] City of Orangeburg, FMPA, City of New Bern, Nucor Steel-South Carolina, and Evergreen Packaging filed answers to Applicants June 17 Answer. Applicants filed an answer to the answers.[39] FMPA filed an answer to Applicants July 7 Answer.

---

[35] North Carolina Electric Membership Corporation states that it "does not object to or oppose the approvals requested by Applicants in this docket." Comment of North Carolina Electric Membership Corporation at 1, Docket No. EC11-60-000, ER11-3306-000, ER11-3307-000 (not consolidated) (June 3, 2011).

[36] North Carolina Eastern Municipal Power Agency states that "the merger is not detrimental to the interests of its members and supports the approval of the merger as proposed by [Applicants]." Statement of North Carolina Eastern Municipal Power Agency at 2, Docket No. EC11-60-000 (June 8, 2011).

[37] Answer of Duke Energy Corporation and Progress Energy, Inc. in Opposition to Motion for an Order Requiring Florida Market Studies, Docket No. EC11-60-000 (May 9, 2011) (Applicants May 9 Answer).

[38] Answer of Duke Energy Corporation and Progress Energy, Inc., Docket Nos. EC11-60-000, ER11-3306-000, and ER11-3307-000 (not consolidated) (June 17, 2011) (Applicants June 17 Answer).

[39] Answer of Duke Energy Corporation and Progress Energy, Inc., Docket Nos. EC11-60-000, ER11-3306-000, ER11-3307-000 (not consolidated) (July 7, 2011) (Applicants July 7 Answer).

20110930-3067 FERC PDF (Unofficial) 09/30/2011

28. The North Carolina Consumer Agencies filed an answer to the City of Orangeburg and FMPA protests.[40] City of Orangeburg and FMPA filed answers to the North Carolina Consumer Agencies July 13 Answer.

29. On August 22, 2011, the Director of the Division of Electric Power Regulation-West issued a request for additional information from Applicants.[41] Applicants filed a response to the request on August 29, 2011 (August 29 Answer).[42] Applicants August 29 Answer was noticed with comments due on or before September 7, 2011. FMPA and City of New Bern filed responses to Applicants August 29 Answer. Applicants filed an answer to the City of New Bern's response to Applicants August 29 Answer.

30. On September 6, 2011, Applicants filed a letter providing the Commission with an update of the status of the State approval proceedings identified by Applicants in Exhibit L of the Merger Application.[43]

---

[40] Answer of the Public Staff-North Carolina Utilities Commission and the Attorney General of the State of North Carolina in Opposition to the Requests for Affirmative Relief of City of Orangeburg, South Carolina, and Florida Municipal Power Agency and Motion for Leave to File Answer Out-of-Time, Docket Nos. EC11-60-000, ER11-3306-000, ER11-3307-000 (not consolidated) (July 13, 2011) (North Carolina Consumer Agencies July 13 Answer).

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

[42] 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).

[43] In this letter, Applicants note that the Kentucky Commission has issued an order conditionally approving the merger. Applicants also explain that they have entered into settlement agreements with the staff of the North Carolina Commission and the South Carolina Office of Regulatory Staff. Both settlements are pending approval by their respective State commissions. On September 9, 2011, Applicants filed a letter clarifying the September 6, 2011 letter.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

III. Discussion

A. Procedural Matters

31. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[44] the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,[45] we will grant the late-filed motions to intervene given intervenors' interests in the proceeding, the early stages of the proceeding, and the absence of undue prejudice or delay.

32. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[46] prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

33. Some parties request that the Commission consolidate this proceeding with the proceeding on the JDA in Docket No. ER11-3306-000 and the proceeding on the Joint OATT in Docket No. ER11-3307-000.[47] Specifically, these parties claim that the three proceedings address common issues of fact and law. The Commission denies these requests. In general, the Commission consolidates matters only if a trial-type evidentiary hearing is required to resolve common issues of law and fact, and consolidation will ultimately result in greater administrative efficiency.[48] In this case, we conclude that consolidating this proceeding with the JDA and Joint OATT proceedings is not appropriate because there are no issues relating to the Proposed Transaction that need to be set for a trial-type evidentiary hearing.

---

[44] 18 C.F.R. § 385.214 (2011).

[45] 18 C.F.R. § 385.214(d) (2011).

[46] 18 C.F.R. § 385.213(a)(2) (2011).

[47] *See, e.g.*, City of New Bern Protest at 8, City of Orangeburg Protest at 61.

[48] *See, e.g., Startrans IO, L.L.C.*, 122 FERC ¶ 61,253, at P 25 (2008); *In re: Terra-Gen Dixie Valley*, 132 FERC ¶ 61,215, at P 44, n.74 (2010).

20110930-3067 FERC PDF (Unofficial) 09/30/2011

34. Similarly, we also deny the requests that the Commission set the Proposed Transaction for hearing.[49] The parties making this request have not demonstrated that there are issues of material fact in dispute which require an evidentiary hearing.[50]

35. In its response to Applicants August 29 Answer,[51] City of New Bern requests that the Commission take official notice of a Staff Notice of Alleged Violations issued August 9, 2011, which provides notice of a non-public Staff investigation of Duke Energy Carolinas.[52] The Commission denies City of New Bern's request as the notice is not relevant to the Proposed Transaction.

B. Analysis Under Section 203

36. Section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest.[53] The Commission's analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.[54] Section 203(a)(4) also requires the Commission to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."[55] The

[49] *See, e.g.,* FMPA Protest at 70-72, City of Orangeburg at 65, City of New Bern at 20.

[50] *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).

[51] Response of the Cities of New Bern and Rocky Mount, North Carolina to Applicants' August 29 Supplementation of their Section 203 Application and Request for Official Notice at 15, Docket Nos. EC11-60-000, ER11-3306-000, ER11-3307-000 (not consolidated) (Sept. 6, 2011) (City of New Bern September 6 Response).

[52] The notice states that the staff of the Office of Enforcement "has preliminarily determined that [Duke Energy Carolinas] violated its tariffs, a Commission order, and Commission regulations." Staff Notice of Alleged Violations at 1, (Aug. 9, 2011).

[53] 16 U.S.C. § 824b(a)(4) (2006).

[54] *See* Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

[55] 16 U.S.C. § 824b(a)(4) (2006).

20110930-3067 FERC PDF (Unofficial) 09/30/2011

Commission's regulations establish verification and information requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or a pledge or encumbrance of utility assets.[56]

1. Effect on Competition

a. Horizontal Market Power

i. Applicants' Analysis

37. Although Applicants acknowledge that they each own a large amount of generation capacity, they claim that the combination of the two companies will "not have a significant effect on competition."[57] As addressed in further detail below, Applicants note that the only region where they own overlapping generation is in the Carolinas. According to Applicants, this generation capacity is almost exclusively devoted to serving the retail and wholesale requirements customers in their respective BAAs. Further, Applicants note that Progress Energy has exited completely the competitive wholesale business and divested the generation previously used to support that business, and Duke Energy does not own any merchant generation in the Carolinas. Applicants also state that only a small percentage of Duke Energy Carolinas' and Progress Energy's total energy generated is used to make wholesale sales to customers other than their native load wholesale requirements customers. Finally, Applicants explain that Duke Energy Carolinas makes "negligible wholesale sales" to third-party customers in the Progress Energy Carolinas BAAs, and Progress Energy makes "negligible wholesale sales" to third-party customers in the Duke Energy Carolinas BAA.[58]

38. Applicants assert that their Appendix A analysis demonstrates that the Proposed Transaction will have no adverse effect on competition.[59] As noted above, Applicants

---

[56] 18 C.F.R. § 33.2(j) (2011).

[57] Merger Application at 16.

[58] *Id.* at 17.

[59] Applicants performed an Appendix A analysis, also referred to as a Delivered Price Test, to determine the pre- and post-transaction market shares from which the market concentration or Herfindahl-Hirschman Index (HHI) change can be derived. The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are

(continued…)

20110930-3067 FERC PDF (Unofficial) 09/30/2011

explain that there are no specific markets in which both Applicants own generation, and the only region where there is any overlap is in the Carolinas.[60] Thus, Applicants focused their analysis on the three BAAs in the Carolinas where Applicants' generation is located: (1) Duke Energy Carolinas; (2) Progress Energy Carolinas-East; and (3) Progress Energy Carolinas-West.[61] Applicants also analyzed each BAA that is directly interconnected with one of these three BAAs (the First Tier Markets). In addition, Applicants considered the effect of the Proposed Transaction in the other markets in which Applicants own generation or historically have sold energy. Applicants conclude that, under the Commission's merger regulations, a competitive analysis is not required in these markets.[62]

---

considered to be unconcentrated; markets in which the HHI is greater than or equal to 1,000 but less than 1,800 points are considered to be moderately concentrated; and markets in which the HHI is greater than or equal to 1,800 points are considered to be highly concentrated. In the Merger Policy Statement, the Commission adopted the 1992 Federal Trade Commission (FTC)/Department of Justice (DOJ) Horizontal Merger Guidelines, which state that in a horizontal merger, an increase of more than 50 HHI points in a highly concentrated market or an increase of 100 HHI points in a moderately concentrated market fails its screen and warrants further review. U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, 57 Fed. Reg. 41,552 (1992), *revised*, 4 Trade Reg. Rep (CCH) ¶ 13,104 (April 8, 1997). On August 19, 2010, the FTC and DOJ issued revised horizontal merger guidelines, which, among other things, raise the thresholds for the measures of market concentration. Our analysis here is based on the thresholds adopted in the 1992 FTC/DOJ guidelines as currently implemented by the Commission. We note that, on March 17, 2011, the Commission issued a Notice of Inquiry seeking comment on the potential impact of the revised guidelines on the Commission's analysis of horizontal market power. *Analysis of Horizontal Market Power Under the Federal Power* Act, 134 FERC ¶ 61,191 (2011) (Horizontal Market Power Analysis NOI).

[60] Merger Application at 18.

[61] *Id.* Applicants expect that the separate BAAs will be maintained after the Proposed Transaction is consummated. *Id.* at n.24.

[62] Merger Application at 19. The five BAAs referred to here, for which a competitive analysis was not performed, were: PJM, South Carolina Public Service Authority (Santee Cooper), South Carolina Electric & Gas Company, Tennessee Valley Authority, and Southern Company Services, Inc. *Id.* at n.25.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

39. In order to perform the required market share calculations, Applicants performed studies of the simultaneous transmission import limits (SIL) for each of Applicants' three Carolina BAAs and for the First Tier Markets,[63] based on projected conditions for 2012. Applicants state that the SIL studies were conducted by their transmission employees "in a manner broadly consistent" with the Commission's guidance regarding SIL studies in the context of market-based rate proceedings.[64] Applicants explain that for purposes of the Merger Application, the SIL is based on projections for 2012 rather than historical information, and that they also considered transmission limits on the interfaces between the BAAs being analyzed. Applicants explain that once they established the import limits, after accounting for all existing firm reservations, they allocated available import capacity to all potential competing suppliers, including Applicants, on a *pro rata* basis. Applicants state that this approach is the standard approach taken by its expert for allocating transmission capacity, and that it has been approved by the Commission on a number of occasions.[65]

40. Applicants performed their competitive analysis using both the Economic Capacity (EC)[66] and Available Economic Capacity (AEC) measures of capacity. Applicants state that they focused on the AEC results because, as the Commission has held on numerous occasions, the AEC measure of capacity is more appropriate for markets where there is no retail competition and no indication that retail competition will be implemented in the near future.[67]

---

[63] Applicants state that they did not conduct a SIL for PJM, one of the First Tier Markets, but instead relied on the recent SIL analysis conducted in connection with the FirstEnergy-Allegheny merger authorized by the Commission in *FirstEnergy Corp.*, 133 FERC ¶ 61,222.

[64] Merger Application at 21.

[65] *Id.* at 21 (citing *Exelon Corp.*, 112 FERC ¶ 61,011, at P 129, *reh'g denied*, 113 FERC ¶ 61,299 at P 24 and n.30 (2005)).

[66] Each supplier's "Economic Capacity" is the amount of capacity that could compete in the relevant market given market prices, running costs, and transmission availability. "Available Economic Capacity" is based on the same factors but subtracts the supplier's native load obligation from its capacity and adjusts transmission availability accordingly.

[67] Merger Application at 22 (citing *Great Plains Energy, Inc.*, 121 FERC ¶ 61,069, at P 34 & n.44 (2007), *reh'g denied*, 122 FERC ¶ 61,177 (2008); *Nat'l Grid, plc.*, 117 FERC ¶ 61,080, at P 27-28 (2006), *reh'g denied*, 122 FERC ¶ 61,096 (2008);

(continued…)

20110930-3067 FERC PDF (Unofficial) 09/30/2011

41. Applicants performed two AEC analyses for the Duke Energy Carolinas market under two different assumptions. In one analysis, Applicants assumed elimination of transmission rate pancaking for service across Applicants' transmission systems. In the second analysis, they assumed the existence of transmission rate pancaking. Applicants' analysis assuming transmission rate pancaking found no screen failures, with a maximum HHI change of one point in the summer super peak 1 season/load period in a moderately concentrated market (Applicants calculated a post-transaction HHI equal to 1,126 for this season/load period).[68] When Applicants revised their analysis to assume elimination of transmission rate pancaking, they found one screen failure in the summer off-peak season/load period, with an HHI change of 241 points in a moderately concentrated market (Applicants calculated a post-transaction HHI equal to 1,073 for this season/load period).[69]

42. Applicants argue that the screen failure resulting from assuming the elimination of transmission rate pancaking creates the false impression that de-pancaking leaves wholesale customers worse off. Applicants explain that eliminating transmission rate pancaking is actually a benefit to wholesale customers in the Duke Energy Carolinas BAA because these customers will gain access to certain wholesale supplies at lower transmission rates. According to Applicants, eliminating rate pancaking lowers the delivered costs of power entering from or through Progress Energy Carolinas, which increases the amount of Progress Energy power that is economic in the Duke Energy Carolinas market.[70] Applicants argue further that the Commission has held on a number of occasions that isolated screen violations during off-peak load conditions do not reflect systematic market power problems.[71] Applicants assert that generation that typically operates during off-peak load conditions is baseload nuclear and coal-fired generation,

---

Westar Energy, Inc., 115 FERC ¶ 61,228, at P 72, *reh'g denied*, 117 FERC ¶ 61,011, at P 39 (2006); and *Nev. Power Co.*, 113 FERC ¶ 61,265, at P 15 (2005)).

[68] Merger Application at 23.

[69] *Id.*

[70] *Id.* at 24.

[71] *Id.* (citing *FirstEnergy*, 133 FERC ¶ 61,222 at P 49-50; *Ohio Edison Co.*, 94 FERC ¶ 61,291, at 62,044 (2001); and *Commonwealth Edison Co.*, 91 FERC ¶ 61,036, at 61,133-34 (2000)).

20110930-3067 FERC PDF (Unofficial) 09/30/2011

and such generation cannot easily or profitably be used to withhold capacity in order to artificially raise market prices.[72]

43. Applicants also performed two AEC analyses for the Progress Energy Carolinas-East BAA using the aforementioned assumptions. Applicants' analysis assuming rate pancaking found a single screen failure in the summer off-peak period with an HHI change of 186 points in a moderately concentrated market (Applicants calculated a post-transaction HHI equal to 1,336 for this season/load period).[73] Assuming the elimination of rate pancaking, the magnitude of the screen failure for the summer off-peak period increased to 214 points in a market of similar concentration (Applicants calculated a post-transaction HHI equal to 1,364).[74] As with the results for the Duke Energy Carolinas BAA, Applicants conclude that a single screen failure during off-peak load conditions does not reflect systematic market power problems.[75]

44. Applicants performed a single AEC analysis for the Progress Energy Carolinas-West BAA assuming the elimination of rate pancaking. Applicants state that because Progress Energy has no excess generation in this BAA, the Proposed Transaction results in no screen violations for AEC in the Progress Energy Carolinas-West BAA. The HHI changes range from minus 45 to plus 63 points in unconcentrated markets (Applicants calculated post-transaction HHIs ranging from 385 to 456).[76] Applicants did not analyze this market assuming transmission rate pancaking because when they assumed the elimination of transmission rate pancaking, the Proposed Transaction showed no screen violations or no near-violations.[77]

45. Applicants state that because Duke Energy Carolinas and Progress Energy Carolinas have both engaged in significant generation construction programs, Applicants performed an AEC analysis of the Duke Energy Carolinas and Progress Energy Carolinas markets in the year 2015 as a sensitivity. Applicants explain that they performed this analysis in order to test whether the addition of that new generation would affect the results of their Appendix A analysis. Applicants state that the results of the sensitivity

---

[72] *Id.*

[73] *Id.* at 25.

[74] *Id.*

[75] *Id.* at 26-27.

[76] *Id.* at 27.

[77] *Id.*

20110930-3067 FERC PDF (Unofficial) 09/30/2011

analysis are not materially different from the results described above, and argue that, as a consequence, there is no reason to conclude that the Proposed Transaction could have adverse competitive effects after Applicants' construction program is completed.[78]

46. Applicants also analyzed all First Tier Markets in addition to their three BAAs. This analysis shows no screen violations in any of the First Tier Markets for AEC. Applicants therefore conclude that the Proposed Transaction raises no market power concerns in any First Tier Market.[79]

47. Finally, Applicants explain that in order to confirm the validity of their results, they analyzed Electric Quarterly Report (EQR) data for Duke Energy Carolinas and Progress Energy Carolinas for the years 2008-2010. Applicants state that this analysis confirms their conclusion that the Proposed Transaction will not have an adverse effect on wholesale competition.[80] According to Applicants, the EQR data shows that Duke Energy Carolinas' total wholesale sales in 2008-2010 represented only 7.8 percent of its total sales over that two-year period; the remaining sales were at retail. Although Applicants did not file a Delivered Price Test using EQR price data as part of the Merger Application, they did use EQR sales data along with EIA-Form 861 and FERC Form No. 1 sales data to state that only 0.067 percent of Duke Energy Carolinas' total wholesale sales were sold in the Progress Energy Carolinas BAAs, and only 0.007 percent of these sales were made to entities in the Progress Energy Carolinas BAAs other than Progress Energy.[81] With respect to Progress Energy Carolinas, Applicants state that, during 2008-2010, wholesale sales were 24.2 percent of its total sales, but that this higher percentage of wholesale sales is "due primarily to Progress Energy Carolinas' somewhat higher wholesale requirements load."[82] Progress Energy Carolinas' sales into the Duke Energy Carolinas BAA were 0.041 percent of its total sales, and its sales into the Duke Energy Carolinas BAA to entities other than Duke Energy Carolinas were 0.003 percent of its total sales. Applicants state that this analysis shows that Duke Energy Carolinas is a small seller into Progress Energy Carolinas, and that Progress Energy Carolinas is an even smaller seller into Duke Energy Carolinas. Applicants also claim

[78] *Id.* at 28.

[79] *Id.*

[80] *Id.* at 28.

[81] *Id.* at 29.

[82] *Id.* at 30.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

that this analysis further demonstrates that Applicants do not compete significantly to sell to third parties in the Carolinas, the region where their supply resources overlap.[83]

48. In the Request for Additional Information, Applicants were directed to provide additional analyses and information which was not provided in the Merger Application. First, Applicants were directed to provide price sensitivity analyses for the Duke Energy Carolinas, Progress Energy Carolinas-East, and Progress Energy Carolinas-West BAAs under two different scenarios – a 10 percent price increase and a 10 percent price decrease. Second, Applicants were instructed to produce a set of prices using short-term energy prices from EQR data, and, using those prices, perform a Delivered Price Test analysis of the base case and two price sensitivities for the three BAAs.[84] Third, Applicants were directed to describe the source, i.e. the BAA, of the units that comprise the top 10 sellers in each season for the base case and each sensitivity analysis. Applicants were also required to explain a discrepancy between the SIL values in spreadsheets they provided in the Merger Application. The Commission discusses the results of these additional analyses below.

49. In Applicants' August 29 Answer, Applicants submitted a Delivered Price Test based on EQR data (August 29 DPT) as directed. In addition, Applicants submitted tables identifying the top 10 sellers in each season/load period, the supply each top10 seller contributed, and the source BAA of that supply, all based on system lambda.[85] While the August 29 DPT differs from the Merger Application DPT with respect to the source of their forecasted 2012 prices, Applicants adjusted both the system lambda and EQR prices by a common natural gas price forecast. The results of the Delivered Price Tests submitted by Applicants are discussed in further detail below.

---

[83] *Id.* at 30.

[84] As noted in P 47, *supra*, Applicants did not provide a Delivered Price Test based on EQR data with the Merger Application. The Delivered Price Test submitted with the Merger Application (Merger Application DPT) was based on system lambda price proxies.

[85] *See* Applicants August 29 Answer.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

ii. Comments and Protests

aa. Impacts of Proposed Transaction on Carolina Markets

50. City of New Bern asserts that the Proposed Transaction will increase already excessive levels of market concentration.[86] According to City of New Bern, Applicants' market power analysis "resorts to a series of methodologically indefensible manipulation of data in an effort to obscure and distract from that market power."[87] Specifically, City of New Bern argues that Applicants employ at least six data selection choices for the preparation of their Competitive Analysis Screen and Delivered Price Test that appear either factually unsupported or counterfactual.[88]

51. First, City of New Bern argues that Applicants provide no explanation of departures from historical trading patterns in the assumptions used in their Appendix A analysis. City of New Bern states that this lack of explanation is contrary to the requirements of 18 C.F.R. § 33.3(a)(6).[89] City of New Bern faults Applicants for not providing a comparison of their "vision" of post-merger supply to any actual current or historical supply in the relevant BAAs.[90] City of New Bern claims that this omission is significant given that Applicants' market screen results are so inconsistent with actual circumstances.[91]

52. Second, City of New Bern complains that Applicants' Appendix A analysis includes generation facilities that "are geographically remote from the relevant geographic market (in this case eastern North Carolina), that have never sold into that

[86] City of New Bern Protest at 2.

