137 FERC ¶ 61,122
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

The AES Corporation
DPL Inc.
The Dayton Power and Light Company
DPL Energy, LLC

Docket No. EC11-81-000

ORDER AUTHORIZING MERGER AND DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued November 15, 2011)

1. On May 18, 2011, The AES Corporation (AES), DPL Inc. (DPL), and DPL's subsidiaries, The Dayton Power and Light Company (DP&L) and DPL Energy, LLC (DPLE) (collectively "Applicants") filed, pursuant to sections 203(a)(1) and 203(a)(2) of the Federal Power Act (FPA),[1] a joint application for authorization of a proposed transaction in which AES will acquire DPL (Proposed Transaction). The Commission has reviewed the application under the Commission's Merger Policy Statement.[2] As

[1] 16 U.S.C. § 824b (2006).

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

discussed below, we will authorize the Proposed Transaction as consistent with the public interest.

I. Background

A. Description of the Parties

1. The AES Companies

a. The AES Corporation

2. Applicants state that AES' worldwide assets include electric generation, transmission, and distribution facilities in 28 countries on five continents that generate annual revenues of $16.6 billion and employ 29,000 people. In the United States, AES indirectly owns and operates over 13,000 MW of electric generation through competitive generating subsidiaries and Indianapolis Power & Light Company (IPL), a traditional, vertically-integrated utility. AES is a holding company under the Public Utility Holding Company Act of 2005 (PUHCA 2005),[3] and holds a single state holding company system waiver of accounting, record retention, and reporting requirements pursuant to 18 C.F.R. § 366.3(c)(1).[4]

3. Applicants state that AES owns and operates its competitive generation segment in the United States through a number of indirect subsidiaries and that each of these subsidiaries whose facilities are interconnected to the interstate transmission grid is either: (i) a public utility under the FPA and an exempt wholesale generator (EWG) under PUHCA 2005, or (ii) the owner of a generating facility that is a qualifying facility (QF) under the Public Utility Regulatory Policies Act of 1978 (PURPA).[5] Applicants contend that wholesale sales by these entities are made either pursuant to market-based rate authority granted by the Commission or pursuant to authority under PURPA.

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[3] 42 U.S.C. § 16451 *et seq*. (2006).

[4] In a delegated order issued on March 9, 2010 in Docket No. EC10-37-000, the Commission authorized a transaction under section 203(a)(1) in which a wholly-owned subsidiary of China Investment Corporation, an investment company owned by the State Council of the People's Republic of China, purchased from AES common stock representing approximately 15 percent of AES' outstanding common stock. *AEE 2, L.L.C.*, 130 FERC ¶ 62,205 (2010). The order issued in this proceeding does not modify the terms and conditions set forth in the March 9, 2010 order.

[5] 16 U.S.C. § 2601 *et seq.* (2006).

Applicants add that in PJM Interconnection, L.L.C. (PJM), the only market where there is overlap in Applicants' generation, AES indirectly owns approximately 1,967 MW, most of which is committed under long-term contracts. In addition, AES also owns subsidiaries that are EWGs and/or that own QFs in Hawaii, Puerto Rico, and within the footprint of the Electric Reliability Council of Texas.

b. Indianapolis Power & Light Company

4. IPL, an Indiana corporation, operates within the geographic footprint of Midwest Independent Transmission System Operator, Inc. (MISO) as a traditional, vertically-integrated electric utility primarily engaged in the generation, transmission, and distribution of electric power to retail customers in metropolitan Indianapolis and portions of other surrounding central Indiana communities. IPL owns and operates electric generating stations with an aggregate gross capacity of approximately 3,700 MW. IPL's electric transmission system is under the operational control of MISO and consists of 345 kV, 138 kV, and 34.5 kV lines designed and constructed to transfer IPL's generation to serve retail load. Applicants state that IPL has no captive or bundled wholesale customers, and IPL has received Commission authorization to make wholesale sales of electric energy at market-based rates.[6] Applicants also add that all of the common stock of IPL is indirectly owned by AES.

c. Dolphin Sub

5. Dolphin Sub, Inc., an Ohio corporation, is a wholly-owned subsidiary of AES and was formed on April 8, 2011, for the purpose of effecting the merger discussed herein. According to Applicants, Dolphin Sub has not conducted any activities other than those incidental to its formation and matters contemplated in the Merger Agreement (as described in P 10 below).

2. The DPL Companies

a. DPL Inc.

