

141 FERC ¶ 61,239
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinohoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

FirstEnergy Generation Corp. and
American Transmission System, Incorporated

Docket No. EC12-119-000

ORDER AUTHORIZING DISPOSITION
OF JURISDICTIONAL FACILITIES

(Issued December 20, 2012)

1. On July 16, 2012, FirstEnergy Generation Corp. (FE GenCo) and American Transmission Systems, Incorporated (ATSI) (jointly, Applicants) filed a joint application (Application) under section 203(a)(1) of the Federal Power Act (FPA).¹ Applicants request Commission authorization of the transfer by FE GenCo to its affiliate, ATSI, of certain generation assets (Transferred Assets) in order to facilitate their conversion to synchronous condensers, which will then support the ATSI transmission system. Specifically, the proposed transaction involves the transfer of the power islands and associated property and equipment for Eastlake Units 1 through 5, located in Eastlake, Ohio (Eastlake Units) and Lakeshore Unit 18, located in Cleveland, Ohio (Lakeshore Unit).

2. The Commission has reviewed the proposed transaction under the Commission's Merger Policy Statement.² As discussed below, we will authorize the proposed transaction as consistent with the public interest.

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 *Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,252 (2007), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008). See also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642 FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). See also *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (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).

I. Background

A. Description of the Parties

1. FE GenCo

3. FE GenCo is a wholly-owned subsidiary of FirstEnergy Solution Corp., which is a wholly-owned subsidiary of FirstEnergy Corp. (FirstEnergy). FirstEnergy subsidiaries and affiliates are involved in the generation, transmission and distribution of electricity, as well as energy management and other energy-related services. First Energy has franchised public utility affiliates, market-regulated power sales affiliates and non-utility affiliates. FirstEnergy's ten electric utility operating companies serve retail customers in Ohio, Pennsylvania, West Virginia, Maryland, New Jersey, and New York. FirstEnergy's generation subsidiaries, including FE GenCo, currently control approximately 22,810 megawatts (MW) of generation capacity, including the capacity of the plants to be deactivated. FE GenCo owns the Eastlake and Lakeshore Units that are the subject of the proposed transaction, and has authority to sell power at market-based rates.³ FE GenCo states that it is not a franchised public utility and does not have captive customers. In addition, FE GenCo states that it does not own or control transmission or distribution facilities other than limited interconnection facilities connected to its generation.

2. ATSI

4. ATSI is a wholly-owned subsidiary of FirstEnergy Transmission, LLC, which is a wholly-owned subsidiary of Allegheny Energy, Inc., which in turn, is a wholly-owned subsidiary of FirstEnergy. ATSI is a transmission-only public utility which owns, operates and maintains transmission facilities in Ohio and western Pennsylvania. Its transmission facilities are subject to the functional control of PJM which provides transmission service to customers pursuant to the PJM Open Access Transmission Tariff (PJM OATT).⁴ Applicants state that ATSI does not own generation and provides no retail utility service. ATSI also states that it is not a franchised public utility and has no captive customers.

B. Proposed Transaction

5. Applicants state that FirstEnergy announced in January 2012 that two of its generation subsidiaries would deactivate, by September 1, 2012, a number of generating units at six older, coal-fired power plants located in Ohio, Pennsylvania, and Maryland totaling 2,217 MW in capacity. Applicants state that a study performed by PJM following the announcement of the deactivations found significant reliability concerns as a result of the deactivations, including

³ *FirstEnergy Generation Corp.*, 94 FERC ¶ 61,177 (2001).