[87] *Id.* at 3.

[88] *Id.* at 12.

[89] City of New Bern Protest at 12.

[90] City of New Bern Protest, Exhibit NCC-1, Affidavit of John W. Wilson (Wilson Aff.) at P 9.

[91] *Id.* P 10.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

market in the past, and that have output that is largely or fully committed elsewhere during the period under study."[92]

53. Third, City of New Bern claims that Applicants presume unrealistically low market prices to define cutoff points for EC in their Appendix A analysis.[93] City of New Bern argues that Applicants have selected dispatch prices in each load period that are well below the projected market clearing prices and far below their own actual historical wholesale prices. City of New Bern asserts that Applicants used an average hourly price of $36.77/Megawatt hour (Mwh) in order to limit EC in each of their market screens. City of New Bern argues, however, that Progress Energy Carolinas' actual average market price for all non-requirements wholesale sales in 2010 was $70.07/Mwh, and Duke Energy Carolinas' average market price for all non-requirements wholesale sales was $82.61/Mwh.[94] City of New Bern states that once this distortion is corrected, it is clear that the merger raises competitive concerns and that it would greatly enhance Applicants' "already substantial" market power.[95]

54. City of New Bern argues that the market prices selected by Applicants to delineate between "economic" and "uneconomic" capacity in the Duke Energy Carolinas and Progress Energy Carolinas BAAs are "well below projected market clearing prices and historical system lambdas in these markets at many hours in most periods."[96] City of New Bern states that by specifying certain cut-offs for market clearing prices, Applicants define as uneconomic and exclude from their analysis substantial capacity that is actually needed and dispatched for hundreds of hours every year in the market.[97] City of New Bern also disputes Applicants' claim that the lower prices used in their Appendix A analysis are based on system lambdas. City of New Bern alleges that the prices Applicants use in their market screens are below their own historical system lambdas, and

---

[92] City of New Bern Protest at 13. *See also* City of New Bern Protest, Exhibit NCC-1, Wilson Aff. at P 12-13.

[93] City of New Bern Protest at 13.

[94] City of New Bern Protest, Exhibit NCC-1, Wilson Aff. at P 19.

[95] *Id.*

[96] *Id.* P 31.

[97] *Id.* P 32.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

far below their actual historical market prices and the projected market clearing prices used in their Appendix A analysis in many of the hours for the relevant markets.[98]

55. Fourth, City of New Bern alleges that Applicants use unrealistic or factually unsupported assumptions about the availability of transmission to potential sellers.[99] Similarly, the fifth flaw identified by City of New Bern is that Applicants use unrealistic assumptions in transmission capacity proration to create an inaccurate picture of "atomistic" competition for sales into eastern North Carolina.[100] With respect to these two points, City of New Bern argues that Applicants have made unrealistic assumptions in prorating transmission capacity among their universe of putative suppliers, and provide little, if any, useful information about the actual performance of (and physical limitations on) Applicants' transmission systems.[101] For example, City of New Bern claims that the transmission capability on the interfaces between Duke Energy Carolinas and Progress Energy Carolinas would become internal to the merged firm after the merger and that this transmission capacity should not have been allocated to other suppliers.[102]

56. City of New Bern argues that the combination of using a "zero dispatch cost" (see below) and unrealistic assumptions regarding prorating transmission capacity is fatal to any credibility of Applicants' Appendix A analysis, especially since the JDA will consume transfer capability across transmission interfaces internal to the merged

---

[98] *Id.* P 33.

[99] City of New Bern Protest at 13.

[100] Specifically, City of New Bern complains that Applicants' analysis, which involves prorating to nearly all of the generating plants in the eastern grid a share of the designated interface capacity to each adjacent area, typically results in "a very small diluted share of the deemed available capacity from each of the several thousand generating units" used in the analysis and in "much smaller delivered fictional shares from a great many more presumed suppliers than have ever actually delivered power to the Carolinas." City of New Bern Protest, Exhibit NCC-1, Wilson Aff. at P 40.

[101] City of New Bern Protest at 16.

[102] City of New Bern Protest, Exhibit NCC-1, Wilson Aff. at P 23. One of City of New Bern's other witnesses also questions whether the SILs relied on by Applicants take into account PJM loop flows. City of New Bern Protest, Exhibit NCC-4, Affidavit of Whitfield A. Russell (Russell Aff.) at P 24.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

company.[103] City of New Bern also asserts that Applicants' AEC analysis is undermined by Applicants' failure to account realistically for such real-world phenomena as transmission losses, transmission constraints, must-run limitations and other, similar, "real-life physical limitations of first-tier balancing authority areas that impede power flowing from remote first-tier resources."[104]

57. Finally, City of New Bern claims that Applicants use unsubstantiated and unrealistically low dispatch cost assumptions as to claimed suppliers for sales into eastern North Carolina.[105] Specifically, City of New Bern argues that Applicants have unrealistically assumed a zero dispatch cost for numerous small wind and hydro generating units, yielding an incorrect impression of competition in eastern North Carolina.[106] According to City of New Bern, use of a zero dispatch price ensures that these resources are designated as economic and results in many hundreds of small units sharing sequential interfaces to reach the Carolina markets, which results in a low post-merger market concentration.[107]

58. City of New Bern states that it performed a corrected Appendix A analysis "using the same generation capacity data base [upon which the Applicants relied], but modifying the mistaken assumptions discussed above."[108] City of New Bern states that in this analysis it set the price "at the average for the top 25 percent of all hourly market-clearing prices in each period"[109] and corrects Applicants' procedure of prorating AEC over post-merger internal interfaces between Duke Energy Carolinas and Progress Energy

---

[103] City of New Bern Protest at 16 (citing *Edison Ohio Co. et al.,* 80 FERC ¶ 61,039, at 61,103-61,104 (1997); *Wisconsin Electric Power Company, et al.* , 79 FERC ¶ 61,158, at 61,691-96 (1997)).

[104] *Id.* at 16-17 (citing *Carolina Power & Light Co., et al.,* 128 FERC ¶ 61,039 at P 6, *clarified* 129 FERC ¶ 61,152 (2009), *quoting Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities,* Order No. 697, FERC Stats. & Regs. ¶ 31,252, at n.361 (2008)).

[105] *Id.* at 13.

[106] *Id.* at 15.

[107] City of New Bern Protest, Exhibit NCC-1, Wilson Aff. at P 41.

[108] *Id.* at P 30.

[109] *Id.* at P 32.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

Carolinas.[110] City of New Bern's results for AEC in the three North Carolina markets show post-merger HHI values that are in excess of 2,500 in 25 of the 30 seasons/load periods, between 1,800 and 2,500 in two seasons/load periods, and between 1,000 and 1,800 in three seasons/load periods.[111] City of New Bern states that the merger-related HHI increases exceed 800 in 28 of the 30 seasons/load periods across the three Carolina BAAs, and that all of these results raise significant competitive concerns.[112]

59. City of Orangeburg also protests the Proposed Transaction and argues that it cannot be approved absent proper conditioning.[113] The issues raised by City of Orangeburg relate to a North Carolina Commission order (NCUC Order) that City of Orangeburg alleges interferes with the wholesale energy markets and the Commission's jurisdiction.[114] In its protest, City of Orangeburg argues that the North Carolina Commission's post-merger control of Duke Energy Carolinas' and Progress Energy Carolinas' wholesale power sales and "attendant determination of favored and disfavored wholesale customers" is anticompetitive under the FPA and Commission policy.[115]

---

[110] *Id.* at P 35.

[111] City of New Bern Protest at 17. *See also* City of New Bern Protest, Exhibit NCC-1, Wilson Aff. at P 36

[112] *Id.* at 17. *See also* City of New Bern Protest, Exhibit NCC-1, Wilson Aff. at P 36. City of New Bern calculated HHI increases of more than 800 points for all 10 of the seasons/load periods in the Progress Energy Carolinas-East and -West BAAs, and for eight of the 10 seasons/load periods in the Duke Energy Carolinas BAA.

[113] 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) (City of Orangeburg Protest).

[114] In the NCUC Order, the North Carolina Commission concluded: (1) that Duke Energy Carolinas could not treat the retail native load of the City of Orangeburg as its own retail native load; and (2) that for retail ratemaking purposes, it would allocate the costs incurred by Duke Energy Carolinas to make sales under a 2008 wholesale power purchase agreement with City of Orangeburg at incremental, rather than system average, costs. City of Orangeburg filed a petition for declaratory order to invalidate the NCUC Order in Docket No. EL09-63-000. That matter is pending.

[115] City of Orangeburg Protest at 45.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

According to City of Orangeburg, the North Carolina Commission's division of "favored and disfavored" wholesale customers violates the FPA and Commission policy.[116]

60. City of Orangeburg argues that, absent conditioning by the Commission and due to new regulatory conditions proposed at the state level,[117] it is "virtually certain" that Duke Energy Carolinas and Progress Energy Carolinas will refuse to offer City of Orangeburg long-term wholesale requirements power on terms equivalent or substantially similar to the terms of service offered and provided to their wholesale native load customers favored by the North Carolina Commission.[118] City of Orangeburg cites Commission precedent for the proposition that it is contrary to the public interest to approve a merger that would enhance the merged company's ability to foreclose competition for bulk power sales, and urges the Commission to reject the Proposed Transaction because it will enhance the North Carolina Commission's ability to foreclose competition.[119] City of Orangeburg asserts that "the unconditioned post-merger competitive environment" will be worse for it as all meaningful competition between Duke Energy Carolinas and Progress Energy Carolinas at wholesale will be effectively eliminated. City of Orangeburg states that Applicants fail to address the market realities of the North Carolina Commission's existing and proposed continuing control over wholesale sales out of Duke Energy Carolinas' and Progress Energy Carolinas' resources.

---

[116] *Id.* at 45-46.

[117] 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 similar conditions for the Proposed Transaction at the state level.

[118] City of Orangeburg argues that the Commission should condition approval of the Proposed Transaction. City of Orangeburg proposes that the Commission should exempt Duke Energy Carolinas and Progress Energy Carolinas from any existing or proposed policies that would, among other things, permit any state commission to require the companies to submit proposed wholesale agreements to state commissions for review, or make adjustment for retail ratemaking purposes. City of Orangeburg Protest at 63-64.

[119] City of Orangeburg Protest at 49.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

61. EPSA expresses concern that Applicants each possesses horizontal market power in their respective markets,[120] and that this market power will be exacerbated by the Proposed Transaction. EPSA states that Applicants' analysis shows that all of their markets are very highly concentrated under the EC measure, and shows screen failures in certain periods under the AEC measure. EPSA notes that these failures occur before the effects of Applicants' "significant generation construction programs" are taken into account.[121] EPSA rejects Applicants' explanation of the screen failures, noting that there has been a paucity of independent power producers that have invested in generating capacity in Applicants' home BAAs, and that those who have invested have had difficulty competing on a level playing field for wholesale power sales. EPSA explains that Applicants admit that, with minor exceptions, Progress Energy makes "competitive market purchases" from "only" four suppliers.[122] According to EPSA, the record lacks the substantial evidence needed by the Commission to conclude that the Proposed Transaction would not have adverse competitive effects.[123]

62. EPSA states that, given the size and scope of the post-merger entity, the proposed JDA, and self-build plans, the burden on existing competitive suppliers seeking to make sales into the market in Applicants' interconnected service territories will increase and also likely deter new entry. EPSA therefore requests that the Commission condition any approval of the Proposed Transaction on the requirement that Applicants join a regional transmission organization (RTO). In the alternative, EPSA urges the Commission to direct Applicants to develop a proposal, in consultation with all affected stakeholders, to establish "an organized, competitive wholesale energy market within the merged entity's service territory that would be administered and overseen by an independent entity or market monitor" and to submit the proposal for Commission approval.[124]

63. Evergreen Packaging alleges that the Merger Application fails to fully address the effects of the Proposed Transaction on competition. Specifically, Evergreen Packaging

---

[120] EPSA cites the fact that Applicants are not authorized to make sales at market-based rates in their home BAAs. Motion to Intervene and Comments of the Electric Power Supply Association at 5, Docket Nos. EC11-60-000, ER11-3306-000, ER11-3307-000 (not consolidated) (June 3, 2011) (EPSA Motion to Intervene and Comments).

[121] *Id.* at 6 (quoting Merger Application at 28).

[122] *Id.* at 2.

[123] *Id.* at 7.

[124] *Id.* at 10.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

states that Applicants do not address the effects of the Proposed Transaction on generation competition from Qualifying Facilities (QF) in North Carolina. According to Evergreen Packaging, the Proposed Transaction would eliminate Progress Energy Carolinas as a potential buyer of QF power generated from renewable energy resources at Progress Energy Carolinas' avoided costs and require QFs to sell to Duke Energy Carolinas at post-merger avoided costs. Evergreen Packaging claims that Duke Energy Carolinas would have the incentive and ability to hold rates to independent QFs below actual avoided cost in North Carolina, and to foreclose their ability to export power in competition with Duke Energy Carolinas.[125] In order to explore these issues further, Evergreen Packaging asserts that the Commission should adduce further evidence on: (1) what effect the Proposed Transaction would have on competition from independent QFs; (2) what conditions are necessary to mitigate the effects of the Proposed Transaction on competition from independent QFs;[126] and (3) how the Proposed Transaction would affect the ability of QFs to sell renewable energy and capacity into other BAAs.[127] Evergreen Packaging also asks the Commission to require Applicants to submit their post-merger 10-year capacity addition plan for North Carolina now, including a forecast of capacity costs that would be incurred under that plan, and to provide Duke Energy Carolinas' avoided costs in North Carolina on the basis of that plan.

64. APPA asserts that Applicants' Appendix A analysis of the Proposed Transaction demonstrates that the Commission should not alter the concentration thresholds of its merger analysis.[128] APPA explains that although the Proposed Transaction would create the largest utility in the Carolinas, "with undeniable market dominance and accompanying political clout," Applicants' Appendix A analysis reveals no competition

[125] Evergreen Packaging Motion to Intervene and Comments at 12.

[126] Evergreen Packaging suggests that if the Commission finds that the Proposed Transaction would have adverse effects on independent QF competition in North Carolina, and Applicants are unwilling to mitigate those adverse effects voluntarily, the Commission could consider conditioning approval of the Proposed Transaction on an expansion of transmission capacity into neighboring BAAs. *Id.* at 16.

[127] *Id.* at 4, 7.

[128] As noted above, the Commission has sought comments on its horizontal market power analysis in the Horizontal Market Power Analysis NOI.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

issues.[129] APPA argues that these results for the Proposed Transaction show that any further relaxation of the Appendix A analysis would not protect consumers, and would not be in the public interest.[130]

bb. Impacts of Proposed Transaction on Peninsular Florida

65. FMPA questions whether the Proposed Transaction will impact already constrained market competition in Peninsular Florida and requests that the Commission issue an order requiring Applicants to file market studies for that region.[131] FMPA argues that such a study is necessary because Duke Energy is a potential competitor into the Peninsular Florida market[132] and the potential for Progress Energy Florida to import more energy from the north could lead to further transmission constraints and a decrease in market competition, thereby harming FMPA and others' interests.[133] FMPA alleges that "[a]fter the merger, Duke-Progress can be expected to use the Florida ties and other transmission to integrate Florida and Carolina generation and loads."[134] FMPA argues that this integration will increase use of the ties by the merged company to the detriment of others, and potentially increase Duke-Progress' Florida market power. FMPA also notes that there is strong evidence that there are barriers to long-term construction of base load generation in Peninsular Florida.[135] FMPA argues that such a study would likely show a worsening of concentration as a result of the Proposed Transaction. FMPA adds that no reasonable examination of the competitive effects of the merger can be made without considering the potential impacts of the Proposed Transaction on Florida.

---

[129] Motion to Intervene and Comments of the American Public Power Association at 5, Docket Nos. EC11-60-000, ER11-3306-000, ER11-3307-000 (June 3, 2011) (APPA Motion to Intervene and Comments).

[130] *Id.* at 5-6.

[131] Motion to Intervene and for an Order Requiring Florida Market Studies at 5, Docket Nos. EC11-60-000, ER11-3306-000, ER11-3307-000 (not consolidated) (May 3, 2011) (FMPA Request for Order).

[132] *Id.* at 5.

[133] *Id.* at 8-9.

[134] *Id.* at 8.

[135] *Id.* at 10.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

66. In its protest, FMPA reiterates that Applicants should have provided an Appendix A analysis for Peninsular Florida,[136] and rejects Applicants' reasons for not submitting one. FMPA states that section 33 of the Commission's regulations requires screens for each destination market in which applicants conduct business, which includes entities that have purchased electricity at wholesale from any of the merging entities during the two years prior to the date of the application.[137] FMPA contends that Applicants are mistaken when they assert that Duke Energy Carolinas has not made any sales in Florida in the past three years. FMPA states that Duke Energy Carolinas' FERC Form No. 1 shows that it is selling at least some power into Florida.[138] FMPA also argues that Duke Energy will be able to sell more power into Florida, and undoubtedly will do so, after the merger: although interface limitations limit its current sales, Duke Energy will be able to use Progress Energy Florida's reserved interface capacity (as well as other available capacity) to sell into Peninsular Florida after the Proposed Transaction is consummated.[139] FMPA also claims that Applicants' reasoning is inconsistent because on the one hand they do not view Duke Energy as a potential competitor into the Peninsular Florida market due to the remoteness of its generation, but on the other hand include much more distant generation in their Appendix A analysis of what generation can reach Carolina markets.[140]

67. FMPA states that although Applicants are responsible for, but failed to provide, market power screens and HHI studies for Peninsular Florida, FMPA performed its own market study. FMPA states that, according to its study, "Applicants fail significant screens" and therefore, the Proposed Transaction must be disallowed.[141] Specifically, in

---

[136] Protest of Florida Municipal Power Agency and Motion to Reject, Deny or Request for Hearing at 8-11, Docket Nos. EC11-60-000, ER11-3306-000, ER11-3307-000 (June 3, 2011) (FMPA Protest).

[137] FMPA also argues that even if the Commission's regulations do not require a market study for Peninsular Florida, one is required for this merger given its scope and because a "wait and see" approach could permit markets to be adversely affected. *Id.* at 30.

[138] *Id.* at 9. FMPA states: "…the Form No. 1 report filed by Duke Energy Carolinas (as well as the revised report filed May 11, 2011) report that in 2010, Duke Energy Carolinas sold 13,989 MWH to Progress Energy Florida with a dollar amount of $1.6 million." *Id.* at 25.

[139] *Id.* at 25.

[140] *Id.* at 25-28.

[141] *Id.* at 11.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

the Peninsular Florida market, FMPA's analysis shows an increase in Progress Energy Florida's off-peak market share from 33.95 percent to 46 percent, with a pre-merger HHI of 3,088 and a post-merger HHI of 3,410 for that market (a 322 point increase).[142] FMPA's analysis for the Progress Energy Florida market shows an increase in Progress Energy Florida's off-peak market share from 68.41 percent to 78.21 percent, with a pre-merger HHI of 4,977 and a post-merger HHI of 6,258 for that market (a 1,280 point increase).[143] FMPA states that, at a minimum, the Merger Application must be set for hearing to consider whether the Proposed Transaction can be approved without remedial relief.[144]

68. FMPA asserts that, in addition to being highly concentrated, the Florida market is affected by limited transmission capacity over the interconnections that connect Georgia and Florida, and also by inadequate transmission capacity inside Florida.[145] FMPA asserts that, as a consequence: (1) FMPA, its members, and other smaller Florida systems cannot rely on power supply from outside of Peninsular Florida; (2) power supply within Florida is highly concentrated; and (3) Peninsular Florida HHIs are very high.[146] FMPA states that, in attempting to obtain both long-term and short-term power supply, FMPA and other smaller electric systems must buy in markets where Progress Energy Florida and Florida Power & Light Company (FPL) have market power.[147]

69. FMPA explains that Progress Energy Florida and FPL are in a better position than FMPA because of their ownership of the Florida-Georgia interconnection facilities and their corresponding grandfathered contractual transmission rights over the interties, which can be rolled over in perpetuity under applicable Open Access Transmission Tariffs (OATT).[148] FMPA states that the tie ownership and grandfathered rights provide Progress Energy Florida and FPL with large amounts of assured tie capacity to purchase economic power from outside the state, but that FMPA and others have no such rights.

---

[142] *Id.* at 20.

[143] *Id*. *See also* FMPA Protest, Exhibit A, Affidavit of Dr. John W. Wilson (Wilson Aff) at P 20.

[144] FMPA Protest at 11.

[145] *Id.* at 35.

[146] *Id.*

[147] *Id.* at 35-36.

[148] *Id.* at 36.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

FMPA adds that virtually all of the import capacity potentially available at the Florida-Georgia interface is already committed to long-term imports.[149] Accordingly, FMPA states that Peninsular Florida market participants like FMPA must look almost entirely to each other for sources of power because there is little or no long-term firm import capability available to them.[150] FMPA adds that for base-load power, and often other power and energy, they are limited to plant participation and buying and selling power within Peninsular Florida. Further, FMPA explains that in the face of constraints on building renewable generation in Florida, FMPA and others are also limited in their ability to help develop and import power from renewables outside of Florida.[151]

70. FMPA states that although tie capacity constraints have precluded it from entering into firm power agreements with companies outside of Florida, FMPA's members and other Florida utilities that do not have firm transmission rights over the ties may have access to interface transmission capacity during off-peak or shoulder periods. FMPA explains that the four interface owners have grandfathered (and roll-over) rights in long-term firm tie capacity, but pursuant to Commission regulations, they must offer unused capacity to other transmission customers in a non-discriminatory basis under their OATTs. FMPA states that utilities outside Florida, including pre-merger Duke Energy, also have limited access to non-firm capacity over the ties.[152] FMPA asserts, however, that after the merger, Duke Energy will have the ability to use Progress Energy Florida's allocated capacity, including during off-peak and shoulder periods. FMPA states that Duke Energy will have substantial economic capacity in the Southeast available to support its newly established entry into the Florida market,[153] and, since Florida prices are significantly greater than Duke Energy prices, Duke Energy will almost certainly increase its Florida sales. FMPA concludes that Duke Energy's use of that capacity will decrease the capacity offered to other transmission customers and further constrain

[149] *Id.* at 37.