6. DPL, an Ohio corporation, is a diversified regional energy company based in Dayton, Ohio. DPL indirectly owns and operates approximately 3,929 MW of generating capacity in the PJM market. Through its principal subsidiaries DP&L, DPLE, and DPL Energy Resources, Inc., DPL generates and sells electricity at wholesale and distributes

[6] *See Indianapolis Power & Light, Co.*, 90 FERC ¶ 61,180 (2000); *Indianapolis Power & Light, Co.*, Docket No. ER00-1026-001 (unpublished letter order) (May 16, 2000).

and sells electricity at retail to customers in west central Ohio. DPL has annual revenues of $1.9 billion and employs approximately 1,500 people. DPL is a holding company under PUHCA 2005 and holds a single state holding company system waiver of the accounting, record retention, and reporting requirements pursuant to 18 C.F.R. § 366.3(c)(1).

b. The Dayton Power and Light Company

7. DP&L, an Ohio corporation, operates within the geographic footprint of PJM. Operational control over DP&L's bulk power transmission facilities has been turned over to PJM and consists of 345 kV and 138 kV transmission lines and substations. DP&L provides electric distribution services to more than 500,000 retail customers in west central Ohio. Applicants state that Ohio adopted retail choice, and DP&L has no captive retail customers. DP&L's retail sales to standard offer service customers are subject to rate regulation by the Public Utilities Commission of Ohio. DP&L owns or controls approximately 3,373 MW of electric generating capacity, including its 4.9 percent equity ownership interest in generation operated by the Ohio Valley Electric Corporation. Of this amount, 2,480 MW consist of undivided ownership interests in generating facilities co-owned with either Duke Energy Ohio, a division of Duke Energy, or both Duke Energy and Columbus Southern Power Company, a division of American Electric Power. Applicants state that DP&L has grandfathered transmission rights, which provide for the delivery of its share of power into PJM from commonly-owned generating facilities with Duke Energy Ohio and Columbus Southern Power Company that are located outside the geographic footprint of PJM. DP&L is a public utility under the FPA and has received Commission authorization to make wholesale sales of electric energy at market-based rates.[7]

c. DPL Energy LLC

8. DPLE, an Ohio limited liability company, owns and operates merchant generation with a generating capacity of approximately 556 MW, all of which is located within the

[7] *Dayton Power & Light Co.*, 123 FERC ¶ 61,231 (2008); *see also* Dayton Power & Light Co., Docket No. ER10-1728-001, Electronic Tariff Filing (July 7 and 20, 2010); *Dayton Power & Light Co.*, Docket No. ER10-1728-001, (unpublished letter order) (Aug. 30, 2010) (accepting tariff filing); *Dayton Power & Light Co.*, Docket No. ER11-3192-000 Electronic Tariff Filing (March 25, 2011) (pending); *Dayton Power & Light Co.*, Docket No. ER11-3193, Electronic Tariff Filing (March 25, 2011) (pending).

geographic footprint of PJM. DPLE is a public utility under the FPA and is authorized by the Commission to make wholesale sales of electricity at market-based rates.[8] According to Applicants, DPLE has no captive or bundled wholesale customers and is a wholly-owned subsidiary of DPL.

d. DPL Energy Resources, Inc.

9. DPL Energy Resources, Inc. (DPLER), an Ohio corporation, is a competitive retail electric supplier under Ohio law that provides electric generation services to approximately 12,500 commercial and industrial retail customers throughout Ohio. DPLER is a wholly-owned subsidiary of DPL. Effective March 1, 2011, DPLER acquired MC Squared Energy Services, LLC, an alternative retail supplier under Illinois law that provides service to approximately 2,300 commercial and industrial customers in northern Illinois. DPLER is also an alternative retail electric supplier in Illinois, an alternative electric supplier in Michigan, and an electric generation supplier in Pennsylvania, but is not active in these retail markets.

B. Description of the Proposed Transaction

10. The terms and conditions of the Proposed Transaction are set forth in the Agreement and Plan of Merger, dated as of April 19, 2011, by and among DPL, AES and Dolphin Sub (Merger Agreement).[9] Under the terms of the Merger Agreement, Dolphin Sub will merge with and into DPL. As a result of the merger, Dolphin Sub will cease to exist and DPL will survive as a direct wholly-owned subsidiary of AES. After the consummation of the Proposed Transaction, all of the outstanding shares of common stock of DPL will be held by AES and will no longer be publicly traded.

11. The Proposed Transaction is valued at $4.7 billion on an enterprise value basis. As consideration for the merger, DPL shareholders will receive $30 per share of DPL common stock. AES expects to finance the Proposed Transaction with a secured borrowing of $1.05 billion and the issuance of $1 billion in unsecured notes, $1.25 billion in unsecured notes issued by DPL and the assumption of $1.20 billion in existing DP&L debt. Neither IPL nor DP&L will pledge or encumber utility assets or issue or incur debt in connection with the Proposed Transaction.

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[8] *See supra* note 6; *see also Dayton Power & Light Co.*, Docket No. ER10-2491-000, Electronic Tariff Filing (Aug. 31, 2010); *Dayton Power & Light Co.*, Docket No. ER10-2491-000, (unpublished letter order) (Nov. 1, 2010) (accepting tariff filing).

[9] *See* Application, Exhibit I.