⁴ *PJM Interconnection, L.L.C.*, FERC Electric Tariff, Sixth Revised Volume No. 1.

concerns with continued reliability of the ATSI transmission system supporting the Cleveland area. The PJM study determined that there was a need for numerous transmission upgrades, including additional voltage support in that area. After consultation with PJM, Applicants state that they determined the best method of providing additional voltage support was conversion of the deactivated Eastlake and Lakeshore Units to synchronous condensers providing up to 1,385 MVAR of dynamic reactive voltage support. Applicants assert that “the installation of synchronous condensers at the Eastlake and Lakeshore locations is the most cost-effective and expedient means of providing the voltage support that the ATSI transmission system will need in the Cleveland area upon the deactivation of these and other generating units.”⁵ Applicants state that, “[a]lthough dynamic reactive voltage support also can be provided by static var compensators [], the conversion of the units to synchronous condensers is a more economical, effective and expedient solution than the installation of new [static var compensators].”⁶

6. Pursuant to the Asset Purchase Agreement, the Transferred Assets include boiler buildings, turbine buildings, administration buildings, control rooms, generators, exciters, voltage regulators, seal oil systems, protective relays, step-up transformers, auxiliary transformers, start-up transformers, cooling water systems and hydrogen systems. According to Applicants, the portion of the Transferred Assets that is necessary for the synchronous condenser conversion and operation and maintenance will be transferred at the assets’ original cost, less accumulated depreciation through the date of closing. They state that the purchase price of the assets necessary for the conversion is \$16,694,710 for Eastlake Units 4 and 5 on October 31, 2012, and \$4,795,646 for Eastlake Units 1, 2, and 3 and Lakeshore Unit 18 on December 31, 2014, resulting in a total purchase price of \$21,490,356. The portion of the Transferred Assets consisting of the remaining equipment, fixtures and other contents in the transferred buildings will be transferred at FE GenCo’s net book value at closing, which will be zero. According to the terms of the sale, ATSI will assume responsibility for environmental remediation of the buildings in which the synchronous condensers and related equipment will be located. ATSI and FE GenCo also will enter into a ground lease, with market rent, for use of the land on which the synchronous condensers will be located. The conversion of the units is scheduled as follows:

- Eastlake Unit 5 – June 1, 2013
- Eastlake Unit 4 – December 1, 2013
- Eastlake Units 1, 2 and 3 – June 1, 2015
- Lakeshore Unit 18 – June 1, 2015

7. Applicants state that the proposed transaction includes the sale of certain jurisdictional generation facilities by FE GenCo, which is a FERC-jurisdictional public utility, and thus is

⁵ Application at 2.

⁶ *Id.* at 7.

subject to the Commission's jurisdiction under section 203(a)(1) of the FPA.⁷ Also, Applicants state that although the Eastlake and Lakeshore Units will be deactivated prior to transfer to ATSI and will not operate as generating units after the transfer, the Commission's regulations extend to the transfer of generating units that were in operation prior to a transaction.⁸

II. Notice of Filing and Responsive Pleadings

8. Notice of the Application was published in the *Federal Register*, 77 Fed. Reg. 43071 (2012), with interventions and protests due on or before August 6, 2012. Exelon Corporation, American Municipal Power, Inc. and American Electric Power Service Corporation filed timely motions to intervene raising no issues. Buckeye Power, Inc. (Buckeye) and Public Service Electric and Gas Company (PSE&G), PSEG Power LLC (PSEG Power) and PSEG Energy Resources & Trade LLC (PSEG ER&T) (collectively, PSEG Companies) filed timely motions to intervene and protests. Applicants filed an answer to Buckeye and PSEG Companies' protests.

III. Discussion

A. Procedural Matters

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely, unopposed motions to intervene serves to make the entities that filed them parties to this proceeding.

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure⁹ prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Applicants' answer to the protests because it has provided information that assisted us in the decision-making process.

B. Standard of Review Under Section 203

11. Section 203(a)(4) of the FPA requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest. The Commission's analysis of whether a transaction is consistent with the public interest generally involves

⁷ Specifically, Applicants state that the Transferred Assets include generator step-up transformers associated with the Eastlake and Lakeshore Units, which the Commission has found to be jurisdictional assets. Application at 5 (citing *Niagara Mohawk Power Corp.*, 87 FERC ¶ 61,283 (1999)).