[150] *Id.* at 38.

[151] *Id*.

[152] *Id.*

[153] *Id.* at 21.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

transmission availability,[154] and also increase Applicants' relevant market shares and HHIs.[155]

71. FMPA also argues that the Commission should not presume, as Applicants urge it to, that long-term markets in Florida are competitive.[156] FMPA argues that, in addition to being highly concentrated, Florida's market concentration is supported by physical and technical isolation, barriers to entry, inadequate transmission, and the lack of an RTO or Florida-wide grid. FMPA argues that these market constraints undercut any possible presumption that, if the merger is approved, long-term markets within Florida will be competitive.[157] FMPA states that two factors underlie the presumption that if short-term markets are competitive, long-term markets will also be competitive: (1) the presumption that short-term markets are, in fact, competitive; and (2) the presumption that transmission is adequate to support new generation. FMPA claims that Florida markets are not competitive, but highly concentrated, that transmission is not adequate to support new generation in Florida, and that the Peninsular Florida grid is constrained.[158]

72. FMPA concludes that if the Commission does not reject the merger outright, then it has the obligation and authority to adopt conditions that will "act to correct the concentration that the merger represents to the maximum extent."[159] FMPA proposes eight conditions, including requiring the merged entity, with the participation of FMPA and others, to expand Florida-Georgia tie capacity;[160] permitting smaller competing systems to purchase a load ratio share of new nuclear generation built by Applicants, irrespective of where that generation is located;[161] and obligating Applicants to sell at system-average cost-based rates.[162]

---

[154] *Id.* at 38-39.

[155] *Id.* at 22.

[156] *Id.* at 46-47.

[157] *Id.* at 46.

[158] *Id.* at 46-47.

[159] *Id.* at 55.

[160] *Id.* at 60.

[161] *Id.* at 64.

[162] *Id.* at 67.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

73. The Orlando Commission expresses concerns regarding the impact of the Proposed Transaction on the availability of economic transmission and generation within Florida, as well as between Florida and other states.[163] The Orlando Commission explains that the interconnections between Florida and other states are too small to permit significant new imports and create a market advantage for Progress Energy affiliates and FPL. The Orlando Commission alleges that the merger will create greater incentives for use of these interconnections by Duke Energy, and tie capacity availability will continue to decrease unless the facilities are upgraded.[164]

74. The Orlando Commission also states that "the combined balance sheets and existing generating fleet of the merged entities give each exceptional opportunities to develop new generation, utilize more efficient technologies and impact fuel supplies within Florida."[165] According to the Orlando Commission, smaller utilities will not have the same opportunities. The Orlando Commission proposes that it and similarly situated Florida municipal electric utilities "be given rights to invest in new Duke-Progress base load Florida generation and new [Duke Energy] nuclear generation inside and outside of Florida for 20 years and wholesale purchased power at traditional average system costs for a similar period."[166]

75. The Orlando Commission also proposes two additional conditions.[167] First, Progress Energy Florida must commit to a definitive timetable for completing certain transmission upgrades critical to transmission users in the Florida Reliability Coordinating Council area. The second condition concerns Crystal River Unit No. 3 (Crystal River Unit), a nuclear power facility of which the Orlando Commission is a minority owner and which is on indefinite outage. Given the timing and uncertainty regarding the repairs to the Crystal River Unit, the Orlando Commission requests that the Commission condition the Proposed Transaction on an existing replacement power agreement between Progress Energy Florida and the Orlando Commission being extended through January 1, 2019.

---

[163] Limited Protest of the Orlando Utilities Commission, Docket Nos. EC11-60-000, ER11-3306-000, ER11-3307-000 (June 3, 2011) (Orlando Commission Protest).

[164] Orlando Commission Protest at 2.

[165] *Id.* at 3.

[166] *Id.*

[167] *Id.* at 3-5.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

76. City of Tallahassee expresses concern that the Proposed Transaction could cause certain long-standing parallel path problems on its system to intensify.[168] City of Tallahassee explains that its transmission system is located near the Florida-Georgia border, on the "seam" between the generation, transmission, and distribution systems of Progress Energy Florida on the Florida side of the border and Georgia Power Company, a subsidiary of Southern Company, on the Georgia side of the border.[169] City of Tallahassee states that it is interconnected with Progress Energy Florida in five locations and with the Southern Company system through one interconnection. This interconnection with Southern Company is one of a number of interconnections with transmission owners in Florida. Together, these various interconnections comprise the Florida-Georgia interface.[170] City of Tallahassee explains that on the Florida side, this interface capacity is essentially pooled and allocated among the four Florida transmission owners pursuant to a multi-party agreement. The Florida transmission owners use their respective capacity allocations to import capacity, energy, and ancillary services into Florida, and to export capacity, energy, and ancillary services out of Florida. City of Tallahassee states that, to some extent, this arrangement necessarily depends on the use of parallel paths: transactions across the interface are scheduled on a transmission path basis, and as a result, interface transactions scheduled by one Florida party often make use of interconnection facilities owned by other Florida parties.[171]

77. City of Tallahassee states that, as a practical matter, the Florida-Georgia interface transactions scheduled by City of Tallahassee itself, rarely, if ever, flow over the interconnection or other transmission facilities owned by other Florida transmission owners; interface transactions scheduled by other Florida parties, however, often make use of its facilities.[172] City of Tallahassee argues that the use of its system by Progress Energy Florida and the other Florida interface owners due to parallel path flows puts greater operational stress on its facilities, which could result in overloading and other operational and reliability problems.[173] In addition, parallel path usage imposes

---

[168] Motion for Leave to Intervene and Comments of the City of Tallahassee at 3, Docket No. EC11-60-000, ER11-3306-000, ER11-3307-000 (June 3, 2011) (City of Tallahassee Comments).

[169] *Id.* at 4.

[170] *Id.* at 3-4.

[171] *Id.* at 4.

[172] *Id.* at 5.

[173] *Id.* at 6.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

economic costs on City of Tallahassee by making use of its facilities without providing compensation for such usage. City of Tallahassee understands that while a certain level of parallel flow on interconnected systems is to be expected, at some point such flows become so one-sided as to be clearly inequitable, unjust, and unreasonable.[174] City of Tallahassee speculates that, going forward, a merged Duke-Progress will "incentivize" Progress Energy Florida and the other Florida interface owners to schedule even more power flows north-to-south across the interface, which will further exacerbate City of Tallahassee's parallel flow problems and deny it more lost opportunity revenues.[175] City of Tallahassee asserts that the merged entity will have an incentive to integrate its various generation resources and loads in Florida and the Carolinas, and that any such integration would require increased use of the Florida-Georgia interface. Interface flows could also increase to the extent that the merged entity eliminates pancaked rates for transmission service between Florida and the Carolinas.[176]

78. City of Tallahassee requests that the Commission impose conditions to ensure that the Proposed Transaction does not exacerbate existing parallel path problems. City of Tallahassee argues that resolution of these problems will likely require both: (1) generation, transmission and/or distribution upgrades in northern Florida to reduce parallel path flows; and (2) a methodology and mechanism for City of Tallahassee to be compensated for parallel path flows that cannot be eliminated.[177] City of Tallahassee recommends that the Commission condition any approval of the Proposed Transaction on the merged entity working with City of Tallahassee and other interested parties to evaluate these alternatives, with the merged entity required to file a proposal by a date certain. City of Tallahassee also agrees with FMPA's analysis and recommendation that Applicants perform a Florida market power study. According to City of Tallahassee, such a study would provide the data needed to analyze the market power issues identified by FMPA and would be useful in projecting how use of the Florida-Georgia interface may increase as a result of the merger. City of Tallahassee states that such a study would

---

[174] *Id.*

[175] *Id.* at 6-7.

[176] *Id.* at 7. City of Tallahassee also notes that Progress Energy Florida has proposed a number of transmission projects in northern Florida that may alleviate some parallel path flows on the Tallahassee system, but that City of Tallahassee is uncertain as to whether these upgrades will be pursued following the Proposed Transaction. City of Tallahassee questions whether the merged entity will be willing to work with City of Tallahassee following the merger to address parallel path issues. *Id.*

[177] *Id.* at 8.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

also provide additional data that could be used to analyze how the parallel path problems faced by the City of Tallahassee described above may be affected by the Proposed Transaction.

iii. Applicants' Answers

aa. Carolina markets

79. Applicants argue City of New Bern has not demonstrated that the Proposed Transaction will have an adverse competitive effect in the Carolinas. According to Applicants, the primary argument advanced by City of New Bern is that Applicants' Appendix A analysis relies on unrealistic assumptions that are not supported by data regarding actual sales.[178] Applicants state that City of New Bern's attacks on Applicants' Appendix A analysis are collateral attacks on the theory underlying the Delivered Price Test as well as the Commission's regulations and precedents dictating how an Appendix A analysis should be performed.[179] Applicants reiterate the results of the 2008-2010 sales data referred to in the Merger Application. According to Applicants, the EQR sales data confirms what is shown in their Appendix A analysis for the relevant markets.

80. Applicants also respond to City of New Bern's criticisms of six data selection choices used in Applicants' Appendix A analysis, noting that two of them have the potential to materially change the results of Applicants' analysis. However, Applicants explain that, while City of New Bern "corrected" two of these data point choices in its own Appendix A analysis, each of these corrections involves "the application of inappropriate assumptions that have the effect of significantly overstating the Applicants' market shares in the Carolinas."[180]

81. Applicants first reject City of New Bern's claim that Applicants should have allocated to themselves all of the interface capacity between Duke Energy Carolinas and Progress Energy Carolinas. Specifically, Applicants address City of New Bern's claim that, upon consummation of the Proposed Transaction, "transmission capability on the interfaces between [Duke Energy] and [Progress Energy] in the Carolinas would become internal to the merged firm,"[181] and thus Applicants' *pro rata* allocation of the entire

---

[178] Applicants June 17 Answer at 32.

[179] *Id.* at 32-33.

[180] *Id.* at 35.

[181] *Id.* (*quoting* City of New Bern Protest, Wilson Aff. at P 23).

20110930-3067 FERC PDF (Unofficial) 09/30/2011

amount of the capacity of these interfaces was in error. Applicants state that City of New Bern's argument is based on a mischaracterization of the Proposed Transaction. According to Applicants, they specifically made clear in their filings that they will not internalize the interfaces between Duke Energy Carolinas and Progress Energy Carolinas.[182] As a result, each company will maintain separate BAAs, transmission systems, and NERC registrations. Thus, neither company will have greater priority to that interface capacity than any of their wholesale customers or third party customers using the same level of service.[183]

82. Applicants also explain that City of New Bern's argument is inconsistent with the Commission's merger regulations that specifically address internal interfaces.[184] Applicants state that the Proposed Transaction will not cause the interfaces to become internal, and that neither the ability of either company to reserve existing capacity on those interfaces for native load growth or load growth of network transmission customers, nor the procedures followed by Applicants to reserve capacity on the interfaces will change.[185] Applicants state that this issue is critical to the results of the Appendix A analysis and that nearly all of the HHI increases calculated by City of New Bern in its own Appendix A analysis result from the assignment of the entire interface capacity to Applicants after the Proposed Transaction, which causes Applicants to be deemed to have more capacity in each others' BAAs.[186]

83. Applicants also respond to City of New Bern's claim that Applicants used market prices that were unreasonably low in their Appendix A analysis. Specifically, City of New Bern alleges: (1) that the prices used by Applicants were, in general, too low, and (2) that regardless of the validity of the prices, it is inappropriate to use the average

---

[182] For example, Applicants note that in the transmittal letter for the Joint OATT, Applicants state that each of the public utility subsidiaries of Duke Energy and Progress Energy will remain distinct entities with separate BAAs. *Id.* at 36.

[183] *Id.*

[184] Applicants cite to 18 C.F.R. § 33.3(c)(4)(i)(D) (2011).

[185] Applicants June 17 Answer at 37.

[186] *Id.* at 38. Applicants note that as a consequence of City of New Bern's improper assignment of interface capacity to Applicants, City of New Bern's Appendix A analysis shows combined market share increases of as much as 92 percentage points in the Progress Energy Carolinas-West BAA, 37 percentage points in the Progress Energy Carolinas-East BAA, and 31.3 percentage points in the Duke Energy Carolinas BAA.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

market price of each load period instead of the top 25 percent hourly prices in each load period.[187] With respect to the first issue, Applicants note that City of New Bern compared the market prices used by Applicants in their analysis with what City of New Bern terms "market-clearing prices" contained in Applicants' workpapers. As the market-clearing prices in the workpapers were higher than the market prices used in Applicants' analysis, City of New Bern asserts that Applicants used artificially low market prices in their analysis.

84. Applicants explain that City of New Bern's argument is based on a misapplication of the data included in Applicants' workpapers. Applicants state that the data City of New Bern refers to as "market-clearing prices" are projections of 2012 price levels developed and provided by Ventyx, a third-party vendor that develops confidential future price projections and provides the natural gas price projections that form the basis for its price projections. Based on the differences in future price projections for natural gas, Applicants made adjustments to the Ventyx electricity price projections. Applicants explain that in order to make a valid comparison of their calculated market prices to Ventyx's electricity price forecast, Applicants adjusted the Ventyx electricity price projects downwards based on a mid-January 2011 gas price forecast for Henry Hub.[188]

85. Applicants state that their use of the Ventyx data is consistent with Commission precedent because it is a competitive price forecast. According to Applicants, since actual price data is not available, they started their price forecast analysis using system lambda data, adjusted for forecasted fuel price differences.[189] Applicants performed several "checks" on the reasonableness of the projected price, one of which was comparison to the Ventyx price forecasts, as appropriately adjusted.[190] Applicants explain further that, even setting aside these issues, a comparison of the market prices used in their Appendix A analysis and the adjusted market price from Applicants' workpapers shows that the market prices used by Applicants in their Appendix A analysis

---

[187] *Id.*

[188] Applicants also adjusted the Ventyx price projections to eliminate an assumed mark-up over incremental costs in the Ventyx price forecast. *Id.* at 39.

[189] *Id.* at 40 (citing *Ohio Edison Co.*, 80 FERC ¶ 61,039 at 61,106).

[190] Among other things, Applicants compared the supply stacks of Applicants' generation against load levels characteristic in each time period in order to determine what units typically are on the margin in each period and also reviewed capacity factors of Applicants' generating units to determine in which periods they were likely to be inframarginal, marginal, or extramarginal. *Id.* n.23.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

are actually higher than, or essentially equal to, the Ventyx market price forecasts in eight out of the 10 load periods comprising more than 98 percent of hours.[191] In addition, Applicants note that, consistent with Commission precedent, they used the same natural gas price projections in determining the generator dispatch costs used in their analysis, whereas City of New Bern mismatched this data by using the higher, unadjusted Ventyx market prices to derive market prices for each period, but used the lower natural gas prices in Applicants' workpapers to determine generation dispatch costs.[192]

86. Applicants reject City of New Bern's second argument, namely, that it would be appropriate to use the average of the top 25 percent of hourly prices in each load period. Applicants state that the impact of City of New Bern's approach is that it overstates the applicable market price in the remaining 75 percent of the hours of the year. Applicants criticize City of New Bern for not explaining why such a distorted approach provides an accurate depiction of market prices.[193] Applicants also note that City of New Bern applies this distorted approach inconsistently. According to Applicants, since AEC is the amount of EC available after all load obligations have been met, the calculation of AEC is equal to the amount of capacity that is available at the market price minus the loads being served in that load period. This calculation requires consistency between the time periods at which load levels are calculated and the time periods at which market prices are measured or estimated. City of New Bern, however, used the top 25 percent of hourly prices to determine supply availability, but continued to use loads assumed by Applicants, which are based on the average loads during all price levels in each period. Applicants state that City of New Bern should have either: (1) compared the highest 25 percent of loads for each period with the amount of generation that is economic at the highest 25 percent prices of that period; or (2) compared average loads for each period with supplies available at average prices for that period.[194]

---

[191] *Id.* at 41.

[192] *Id.* at 42. Applicants also reject City of New Bern's suggestion that the market price data is inconsistent with sales price data reported in Applicants' FERC Form No. 1 reports for 2010. Applicants explain that FERC Form No. 1 data is provided on an annualized basis and is not broken down into multiple load conditions. In addition, the FERC Form No. 1 data cited by City of New Bern includes other cost elements, such as capacity/demand charges and transmission payments. *Id.*

[193] *Id.* at 43.

[194] *Id.* at 44-45.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

87. Applicants also address several other criticisms raised by City of New Bern, but dismiss their validity because City of New Bern makes no effort to correct for the alleged deficiencies in its own Appendix A analysis. First, Applicants address City of New Bern's complaint that Applicants included generation capacity that should been excluded. While Applicants concede that some of the units they included in their Appendix A analysis should not have been included as potential AEC, Applicants note that City of New Bern is silent as to the impact of removing these units. Applicants state that there is "substantially more AEC located outside of the Carolinas with a price that is 105 [percent] or less of the market price – which is the standard established in the Commission's regulations – than there is import capacity in the Carolinas BAAs."[195] According to Applicants, there is more than enough capacity to replace all of the capacity City of New Bern questions without having any material impact on Applicants' market shares or the resulting HHI calculations.

88. Applicants next address City of New Bern's claim that Applicants included geographically remote units that do not make sales into the Carolinas. According to Applicants, this argument is based on a misapprehension of the purpose of the Delivered Price Test and constitutes a collateral attack on the Commission's merger regulations and precedent. Applicants state that in Order No. 642, the Commission stated that the purpose of the Delivered Price Test is to "'identify those participants whose generating capacity could discipline future price increases.'"[196] Applicants claim that City of New Bern's assertion that it is inappropriate to include potential suppliers that have never made sales into a market is also in error since in Order No. 642 the Commission explained that suppliers' ability to serve a market economically is better measured by the generating capacity they control than by historical sales. Applicants state that, consistent with Commission precedent, they limited their analysis of potential suppliers to those located within three wheels of the Carolinas markets.[197]

89. Applicants also address City of New Bern's complaint that Applicants used a near zero dispatch price for wind and hydro generation. Applicants state that City of New Bern fails to provide an alternative to Applicants' approach. According to

---

[195] *Id.* at 46.

[196] *Id.* at 47 (quoting Order No. 642, FERC Stats. & Regs. ¶ 31,111, *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289).

[197] *Id.* at 48-49 (citing *Ohio Edison Co.*, 80 FERC ¶ at 61,106 and *Inquiry Concerning the Commission's Policy on the Use of Computer Models in Merger Analysis* at 17, Docket No. PL98-6-000, Notice of Request for Comments and Intent to Convene a Technical Conference (Apr. 16, 1998)).

20110930-3067 FERC PDF (Unofficial) 09/30/2011

Applicants, dispatch prices are based on the incremental costs of running a unit, which costs consist primarily of the unit's fuel costs. Applicants explain that since wind and most hydro units do not have any fuel costs, their dispatch price will in fact be at or close to zero.[198]

90. With respect to City of New Bern's allegation that Applicants' *pro rata* transmission allocation methodology is inappropriate, Applicants respond that the Commission's regulations require that each supplier's EC and AEC be adjusted to reflect available transmission capability and that any transmission allocation approach used in an Appendix A analysis must be explained and supported.[199] Applicants state that City of New Bern does not explain what allocation methodology should be used and that it did not adjust the *pro rata* approach in its own Appendix A analysis. Applicants also reject City of New Bern's claims regarding the SIL studies and other transmission assumptions underlying Applicants' Appendix A analysis.[200] Applicants respond that the SIL studies they used were performed in accordance with the Commission's requirements and implicitly took loop flows from PJM into account. Applicants also state that the transmission constraints referred to in the Joint Dispatch Study were fully taken into account in Applicants' Appendix A analysis, and that they are not aware of any evidence, and City of New Bern has not cited any, that there are any binding transmission constraints located within any of the BAAs that would require separation of those BAAs into separate relevant geographic submarkets.[201]

91. Finally, Applicants argue that the Commission should reject City of New Bern's motion to consolidate the Merger Application, Joint OATT application, and JDA application into one proceeding and establish an evidentiary hearing. Applicants explain that while the filings are related, the Proposed Transaction is not conditioned on the

---

[198] *Id.* at 50-51.

[199] Applicants also note that the Commission has not required a specific transmission allocation approach in its merger regulations, but has noted that certain methods, including pro rata, provide more accurate and reasonable results than others. *Id.* at 51 (citing Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,894).

[200] *Id.* at 52-53.