II. Notice of Filing and Responsive Pleadings

12. Notice of the application was published in the *Federal Register*, 76 Fed. Reg. 30,699 (2011), with interventions and protests due June 9, 2011. An errata notice extending the comment date to July 18, 2011 was issued on May 24, 2011. Timely motions to intervene were filed by Buckeye Power, Inc., and American Municipal Power, Inc. A timely motion to intervene and protest was filed by Western Area Service Group Municipals (Western Group).[10]

13. On August 3, 2011, Applicants filed an answer to the protest.

III. Discussion

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[11] the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[12] prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Applicants' answer to Western Group's protest because it has provided information that assisted us in our decision-making process.

B. Standard of Review Under Section 203

15. Section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest.[13] 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.[14] 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

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[10] Western Group states that its members are the 12 municipal electric systems that are interconnected to the transmission system of DP&L.

[11] 18 C.F.R. § 385.214 (2011).

[12] 18 C.F.R. § 385.213(a)(2) (2011).

[13] 16 U.S.C. § 824b(a)(4) (2006).

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

an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest." The 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.[15]

C. Analysis Under Section 203

1. Effect on Competition - Horizontal Market Power

a. Applicants' Analysis

16. Applicants assert that the Proposed Transaction will have no adverse effect on competition. They identify three relevant products: non-firm energy, capacity, and ancillary services.

17. In their analysis of non-firm energy markets, Applicants state that the combination of the two companies will not have a significant effect on competition. Applicants state that the absence of any competitive harm resulting from the Proposed Transaction is reflected in the fact that Applicants' generating holdings overlap in only one geographic market, PJM, and neither AES nor DPL currently owns or controls a significant share of the capacity in that market. Applicants state that they performed a competitive analysis for the PJM market based on current market conditions and known changes in Regional Transmission Organization (RTO) topography, including the planned relocation of FirstEnergy into PJM. Applicants state that AES owns 1,967 MW of generation (1.1 percent of the approximately 177,000 MW of PJM's installed capacity), and DPL owns 3,929 MW of generation in PJM (2.2 percent of PJM's installed capacity). Applicants continue that, based on the "2ab" method, the Herfindahl-Hirschman Index (HHI)[16] change resulting from the combination of AES and DPL in the PJM market is

[15] 18 C.F.R. § 33.2(j) (2011).

[16] Applicants approximated the results of 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 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 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

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only 5 points.[17] Applicants argue that even this *de minimis* change in the HHI overstates the effect of the Proposed Transaction, because the majority of AES's generation is committed under long-term contracts to third parties. Applicants perform an additional analysis, correcting for AES's capacity committed under contract. Applicants state that of AES's 1,967 MW of generation in PJM, all but 227 MW is committed to third parties under long-term contracts. In addition, Applicants contend that AES's 227 MW of generation represents 0.1 percent of installed capacity in PJM, and DPL's 3,929 MW of generation represents 2.2 percent of installed capacity. Based on these shares, Applicants compute an HHI change of 1 point, in a market that is at most moderately concentrated. Applicants argue that these data are sufficient to demonstrate that the extent of Applicants' business transactions and the actual level of overlap in PJM is *de minimis*, and no Competitive Analysis Screen is necessary.[18]

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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, FERC Stats. & Regs. ¶ 35,571 (2011) (Horizontal Market Power Analysis NOI).

[17] Application, Solomon Affidavit, at 12-14, n.35. Applicants state that the HHI changes they report are based on the "2ab" method. Under the "2ab" method, the change in HHI is equal to the difference between the sum of the squares of the pre-merger market shares of the two companies ($a^2 + b^2$) and the square of the combined company's post-merger market share ($(a+b)^2 = (a^2 + b^2 + 2ab)$). *Horizontal Merger Guidelines,* 57 Fed. Reg. 41,558 n.18.

[18] Application, Solomon Affidavit, at 13-15. To support their assertion that PJM energy markets are, at most, moderately concentrated, Applicants reference the State of

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18. In spite of the fact that they determined that conducting a Competitive Analysis Screen was unnecessary, Applicants nonetheless approximate the results of a Competitive Analysis Screen to further demonstrate the *de minimis* effect of the Proposed Transaction in PJM.[19] Applicants state that their post-Transaction market share of the PJM energy markets is less than 3 percent in all time periods with a change in market concentration resulting from the Proposed Transaction of only 5 points as measured by the HHI. Applicants conclude that their analysis affirms the *de minimis* impact of the Proposed Transaction on competition in the market for non-firm energy in PJM.

19. Applicants conclude that there are no geographic submarkets within PJM that are relevant in the context of the Proposed Transaction. Applicants state that nearly all of DPL's generation within PJM is located in the Dayton zone of PJM, while none of AES' generation within PJM is located in that zone. Applicants further state that, while AES has generation located in the PJM East submarket that the Commission has previously defined as a separate relevant market, DPL owns no generation in PJM East, and in any event, all of that AES capacity is committed under long-term contract. Accordingly, Applicants assert that there are no horizontal market power issues related to overlapping generation in either the PJM market or any relevant submarket within PJM.[20]

20. Likewise, Applicants argue that there are no horizontal effects resulting from the Proposed Transaction in the MISO market. Applicants state that only AES owns generation in the MISO market, and its 3,534 MW of generation represents only a small share (2.6 percent) of the approximately 134,000 MW of installed capacity in the MISO market. Applicants state that since DPL owns no generation in the MISO market, there is

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the Market Report for PJM, Volume1 (http://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2010/2010-som-pjm-volume1.pdf, which states that "Analysis of the PJM Energy Market indicates moderate market concentration overall.")

[19] Application at 12. Applicants state that this analysis relies on the testimony and accompanying work papers filed by the applicants in connection with FirstEnergy Corp., Docket No. EC10-68-000, Application for Authorization of Disposition of Jurisdictional Assets and Merger Under sections 203(a)(1) and 203(a)(2) of the Federal Power Act, Prepared Direct Testimony and Exhibits of William H. Hieronymus on Behalf of Applicants (May 11, 2010).

[20] *Id.* at 14.

no overlap and no possible change in market shares or concentration resulting from the Proposed Transaction.[21]

21. Finally, Applicants contend that the Proposed Transaction raises no horizontal market power issues in geographic markets outside of the Midwest. Applicants state that only AES owns generation outside of the MISO and PJM markets.[22] Applicants add that because DPL and its affiliates do not own or control generation in these other geographic markets, no horizontal analysis is required, and therefore, Applicants conclude that the Proposed Transaction does not raise any horizontal market power issues in any relevant market.[23]

22. Applicants used installed capacity market shares to study the effect of the Proposed Transaction on the PJM capacity product market. Applicants argue that given the *de minimis* market shares of installed capacity and minor HHI changes for the PJM non-firm energy market, there are no competitive concerns related to the Proposed Transaction in the PJM RTO-wide capacity market.[24]

23. Applicants also studied the impact of the Proposed Transaction on ancillary services markets in PJM. Applicants state that, given their small shares of generation in PJM, and the fact that their generation is not uniquely situated to provide ancillary services, the Proposed Transaction poses no competitive concerns in the PJM ancillary services markets.[25]

b. Commission Determination

24. We find that the Proposed Transaction does not raise horizontal market power concerns. Applicants have demonstrated that the effect of combining their operations in PJM, the relevant geographic market, is *de minimis* and, therefore, that further economic

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[21] *Id.*

[22] More specifically, AES owns generation in the New York Independent System Operator, Inc., ISO New England Inc., and California Independent System Operator Corporation RTO markets, and in the Bonneville Power Authority and Oklahoma Gas and Electric Company balancing authority areas.

[23] Application at 15-16.

[24] Application Appendix 1 at 15.

[25] Application at 13.

analysis of the effects of the Proposed Transaction on horizontal market power is not necessary. PJM is the relevant market because it is the only market in which Applicants' generation overlaps. Applicants show that using the 2ab calculation results in an HHI change of 1 point (considering AES's contractual commitments, as consistent with the Commission's requirements for calculating supplier's presence in the market, as found in 18 C.F.R. § 33.3(c)(4)(i)(A)).[26] Because the impact of the Proposed Transaction on horizontal competition falls far below the screen value of an HHI change of 100 points in a moderately concentrated market, we find that the Proposed Transaction will not materially increase market concentration in PJM.[27] Applicants have demonstrated that there is no overlap in any other relevant market, and therefore, we find that the Proposed Transaction presents no harm to horizontal competition.

2. Effect on Competition – Vertical Market Power

a. Applicants' Analysis

25. Applicants argue that the Proposed Transaction does not raise any issues related either to electric transmission ownership and operation, or to the combination of electric generation assets and fuel supply sources or fuel transportation systems. Applicants state that IPL's transmission facilities are controlled by MISO, and DP&L's transmission facilities are controlled by PJM. Applicants contend that other than the transmission facilities owned by these traditional utilities and interconnection facilities that connect generation to the grid, the Applicants and their affiliates do not own or control other transmission facilities. As the transmission facilities of DP&L and IPL are under the operational control of Commission-approved RTOs with market monitoring and mitigation, Applicants conclude that the Proposed Transaction does not raise any transmission market power concerns under the Commission's competitive guidelines. Further, Applicants note that neither AES nor DPL has any significant ownership interest in fuel supply sources, fuel transportation systems or other inputs to electricity products. Applicants state that to the extent that they have contracts for firm, interstate or intrastate

[26] The Commission has accepted the "2ab" method in such cases as *SUEZ Energy North America, Inc*., 125 FERC ¶ 61,188 (2008), *MidAmerican Energy Holdings Company*, 113 FERC ¶ 61,298 (2005) and *Union Electric Company*, 114 FERC ¶ 61,255 (2006).