[201] *Id.* at 53.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

Commission's approval of the JDA and Joint OATT.[202] Further, Applicants state that an evidentiary hearing is unnecessary because there are no material issues of fact.[203]

92. Applicants also respond to Evergreen Packaging's assertions that independent QFs may be adversely affected by the Proposed Transaction. According to Applicants, Evergreen Packaging points to no requirement in the Commission's merger regulations requiring an analysis of competition from QFs, nor does Evergreen Packaging present any reason for the Commission to conclude that such an analysis would show adverse effects on QF competition.[204] Applicants also explain that Evergreen Packaging's statement that the Proposed Transaction will eliminate Progress Energy Carolinas as a potential buyer of QF power is incorrect because both that company and Duke Energy Carolinas will continue to exist and fulfill their PURPA obligations. Applicants also reject Evergreen Packaging's concern that Duke Energy Carolinas' ownership of small QFs could result in discrimination against independent QFs. Applicants note that Duke Energy subsidiaries own QFs today and the Proposed Transaction will not change that fact.[205]

93. Finally, Applicants state that because EPSA does not address any specific merger-related harm, the Commission should reject the requested conditions.[206]

bb. Florida markets

94. Applicants also respond to FMPA's arguments that Applicants should be required to analyze the effects of the Proposed Transaction on Peninsular Florida, explaining that they followed the merger filing requirements contained in the Commission's regulations, and that no analysis of the Peninsular Florida market is required. Applicants reiterate that section 33.3(a)(2)[207] provides that a horizontal Competitive Analysis Screen need not be filed if the merger applicants demonstrate that the merging entities do not currently conduct business in the same geographic markets or that the extent of the business

---

[202] *Id.* at 68.

[203] *Id.* at 70.

[204] *Id.* at 55-56.

[205] *Id.* at 56.

[206] *Id.* at 55.

[207] 18 C.F.R. § 33.3(a)(2) (2011).

20110930-3067 FERC PDF (Unofficial) 09/30/2011

transactions in the same geographic market is *de minimis*.[208] Applicants state that Duke Energy does not own or control any generation capacity in Florida and has not sold or delivered any energy into Florida in the past three years. Based on these facts, Applicants conclude that they are not required to submit a horizontal market power analysis for Florida.[209] Applicants add that the "Florida" sales which FMPA refers to in its protest were not made in Florida, but rather in the Progress Energy Carolinas and Southern Company markets.[210] Applicants assert that even if the sales referenced by FMPA had been made in Florida, they would represent only 0.006 percent of total energy consumed in Florida in 2010, which Applicants submit would constitute a *de minimis* amount. Applicants also note that FMPA's assertion that Duke Energy has a presence in the Florida market is contradicted by its own market share analysis, which shows no such market presence in Florida. [211]

95. Applicants also argue that Duke Energy is not a potential competitor in Peninsular Florida because: (1) Duke Energy's generation facilities are located several wheels away from Florida; (2) import capacity into Florida is extremely limited; (3) Duke Energy's past efforts to compete in Florida ended when the Florida Supreme Court ruled that Duke Energy could not build a merchant plant in Florida; and (4) Duke Energy has not made any sales in Florida in the past three years.[212] Applicants state that the relevant issue is whether the Proposed Transaction might prevent the potential entry of a new competitor in the market. Applicants explain that no market power problems would result if Duke Energy were to enter the market as a result of the Proposed Transaction, and that such entry would actually be pro-competitive.[213] Applicants argue that FMPA has presented no evidence that Duke Energy might enter the Florida market absent the Proposed Transaction nor that the Proposed Transaction could prevent the future entry of Duke Energy into the Florida market.

96. According to Applicants, FMPA claims that, due to the lower dispatch price of Duke Energy's AEC as compared to the marginal generation costs in Florida,

---

[208] Applicants May 9 Answer at 7.

[209] *Id.* at 3.

[210] Applicants June 17 Answer at 7-8.

[211] *Id.* at 5-8.

[212] Applicants May 9 Answer at 5.

[213] *Id.* at 5.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

Duke Energy will attempt to import low-cost power into Florida after the Proposed Transaction is consummated.[214] Applicants claim that this assertion is essential to FMPA's contention that the Proposed Transaction will increase the Applicants' market share in Florida, because Duke Energy does not currently participate in the Florida market. Applicants argue, however, that the facts FMPA presents regarding relative costs and prices between the Carolinas and Florida are not "new" and do not change as a result of the Proposed Transaction. Applicants note that it is already the case that Duke Energy Carolinas' AEC has a lower dispatch price than marginal generation costs in Florida. Further, while FMPA asserts that there is currently a minimum of 645 MW of available monthly non-firm import capacity into Florida, and estimates that there is from 950 MW to almost 2,000 MW of off-peak hourly non-firm tie capacity,[215] Applicants note that FMPA bases this calculation on current conditions and does not claim that the calculation of import capacity changes as a result of the Proposed Transaction. Thus, Applicants argue that the only material change in circumstances caused by the Proposed Transaction is that Duke Energy will lose its ability to make market-based rate sales in Florida after the Proposed Transaction due to its affiliation with Progress Energy Florida. Applicants argue that this change makes it *less* likely that Duke Energy would make sales in Florida after the Proposed Transaction, because Duke Energy would be unable to take full advantage of selling its low-cost energy in Florida as compared to making sales in other markets where it retains its market-based rate authority.[216]

97. Applicants also note that Progress Energy already owns operating utilities in both Florida and the Carolinas, so it is in the same position that Duke Energy will be in if the Proposed Transaction is consummated. Yet, as Applicants note, Progress Energy Carolinas has made no sales of energy in Florida since 2003.[217] Additionally, Progress Energy Carolinas has made no sales of energy in Florida using the 50 MW firm transmission path into Florida that it contracted for in connection with the 1999 merger that formed Progress Energy. Applicants argue these facts support the conclusion that importing power into Florida is not a strategy that a similarly situated Duke Energy would likely pursue after the Proposed Transaction. Applicants refute FMPA's claim that Progress Energy Carolinas does not currently make sales into Florida only because it does not have capacity to sell. Applicants explain that Progress Energy Carolinas has 1,340 MW of AEC in the summer off-peak period, and lesser amounts of AEC available

---

[214] Applicants June 17 Answer at 11.

[215] *Id.*

[216] *Id.* at 11-12.

[217] *Id.* at 12.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

in six of the other nine periods.[218] According to Applicants, FMPA is mistaken that the mere fact of Duke Energy's affiliation with Progress Energy after the Proposed Transaction is consummated will lead to sales by Duke Energy into Florida.[219]

98. Applicants also reject FMPA's arguments regarding Duke Energy's use of Progress Energy Florida's contract rights to import capacity into Florida.[220] Applicants argue that FMPA contradicts itself by asserting that Duke Energy will be able to use a 438 MW entitlement to import capacity to sell into Peninsular Florida, but then testifying that Progress Energy Florida uses its entitlement to import 412 MW of firm power from Southern Company under a contract that remains in effect through 2015. Applicants explain that this contract leaves 26 MW available to third parties for imports if the Proposed Transaction is consummated. If Progress Energy Florida exercises its right to terminate its contract with Southern Company, as FMPA speculates, then, to the extent that Progress Energy Florida were simply to substitute a purchase of power from Duke Energy for a purchase from Southern Company, that would not increase the Applicants' combined market share in Florida.[221] Applicants reason that their market share in Florida would not increase because Progress Energy Florida's purchase from Southern Company would have to be subtracted from its market share before the purchase from Duke Energy was added. Applicants add that the Commission should also reject FMPA's assertion that Duke Energy could use Progress Energy's 412 MW of import capacity on a non-firm basis in those hours when Progress Energy is not using it to import power purchased from the Southern Company. Applicants argue that this approach would simply involve substitution of power imported from Duke Energy for power Progress Energy Florida purchases from Southern Company.[222]

---

[218] *Id.* at 12-13. In Applicants May 9 Answer, Applicants also state that while Duke Energy Carolinas and Progress Energy Carolinas proposed to enter into the JDA, Progress Energy Florida is not part of that agreement. Applicants note that Progress Energy Florida's non-participation in that agreement is not surprising, given that Progress Energy has not integrated the generation and loads of Progress Energy Carolinas and Progress Energy Florida. Applicants conclude that FMPA's assertion of integration is thus purely speculative. Applicants May 9 Answer at 6.

[219] Applicants June 17 Answer at 13.

[220] *Id.* at 13-14.

[221] Applicants state that, in any case, any such sale would be an affiliate transaction subject to various state and federal reviews. *Id.* at 13-14.

[222] *Id.* at 14.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

99. Applicants also respond to FMPA's market analysis of the Florida markets, asserting that the analysis is unreliable and rests on flawed assumptions.[223] According to Applicants, the flawed analysis yields inflated market shares. Applicants challenge FMPA's AEC calculations, contending that FMPA did not make any real attempt to measure market participants' AEC, but instead assumed, without justification, that each Florida entity's peak AEC is equal to the amount by which its generation capacity exceeds its peak load plus a twenty percent reserve margin, and that its off-peak AEC is 10 percent higher than its peak AEC. Applicants contend that because FMPA's market shares are unreliable, the market analysis results are similarly unreliable.

100. Applicants also contend that FMPA failed to properly account for existing firm transmission entitlements. Applicants note that FMPA assumes that 1,000 MW of import capability is available to Duke Energy when, as FMPA testifies, there is actually only 184 MW of import capacity into Florida that is not already subject to firm reservations.[224] Applicants also argue that FMPA "double counts" imports into Florida. According to Applicants, FMPA's calculation of non-firm hourly transmission capacity is based on the argument that where Progress Energy Florida and FPL do not fully use their allocated transmission import capability, such unused capacity must be offered to transmission customers under their respective OATTs.[225] Applicants point out, however, that when Progress Energy Florida and FPL *do* use their capacity, it is not available to third parties. Applicants explain that although these two situations are mutually exclusive, FMPA's calculation of AEC for Progress Energy Florida and FPL assigns all but 184 MW of Florida intertie capacity in determining their market shares, but also assumes that there is 1,000 MW of import capacity available and allocates all of that amount to Duke Energy.[226] Applicants state that this double counting is inappropriate.

101. Applicants also allege that FMPA erred by failing to consider all capacity that is located in a market and that can be imported into that market at 105 percent of the market price applicable under the relevant load condition. Applicants contend that FMPA made no attempt to determine what capacity located outside of Florida could be economically delivered into the Florida market, or to allocate the available Florida intertie capacity among the various owners of that capacity. Instead, FMPA assigns all of the assumed

---

[223] *Id.* at 15-16.

[224] *Id.* at 17 (citing FMPA Protest, Exhibit C, Affidavit of Francis P. Gaffney (Gaffney Aff.) at 6).

[225] *Id.* at 18 (*quoting* FMPA Protest, Exhibit C, Gaffney Aff. at P 7).

[226] *Id.* at 18-19.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

(and overstated) Florida intertie import capacity to Duke Energy and none to any other potential competitors.[227] Applicants argue that FMPA's Florida market study also fails to include any potential suppliers that are located inside Florida. FMPA's analysis shows that FPL has 1,739 MW of AEC available in peak periods and 1,913 MW of AEC available in the off-peak, and Tampa Electric Company has 255 MW and 281 MW, respectively, during these periods. Applicants contend that FMPA omitted this capacity, which omission clearly violates the Commission's requirement that all potential suppliers to a market be considered in a Competitive Analysis Screen.[228]

102. In response to these deficiencies, Applicants provide a corrected version of FMPA's Florida market study. The study uses all of FMPA's assumptions, except that it reduces the amount of available import capacity into Florida to 184 MW, and reduces Duke Energy's share of the 184 MW import capacity to a *pro rata* share of all potential suppliers. Applicants state that when the Florida analysis is performed consistent with the Commission's regulations, the increase in HHI is only 3 points, which does not represent a screen violation regardless of the market concentration level.[229] Applicants submit the corrected analysis not because such an analysis is required, but to correct the inaccurate and misleading analysis presented by FMPA, and to confirm that Duke Energy is not a competitor in Florida.[230]

103. With respect to FMPA's argument regarding the threat to competition posed by the Proposed Transaction to long-term markets, Applicants argue that the Commission's stance on the competitiveness of long-term markets does not depend on the competitiveness of short-term markets.[231] Applicants explain that the Commission has

---

[227] *Id.* at 19-20. Applicants dispute FMPA's contention that it did not have access to all the data necessary to perform a Florida Competitive Analysis Screen. Applicants state that the workpapers they filed as part of the Merger Application to support their Appendix A analysis of the Carolina markets included a database showing all generation in the Eastern Interconnection as well as all other information necessary to identify potential suppliers into the Florida market. Applicants argue that there is no basis for FMPA to have included only Duke Energy, and no other potential supplier, in its analysis, other than to deliberately overstate Applicants' Florida market share. *Id.* at 20-21.

[228] *Id.* at 21.

[229] *Id.* at 24.

[230] *Id.* at 23-24.

[231] *Id.* at 25-26.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

stated that "after examining generation dominance in many different cases over the years, we have yet to find an instance of generation dominance in long-run bulk power markets."[232] Applicants contend that since the time of that pronouncement, the Commission has reviewed many merger transactions, including mergers that involved highly concentrated markets, and has not reversed this presumption and found a merger to have any adverse effect on competition in long-term capacity markets.[233] Applicants add that, in any event, the Proposed Transaction cannot adversely affect competition in long-term capacity markets in Florida because Duke Energy owns no capacity in Florida. Applicants conclude that the Proposed Transaction will not affect long-term capacity markets in Florida, and that any of the deficiencies asserted by FMPA to exist in the Florida long-term capacity market are unaffected by the Proposed Transaction.

104. Applicants also argue that the Commission should reject the conditions requested by FMPA. According to Applicants, the proposed conditions are nothing more than a wish list of items that would confer considerable benefits to FMPA. Applicants claim that the Proposed Transaction does not cause any competitive harm that requires any mitigation, and no conditions of any sort should be imposed by the Commission.[234]

105. Applicants also respond to the issues raised by the Orlando Commission and City of Tallahassee. Applicants urge the Commission to reject the conditions proposed by the Orlando Commission because they are not required to address any identified merger-related harm, and the concerns they would ostensibly address are unrelated to the Proposed Transaction.[235] Applicants assert that there is no basis for assuming that Duke Energy will use the Florida intertie to any greater extent than at present or that the Proposed Transaction will otherwise increase the Applicants' market power in Florida.[236] Applicants also explain that the Proposed Transaction will not affect Progress Energy Florida's existing transmission system improvement obligations, nor will it change Progress Energy Florida's obligations with respect to the Crystal River unit. Applicants likewise urge the Commission to reject the conditions requested by City of Tallahassee. Applicants argue that there is no evidence to support City of Tallahassee's assertion that the Proposed Transaction will result in increased imports of power into Florida, and that

---

[232] *Id.* (*quoting* Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,629, n.86).

[233] *Id.* at 26.

[234] *Id.* at 27.

[235] *Id.* at 28.

[236] *Id.* 27-28.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

the city's loop flow concerns appear to be based on existing conditions which are unrelated to and will not be affected by the Proposed Transaction.[237] Applicants state that City of Tallahassee presents no evidence to explain its assertion that the merged company will have an "incentive to integrate its various generation resources."[238] Applicants argue that they should not be required to address the issues raised by City of Tallahassee, and that the Commission should not condition approval of the Proposed Transaction as requested.[239]

iv. Additional Answers and Responsive Pleadings

aa. Pleadings related to the Carolina markets

106. City of New Bern alleges that the disputes between it and Applicants demonstrate that it has raised genuine issues of material fact requiring an evidentiary hearing.[240] City of New Bern challenges Applicants' claim that it treated the transmission interface between the Duke Energy Carolinas and Progress Energy Carolinas BAAs incorrectly, alleging that Applicants will be able to use the JDA to bypass OATT reservation processes in the near term. City of New Bern also claims that Applicants have indicated their plan to integrate the two companies in the long-term, and that the Commission should not ignore this future integration and the internalization of interface capacity in evaluating the Proposed Transaction.[241] City of New Bern also alleges that Applicants fail to meet the criteria established in Order No. 642 regarding internalization.[242]

---

[237] *Id.* at 29.

[238] *Id.* (*quoting* City of Tallahassee Comments at 7).

[239] *Id.* at 29.

[240] Motion of the Cities of New Bern and Rocky Mount, North Carolina for Leave to Respond, and Proposed Response, to Applicants' Answer to Protest, Docket No. EC11-60-000, ER11-3306-000, ER11-3307-000 (Jul. 1, 2011) (City of New Bern July 1 Answer).

[241] *Id.* at 7-8.

[242] City of New Bern cites Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,894, which states that it would be inappropriate for applicants to allocate to competing suppliers unreserved capability over interfaces internal to the merged company unless the applicants demonstrate that: (1) the merged company would not have adequate economic generating capacity to use the interface capability fully; (2) applicants have committed

(continued…)

20110930-3067 FERC PDF (Unofficial) 09/30/2011

107. City of New Bern also defends the clearing prices used in its Appendix A. With respect to Applicants' explanation for using generation outside of the Carolinas BAAs, City of New Bern states that it only provided illustrative examples of the types of units that should have been excluded from Applicants' Appendix A analysis. Without being able to identify and eliminate each unrealistic source of supply, rerunning an Appendix A analysis would not have been useful.[243] City of New Bern also points out that while the Commission's regulations do not specify a geographic range over which each potential supplier's presence must be measured, those regulations do require the submission of actual trading data to corroborate the suppliers identified and the extent of their participation.[244] City of New Bern also states that Applicants' response to its challenge regarding the zero dispatch cost assumption ignores City of New Bern's primary point, that wind and hydro resources are typically under long-term contract.[245] City of New Bern also rejects Applicants' response to the city's criticisms regarding transmission system issues. City of New Bern complains that the SIL studies Applicants rely on are not part of the Merger Application,[246] and that Applicants have failed to provide meaningful information regarding the limitations of their transmission system.[247]

108. Evergreen Packaging respond to Applicants June 17 Answer, explaining that it did not request an analysis of the effect of the merger on independent QF competition because such analysis is required by the Commission's regulation, but because such analysis is relevant to the Commission's statutory obligation to determine whether the Proposed Transaction is consistent with the public interest "where Applicants do not propose to allow QFs to sell power into an organized competitive wholesale market."[248]

---

that the portion of the interface capability allocated to third parties actually will in fact be available to such parties; or (3) alternate suppliers have purchased the transmission capability on a long-term basis. *Id.* at 9.

[243] *Id.* at 11.

[244] *Id.* at 12.

[245] *Id.* at 13.

[246] *Id.* at 14.

[247] *Id.* at 15-16. City of New Bern alleges, for example, that Applicants have presented no evidence or information regarding whether there are binding transmission constraints within any of the BAAs. *Id.* at 16.

[248] Reply to Answer of Duke Energy Corporation and Progress Energy, Inc. and Motion for Leave to File of Blue Ridge Paper Products, Inc. d/b/a Evergreen Packaging

(continued…)

20110930-3067 FERC PDF (Unofficial) 09/30/2011

Evergreen Packaging states that while it is aware that Progress Energy Carolinas and Duke Energy Carolinas will continue to exist as operating utility companies, it is concerned that the companies' policy regarding purchasing power from independent QFs will be dictated by Duke Energy Carolinas, which has an incentive to discriminate against independent QFs, because, through its subsidiaries, it is engaged in the QF business.[249]

109. Applicants respond to City of New Bern's assertions regarding the internalization of the Duke Energy Carolinas-Progress Energy Carolinas interface.[250] First, Applicants state that City of New Bern's claim that the JDA will allow Applicants to bypass the OATT reservation processes is unsupported and that Applicants have made clear that they will not bypass the OATT requirements in implementing the JDA.[251] Second, Applicants state that their plans to integrate operations in the longer term is irrelevant since the Applicants are not, as part of the Proposed Transaction, proposing to integrate their operations in any way that will cause the interfaces to be internalized.[252] Applicants also challenge City of New Bern's statement that in performing its Appendix A analysis it followed the Commission's preference for using observed pricing data. Applicants note that City of New Bern explicitly stated that it used projected market clearing prices. In addition, Applicants clarify that, contrary to City of New Bern's explanation, the requirement to submit trading data does not apply to third party transactions by other suppliers in the same market, but to sales and purchases in which applicants participated in the most recent two years.[253] Finally, Applicants dispute City of New Bern's claim that Applicants did not provide adequate support for the transmission assumptions in their Appendix A analysis.

110. City of New Bern responded to Applicants August 29 Answer, contending that the EQR prices Applicants use in the August 29 DPT are "unrepresentative of actual

---

at 2, Docket No. EC11-60-000, ER11-3306-000, ER11-3307-000 (not consolidated) (Jul. 8, 2011) (Evergreen Packaging July 8 Answer).

[249] *Id.* at 4.

[250] Answer of Duke Energy Corporation and Progress Energy, Inc., Docket No. EC11-60-000, ER11-3306-000, ER11-3307-000 (not consolidated) (July 7, 2011) (Applicants July 7 Answer).

[251] *Id.* at 7.

[252] *Id.* at 6-7.

[253] *Id.* at 9.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

Carolina market pricing."[254] City of New Bern calculates a new series of corrected market clearing prices from the Duke Energy and Progress Energy FERC Form No. 1 Annual Reports and, using these new prices, provides "tables summarizing the HHI changes and screen failures that would have resulted" had Applicants used City of New Bern's corrected market clearing prices. City of New Bern claims that these tables show that there are screen failures in eight of the 10 seasons/load periods in the Duke Energy Carolinas and Progress Energy Carolinas-East BAAs, and in five periods for the Progress Energy Carolinas-West BAA.[255] City of New Bern also states that Applicants' analysis providing the location of the top ten suppliers in each season/load period is insufficient and that they should identify individual generating units presumed to discipline post-merger price increases.[256]

111. Applicants filed an answer to the City of New Bern September 6 Response.[257] Applicants reject City of New Bern's reliance on FERC Form No. 1 data to evaluate Applicants' EQR-based analysis. Applicants explain that the FERC Form No. 1 data relied on by City of New Bern is not limited to sales within the relevant BAA, and thus is not responsive to the directive in the Request for Additional Information that Applicants provide an analysis based on EQR data for sales in their own BAAs.[258] Applicants state that City of New Bern's inclusion of sales made in BAAs outside of the Carolinas yields calculated market prices that are not representative of market prices in the Carolinas. Finally, Applicants state that any price data used in a competitive screen analysis must be adjusted for the fact that gas prices have decreased since 2009-2010 (the years of the relevant EQR data).[259]

---

[254] City of New Bern September 6 Response at 5.