[27] We also note that Applicants' delivered price test "approximation" confirms Applicants' "2ab" analysis, and reinforces Applicants' conclusion that a full competitive analysis is not necessary.

gas transportation in any relevant market, the pipeline capacity associated with such contracts is committed for use by their gas-fired generating facilities.[28]

26. Applicants state that there are no other barriers to entry that raise vertical market power concerns. Applicants add that neither AES nor DPL controls a sufficient number of generating sites in any relevant market that would allow them to raise barriers to entry by competing suppliers. Applicants also state that AES affiliates have limited ownership in rail cars, but argue that their limited ownership and leasing of railroad cars does not provide the AES affiliates any ability to erect barriers to entry into generation markets.[29]

b. Commission Determination

27. In transactions combining electric generation assets with inputs to generating power (such as natural gas transportation or fuel) or electric transmission assets, competition can be harmed if the transaction increases a firm's ability or incentive to exercise vertical market power in wholesale electricity markets. For example, by denying a rival firms' access to inputs or by raising their input costs, a post-transaction firm could impede entry of new competitors or inhibit existing competitors' ability to undercut an attempted price increase in the downstream wholesale electricity market. As discussed below, Applicants have shown that the Proposed Transaction does not raise any of these concerns.

28. Applicants have shown that the proposed combination of their electric transmission and generation assets will not harm competition. Here, IPL's transmission facilities are controlled by MISO, and DP&L's transmission facilities are controlled by PJM. Applicants state that neither AES nor DPL has any significant ownership in fuel supply sources, fuel transportation systems, or other inputs to electricity production. Therefore, Applicants cannot exercise vertical market power through a combination of electricity generating inputs and electric generation assets. We further note that no intervenor has asserted otherwise.

3. Effect on Rates

a. Applicants' Analysis

29. Applicants state that they do not have captive wholesale requirements customers, and therefore, the Proposed Transaction will not have an adverse impact on these kinds of

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[28] *Id.* at 16-17.

[29] *Id.* at 17-18.

customers. Applicants state that DP&L provides wholesale power to 12 municipal customers, the Western Group, under contracts that were entered into at a time when rates were established based on cost of service principles.[30] Applicants argue that none of these customers are captive because each customer has the option under the terms of its Power Service Agreement with DP&L, to either schedule purchases for the next 90-day period from DP&L at the contract price or purchase from another supplier. Applicants add that DP&L is obligated to deliver electricity to these customers irrespective of the supplier chosen.[31]

30. Applicants add that they are willing to make commitments to ensure that the Proposed Transaction will not have an adverse effect on any wholesale cost-based rates**.** Specifically, the Applicants commit for a period of five years to hold harmless wholesale requirements and transmission customers regarding their service rates under current contracts from the costs related to the Proposed Transaction.[32] For that five-year period, Applicants state that they will not seek to include transaction-related costs in their transmission revenue requirements or in any wholesale requirements rates, except to the extent that they can demonstrate that merger-related savings are equal to or in excess of the transaction-related costs included in the rate filing. Applicants state that the Commission has approved this type of commitment in its Merger Policy Statement and in a number of subsequent cases and has full authority to enforce its provisions.[33]

b. Protests

31. Western Group urges the Commission to set the matter for hearing, suspend hearing procedures other than discovery rights for a period of 90 days, and refer the matter to a Settlement Judge. Western Group argues that discovery is necessary because Applicants did not engage in pre-filing consultations with DP&L's wholesale customers and have not provided information on matters that are directly relevant to determining whether the Proposed Transaction will have adverse impacts on rates or service that need

[30] Western Group states that its members are parties to separate but similar power sales agreements or, in one case, an interconnection agreement, under which DP&L sells power or provides transmission service (collectively, Power Service Agreements).

[31] Application at Exhibit F.

[32] Application at 18.

[33] *Id.* at 18-19 (citing Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124; *see also 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)).

to be addressed as part of the Commission's consideration of the Proposed Transaction. Western Group maintains that Applicants provide little information about what DP&L's practices and policies affecting rates and service will be like once AES acquires DPL (e.g., whether AES intends to invest heavily to upgrade DPL facilities).[34]

32. Western Group states that under Power Service Agreements, which they entered into in 1995, DP&L is obligated to provide Western Group members the opportunity to buy from DP&L firm power and associated energy.[35] Western Group continues that the Power Service Agreements embody a schedule for firm power and the cost of fuel, which consists of the weighted average cost of fuel per kilowatt-hour of energy available for sale by DP&L during the calendar month immediately preceding the end of the billing month covered by the service bill.

33. Western Group states that Applicants are silent on how the Proposed Transaction will affect the rates charged to Western Group members that buy firm power under Rate Schedule A of the Power Service Agreements. Specifically, Western Group questions how the Proposed Transaction will affect a fuel charge component in the Power Service Agreements. Western Group continues that without information regarding how the combined company's resources will be dispatched, how that dispatch compares to DP&L's present day dispatch patterns and without information regarding each company's fuel costs, it is impossible for Western Group members to conduct any analysis to determine what effect the Proposed Transaction will have on the merged company's fuel costs and how those combined costs will flow through under the Power Service Agreements. Western Group notes that Applicants' proposed hold harmless commitment does not address Western Group's concerns regarding fuel costs. Western Group states that the concern about resulting fuel costs and the effect of such fuel costs on firm power rates is not a merger cost issue and thus is not at all mitigated by the hold harmless provisions. Western Group further argues that the firm power schedules of the Power Service Agreements could be adversely affected if AES were to divest itself of some of DPL's generation resources. Western Group argues that resource divestiture would presumably affect the fuel cost component of the rate payable under the Power Service Agreements for firm power. Western Group maintains that Applicants should commit that they will not divest any of this generation without reporting such actions to Western Group members in advance and negotiating mutually agreeable changes to the firm power schedule.[36]

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[34] Western Group Protest at 1, 4.

[35] *Id.* at 2.

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

34. Further, Western Group argues that Applicants do not discuss the effect the Proposed Transaction will have on transmission rates. Western Group states that Applicants have provided no information about their management plan, transmission expansion plan, maintenance program, North American Electric Reliability Corporation (NERC) reliability standards compliance program or anything else along those lines. Western Group argues that it is therefore impossible for the Commission or any customer to develop any sense of how the Proposed Transaction might affect transmission rates. Western Group argues that the proposed hold harmless commitment is only a commitment for five years to keep merger costs out of the transmission revenue requirement unless merger savings are at least equal to merger costs, and that these other impacts are neither addressed nor mitigated by the hold harmless provision. Western Group maintains that Applicants could mitigate this concern by agreeing not to alter the transmission rates under the Power Service Agreements at least until the earlier of the expiration of the Applicants' hold harmless provision or the termination of the Power Service Agreements.[37] Western Group argues that without this mitigation, they should be afforded the opportunity to conduct discovery so they and the Commission can better understand and determine what impact the Proposed Transaction will have on transmission rates.

c. Applicants Answer

35. Applicants respond that Western Group's concerns regarding generation dispatch are speculative, unrelated to the Proposed Transaction, and presume a contractual right that does not exist under the Power Service Agreements, and therefore, are not appropriate for consideration in this merger proceeding. Applicants allege that the claim that future generation divestiture may impact firm power rates is speculative because the Proposed Transaction does not involve any generation divestiture by the combined companies nor is any divestiture of DP&L's generation contemplated at this time. Applicants state that should the combined companies decide at some point in the future to divest generation, the combined companies would do so pursuant to a filing with the Commission under section 203 of the FPA. Applicants assert that Western Group members could intervene and participate in that proceeding and any subsequent rate filing based on a real divestiture proposal instead of an assumed possibility. Applicants add that Western Group members do not have any contractual rights pursuant to the existing Power Service Agreements to be served by a particular portfolio of generation resources.[38]

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

[38] Applicants Answer at 5.

36. Applicants argue that the concern that the Proposed Transaction will lead to an increase in fuel costs and therefore firm power rates is also speculative. Applicants state that nothing in the Proposed Transaction itself would lead to the conclusion that DP&L's fuel cost will increase. Regardless, Applicants assert that Western Group members will have ample opportunity in future rate proceedings to challenge any pass through of fuel costs they believe have increased as result of the Proposed Transaction.[39]

37. With regard to Western Group's challenge of the proposed hold harmless commitment, Applicants argue that the Commission has consistently found that hold harmless commitments identical to the one made by Applicants are sufficient to demonstrate that a proposed merger or transaction will not have an adverse impact on rates.[40] Applicants state that they have accepted the standard hold harmless commitment previously approved by the Commission in other proceedings to ensure that no transmission customers or wholesale customers with cost-based rates suffer adverse rate consequences from the Proposed Transaction.

38. Applicants state that each Western Group member has an option to provide DP&L with a schedule for firm power purchases under Rate Schedule A of their respective Power Service Agreements, but that Western Group members have no obligation to do so. Applicants claim that each Western Group member is able to purchase power from third parties, and that they regularly exercise that right. Applicants state that, in fact, no Western Group member has scheduled any firm power under its Power Service Agreement since August 2009. Applicants contend that because the Western Group members have the unrestricted ability to purchase power in the competitive market, the Commission should therefore have no concern with the effect of the Transaction on firm power rates under the Power Service Agreements. Applicants assert that the Western Group members' protest is nothing more than a pretense to extract a contract concession by expressing speculative concerns unrelated to the Proposed Transaction.[41]

39. Applicants argue that Western Group members' claim concerning transmission rates overlooks the fact that transmission planning, expansion, and reliability functions affecting DP&L's transmission facilities are now largely a function of PJM and NERC

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

[40] *Id.* at 6, citing *FirstEnergy Corp.*, 133 FERC ¶ 61,222, at P 62 (2010); *Great Plains Energy Inc.*, 121 FERC ¶ 61,069, at P 48 (2007); *Ameren Corp.*, 108 FERC ¶ 61,094 at P 68 (2004) , *reh'g denied*, 111 FERC ¶ 61,055 (2005); and Merger Policy Statement.