[255] *Id.* at 10.

[256] *Id.* at 14.

[257] Answer of Duke Energy Corporation and Progress Energy, Inc., Docket No. EC11-60-000 (Sept. 14, 2011) (Applicants September 14 Answer).

[258] *Id.* at 2.

[259] Applicants explain that this adjustment is "necessary to make the market prices in the competition analysis consistent with the 2012 fuel cost estimates used to set the dispatch costs for determining which generation is economic in a particular load period." *Id.* at 4.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

bb. Pleadings related to the Florida markets

112. FMPA reiterates its argument that a hearing regarding the effects of the Proposed Transaction is necessary,[260] and that the long-term impacts of the Proposed Transaction on Florida must be evaluated.[261] FMPA asserts that Applicants' focus on the Commission's requirements ignores the fact that the Commission must conduct a fact-specific inquiry into each merger.[262] FMPA states that it is willing to presume that the sales it previously alleged were made in Florida were actually made in the Carolina or Southern Company markets, but that there is missing data regarding these sales, which shows that a factual investigation is required.[263] FMPA also rejects Applicants' criticism of its Appendix A analysis for Florida. FMPA states that Applicants' critique of the double counting issue assumes that "previously committed tie capacity is *never* available, even though in off-peak and shoulder periods it clearly is."[264] FMPA alleges that Applicants ignore Duke Energy's ability to use off-peak capacity that is available and Progress Energy Carolina's tie capacity, which will be available to the merged company after the Proposed Transaction. According to FMPA, adequate future capacity and energy cannot be expected due to the barriers to the transmission of power and to the construction of new Florida generation.

113. Applicants respond that FMPA concedes that Duke Energy does not compete to make sales in Florida. According to Applicants, this admission undermines FMPA's line of argument because the Commission's focus in merger proceedings is on whether a merger will materially increase the applicants' market power in a relevant market, not whether one of the applicants already possesses market power in that market.[265]

---

[260] FMPA Reply to Answer of Duke Energy Corporation and Progress Energy, Inc. and Motion for Leave to File, Docket No. EC11-60-000, ER11-3306-000, ER11-3307-000 (not consolidated) (Jul. 1, 2011) (FMPA July 1 Answer).

[261] *Id.* at 19.

[262] *Id.* at 8.

[263] *Id.* at 12.

[264] *Id.* at 14 (emphasis in original).

[265] Applicants July 7 Answer at 2. Applicants note that in the Merger Policy Statement the Commission noted that in cases where the firms merging do not have facilities or sell relevant products in common geographic markets, the proposed merger

(continued…)

20110930-3067 FERC PDF (Unofficial) 09/30/2011

Applicants state that they have demonstrated that Duke Energy is not a competitor in the Florida markets and is not a potential competitor in those markets absent the Proposed Transaction.[266] Finally, Applicants claim that FMPA did not contest or address the flaws that Applicants demonstrated exist in FMPA's Appendix A analysis for Florida.

114. FMPA rejects Applicants' claim that FMPA conceded that Duke Energy does not compete to make sales in Florida.[267] FMPA explains that its answer pointed out a discrepancy in Applicants' pleadings, which show sales to Progress Energy Florida while tag data, which possibly does not represent the entire transaction, shows transfers to Progress Energy Carolina or Southern Company. FMPA states that Applicants have still failed to answer why the Commission should approve a transaction which would perpetuate the existence of severe market power in Florida from which Applicants hope to gain advantage.[268]

115. The North Carolina Consumer Agencies argue that the Commission should reject FMPA's request that the Commission impose a condition requiring Applicants to sell at system-average cost-based rates.[269] According to the North Carolina Consumer Agencies, FMPA provides no justification, nor does any exist, to require Duke Energy Carolinas or Progress Energy Carolinas to sell at system average pricing to non-native load customers. FMPA responds to the North Carolina Consumer Agencies, explaining that it requested the system average cost condition to mitigate Applicants' market power and arguing that North Carolina's "attempt to reserve Duke-Progress economic wholesale

---

will not have an adverse competitive impact because there can be no increase in the applicants' market power unless they are selling in the same market. *Id.* at 2-3 (citing Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,118 (1996)).

[266] *Id.* at 3.

[267] FMPA Reply to July 7, 2011 Answer of Duke Energy Corporation and Progress Energy, Inc. and Motion for Leave to File at 1, Docket Nos. EC11-60-000, ER11-3306-000, ER11-3307-000 (not consolidated) (Jul. 12, 2011) (FPMA July 12 Answer).

[268] *Id.* at 3.

[269] North Carolinas Consumer Agencies July 13 Answer at 13.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

power for 'their' customers by offsetting prices allowed by this Commission is clearly illegal and unjustified."[270]

116. FMPA responded to Applicants August 29 Answer.[271] FMPA maintains that they have demonstrated that Progress Energy has market power in Florida and that while Applicants August 29 Answer addresses the questions raised by Commission staff, Applicants still have failed to provide an analysis of the Proposed Transaction's potential impacts on already constrained Florida markets. FMPA reiterates that the Proposed Transaction cannot be approved without careful consideration of the competitiveness of the Florida market.[272]

v. Commission Determination

aa. Carolina Markets

117. We find that, based on the record in this proceeding, Applicants have not shown that the Proposed Transaction will not have an adverse effect on horizontal competition in the Duke Energy Carolinas BAA and the Progress Energy Carolinas-East BAA. We will, however, afford Applicants the opportunity to propose measures to remedy the screen failures identified below. This approach is consistent with the Merger Policy Statement, where the Commission noted that the merger guidelines "contemplate using remedies to mitigate any harm to competition."[273] The Commission explained that "[t]here will be mergers where, at the end of an analysis, market power concerns persist but that could be made acceptable with measures to mitigate potential market power problems.".[274] We stated that proposing mitigation measures could "avoid the need for a

[270] FMPA Reply to Answer of the Public Staff-North Carolina Utilities Commission and the Attorney General of the State of North Carolina and Motion for Leave to File at 2, Docket Nos. EC11-60-000, ER11-3306-000, ER11-3307-000 (not consolidated) (July 26, 2011).

[271] FMPA Comments to August 29, 2011 Duke Energy Corporation and Progress Energy, Inc.'s Filing of Additional Information Regarding their Application for Approval of their Proposed Merger, Docket No. EC11-60-000 (Sept. 6, 2011).

[272] *Id.* at 2.

[273] Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,118.

[274] *Id.*

20110930-3067 FERC PDF (Unofficial) 09/30/2011

formal hearing on competition issues and thus result in a quicker decision."[275] Accordingly, we conditionally authorize the Proposed Transaction and provide Applicants with 60 days to propose mitigation measures to address the anticompetitive effects of the Proposed Transaction and give intervenors 30 days to comment on Applicants' proposals. After analyzing these new submissions and comments, the Commission will make a finding as to whether the proposed mitigation measures remedy the screen failures identified below and determine what further steps, if any, are necessary. We note that mitigation measures could include, but not be limited to, joining or forming an RTO, implementation of an ICT arrangement,[276] generation divestiture, virtual divestiture,[277] and proposals to build new transmission to provide greater access to third-party suppliers. Regardless of what mitigation Applicants propose, such mitigation should be sufficient to reduce the HHI changes resulting from the Proposed Transaction to no more than a 50 point increase for highly concentrated markets, and no more than a 100 point increase for moderately concentrated markets. The Commission will review any such proposal to ensure that the Proposed Transaction, as mitigated, will not result in an adverse effect on competition and is consistent with the public interest.

118. We begin our analysis by explaining that every Delivered Price Test should address three scenarios: the base case, in which applicants should use appropriate forecasted market prices to model post-merger competition in the study area, and sensitivity analyses of the base case that measure the effect of increasing or decreasing the market prices relative to the base case. [278] Each scenario is examined over 10

---

[275] *Id.*

[276] *See, e.g.*, *Entergy Services Inc.*, 115 FERC ¶ 61,095 (ICT Order), *order on reh'g*, 116 FERC ¶ 61,275, *order on compliance*, 117 FERC ¶ 61,055 (2006), *order on clarification*, 119 FERC ¶ 61,013 (2007).

[277] Virtual divestiture refers to transactions in which a generation owner sells rights or entitlements to all or a portion of a generating plant's output, rather than selling the generating plant outright.

[278] The Commission's regulations state: "The applicant must provide, for each relevant product and destination market, market prices for the most recent two years. … Applicants must demonstrate that the results of the analysis do not vary significantly in response to small variations in actual and/or estimated prices." 18 C.F.R § 33.3(d)(6) (2011).

20110930-3067 FERC PDF (Unofficial) 09/30/2011

seasons/load periods,[279] which, in this case, Applicants have labeled summer super-peak 1, summer super-peak 2, summer peak, summer off-peak, winter super-peak, winter peak, winter off-peak, shoulder super-peak, shoulder peak, and shoulder off-peak.

Use of EQR Prices

119. In this proceeding, Applicants studied the Duke Energy Carolinas BAA, and the Progress Energy Carolinas-East and Progress Energy Carolinas-West BAAs.[280] Applicants submitted two different Delivered Price Tests based on two different sets of proposed prices. As mentioned above, as part of the Merger Application, Applicants submitted a Delivered Price Test based on system lambda, Merger Application DPT; as part of Applicants August 29 Answer, Applicants submitted a Delivered Price Test based on EQR data, August 29 DPT. In addition, Applicants submitted tables identifying the top 10 sellers in each season/load period, the supply each top 10 seller contributed, and the source BAA of that supply, all based on system lambda.[281] While the Delivered Price Tests differ with respect to the source of their forecasted 2011 prices, Applicants adjusted both the system lambda and EQR prices by a common natural gas price forecast.

120. As the Commission has explained, system lambda, as reported on FERC Form No. 714, reflects the system incremental fuel cost of the least-cost dispatch of thermal units located in a BAA.[282] In other words, system lambda is the utility's cost to produce

---

[279] *See AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 at 61,087, Appendix F (2004) (setting out 10 seasons/load periods in staff summary regarding steps in the Delivered Price Test). *See also* Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,130 ("Applicants should present separate analyses for each of the major periods when supply and demand conditions are similar. One way to do this it to group together the hours when supply and demand conditions are similar; for example, peak, shoulder, and off-peak hours.").

[280] As explained elsewhere in this order, Applicants did not study the Peninsular Florida market because, pursuant to the Commission's regulations, a horizontal Competitive Analysis Screen is not necessary where applicants show that the merging entities "do not currently conduct business in the same geographic markets or that the extent of the business transactions in the same geographic market is *de minimis*," and Duke Energy and Progress Energy do not both conduct business in the Peninsular Florida market.

[281] *See* Applicants August 29 Answer.

[282] *See Duke Power*, 111 FERC ¶ 61,506, at P 31 (2005) (*Duke Power*).

20110930-3067 FERC PDF (Unofficial) 09/30/2011

or purchase an additional unit of output in a BAA in each hour.[283] Delivered Price Tests based on system lambda thus use system lambda as a proxy for market prices.

121. The Commission, however, prefers the use of actual market prices rather than price proxies such as system lambda. The Commission's preference for the use of actual market prices rather than proxies or estimates was established in the Merger Policy Statement. At the time, the Commission noted that electricity markets were not sufficiently mature to exhibit single market clearing prices for products and that "price discovery is difficult because the reporting of actual transaction prices is still in its formative stage."[284] The Commission explained that until market institutions were mature enough to reveal single market clearing prices, applicants could use "surrogate measures" as long as those measures were properly supported. The Commission anticipated that in the future it would "rely more on actual transaction prices because they will be more available as market institutions such as ISOs and power exchanges produce this information and because they are a better measure of market boundaries."[285]

122. The Commission continued this line of reasoning in Order No. 642, where it noted that while the availability of price data has increased, there will be instances where actual price data may be limited or unavailable.[286] The Commission explained that it was "open to the use of estimated prices, provided that they are accurate representations of prevailing market conditions."[287] Further, the accuracy of such prices must be supported by available data. Given the importance of prices to the outcome of a Delivered Price Test, the Commission stated that it would also require applicants to "perform sensitivity analysis of alternative prices on the predicted competitive effects."[288]

123. In describing how to perform the horizontal Competitive Analysis Screen, the Commission's regulations clearly state that applicants "must provide, for each relevant

---

[283] System lambda represents the variable cost of the last kilowatt produced over a particular hour of a generator's dispatchable units. *See Oklahoma Gas and Electric Company*, 124 FERC ¶ 61,239, at n.19 (2008). System lambda is closely associated with the marginal cost of producing electricity.

[284] Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,131.

[285] Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,136.

[286] Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,892.

[287] Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,892.

[288] Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,892.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

product and destination market, market prices for the most recent two years."[289] The regulations explain that "[t]he applicant may provide suitable proxies for the market price *if actual market prices are unavailable*."[290] The Commission confirmed its preference for using actual market prices in *Duke Power*, 111 FERC ¶ 61,506 (2005) where, citing its regulations, the Commission rejected the use of system lambda where actual prices were available from EQR data. In that case, the Commission concluded that where actual energy prices are available from EQR data, those market prices better reflect actual energy prices than does the use of system lambda as a proxy.[291]

124. Accordingly, the Commission's analysis focuses on the results of the August 29 DPT, which is based on actual market prices, *i.e.* EQR data. This study measures AEC and assumes no rate pancaking because the AEC measure is more appropriate for markets where there is no retail competition and no indication that retail competition will be implemented in the near future,[292] and because the proposed Joint OATT will, if approved, eliminate any potential transmission rate pancaking.[293]

125. Although Applicants created a price series for the August 29 DPT from the last two years of EQR data, 2009 and 2010, they argue that the EQR database reflects a limited dataset of prices because it contains limited short-term, hourly transactions.[294] Applicants further state that hourly price observations from the EQR database for the Duke Energy Carolinas and Progress Energy Carolinas-East BAAs in 2010 account for only approximately half of the hours in that year. With respect to the 2009 data, Applicants state that the EQR data for the Duke Energy Carolinas BAA reflects

---

[289] 18 C.F.R. § 33.3(d)(6) (2011).

[290] 18 C.F.R. § 33.3(d)(6) (2011) (emphasis added).

[291] *Duke Power*, 111 FERC ¶ 61,506 at P 31.

[292] *See, e.g.*, *Great Plains*, 121 FERC ¶ 61,069 at P 34 & n.44, *reh'g denied*, 122 FERC ¶ 61,177 (2008); *Nat'l Grid, plc.,* 117 FERC ¶ 61,080 at P 27-28, *reh'g denied,* 122 FERC ¶ 61,096; *Westar Energy, Inc.,* 115 FERC ¶ 61,228 at P 72, *reh'g denied,* 117 FERC ¶ 61,011 at P 39; *Nev. Power Co.*, 113 FERC ¶ 61,265 at P 15.

[293] Merger Application at 13. As explained in Order No. 642, merger analyses should be as forward-looking as practicable. Order No. 642, ¶ 31,111 at 31,887.

[294] Applicants August 29 Answer at 6.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

observations for essentially all hours, but for only approximately twenty percent of all hours for the Progress Energy Carolinas-East BAA.[295]

126. We believe that Applicants' assertion that the EQR data provides only partial coverage of wholesale sales in the Duke Energy Carolinas and Progress Energy Carolinas-East BAAs does not undermine our reliance on that data because it is sufficient to provide a reasonable estimate of market prices. In this case, the volume of transactions is sufficiently large to be statistically reliable. Applicants understate the coverage of the EQR price data. Consider that there are 8,760 hours per year, and those hours are aggregated into the 10 seasons/load periods. While it is true that, based on the information submitted by Applicants, EQR transactions do not exist for *every hour* in every season/load period, we believe that there are a sufficient number of EQR transactions in *every season/load period* to calculate an EQR price that is sufficiently robust. We note that the Delivered Price Test "collects" the individual hours in a year into representative segments with similar system conditions (load, transmission availability, generation costs and weather). Accordingly, the focus should be on whether there is sufficient coverage of transactional data for each season/load period, and not on each individual hour within a season/load period. Thus, even if a particular hour of the year has no transactions, many of the other hours in the season/load period to which that hour belongs have transactions and many include multiple transactions per hour. For example, for 2010, Applicants' data shows that for the Duke Energy Carolinas BAA, in the summer super-peak 2 season/load period there were 77 hours with EQR observations which were used to compute a weighted average market price for that season/load period.[296] Similarly, for the summer peak season/load period, there were 632 hours with EQR observations used to compute a weighted average market price for that season/load period.We also note that Applicants have filed EQR data for not one, but two years, which provides an even greater number of EQR prices for each of the 10 seasons/load periods. Thus, we conclude that the EQR price data provides a sufficient number of observations for each season/load period.

127. Applicants and City of New Bern both also dispute the appropriate level and source of market prices. Applicants claim that assuming that EQR data properly measures competitive market price levels does not mean that suppliers would offer to sell at those prices. Applicants explain that trade generally occurs only if a seller achieves

---

[295] *Id.* Applicants use 2009 EQR data and 2010 EQR data, separately, as the primary basis for their forecasted prices for 2011 and then average these two sets to create the forecasted price used in the August 29 DPT.

[296] *See* Applicants August 29 Answer, "EQR Price Summary 2010" worksheet in "Response to Question 2 (EQR Data and Price Derivation).XLSX" spreadsheet.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

some level of profit margin (i.e., "hurdle rate"), so available supplies likely to be in the market are limited to those that are fractionally cheaper than the market price.[297] Applicants thus assert that the August 29 DPT sensitivity analysis with a 10 percent price decrease is the most appropriate of the EQR-based analyses. In contrast, City of New Bern claims that Applicants presume unrealistically low market prices to define cutoff points for EC in the Merger Application DPT. City of New Bern argues that Applicants have selected dispatch prices, based on system lambda, in each season/load period that are well below the projected market clearing prices[298] and far below their own actual historical wholesale prices.

128. Since the results of any Delivered Price Test depend on the assumed market price, the Commission has fully considered all of the analyses provided, including base cases and sensitivities. As explained above, Applicants should not use dispatch prices based on system lambda when actual historical wholesale prices are available for price forecasts, and thus we agree with City of New Bern on this point. Specifically, as noted above, under the Commission's regulations and precedent, the optimal way to select the price for a Delivered Price Test is to use actual market prices, by using EQR data, for example, when they are available. While system lambda may differ from actual market prices, EQR data is based on actual market transactions and prices. In fact, the Commission has previously found, in an order regarding the Duke Energy Carolinas BAA, that actual prices, such as EQRs, when available, should be used rather than system lambda.[299]

---

[297] Applicants August 29 Answer at 6.

[298] "Applicants contend that their available economic capacity analysis indicates that the merger may be expected to have virtually no competitive impact in the short run if one relies exclusively on 'available' economic capacity data. They are able to make that argument only by assuming that Progress Energy has no available economic capacity in the Carolinas prior to the merger, and therefore, its merger with [Duke Energy] cannot possibly increase concentration – adding zero adds nothing. This contention is wrong. Its premise, that [Progress Energy] has no AEC, relies on exceedingly low market price assumptions (well below the Applicants' own reported historic prices and below the projected 2012 market clearing prices in their filing) that artificially understate Progress Energy's economic capacity." City of New Bern Protest, Exhibit NCC-1, Wilson Aff. at P 27.

[299] *Duke Power*, 111 FERC ¶ 61,506 at p 31 (2005) (*Duke Power*). As in *Duke Power*, the system lambda price proxies used by Applicants are generally below the EQR prices.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

129. Specifically, in the *Duke Power* proceeding, which concerned Duke Power's market-based rate authority and updated market power analysis, Duke Power submitted a Delivered Price Test analysis using two separate sets of proposed prices: system lambda proxy prices and a range of market prices submitted to "'reflect the full range of market and load conditions' as the 'range of [system lambda proxy] prices would have been very limited.'"[300] The Commission considered the Delivered Price Test results for only the range of market prices that Duke Power had submitted, and not the results using the system lambda price proxies, because the range of market prices submitted by Duke Power "better reflects these actual wholesale energy prices for 2003 and 2004 than does the use of system lambda as a proxy."[301] We note that there, as here, the system lambda price proxies were generally lower than the actual market prices. In the *Duke Power* proceeding, Duke Power's system lambda price proxies were lower than the "market price" in nine out of 10 seasons/load periods by an average of 49 percent.[302] In the current case, the system lambda price proxies are lower than the EQR prices in seven out of the 10 seasons/load periods, by an average of 17.6 percent.[303]

DPT Results for Carolina Markets

130. The Commission's Merger Policy Statement establishes three ranges of post-merger market concentration. First, in an unconcentrated post-merger market, if the post-merger HHI is below 1,000, regardless of the change in HHI the merger is unlikely to have adverse competitive effects. Second, in a moderately concentrated post-merger market, if the post-merger HHI ranges from 1,000 to 1,800 and the change in HHI is greater than 100, the merger potentially raises significant competitive concerns. Third, in a highly concentrated post-merger market, if the post-merger HHI exceeds 1,800 and the

[300] *Duke Power*, 111 FERC ¶ 61,506 at P 30 (quoting *Compliance Filing of Duke Power, a Division of Duke Energy Corporation*, Exhibit DUK-13 at 8, Docket No. ER96-110-010, *et al.* (Feb. 14, 2005)).

[301] *Duke Power*, 111 FERC ¶ 61,506 at P 31

[302] *See Compliance Filing of Duke Power, a Division of Duke Energy Corporation*, Supplemental Affidavit of Julie R. Solomon, Docket No. ER96-110-010, *et al.* (Feb. 14, 2005). In the shoulder off-peak season/load period, the system lambda proxy price was three percent higher than the "market price."