[41] Applicants Answer at 6-7.

requirements. Applicants state that these PJM and NERC requirements are not affected by the Proposed Transaction and will remain in full force and effect whether DPL becomes part of AES or not. Applicants further argue that the purpose of a hold harmless commitment is not to give contract counterparties additional rights that they do not currently have. Applicants assert that the hold harmless commitment is narrowly designed to preclude any transmission rate increase based on merger-related costs, but does not and should not be construed to bar rate changes that the Power Service Agreements currently authorize with respect to other costs not related to the transaction. Applicants further argue that Western Group members' proposal is, in effect, an attempt to use the hold harmless commitment under section 203 as a means to force a unilateral modification to the existing agreements that they have otherwise been unable to obtain through the negotiation process set forth in the Power Service Agreements.[42]

40. Applicants argue that Western Group has failed to establish any factual dispute that would require additional discovery and the Commission is under no obligation to initiate a hearing when there is no material fact in dispute. Applicants refer to Order No. 669, in which the Commission stated that, under the Merger Policy Statement, an applicant that wishes to avoid a hearing on rate issues should submit a commitment that adequately protects captive customers, such as a hold harmless commitment.[43] Applicants argue that in this proceeding there is a hold harmless commitment consistent with those previously approved by the Commission. Therefore, Applicants request that the Commission deny the Western Group's request for hearing or additional discovery.

d. Commission Determination

41. We accept Applicants' commitment to hold transmission and wholesale requirements customers harmless for five years from transaction-related costs associated with the Proposed Transaction. We interpret Applicants' hold harmless commitment to include all transaction-related costs, not only costs related to consummating the Proposed Transaction.[44] We note that nothing in the application indicates that rates to such

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

[43] *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200, at P 166 (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).

[44] We note, however, that any acquisition premium (or acquisition adjustment) associated with the Proposed Transaction is not permitted to be included in rates absent Commission approval in a section 205 rate filing. The Commission has stated that it

(continued…)

customers will increase as a result of costs related to the Proposed Transaction. The Commission will be able to monitor the Applicants' hold harmless commitment under the books and records provision of PUHCA 2005 and its authority under section 301(c) of the FPA, and the commitment is fully enforceable based on the Commission's authority under section 203 of the FPA.

42. If Applicants seek to recover transaction-related costs through their wholesale power or transmission rates within five years after the transaction is consummated, 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.[45] We also note that, if the 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.[46] 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 the savings produced by 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.[47]

43. In addition, we agree with Applicants that Western Group's assertions concerning the effect of increased fuel costs on firm power rates and of possible future generation divestitures are speculative, unsupported, and unrelated to the Proposed Transaction.[48] As for the rate impact of any possible divestitures, we agree with Applicants that Western Group would have an opportunity to intervene in future section 203 proceedings if

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"historically has not permitted rate recovery of acquisition premiums." Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,126.

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

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

[47] *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.

[48] *See supra* note 2.

Applicants were to divest generation. Further, with respect to Western Group's assertion that the fuel charge component under the Power Service Agreements may change depending on how the combined company dispatches its generating resources, we note that DP&L, which operates in MISO's control area, will remain as a separate subsidiary of AES and that there is nothing in the record that indicates that Applicants intend to coordinate the dispatch of DP&L's generating resources with those of IPL, which operates in PJM's control area, or of any other AES subsidiary.[49] Furthermore, we note that all but 227 MW of AES's generation inside PJM is committed to third parties under long-term contracts. Additionally, as Applicants explain, Western Group's members have no obligation to purchase power under the Power Service Agreements, and, in fact, no member has scheduled firm power from DP&L since August 2009. Lastly, we are not persuaded by Western Group's arguments concerning transmission planning, expansion, and reliability functions because these functions are independently performed under PJM's regional transmission expansion planning process and are not directly related to the Proposed Transaction. Similarly, we note that NERC requirements are also independent of the Proposed Transaction and therefore find no factual disputes that would require us to set the matter for hearing.

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

4. Effect on Regulation

a. Applicants' Analysis

45. Applicants state that each of the public utility subsidiaries of AES and DPL will remain jurisdictional public utilities subject to regulation by the Commission after the Proposed Transaction closes to the same extent each was regulated before such closing. Applicants argue that the Proposed Transaction will have no effects on state regulation that need to be addressed by the Commission. Applicants further state that the Proposed Transaction does not implicate or involve IPL. In this regard, Applicants state that the approval of the Indiana Utility Regulatory Commission is not required for the Proposed Transaction, and its jurisdiction will not be affected. Applicants state that the Proposed Transaction requires approval from the Public Utilities Commission of Ohio, but that the Public Utilities Commission of Ohio's jurisdiction over DP&L will remain unchanged.[50]

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[49] We also note that Western Group has failed to explain how Applicants could coordinate dispatch of their generating resources post-merger given the different RTO memberships of DP&L and IPL.