[303] In the summer super-peak 1 and winter super-peak seasons/load periods, the system lambda proxy prices are 16 and 66.6 percent higher than the EQR prices, respectively. In the shoulder super-peak season/load period, the system lambda proxy prices are equal to the EQR prices.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

change in the HHI exceeds 50, the merger potentially raises significant competitive concerns; if the change in HHI exceeds 100, it is presumed that the merger is likely to create or enhance market power.[304]

131. The August 29 DPT results using EQR prices for the Duke Energy Carolinas BAA show that there are three screen failures in 10 of the seasons/load periods in the AEC base case. These failures occur in the summer super-peak 2, summer off-peak, and winter off-peak seasons/load periods where Applicants have high market shares involving large HHI increases.[305] The sensitivity analysis performed using EQR prices with a 10 percent price increase results in two additional screen failures, for a total of five screen failures.[306] The sensitivity analysis performed using EQR prices with a 10 percent decrease results in two screen failures.[307] Based on these results, under the base and 10 percent price increase sensitivity analysis, Applicants fail all but one of the seasons/load periods during the summer.[308]

132. For the Progress Energy Carolinas-East BAA, in the base case, the August 29 DPT using EQR prices shows one screen failure in the summer off-peak season/load period. In that season, the post-merger HHI is 2,194, which represents an increase of 894 points, and the market share is 45.5 percent. Applicants' sensitivity analysis performed using

---

[304] Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,129.

[305] The post-merger HHI for summer super-peak 2 is 2,349 with an increase of 72 points; for summer off-peak the post-merger HHI is 3,963 with an increase of 529 points; for winter off-peak, the post-merger HHI is 2,262 with an increase of 299 points. The Applicants' largest market share in these three periods is 62.4 percent.

[306] These additional failures are in the summer peak (post-merger HHI of 2,866, an increase of 144 points) and winter peak seasons/load periods (post-merger HHI of 1,202, an increase of 112 points). Applicants' market shares in these two periods are 52.4 percent and 32 percent, respectively.

[307] One failure occurs in the summer off-peak period (post-merger HHI of 2,427, an increase of 400 points). The other failure occurs in the winter off-peak season/load period (post-merger HHI of 1,756, an increase of 227 points). Applicants' market shares in these two seasons/load periods are 47.8 percent and 40.0 percent, respectively .

[308] We note that the only season/load period where Applicants do not fail is summer super-peak 1, which Applicants define as one hour out of the entire year. *See* n.284, *supra*.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

EQR prices with a 10 percent increase results in two additional screen failures;[309] the sensitivity analysis performed using EQR prices with a 10 percent decrease results in one screen failure.[310] The aforementioned results for the Duke Energy Carolinas and Progress Energy Carolinas-East BAAs are summarized in Table 1.

133. For the Progress Energy Carolinas-West BAA, Applicants explained that there were no qualifying transactions in the EQR database for the relevant time period. As explained above, the Commission allows, "in support of the Delivered Price Test," the use of system lambda as a proxy for price "if actual prices are unavailable."[311] Because EQR data is not available for the Progress Energy Carolinas-West BAA, we rely on the Merger Application DPT. That test, which uses system lambda price proxies, does not indicate any screen failures in the Progress Energy Carolinas-West BAA in any season/load period for either the base case or the 10 percent price increase or decrease sensitivity analyses.

134. The Commission is normally concerned with cases where there are systematic screen failures, where screen failures "present a consistent pattern across time periods and/or markets."[312] The Commission has indicated that systematic screen failures in markets that are highly concentrated and where an entity seeking authorization has a significant share of the market are a cause for concern.[313] Based on the record in this proceeding, the Commission concludes there is no indication that the Proposed Transaction will create or enhance Applicants' ability to exercise market power in the

[309] These additional failures are in the summer peak (post-merger HHI of 1,445, an increase of 715 points) and summer super-peak 2 seasons/load periods (post-merger HHI of 1,117, an increase of 471 points). Applicants' market shares in these two seasons/load periods are 35.3 percent and 31.1 percent, respectively.

[310] This failure occurs in the summer off-peak period with a post-merger HHI of 1,423, an increase of 224 points. Further, Applicants' market share in this period is 35.4 percent.

[311] 18 C.F.R. § 33.3(d)(6) (2011).

[312] *CP&L Holdings, Inc.*, 92 FERC ¶ 61,023, at 61,054 (2000).

[313] *Nevada Power Co.*, 113 FERC ¶ 61,265 at P 15 (2005) (explaining that systematic screen failures would be cause for concern if a market was highly concentrated and post-merger the applicant had a more significant market share).

20110930-3067 FERC PDF (Unofficial) 09/30/2011

Progress Energy Carolinas-West BAA.[314] We find, however, that the screen failures in the Duke Energy Carolinas BAA present systematic screen failures. First, the failures are present in both summer and winter in all three price series (i.e. the base case, and the 10 percent price increase and 10 percent price decrease sensitivity analyses) and in multiple seasons/load periods of summer and winter in the base case and the 10 percent increase sensitivity analysis. Second, in the Duke Energy Carolinas BAA, Applicants fail at least one season/load period in each of the price series: Applicants fail at least one season/load period in the base case and in the 10 percent price decrease sensitivity analysis. The 10 percent price increase sensitivity analysis has the most failures. Specifically, in the Duke Energy Carolinas market, Applicants fail all but one (or three of the four) of the summer seasons/load periods in the 10 percent price increase sensitivity analysis. The only summer season/load period where Applicants pass, summer super-peak 1, consists of only one hour out of the entire year.[315] Table 1, below, illustrates the pattern of persistent screen failures in the Duke Energy Carolinas BAA.

[314] As noted above, this conclusion is not based on a Delivered Price Test using EQR data, but on a Delivered Price Test using system lambda. Sufficient EQR data is not available for the Progress Energy Carolinas-West BAA.

[315] *See* Applicants August 29 Answer, "EQRs Price Summary -2009" and "EQRs Price Summary -2010" worksheets in "FERC Response to Question 2 (EQR Data and Price Derivation)" spreadsheet.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

Table 1

Screen Failures (AEC with EQR Price with Rate Depancaking)

Duke Energy Carolinas BAA	**Base Case** Post Merger			**Price increase 10%** Post Merger			**Price decrease 10%** Post Merger		
	Mkt Share	HHI	HHI Change	Mkt Share	HHI	HHI Change	Mkt Share	HHI	HHI Change
S_SP1	26.3%	1,126	-	26.7%	1,137	5	1.6%	789	3
S_SP2	***46.5%***	***2,349***	***72***	***48.8%***	***2,567***	***235***	32.6%	1,489	1
S_P	41.0%	1,813	(2)	***52.4%***	***2,866***	***144***	41.1%	1,826	6
S_OP	***62.4%***	***3,963***	***529***	***63.1%***	***4,047***	***572***	***47.8%***	***2,427***	***400***
W_SP	1.4%	378	(27)	17.5%	560	6	0.0%	385	(15)
W_P	31.3%	1,168	76	***32.0%***	***1,202***	***112***	16.8%	555	39
W_OP	***46.3%***	***2,262***	***299***	***47.7%***	***2,394***	***380***	***40.0%***	***1,756***	***227***
SH_SP	36.4%	1,475	3	38.4%	1,779	0	0.0%	404	11
SH_P	0.6%	494	35	3.4%	446	(17)	0.9%	348	(85)
SH_OP	0.9%	402	31	21.0%	791	149	0.1%	387	(18)
Progress Energy Carolinas-East BAA	**Base Case** Post Merger			**Price increase 10%** Post Merger			**Price decrease 10%** Post Merger		
	Mkt Share	HHI	HHI Change	Mkt Share	HHI	HHI Change	Mkt Share	HHI	HHI Change
S_SP1	4.0%	476	(48)	5.4%	441	(24)	1.5%	517	(50)
S_SP2	25.6%	897	307	***31.1%***	***1,170***	***471***	4.6%	440	(45)
S_P	8.7%	392	24	***35.3%***	***1,445***	***715***	8.1%	367	28
S_OP	***45.4%***	***2,194***	***894***	***45.5%***	***2,205***	***826***	***35.4%***	***1,423***	***224***
W_SP	2.0%	393	(73)	1.7%	409	15	0.0%	445	(79)
W_P	13.5%	431	96	14.0%	452	100	5.1%	425	(49)
W_OP	28.2%	992	424	27.8%	988	391	20.1%	655	160
SH_SP	6.6%	430	17	8.9%	421	(22)	0.0%	410	36
SH_P	0.8%	498	51	10.3%	451	(9)	1.0%	405	(18)
SH_OP	4.2%	412	32	26.6%	932	110	0.5%	366	(10)

Source: Applicants August 29 Answer, Exhibit B

135. As Table 1 demonstrates, many of Applicants' failures occur in highly concentrated post-merger markets, with overall HHIs in the Duke Energy Carolinas BAA ranging from 2,349 to 4,047 for the summer seasons/load periods, which is significantly higher than the Commission's definition of a highly concentrated market, and 1,202 to 2,394 for the winter seasons/load periods. We find that the screen violations are often severe in the seasons/load periods where Applicants fail. For example, in the base case, the HHI changes are 299 and 529 in the winter off-peak and summer off-peak

20110930-3067 FERC PDF (Unofficial) 09/30/2011

seasons/load periods, respectively. These seasons/load periods are highly concentrated with HHI values of 2,262 for the winter off-peak season/load period, and 3,963 for the summer off-peak season/load period. These HHI changes are multiple times greater than HHI changes that are "presumed likely to create or enhance market power."[316] In the 10 percent price increase sensitivity analysis for the Duke Energy Carolinas BAA, the HHI changes range from 144 to 572 in highly concentrated seasons/load periods. These HHI changes are greater than HHI changes that are "presumed likely to create or enhance market power" and often significantly greater.[317]

136. Based on the record in this proceeding, we also find screen failures for the summer in the Progress Energy Carolinas-East BAA. In this market, there are screen failures in all three price series (the base and 10 percent increase and decrease sensitivity analyses). In addition, Applicants fail at least one season/load period in the base case and 10 percent price decrease sensitivity analysis. The 10 percent increase sensitivity analysis has the most failures. Specifically, in the Progress Energy Carolinas-East BAA, Applicants fail all but one (or three of the four) of the summer seasons/load periods in the 10 percent increase sensitivity analysis. Table 1 illustrates Applicants' market screen failures in the Progress Energy Carolinas-East BAA.

137. Table 1 demonstrates that many of Applicants' failures in the Progress Energy Carolinas-East market occur in moderately to highly concentrated markets, with HHIs ranging from 1,170 to 2,205 for the summer super-peak 2, summer peak, and summer off-peak seasons/load periods. The screen violations are severe in the seasons/load periods where Applicants fail. For example, in the base case, the HHI increase in the summer off-peak season/load period is 894 points in a highly concentrated season/load period. 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." In the 10 percent price increase sensitivity analysis for the Progress Energy Carolinas-East BAA, the HHI changes for the summer super-peak 2 and summer peak seasons/load periods are 471 points and 715 points for moderately concentrated seasons/load periods. These changes

[316] The Commission notes again 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. Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,134.

[317] *See* n.305, *supra*.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

are four to seven times greater than HHI changes that "potentially raise significant power concerns." The HHI change for the summer off-peak season/load period, a highly concentrated market, is 826 points. This HHI increase is more than 16 times greater than HHI changes that "potentially raise significant market power concerns," and over eight times greater than HHI changes that are "presumed likely to create or enhance market power."

138. The Commission notes that even Applicants' analysis using their preferred price proxy of system lambda shows failures in one season/load period during the summer off-peak for both the Duke Energy Carolinas BAA and the Progress Energy Carolinas-East BAA in the base case with HHI changes of 241 and 214, respectively, in these moderately concentrated seasons.[318] In the 10 percent price increase sensitivity analysis, Applicants show four additional post-merger screen failures for the Duke Energy Carolinas BAA and one additional post-merger screen failure for Progress Energy Carolinas-East BAA with HHI increases from 72 to 389 in the highly concentrated or moderately-concentrated season/load period[319] Accordingly, the Commission concludes that Applicants have not shown that the Proposed Transaction will not have an adverse effect on horizontal competition in the Duke Energy Carolinas and Progress Energy Carolinas-East BAAs.[320]

---

[318] Merger Application at 23, 26, respectively.

[319] Applicants August 29 Answer, Exhibit A.

[320] On September 6, 2011, City of New Bern filed its response to Applicants' August 29 Answer. City of New Bern states that, in each case, Applicants' EQR price understates the market price. City of New Bern adjusts Applicants' assumed market clearing prices in each season/load period by the ratio of Applicants' average EQR price to Applicants' average 2010 Form No. 1 short term non-requirements price. Based on these price adjustments, City of New Bern then presents Delivered Price Test results which show, for AEC with rate depancaking, screen failures in eight out of 10 seasons/load periods for the Duke Energy Carolinas BAA, and all seasons/load periods for the Progress Energy Carolinas-East and -West BAAs. We find that City of New Bern's use of FERC Form No. 1 data does not yield an accurate series of prices. City of New Bern mixes and mismatches national data for all sales in all markets by Applicants and local data for the three Carolinas BAAs to compile its new price series. Applicants' FERC Form No. 1 reports transactions for all of Applicants' sales throughout the United States, not only for their Carolinas BAAs, while the EQR sales data used by Applicants are specifically for the Carolinas BAAs. Accordingly, we do not address City of New Bern's new DPT results because they are based on an inaccurate price series.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

Applicants' Dominance Increases Post-Merger

139. We agree with City of New Bern that the Proposed Transaction will increase already excessive levels of market concentration in the Duke Energy Carolinas and Progress Energy Carolinas-East BAAs. According to the base case of the August 29 DPT, in the Duke Energy Carolinas BAA, Duke Energy has pre-merger market shares in the four summer seasons ranging from 26.3 percent to 57.8 percent, and has market shares of over 30 percent or higher in three other seasons.[321] In the post-merger base case, the August 29 DPT shows a significant increase in market share in the summer off-peak season/load period for the merged company. Specifically the merged company's market share in the summer off-peak season/load period would increase from Duke Energy's 57.8 percent (pre-merger) to 62.4 percent (post-merger).[322]

140. Likewise, in the base case of the August 29 DPT, the merged company would have higher market shares in the Progress Energy Carolinas-East BAA in all 10 seasons/load periods than Progress Energy Carolinas currently has. For instance, Progress Energy Carolinas' pre-merger market share of 31.8 percent in the summer off-peak season/load period would increase to 45.4 percent for the merged company. Similarly, the merged company's market share would increase from Progress Energy Carolinas' 16.8 percent (pre-merger) to 25.6 percent (post-merger) in the summer super-peak 2 season/load period. The merged company's winter off-peak market share would be almost double the market share of the pre-merger Progress Energy, increasing from 14.5 percent (per-merger) to 28.2 percent (post-merger). The 10 percent price increase sensitivity analysis also shows that the market shares of the combined company would be higher than those of Progress Energy in all 10 seasons/load periods.

Amount of Remote Generation in Delivered Price Test Results

141. As noted above, City of New Bern argues that the Commission should rely on its evidence and arguments to conclude that Applicants should be found to have failed the market concentration screens in all 10 seasons/load periods in Duke Energy Carolinas and Progress Energy Carolinas-East, and in eight seasons in Progress Energy Carolinas-

[321] Applicants August 29 Answer, AEC-EQR Prices Summary Table with Rate Depancaking.

[322] Market shares of the merged company increase over Duke Energy's current market share in nine of the 10 seasons/load periods in the 10 percent price increase sensitivity analysis. *See* Table 1, *supra.*

20110930-3067 FERC PDF (Unofficial) 09/30/2011

West. We disagree with City of New Bern for several reasons. First, the Commission does not agree with City of New Bern's assertion that the Merger Application DPT unrealistically assumes that a disproportionate amount of remote generation can reach the Carolinas BAAs, thus artificially diluting Applicants' post-merger market share. Applicants August 29 Answer provides the identity and source BAA of the top 10 sellers for all 10 seasons/load periods in the Merger Application DPT.[323] Our analysis of the AEC results for both the Duke Energy Carolinas BAA and the Progress Energy Carolinas-East BAA indicate that the majority of the supply for the top 10 sellers is not from remote sources. In fact, most of the supply in Applicants' analysis is within one wheel of the relevant markets, as Applicants explain.[324]

142. Table 2, below, shows a summary of the data identifying the source BAA supplying energy to the Duke Energy Carolinas BAA in the Merger Application DPT. Specifically, Table 2 identifies, for both the base case and the 10 percent price increase sensitivity analysis, the amount of the supply, the source BAA of that supply, and how many "wheels"[325] away that source is located from the Duke Energy Carolinas BAA. In the base case, only one percent of the supply comes from the third tier or wheel; nine percent of the supply comes from the second wheel; and 89 percent of the supply comes from within one wheel of the Duke Energy Carolinas BAA. The 10 percent price increase sensitivity analysis shows comparable results: one percent of the supply comes from the third tier or wheel, five percent of the supply comes from the second wheel, and 95 percent of the supply comes from within one wheel of the Duke Energy Carolinas BAA. Although these results are only for the top 10 suppliers, we have no reason to believe that the results would differ significantly if the contribution of suppliers outside of the top 10 were included. Based on this analysis, we agree with Applicants that a

[323] The Commission relies on the Merger Application DPT for this analysis because a top 10 supplier analysis based on EQR data is not in the record.

[324] Applicants August 29 Answer at 8.

[325] Wheeling refers to transmitting or wheeling electric power and energy across a balancing authority area (*see, e.g. Southeastern Power Administration v. Kentucky Utilities Company*, 25 FERC ¶ 61,204, at 61,528 (1983); *The Cleveland Electric Illuminating Company*, 7 FERC ¶ 63,030, at 65,151 (1979)). "Wheels" here is used to describe the number of balancing authority areas that power must cross to reach the study area.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

majority of the supply comes from within one wheel of the Duke Energy Carolinas BAA and conclude that Applicants' analysis does not overstate the impact of remote generation.

Table 2

Location of Top Ten Suppliers in all ten load period/seasons
Merger Application DPT (System Lambda Prices)

Duke Energy BAA
Base Case

Wheels	Source	Supply
0	Duke	15,807
1	PJM	7,380
1	SOCO	1,109
1	SCEG	278
2	MISO	2,307
2	EES	201
2	AECI	81
2	NYISO	22
3	CSWS	256
3	WR	104
3	OKGE	100
3	MPS	45
3	KCPL	32
3	SWEPA	20
	Total	27,742

Duke Energy BAA
Sensitivity
(10 percent price increase)

Wheels	Source	Supply
0	Duke	25,492
1	PJM	7,888
1	SOCO	1,473
1	CPLE	208
1	SCEG	185
2	MISO	1,646
2	EES	101
2	NYISO	18
3	CSWS	172
3	OKGE	37
3	MPS	25
	Total	37,245

Duke Energy BAA
Base Case

Wheels	Percent
0	57%
1	32%
2	9%
3	1%
Total	99%
Total (0+1)	89%

Duke Energy BAA
Sensitivity
(10 percent price increase)

Wheels	Percent
0	68%
1	26%
2	5%
3	1%
Total	100%
Total (0+1)	95%

Source: Applicants August 29 Answer, Exhibit C
"Wheels" calculated by staff.
"Source" is the abbreviation for the name of the source BAA
"CPLE" is Progress Energy Carolinas-East

143. The results for the Progress Energy Carolinas-East BAA are similar in that most of the supply is not from geographically remote sources. Table 3, below, shows that, for the

20110930-3067 FERC PDF (Unofficial) 09/30/2011

base case, only one percent of the supply comes from the third tier or wheel; 21 percent of the supply comes from the second wheel; and 78 percent of the supply comes from within one wheel of the Progress Energy Carolinas-East BAA. The 10 percent price increase sensitivity analysis shows comparable results: one percent of the supply comes from the third tier or wheel; 16 percent of the supply comes from the second wheel; and 84 percent of the supply is within one wheel of the Progress Energy Carolinas-East BAA. We reiterate that although these results are only for the top 10 suppliers, we have no reason to believe that the results would differ significantly if the contribution of suppliers outside the top 10 were included. Therefore, we agree with Applicants that a majority of the supply comes from within one wheel of the Progress Energy Carolinas-East BAA and Applicants' analysis does not overstate the impact of remote generation.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

Table 3

Location of Top Ten Suppliers in All Ten Load Period/Seasons
Merger Application DPT (System Lambda Prices)

Progress Energy Carolinas-East BAA Base Case

Wheels	Source	Supply
0	CPLE	3,608
1	PJM	12,821
1	DUKE	1,563
1	SCEG	504
1	YAD	232
2	MISO	3,089
2	SOCO	1,847
2	NYISO	66
3	CSWS	198
3	OKGE	46
3	MPS	28
3	EES	27
	Total	24,029

Progress Energy Carolinas-East BAA Sensitivity (10 percent price increase)

Wheels	Source	Supply
0	CPLE	7,013
1	PJM	11,296
1	DUKE	2,991
1	SCEG	556
1	SC	184
1	YAD	125
2	SOCO	2,152
2	MISO	1,943
2	NYISO	42
3	CSWS	109
3	OKGE	27
3	EES	18
3	MPS	11
	Total	26,467

Progress Energy Carolinas-East BAA Base Case

Wheels	Percent
0	15%
1	63%
2	21%
3	1%
Total	100%
Total (0+1)	78%

Progress Energy Carolinas-East BAA Sensitivity (10 percent price increase)

Wheels	Percent
0	26%
1	57%
2	16%
3	1%
Total	100%
Total (0+1)	84%

Source: Applicants August 29 Answer, Exhibit C
"Wheels" calculated by staff.
"Source" is the abbreviation for the name of the source BAA
"CPLE" is Progress Energy Carolinas-East

144. We also disagree with the relevance of City of New Bern's criticism that Applicants have modeled certain generation as available when it is actually committed. The record supports Applicants' claim that "there is substantially more AEC located

20110930-3067 FERC PDF (Unofficial) 09/30/2011

outside of the Carolinas with a price that is 105 percent or less of the market price…than there is [transmission] import capacity into the Carolinas BAAs."[326] City of New Bern's identification of a few newly committed generation units that Applicants count as uncommitted, while correct, makes no difference in the AEC study results because, as Applicants point out, "[t]he amount of AEC assumed to be imported into [Progress Energy Carolinas-East] would not change…only the identity of the owner of that AEC."[327] Finally, we agree with Applicants that City of New Bern has not offered any alternative price assumptions to the zero dispatch cost value assumed by Applicants for wind and hydro units, and thus we reject City of New Bern's criticism in this regard.

Conclusion

145. Based on the evidence in the record and as discussed above, we find that Applicants have not demonstrated that the merger will not result in an adverse effect on horizontal competition. We find that, in the absence of appropriate mitigation, the merger can be expected to result in adverse effects on competition in both the Duke Energy Carolinas BAA and in the Progress Energy Carolinas-East BAA. If Applicants wish to proceed with the merger they are directed to make a compliance filing within 60 days of the date of this order proposing mitigation that would be sufficient to remedy the screen failures discussed above in these two BAAs.[328] After providing an opportunity for comments from interested parties, the Commission will issue a subsequent order indicating whether the proposed mitigation is sufficient.

146. We note that mitigation measures could include, but not be limited to, joining or forming an RTO, implementation of an ICT arrangement, generation divestiture, virtual divestiture, and proposals to build new transmission to provide greater access to third party suppliers. Regardless of what mitigation Applicants propose, such mitigation should be sufficient to reduce the HHI changes resulting from the Proposed Transaction to no more than a 50 point increase for highly concentrated markets, and no more than a 100 point increase for moderately concentrated markets.[329] The Commission will review

[326] Applicants June 17 Answer at 46.

[327] *Id.*

[328] We note that Applicants should base their analysis on EQR data rather than system lambda.

[329] *See, e.g.*, *Westar Energy, Inc.*, 115 FERC ¶ 61,228, at P 81 (2006) (finding that in order to mitigate harm to competition, applicant had to increase transmission transfer capability into market by an amount "that will bring the market concentration within screening tolerances…of the pre-transaction level"). As previously noted, the 50 and

(continued…)

20110930-3067 FERC PDF (Unofficial) 09/30/2011

any such proposal to ensure that the Proposed Transaction, as mitigated, will not result in an adverse effect on competition and is consistent with the public interest..

Other Arguments

147. The Commission rejects the arguments raised by City of Orangeburg as it has failed to demonstrate that the alleged harms to competition stem from the Proposed Transaction. Rather than showing that the Proposed Transaction will negatively affect competition, City of Orangeburg bases its allegations and arguments on existing state regulatory policies. The Commission's authority to condition section 203 authorizations is limited to addressing specific, transaction-related harm.[330] The alleged harms City of Orangeburg complains of, however, do not stem from the Proposed Transaction, but instead from existing regulatory policies that will continue in effect irrespective of whether the Proposed Transaction is consummated. Accordingly, the Commission finds that City of Orangeburg has not demonstrated that the alleged harms are a result of the Proposed Transaction, and therefore rejects City of Orangeburg's request that we condition our approval of the Proposed Transaction.[331]

148. The Commission declines to require Applicants to provide a specific analysis of the effects of the Proposed Transaction on competition from QFs as requested by Evergreen Packaging. The Commission's merger analysis does not focus on, or address specifically, the effects on competition from specific types of generation. Rather, the Commission's analysis evaluates the impact of a transaction on competition in the relevant markets. The Commission notes that Applicants' obligations under PURPA will remain, and that Evergreen Packaging will retain its right to file a complaint with the Commission should it conclude that Applicants are not meeting those obligations. Although we decline to impose EPSA's proposed condition of a RTO membership on the proposed transaction, Applicants may consider joining or forming an RTO as a means of

---

100 point reductions correspond to the thresholds identified in the Merger Policy Statement as potentially raising significant competitive concerns and presumed likely to create or enhance market power, respectively. *See* n.321, *supra*.

[330] *See e.g. Entergy Gulf*, 121 FERC ¶ 61,182, at 71 (2007) ("The Commission conditions section 203 authorizations only when needed to address specific, transaction-related harm"). *See also Duke Energy*, 113 FERC ¶ 61,297 (2005) (Commission will only condition merger approval when there would be harm to competition).

[331] *See Boston Edison Company*, 117 FERC ¶ 61,083, at P 34 (2006) (rejecting concern raised by commentor because change was not a product of merger and thus had no "direct connection" to merger).

20110930-3067 FERC PDF (Unofficial) 09/30/2011

mitigating the competitive harms the Commission has identified. Applicants may also propose to adopt other mitigation measures discussed herein. Such mitigation will alleviate any adverse effects that may result from the Proposed Transaction.

149. Finally, the Commission notes that APPA's assertion that Applicants' Appendix A analysis of the Proposed Transaction demonstrates that the Commission should not alter the concentration thresholds of its merger analysis is unrelated to the Proposed Transaction. Issues relating to whether the Commission should change how it conducts its horizontal market power analysis will be addressed as part of the Horizontal Market Power Analysis NOI.

bb. Florida Market

150. The Commission rejects FMPA's request that the Commission require Applicants to submit an Appendix A analysis for Peninsular Florida. As explained in the Merger Policy Statement: "it will not be necessary for the merger applicants to perform the screen analysis or file the data needed for the screen analysis in cases where the merging firms do not have facilities or sell relevant products in common geographic markets."[332] As the Commission explained, "in these cases, the proposed merger will not have an adverse competitive impact (i.e., there can be no increase in the applicants' market power unless they are selling relevant products in the same geographic markets) so there is no need for a detailed data analysis."[333] The Commission's regulations state further that a horizontal Competitive Analysis Screen is not necessary where applicants show that the merging entities "do not currently conduct business in the same geographic markets or that the extent of the business transactions in the same geographic market is *de minimis*."[334]

151. Based on the record before us, the Commission concludes that Duke Energy and Progress Energy have demonstrated that they do not conduct business in the same geographic market in Florida.[335] Applicants show that Duke Energy does not own or control any generation capacity in Florida, and that it has not sold or delivered any energy

---

[332] Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,136.

[333] *Id.*

[334] 18 C.F.R. § 33.3(a)(2)(i) (2011).

[335] The Commission notes that, if Duke Energy begins making sales into the Peninsular Florida market, Applicants must inform the Commission within 30 days.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

into Florida in the past three years.[336] FMPA calls into question Applicants' analysis by pointing to certain sales that Duke Energy made to Progress Energy Florida.[337] Applicants, however, have explained that these sales were not delivered into Florida, but were made in the Progress Energy Carolinas and Southern Company markets.[338] Applicants have also shown that, even assuming that these sales had been made in Florida, they would have represented only 0.006 percent of total energy consumed in Florida in 2010.[339] Similarly, while FMPA argues that Applicants must submit a Competitive Analysis Screen for Peninsular Florida because Duke Energy is a potential competitor in that market,[340] the Commission finds that FMPA has failed to show that this is the case. Duke Energy does not currently compete in the Peninsular Florida market, and its previous attempts to build new generation in Florida have been unsuccessful.[341] Further, Florida law and policy limits the construction of new generation.[342]

152. In any event, the Commission finds the market power study submitted by FMPA to be flawed. This study purports to measure AEC in Peninsular Florida and in the Progress Energy Florida BAA, but only calculates the uncommitted generation capacity of Florida's utilities for two periods (peak and off-peak).[343] Also, market prices are not

---

[336] Applicants May 9 Answer at 3. *See also* Merger Application, Exhibit J-1, Hieronymus Aff. at 11-12, n. 20.

[337] *See, e.g.*, P 65, *supra.*

[338] Applicants June 17 Answer at 7-8. As Applicants explain: "In the past three years, Duke Energy Carolinas sold very small amounts of power to Progress Energy Florida and Florida Power and Light. These sales were not delivered in Florida but rather sunk either in the Progress Energy Carolinas or the Southern Company BAAs." Merger Application, Exhibit J-1, Hieronymus Aff. at 12, n.20.

[339] Applicants June 17 Answer at 8.

[340] FMPA Protest at 25-30. *See also* 18 C.F.R. 33.3(a)(2)(ii) (2011).

[341] Applicants June 17 Answer at 9.

[342] *See, e.g.* FMPA Protest at 42-43.

[343] FMPA's study is inconsistent with prior Commission direction on the calculation of available economic capacity, the required use of market prices and the analysis of 10 seasons/load periods (*AEP Power Marketing, Inc.*,107 FERC ¶ 61,018, at Appendix F (2004)).

20110930-3067 FERC PDF (Unofficial) 09/30/2011

considered at all in this analysis, so it is impossible to know how much of the uncommitted capacity identified in the FMPA study could be sold economically in the Progress Energy Florida BAA. In addition, the study does not consider potential suppliers outside of Peninsular Florida other than Duke Energy, which is assumed to utilize most of the available transmission capability into Florida subsequent to the merger. For these reasons, we find FMPA's market power study unpersuasive.

153. The Commission also rejects the conditions proposed by the Orlando Commission.[344] The issues the Orlando Commission would address through the proposed conditions are not related to the Proposed Transaction. As explained above, the Commission's authority to condition authorizations under section 203 is limited to addressing merger-related harm. The Proposed Transaction, however, will not adversely affect competition in the Peninsular Florida market. Accordingly, the Commission declines to adopt the conditions proposed by the Orlando Commission. We also find that City of Tallahassee's concerns regarding parallel flows are not related to the Proposed Transaction. City of Tallahassee has not demonstrated that the Proposed Transaction will exacerbate any existing problems on its transmission system or create new ones. Accordingly, the Commission declines to condition the Proposed Transaction as requested by City of Tallahassee.

b. Vertical Market Power

i. Applicants' Analysis

154. Applicants contend that the Proposed Transaction does not raise any vertical market power issues. Applicants explain that with respect to transmission, all of Duke Energy's Ohio, Kentucky, and Indiana transmission assets are currently under the control of Midwest ISO, and, subsequent to the integration of Duke Energy Ohio and Duke Energy Kentucky into PJM, the transmission facilities of those companies will be under

[344] As described above, the Orlando Commission alleges that the Proposed Transaction will create greater incentives for Duke Energy to use the Florida interconnections, thereby decreasing tie capacity availability, and that the transaction will further limit opportunities for small players in the Florida generation market. The Orlando Commission proposes that the Commission (1) grant it and similarly situated Florida municipal electric utilities the rights to invest in new Duke-Progress base load generation, and new nuclear generation outside of Florida for 20 years; (2) require Progress Energy Florida to commit to a definitive timetable for completing certain transmission upgrades; and (3) require that an existing replacement power agreement between Progress Energy Florida and the Orlando Commission be extended through January 1, 2019. *See* P 72-74, *supra*.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

the control of PJM.[345] Applicants state that the transmission facilities of Duke Energy Carolinas, Progress Energy Carolinas, and Progress Energy Florida will be subject to the Joint OATT. With respect to other inputs to electricity, Applicants state that Duke Energy has local gas distribution companies operating in Ohio and Kentucky, but owns no interstate gas pipelines. Progress Energy does not own any local gas distribution company or interstate or intrastate gas pipelines. Based on these claims, Applicants conclude that there are no vertical concerns present in the Carolinas markets with respect to gas delivery systems.[346]

ii. Comments and Protests

155. As described in further detail above, FMPA contends that transmission barriers within Florida limit its ability to purchase economic wholesale power and to build needed baseload generation.[347] FMPA states that Progress Energy Florida and FPL own and control the majority of transmission within Peninsular Florida, subjecting FMPA to multiple tariffs and transmission rates. FMPA notes that it cannot dispatch on a single-system basis like these companies without being subject to potential dual transmission rates for affected transactions. FMPA adds that the Proposed Transaction and Joint OATT will only eliminate rate pancaking for service over Applicants' transmission systems (i.e. exporting energy into Florida), and Applicants do not address internal Florida transmission constraints.[348] FMPA argues that internal transmission constraints limit the availability of transmission routes open for new dispatch, which adversely affects FMPA's ability to optimally size generation and to plan and operate power supply for its members and others.[349] FMPA argues that the formation of a Florida RTO could have addressed some of these issues. FMPA notes that the Commission relied on Progress Energy's "unconditional commitment to participate in a Commission-approved

[345] Merger Application at 32.

[346] Merger Application at 32.

[347] FMPA Protest at 39.

[348] *Id.* at 39-40. FMPA claims that Progress Energy Florida continues to avoid building critical transmission upgrades that would allow FMPA to develop low-cost generation resources and remove operational limits on some of its generation. *Id.* at 41.

[349] *Id.* at 39-40.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

RTO" when the Commission approved the 2000 merger between Florida Power and Carolina Power & Light, but that this promise has yet to be fulfilled.[350]

156. FMPA argues that the combination of Duke Energy's generation with Progress Energy Florida's ownership of transmission over both the ties to Florida and within Florida raises vertical market power concerns. According to FMPA, unless appropriate conditions are imposed, Applicants will enjoy an advantage through transmission and generation control or preferred transmission use rights that may limit FMPA and other competitors' access to Florida energy markets. This result would have adverse impacts on the rates and availability of wholesale energy within Peninsular Florida. FMPA argues that because Applicants have neither provided an analysis of vertical market power concerns nor any evidence that the proposed merger will not adversely affect competition, the Commission must investigate vertical integration harms and, at the very least, order conditions to mitigate potential harm.[351]

157. FMPA also argues that the Proposed Transaction enhances Applicants' incentive to foreclose competition. FMPA claims that after the Proposed Transaction, the merged entity will be able to economically bring additional low-cost generation from Duke Energy's plants in the southeast into Florida, thereby further constraining a transmission path whose capacity is limited but which currently allows competitors to access generation during off-peak and shoulder periods.[352] FMPA explains that strategic operation of the Progress Energy Florida share of the internal Florida transmission system will allow Progress Energy Florida to influence prices paid by entities such as FMPA, who are dependent on Progress Energy Florida transmission to access wholesale power.

---

[350] *Id.* at 40. FMPA argues that, in developing appropriate conditions for Applicants' proposed merger, the Commission should consider the circumstances of its 2000 approval of the merger of Carolina Power & Light (CP&L) and Florida Progress Corporation. FMPA states: "The Commission *relied* on Progress Energy's 'unconditional commitment to participate in a Commission-approved RTO' when it approved the 2000 Merger between [Florida Progress Corporation] and CP&L." FMPA Protest at 40 (*quoting CP&L Holdings, Inc.*, 92 FERC ¶ 61,023 at 61,055 (2000)). FMPA states that, where the prior merger was approved on the premise that there would be such a Florida RTO, but such an RTO was not implemented, a merger sought by one of the same parties should not be approved without correcting transmission problems.

[351] FMPA Protest at 51-52.

[352] *Id.* at 53.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

158. FMPA notes that the Commission has stated in the past that an OATT may not fully mitigate vertical market power.[353] FMPA asserts that Applicants' reliance on Commission-approved OATTs as explanation for not producing vertical market power screens is invalid. FMPA faults Applicants for not evaluating vertical market power, and for failing to show that the Proposed Transaction "will not 'adversely affect competition as a result of combining [Applicants'] generation and transmission.'"[354] FMPA proposes two conditions related specifically to transmission: first, that the merged entity should be required to expand the interface capacity of the Florida-Georgia interface;[355] and second, that the merged entity should be required to expand and improve the internal Florida transmission system.[356]

iii. Applicants' Answer

159. Applicants reject FMPA's arguments regarding vertical market power. Applicants state that Duke Energy has no ownership rights in the transmission facilities leading into Florida or that are internal to Florida, and thus, Duke Energy has no ability to exercise control over upstream facilities in a way that would advantage the downstream Progress Energy generation facilities located in Florida.[357] Applicants also explain that Duke Energy owns no downstream generation facilities in Florida that could be advantaged as a consequence of Progress Energy's ownership of upstream transmission facilities at the Florida interface or within Florida. Applicants argue that because Duke Energy has no presence in the Florida market, the Proposed Transaction cannot increase either the incentive or ability to exercise vertical market power that results from Progress Energy's already existing ownership of transmission and generation assets in Florida.[358]

---

[353] *Id.* at 54 (citing *Oklahoma Gas and Electric Co. and NRG McClain LLC*, 105 FERC ¶ 61,297, at P 35 (2003)).

[354] *Id.* (*quoting* 18 C.F.R. § 33.4 and *American Electric Power*, 90 FERC ¶ 61,242, at 61,786 (2000)).

[355] *Id.* at 56-60.

[356] *Id.* at 60-64.

[357] Applicants June 17 Answer at 25.

[358] *Id.*

20110930-3067 FERC PDF (Unofficial) 09/30/2011

iv. Commission Determination

160. Transactions that combine electric generation assets with inputs to generating power (such as natural gas, transmission, or fuel) can harm competition if the transaction increases a firm's ability or incentive to exercise vertical market power in wholesale electricity markets. For example, by denying rival firms access to inputs or by raising their input costs, a firm created by the transaction could impede entry of new competitors or inhibit existing competitors' ability to undercut an attempted price increase in the downstream wholesale electricity market.

161. Based on Applicants' representations, the Commission finds that the Proposed Transaction does not raise any vertical market power concerns. As Applicants note, they have turned over control of Duke Energy's Ohio, Kentucky, and Indiana transmission assets to Midwest ISO, and subsequent to the integration of Duke Energy Ohio and Duke Energy Kentucky into PJM, the transmission facilities of those companies will be under the control of PJM. The transmission facilities of Duke Energy Carolinas, Progress Energy Carolinas and Progress Energy Florida are subject to the open access requirements of their currently effective OATTs on file with the Commission.[359]

162. The Commission rejects the arguments regarding the alleged impacts of the Proposed Transaction on competition in Florida. As explained above, based on the record before us, the Commission has concluded that Duke Energy and Progress Energy do not conduct business in the same geographic market in Florida, and thus this market is not relevant to our review of the Proposed Transaction. Nevertheless, the Proposed Transaction is not detrimental to the Peninsular Florida market because it does not involve two competitors in one market merging and leaving one less competitor, and also will not affect the available transmission capacity into Peninsular Florida. As Applicants have explained, and FMPA itself notes, Peninsular Florida's interconnection to the remainder of the Eastern Interconnection is limited.[360] Thus, the merged entity will face the same transmission limitations subsequent to the merger as Duke Energy currently faces, making it unlikely that, after the Proposed Transaction is consummated, Duke Energy will, as FMPA claims, "bring additional low cost generation from [Duke Energy's] plants in the southeast into Florida."[361] Moreover, as Applicants note, given

[359] *See Sharyland Utilities, L.P.*, 131 FERC ¶ 61,275 (2010). *See also Great Plains*, 121 FERC ¶ 61,069.

[360] *See, e.g.* FMPA Protest at 37 ("virtually all of the import capacity potentially available at the Florida/[Southern Company] interface is already committed to long-term imports."). *See also* FMPA Protest, Exhibit C, Gaffney Aff. at 9-10.

[361] FMPA Protest at 53.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

Duke Energy's affiliation with Progress Energy Florida after consummation of the Proposed Transaction, the merged entity and its affiliates will not have the authority to make market-based rate sales in Peninsular Florida. Thus, even if Duke Energy were able to access the Peninsular Florida market after consummation of the Proposed Transaction, it would be required to make such sales at cost-based rates. Accordingly, the Commission dismisses FMPA's arguments regarding the alleged harms to Peninsular Florida.

2. Effect on Rates

a. Applicants' Analysis

163. Applicants assert that the Proposed Transaction will have no adverse effect on rates. Applicants state that the fuel savings resulting from the JDA and from other fuel-related operating synergies will flow automatically to wholesale requirements customers and that these customers' rates should be reduced as a result of the Proposed Transaction even without any commitments by Applicants.[362] Applicants also state that wholesale customers and transmission customers will benefit from the elimination of pancaked transmission rates across Applicants' transmission systems.[363]

164. Notwithstanding what Applicants characterize as "clear benefits to wholesale customers," they "commit for a period of five years to hold harmless wholesale requirements and transmission customers from the costs of the [Proposed] Transaction."[364] Applicants state that for that five-year period they "will not seek to include merger-related costs in their transmission revenue requirements or in their wholesale requirements rates, except to the extent they can demonstrate that merger-related savings are equal to or in excess of the transaction-related costs included in the rate filing."[365] According to Applicants, if they seek to recover transaction-related costs through their wholesale power or transmission rates, they will submit a compliance filing that details how they are satisfying the hold harmless commitment. Applicants state that

[362] Merger Application at 32.

[363] *Id.* at 32

[364] *Id.* at 32-33.

[365] *Id.* at 33.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

they will comply with the Commission's directive in other proceedings involving a similar hold harmless provision.[366]

b. Comments and Protests

165. The Carolina EMCs support the Merger Application in light of Applicants' hold harmless commitment. The Carolina EMCs explain that, in reliance on this commitment, they believe that there will be adequate wholesale and ratepayer protection regarding the potential effects of the Proposed Transaction.[367]

166. City of New Bern alleges that the JDA, Applicants' maintenance of separate BAAs, and a system of zonal transmission rates in the Joint OATT "all tend to adversely affect rates."[368] City of New Bern states that "these elements of the merger appear independently to be unjust, unreasonable and unduly discriminatory."[369]

167. With respect to the effect of the Proposed Transaction on rates, City of Orangeburg alleges that the Proposed Transaction and JDA will have a "radically adverse effect on wholesale rates and perpetuate and entrench a regime under which [the North Carolina Commission] determines which wholesale customers are entitled to purchase low cost power from [Duke Energy Carolinas or Progress Energy Carolinas] and which are not."[370] City of Orangeburg claims that Duke Energy Carolinas and Progress Energy Carolinas are unwilling to make wholesale sales contrary to the North Carolina Commission's determination and suffer the consequences of selling at average system costs, but having their retail rates determined on the basis of higher incremental costs.[371] City of Orangeburg claims that after the Proposed Transaction is consummated, the rate discrimination perpetuated by the North Carolina Commission's regulatory policies will persist to the detriment of City of Orangeburg and other similarly situated wholesale customers. City of Orangeburg argues that the Commission has

---

[366] *Id.* at 33 (*citing ITC Midwest LLC*, 133 FERC ¶ 61,169, at P 24 (2010), *FirstEnergy*, 133 FERC ¶ 61,222 at P 63, *PPL Corp.*, 133 FERC ¶ 61,083, at P 26-27 (2010)).