[50] Application at 19-20.

Therefore, Applicants argue that the Proposed Transaction will have no effect on regulation.

b. Commission Determination

46. 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.[51] 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 closes. The Commission stated in the Merger Policy Statement that it ordinarily will not set the issue of the effect of a transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the transaction. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission stated that it may set the issue for hearing, and that it will address such circumstances on a case-by-case basis.[52] We note that no party alleges that regulation would be impaired by the Proposed Transaction, and no state commission has requested that the Commission address the issue of the effect on state regulation.

5. Cross Subsidization

a. Applicants' Analysis

47. Applicants contend that the Proposed Transaction will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company. Applicants note that the Commission examines whether a proposed transaction, at the time of the transaction or in the future, will result in (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,

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

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

other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA.[53] Applicants state that, based on the facts and circumstances known to them or that are reasonably foreseeable, the Proposed Transaction will not result in any of the above-outlined transfers of facilities, issuances or securities, pledges or encumbrance of assets or other agreements. Further, Applicants provide a listing of the existing pledges and encumbrances of AES' and DPL's traditional utilities, IPL and DP&L.

b. Commission Determination

48. Based on the representations as discussed above, and subject to the compliance filing we direct below, 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. Applicants "provide assurance and verify, based on facts and circumstances known to the Applicants 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."[54] However, we note that in Applicants' Exhibit M, Applicants state that "[t]he Transaction will take place at the holding-company level only and *does* involve transfers of any facilities to the traditional utility associate companies, IPL or DP&L, either at the time of the Transaction or in the future."[55] We assume this is a typographical error and that Applicants intended to represent that "[t]he Transaction will take place at the holding-company level only and *does not* involve transfers of any facilities to the traditional utility associate companies, IPL or DP&L, either at the time of the Transaction or in the future." We direct Applicants to submit a compliance filing to correct this error in their Exhibit M representations.

49. 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

[53] Application at 20-21.

[54] Application at Exhibit M.

[55] *Id.* (emphasis added).

of PUHCA 2005. The approval of this transaction is based on such ability to examine books and records.

D. Accounting Analysis

50. Applicants state that they do not intend to reflect any aspect of the Proposed Transaction on the books of any entity that is required to keep its books and records in accordance with the Commission's Uniform System of Accounts (USofA). Further, Applicants state that in the event this determination should change, any required accounting entries will be submitted within 6 months of the consummation of the Proposed Transaction. Therefore, to the extent any entity that is subject to the Commission's USofA[56] 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.[57] Further, if the accounting entities are recorded six months after the consummation of the Proposed Transaction, the entity 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.

E. Reliability and Cyber Security Standards

51. 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

[56] 18 C.F.R. Part 101 (2011).

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

standards. The Commission, NERC, or the relevant regional entity may audit compliance with reliability and cyber security standards.[58]

1. Other Issues Raised by Western Group

52. The Western Group states that Applicants provide no information about what impact the Proposed Transaction may have on DP&L's compliance with reliability standards or other operational matters that might affect compliance, reliability or the Western Group's members. The Western Group cites the possibility of significant budget cutbacks, staffing reductions, deferred maintenance or other similar policies that it claims could readily alter reliability of service. The Western Group argues that the Commission should explore and consider such matters as part of its consideration of the Proposed Transaction.[59]

2. Applicants Answer

53. Applicants argue that the Commission has never included effects of a proposed merger on reliability within the criteria for approval of section 203 applications. Applicants presume that this is because the reliability requirements enforced by NERC and regional reliability organizations apply regardless of mergers and other changes in commercial relationships. Applicants state that DP&L will not be relieved from the independent reliability obligations it is required to meet with or without the Proposed Transaction.[60]

3. Commission Determination

54. We find the Western Group's assertions regarding DP&L's future actions with respect to reliability to be speculative. Further, as previously noted, systems connected to the bulk power system involved in this transaction may be subject to reliability standards approved by the Commission pursuant to section 215. Compliance with these standards is mandatory and enforceable whether or not the Proposed Transaction takes place and, as we noted above, DP&L's obligations under NERC requirements will remain the same.

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[58] *See also AEE, L.L.C.*, 130 FERC ¶ 62,205 (2010) (delegated order).

[59] Western Group Protest at 6-7.

[60] Applicants Answer at 9.

The Commission orders:

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

(B) Applicants must submit a compliance filing to correct the error in Exhibit M within 30 days of issuance of this order.

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

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

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

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

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

(H) 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 six 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.

(I) 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.

(J) Applicants shall notify the Commission within 10 days of the date on which the transaction is consummated.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Document Content(s)