[367] Carolina EMCs Comments at 7.

[368] City of New Bern Protest at 18.

[369] *Id.* at 18.

[370] City of Orangeburg Protest at 35.

[371] *Id.* at 36.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

eliminated the category of wholesale native load and that it no longer exists under the Commission's "prevailing regulatory scheme of open-access transmission and [market-based rate] authority."[372] According to City of Orangeburg, the distinctions among customers drawn by the North Carolina Commission are discriminatory and have no rational basis.[373]

168. FMPA asserts that Applicants' hold harmless provision, which Applicants have proposed to protect wholesale power and transmission customers from the costs of the merger, is insufficiently specific.[374] According to FMPA, following the merger, "Applicants intend to rely on one or more affiliates to manage and operate [Progress Energy Florida's Crystal Unit No. 3 Nuclear Unit (Crystal Unit No. 3)]" as part of the merged entity's nuclear fleet.[375] FMPA, whose members jointly own Crystal River Unit No. 3 with Progress Energy Florida, the principal owner,[376] states that as a result of this change, operation and maintenance and administrative and general costs may not be directly traceable to Crystal Unit No. 3 operations. FMPA states that while there should be opportunities for cost savings from Applicants' operation and management strategy, there may also be an opportunity to inappropriately shift costs.[377] FMPA argues that it and its members should be specifically protected from any increase in operation and maintenance or administrative and general costs due to the Proposed Transaction. FMPA states that the Commission should clarify that Applicants' hold harmless provision precludes them from assessing more operation and maintenance or administrative and general costs than would have been the case if the Proposed Transaction had not been approved. In addition, FMPA asserts that the Commission should require Applicants to maintain sufficiently detailed books and records that show the costs of units in no less detail than is currently provided.[378]

---

[372] *Id.* at 40.

[373] *Id.* at 42-44.

[374] FMPA Protest at 69.

[375] *Id.* at 69-70 (quoting FMPA Protest, Exhibit B, Affidavit of Thomas Reedy (Reedy Aff.) at P 7).

[376] *Id.* at 68-69.

[377] FMPA Protest, Exhibit B, Reedy Aff. at P 7.

[378] FMPA Protest at 70.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

c. Commission Determination

169. We accept Applicants' commitment to hold transmission and wholesale requirements customers harmless for five years from costs related to the Proposed Transaction. We interpret Applicants' hold harmless commitment to include all transaction-related costs, not only costs related to consummating the transaction. We note that nothing in the Merger Application indicates that rates to customers will increase as a result of costs related to the Proposed Transaction. The Commission will be able to monitor Applicants' hold harmless commitment under the books and records provision of PUHCA 2005 and its authority under section 301(c) of the FPA,[379] and the commitment is fully enforceable based on the Commission's authority under section 203 of the FPA.

170. If Applicants seek to recover transaction-related costs through their wholesale power or transmission rates within the next five years, they must submit a compliance filing that details how they are satisfying the hold harmless requirement. If Applicants seek to recover transaction-related costs in an existing formula rate that allows for such recovery within the next five years, then that compliance filing must be filed in the section 205 docket in which the formula rate was approved by the Commission, as well as in the instant section 203 docket.[380] We also note that, if Applicants seek to recover transaction-related costs in a filing within the next five years whereby it is proposing a *new* rate (either a new formula rate or a new stated rate), then that filing must be made in a *new* section 205 docket as well as in the instant section 203 docket.[381] The Commission will notice such filings for public comment. In such filings, Applicants must: (1) specifically identify the transaction-related costs they are seeking to recover; and (2) demonstrate that those costs are exceeded by quantified savings resulting from the transaction, in addition to any requirements associated with filings made under section 205. Such a hold harmless commitment will protect customers' wholesale and transmission rates from being adversely affected by the Proposed Transaction.[382]

171. The Commission rejects City of Orangeburg's claims regarding the effects of the Proposed Transaction on rates. City of Orangeburg has failed to demonstrate that the

---

[379] 16 U.S.C. § 825 (2006).

[380] In this case the filing would be a compliance filing in both the section 203 and 205 dockets.

[381] In this case the filing would be a compliance filing in the section 203 docket, but a rate application in the section 205 docket.

[382] *See ITC Midwest LLC*, 133 FERC ¶ 61,169 at P 24-25; *FirstEnergy Corp.*, 133 FERC ¶ 61,222 at P 63; and *PPL Corp.*, 133 FERC ¶ 61,083 at P 26-27.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

alleged adverse effects stem from the Proposed Transaction. Rather than showing that the Proposed Transaction will negatively affect rates, City of Orangeburg bases its allegations and arguments on existing state regulatory policies and the JDA. The Commission's authority to condition section 203 authorizations is limited to addressing specific, transaction-related harm.[383] The harms alleged by City of Orangeburg, however, do not stem from the Proposed Transaction, but instead from existing regulatory policies, which will continue in effect irrespective of whether the Proposed Transaction is approved, and the JDA, approval of which the merger is not predicated or conditioned on.[384] Accordingly, the Commission finds that City of Orangeburg has not demonstrated that the alleged harms are a result of the Proposed Transaction.

172. For the same reasons, the Commission rejects the arguments raised by City of New Bern. City of New Bern complains that the JDA and Joint OATT tend to adversely affect rates, and that these elements of the merger also appear independently unjust, unreasonable and unduly discriminatory.[385] As with City of Orangeburg's arguments, City of New Bern has failed to demonstrate that the alleged harms stem from the Proposed Transaction.

173. The Commission also rejects FMPA's claims regarding Applicants' hold harmless commitment. As noted above, nothing in the Merger Application indicates that rates to wholesale customers will increase due to the Proposed Transaction, and FMPA provides no evidence to support its speculative concerns. The Commission has explained the filing requirements Applicants must meet if they seek to recover transaction-related costs through their wholesale power or transmission rates within the next five years. Further, Applicants' wholesale rates will continue to be subject to the requirements of FPA 205, and changes to those rates require Commission approval.[386] With respect to FMPA's

---

[383] *See, e.g.*, *Entergy Gulf*, 121 FERC ¶ 61,182 at P 71 ("The Commission conditions section 203 authorizations only when needed to address specific, transaction-related harm"). *See also Duke Energy*, 113 FERC ¶ 61,297 (Commission will only condition merger approval when there would be harm to competition).

[384] *See e.g.*, Applicants June 17 Answer at 68 ("While [the JDA, Joint OATT and Merger Application] are related, the merger is not conditioned on the Commission's approval of the JDA and the Joint OATT…").

[385] As previously noted, the JDA and Joint OATT are being addressed in a separate order.

[386] The Commission also notes that FMPA may also file a complaint under FPA section 206 if it believes Applicants' wholesale rates have become unjust and unreasonable.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

request that the Commission should require Applicants to maintain sufficiently detailed books and records that show the costs of units in no less detail than is currently provided, the Commission notes that Applicants will remain subject to the Commission's requirements regarding books and records.

174. Accordingly, in light of these considerations and requirements, we find that the Proposed Transaction will not adversely affect rates.

3. Effect on Regulation

a. Applicants' Analysis

175. Applicants explain that after the Proposed Transaction closes, each of the public utility subsidiaries of Duke Energy and Progress Energy will remain jurisdictional public utilities subject to regulation by the Commission to the same extent as each was regulated before the close of the transaction.[387] According to Applicants, the Proposed Transaction will not have effects on state regulation that need to be addressed by the Commission. Applicants state that the North Carolina Commission, the South Carolina Commission, and the Kentucky Public Service Commission each will have the authority to review the effect of the Proposed Transaction on their jurisdiction and thus, under the Merger Policy Statement, "the Commission does not consider the effect of the Proposed Transaction on those commissions."[388] Applicants add that while none of the other state commissions have jurisdiction to review the Proposed Transaction, none of these commissions will have its jurisdiction affected by the Proposed Transaction.

b. Comments and Protests

176. City of Orangeburg disputes Applicants' claim that the Proposed Transaction will have no adverse impact on regulation. City of Orangeburg alleges that the Proposed Transaction will "entrench and further the North Carolina Commission's usurpation of the Commission's jurisdiction."[389] City of Orangeburg claims that the North Carolina Commission's claimed authority to second-guess the terms of Duke Energy Carolinas' and Progress Energy Carolinas' wholesale sales for purposes of retail ratemaking will be

[387] Merger Application at 34.

[388] *Id.* at 34-35.

[389] City of Orangeburg Protest at 30.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

perpetuated through newly proposed regulatory conditions.[390] According to City of Orangeburg, Applicants fail to address the nature and likely impacts of the proposed regulatory conditions, as well as the design and operation of the JDA. City of Orangeburg claims that "at the behest" of staff of the North Carolina Commission, the JDA "is intended to preclude or strip [the Commission] of jurisdiction over Duke Energy Carolinas' and Progress Energy Carolinas' wholesale sales post-merger."[391] City of Orangeburg claims that the Commission cannot turn a blind eye to the interplay of the JDA and the proposed regulatory conditions, and must not approve the Proposed Transaction without conditions that preserve the full range of the Commission's jurisdiction over Duke Energy Carolinas' and Progress Energy Carolinas' jurisdictional transactions post-merger.

177. The North Carolina Consumer Agencies request that the Commission not impose conditions that may adversely affect state regulation of retail service provided by the merged company or adversely affect North Carolina consumers.[392] The North Carolina Consumer Agencies explain that the terms and conditions of retail electric service to Duke Energy and Progress Energy's North Carolina consumers are under the exclusive jurisdiction of the North Carolina Commission. Duke Energy Carolinas and Progress Energy Carolinas both have exclusive retail franchises under North Carolina law, and pursuant to those franchises the companies have constructed generation, transmission, and distribution facilities, and are required by law to operate those facilities to furnish electricity service on an integrated, least-cost basis to their North Carolina retail customers. The North Carolina Consumer Agencies discourage the Commission from requiring Applicants to join an RTO as a condition of merger approval. According to the North Carolina Consumer Agencies, conditioning the merger in this manner could

---

[390] As explained earlier, 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 similar conditions for the Proposed Transaction at the state level. *See* n.115, *supra*.

[391] City of Orangeburg Protest at 35.

[392] North Carolina Consumer Agencies Comments at 5.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

severely compromise the North Carolina Commission's ability to ensure that Duke Energy Carolinas and Progress Energy Carolinas meet their native load priority obligation.[393]

178. Applicants dispute City of Orangeburg's claims that approval of the Proposed Transaction will "perpetuate" certain North Carolina Commission regulatory conditions imposed in past proceedings regarding past transactions.[394] Applicants state that the alleged harm has nothing to do with the Proposed Transaction: if the Proposed Transaction is not consummated, the current regulatory framework City of Orangeburg challenges would continue to exist.[395] Applicants conclude that City of Orangeburg's objections are not relevant to the Commission's analysis of the Proposed Transaction under FPA section 203.

179. Applicants also respond to the North Carolina Consumer Agencies' concerns. Applicants state that the North Carolina Commission will have the same jurisdiction and authority to regulate Duke Energy Carolinas and Progress Energy Carolinas after the Proposed Transaction as it does today. Applicants add that since the North Carolina Commission has its own authority to review the Proposed Transaction, the Commission need not evaluate or analyze whether the Proposed Transaction will affect the regulatory jurisdiction of the North Carolina Commission.[396]

180. City of Orangeburg responds to Applicants, alleging that it has demonstrated that the Proposed Transaction, JDA, and proposed state regulatory conditions will interfere with the Commission's jurisdiction, result in undue discrimination in wholesale power sales, and impede competition in wholesale power markets in the Carolinas.[397] City of Orangeburg states that it has shown that the Proposed Transaction is predicated on the JDA and, by incorporation, the proposed state regulatory conditions. City of Orangeburg adds that Applicants do not explain how the Commission can dismiss its arguments on procedural grounds and address them in the proceeding pending in Docket No. EL09-63-

---

[393] *Id.* at 6.

[394] Applicants June 17 Answer at 56-57.

[395] *Id.* at 57.

[396] *Id.* at 57-58.

[397] Motion for Leave to Answer and Answer of the City of Orangeburg, South Carolina at 1, Docket No. EC11-60-000, ER11-3306-000, ER11-3307-000 (not consolidated) (June 30, 2011).

20110930-3067 FERC PDF (Unofficial) 09/30/2011

000 since the JDA, Joint OATT, and Proposed Transaction are not at issue in that docket.[398]

181. The North Carolina Consumer Agencies argue that the Commission should deny City of Orangeburg's relief because no aspect of the NCUC Order "impairs, usurps or otherwise interferes with the Commission's exclusive jurisdiction under the FPA over interstate wholesale sales and interstate transmission."[399] The North Carolina Consumer Agencies add that the NCUC Order is both lawful and consistent with the Commission's policies and precedent.[400]

182. City of Orangeburg rejects the explanations provided by the North Carolina Consumer Agencies, arguing that they have failed to explain how the North Carolina Commission may disregard the agreed-upon terms and prices of a wholesale sale and treat that sale as having been made on other terms.[401] City of Orangeburg reiterates that the Commission cannot properly approve a merger that is predicated on Commission-jurisdictional agreements and regulatory conditions that purport to cede the Commission's jurisdiction to the North Carolina Commission, and that the North Carolina Commission's policies and actions violate Commission and court precedent, and the Commission's policies.[402]

c. Commission Determination

183. We find no evidence that either state or federal regulation will be impaired by the Proposed Transaction. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap at the federal or state level.[403] We find that the Proposed Transaction will not create a regulatory gap at the federal level because the Commission will retain its regulatory authority over the companies after the transaction. The Commission stated in the Merger Policy Statement

---

[398] *Id.* at 4.

[399] North Carolina Consumer Agencies July 13 Answer at 6.

[400] *Id.* at 8.

[401] Motion for Leave to Answer and Answer of the City of Orangeburg, South Carolina at 3, Docket Nos. EC11-60-000, ER11-3306-000, ER11-3307-000 (not consolidated) (July 22, 2011).

[402] *Id.* at 8-9.

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

20110930-3067 FERC PDF (Unofficial) 09/30/2011

that it ordinarily will not set the issue of the effect of a transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the transaction. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission stated that it may set the issue for hearing, and that it will address such circumstances on a case-by-case basis.[404] We note that no state commission has requested that the Commission address the issue of the effect of the Proposed Transaction on state regulation. With respect to the North Carolina Consumer Agencies' concerns, any conditions ultimately ordered by the Commission will not interfere with state jurisdiction.

184. We reject City of Orangeburg's claims that the Proposed Transaction will negatively affect the Commission's jurisdiction. City of Orangeburg has failed to demonstrate that the Proposed Transaction will impair the Commission's jurisdiction. City of Orangeburg relies on the JDA and existing and proposed state regulatory conditions to assert that the Proposed Transaction will have negative effects on the Commission's jurisdiction. The Commission's authority to condition section 203 authorizations, however, is limited to addressing specific, transaction-related harm.[405] The regulatory framework in North Carolina is preexisting and the alleged harms will persist irrespective of whether the Proposed Transaction is consummated or not. Similarly, the Proposed Transaction is not predicated upon our approval of the JDA,[406] which is being addressed in a separate order. Accordingly, the Commission finds that the alleged competitive harms cited by City of Orangeburg do not flow from the Proposed Transaction, and therefore rejects City of Orangeburg's request that we condition approval of the transaction.[407]

---

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

[405] *See, e.g. Entergy Gulf*, 121 FERC ¶ 61,182 at P 71 ("The Commission conditions section 203 authorizations only when needed to address specific, transaction-related harm"). *See also Duke Energy*, 113 FERC ¶ 61,297 (Commission will only condition merger approval when there would be harm to competition).

[406] *See* Applicants June 17 Answer at 68 ("While [the JDA, Joint OATT and Merger Application] are related, the merger is not conditioned on the Commission's approval of the JDA and the Joint OATT…").

[407] *See Boston Edison Company*, 117 FERC ¶ 61,083 at P 34 (rejecting concern raised by commentor because change was not product of merger and thus had no "direct connection" to merger).

20110930-3067 FERC PDF (Unofficial) 09/30/2011

4. Cross-Subsidization

a. Applicants' Analysis

185. Applicants provide assurance and verify, based on facts and circumstances known to them or that are reasonably foreseeable, that the Proposed Transaction will not result in, at the time of the transaction or in the future, cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company.[408] According to Applicants, "given the anticipated need of [their] operating utilities for new capacity," the merger of the two companies will act to benefit the operations of Applicants' public utility operations, and not subsidize unregulated affiliates at the expense of the operating utilities.[409] Applicants state that the Proposed Transaction is not the type of transaction that raises cross-subsidization issues and that it does not present any longer-term concerns about improper cross-subsidization.[410]

186. Applicants specifically verify that, based on the facts and circumstances known to them or that are reasonably foreseeable, the Proposed Transaction will not result in, at the time of the transaction or in the future: (1) any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) any new issuance of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) any new affiliate 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 sections 205 and 206 of the FPA.[411] Further, as required by

---

[408] *See generally*, Merger Application, Exhibit M: Cross-Subsidization (Exhibit M).

[409] Merger Application, Exhibit M at 1.

[410] *Id.* at 2.

[411] Merger Application at 35-36. *See also* Merger Application, Exhibit M at 3.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

Order No. 669-A and 18 C.F.R. § 33.2(j)(l), Applicants provide a listing of the existing pledges and encumbrances of their regulated utilities.[412]

b. Commission Determination

187. Based on the representations as presented in the Merger Application, we find that the Proposed Transaction will not result in cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company.

188. When a controlling interest in a public utility is acquired by another company, whether a domestic company or a foreign company, the Commission's ability to protect public utility customers adequately against inappropriate cross-subsidization may be impaired unless it has access to the acquirer's books and records. Section 301(c) of the FPA gives the Commission authority to examine the books and records of any person who controls, directly or indirectly, a jurisdictional public utility insofar as the books and records relate to transactions with or the business of such public utility. In addition, the merged company will be subject to record-keeping and books and records requirements of PUHCA 2005. The approval of the Proposed Transaction is based on such ability to examine books and records.

C. Accounting Matters

189. Applicants state that they do not intend to reflect any aspect of the Proposed Transaction on the books of any applicant that is required to keep its books in accordance with the Commission's Uniform System of Accounts, and therefore there are no *pro forma* accounting entries to provide. Applicants explain, however, that if the Proposed Transaction were to impact the books of any such entity, they will submit the required accounting entries within six months of the consummation of the Proposed Transaction.

190. To the extent any applicant that is subject to the Commission's Uniform System of Accounts[413] records any aspect of the Proposed Transaction in its accounts, it is directed to file its accounting entries with the Commission within six months of the consummation of the Proposed Transaction.[414] Further, if the accounting entities are

[412] *See* Merger Application, Exhibit M at 5-7

[413] 18 C.F.R. Part 101 (2011).

[414] Such accounting entries include entries related to transaction costs, merger premiums, acquisition adjustments, goodwill, or any cost related to the Proposed Transaction.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

recorded six months after the consummation of the Proposed Transaction, the applicant must file those accounting entries with the Commission within 60 days from the date they were recorded. The accounting submission must provide all accounting entries related to the Proposed Transaction, including narrative explanations describing the basis, and the rate impact, of such entries.

D. Reliability and Cyber Security Standards

191. Information and/or systems connected to the bulk power system involved in this transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to FPA section 215. Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information databases, and operating systems. If affiliates, personnel or investors are not authorized for access to such information and/or systems connected to the bulk power system, a public utility is obligated to take the appropriate measures to deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, and the like, must comply with all applicable reliability and cyber security standards. The Commission, North American Electric Reliability Corporation, or the relevant regional entity may audit compliance with reliability and cyber security standards.

The Commission orders:

(A) The Proposed Transaction is hereby conditionally authorized subject to the Commission finding that any mitigation measures proposed by Applicants, in a compliance filing filed within 60 days of the issuance of this order, remedy the identified screen failures such that the Proposed Transaction does not have an adverse effect on competition, as discussed in the body of this order.

(B) Applicants must inform the Commission within 30 days of any material change in circumstances that departs from the facts the Commission relied upon in conditionally authorizing the Proposed Transaction, including, but not limited to, if Duke Energy begins making sales into the Peninsular Florida market.

(C) The foregoing conditional 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.

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

20110930-3067 FERC PDF (Unofficial) 09/30/2011

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

(F) Applicants shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction.

(G) If Applicants seek to recover transaction-related costs through their wholesale power or transmission rates, they must first submit a compliance filing in this docket that details how they are satisfying the hold harmless requirement. In particular, in such a filing, Applicants must: (1) specifically identify the transaction-related costs they are seeking to recover; and (2) demonstrate that those costs are exceeded by the savings produced by the transaction.

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

(I) To the extent any entity that is subject to the Commission's Uniform Systems of Accounts records any aspect of the Proposed Transaction in its accounts, it must submit those accounting entries within six months of the consummation of the Proposed Transaction, and if any entity records such accounting entries 6 months after the consummation of the Proposed Transaction, those accounting entries must be submitted within 60 days from the date they were recorded. The accounting submission must provide all accounting entries related to the Proposed Transaction, including narrative explanations describing the basis, and rate impact, of such entries.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

20110930-3067 FERC PDF (Unofficial) 09/30/2011

Document Content(s)