⁸ Application at 5, n. 8 (citing 18 C.F.R. §33.1(a)(1)(iv); Order No. 669, FERC Stats. & Regs. ¶ 31,200 at P 84, *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).

⁹ 18 C.F.R. § 385.213(a)(2) (2012).

consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.¹⁰ 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.”¹¹ The Commission’s regulations establish verification and informational requirements for Applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.¹²

C. Section 203 Application

1. Effect on Competition – Horizontal Market Power

a. Applicants’ Analysis

12. Applicants state that the proposed transaction does not involve the transfer of generating assets between unaffiliated companies because both the seller, FE GenCo, and the buyer, ATSI, are currently owned indirectly by FirstEnergy. In addition, Applicants state that the Transferred Assets will not only be deactivated at the time of the transfer, but after their transfer they will be physically converted to serve a transmission function and will be rendered incapable of any generation function by the permanent removal of all the equipment and material necessary for the generation function, including the turbine and the coal. Therefore, according to Applicants, the proposed transaction will not result in a change in the generation market share of the subsidiaries of FirstEnergy.

b. Commission Determination

13. Applicants have demonstrated that the proposed transaction will not eliminate a competitor or materially increase market concentration in the relevant market because the Transferred Assets will be physically converted to serve a transmission function rather than a generation function and will be rendered incapable of any generation function. Therefore, we find that the proposed transaction does not raise horizontal market power concerns.

¹⁰ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

¹¹ 16 U.S.C. § 824b(a)(4) (2006).

¹² 18 C.F.R. § 33.2(j) (2012).

2. Effect on Competition – Vertical Market Power

a. Applicants’ Analysis

14. Applicants assert that the proposed transaction does not raise any vertical market power concerns. Applicants state that the core of the proposed transaction is the transfer by FE GenCo to ATSI of the Transferred Assets in order to facilitate their conversion to a transmission function as synchronous condensers. As synchronous condensers, the Transferred Assets will provide voltage support. Applicants state that ATSI will provide open, non-discriminatory access to these facilities, together with its existing transmission facilities, under the PJM OATT. Moreover, Applicants assert that the proposed transaction involves affiliated entities, so there is no change in concentration of ownership or control of transmission facilities.

b. Commission Determination

15. Applicants have shown that the proposed transaction does not raise any vertical market power concerns. We find that Applicants’ ownership of transmission facilities does not present vertical market power concerns because Applicants have turned over control of their transmission facilities to PJM, eliminating their ability to use the transmission system to harm competitors. As a result, we find that the proposed transaction does not raise any vertical market power concerns.

3. Effect on Rates

a. Applicants’ Analysis

16. Applicants state that the proposed transaction will have no adverse effect on rates for wholesale power sales because the generation assets at issue will be deactivated, then permanently converted for use as transmission assets and will not be capable of nor used to make wholesale power sales. According to Applicants, ATSI will include the purchase price of the Transferred Assets, as well as the costs of the conversion and the installation of synchronous condensers, in its transmission formula rate under the PJM OATT. Applicants also state that ATSI will not include any transaction-related costs¹³ in its transmission formula rate. However,

¹³ While Applicants state that the Commission has interpreted transaction costs to include all transaction-related costs (including acquisition premiums, if any), not only costs related to consummating a transaction, the Commission has found that transaction-related costs do not include acquisition premiums. *See International Transmission Co.*, 139 FERC ¶ 61,003, at P 17, n.22 (2012). The Commission has stated that it "historically has not permitted rate recovery of acquisition premiums." Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,126. 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. *Duke Energy Moss Landing LLC*, 86 FERC ¶ 61,227, at 61,816 (1999).

Applicants state that, to the extent ATSI's acquisition of these assets could affect rates for transmission service, ATSI proposes a hold harmless commitment. For a period of five years, ATSI will not seek to include transaction-related costs in its filed transmission revenue requirements unless it can demonstrate transaction-related savings equal to or in excess of the transaction-related costs.¹⁴

b. Protests and Answer

17. Buckeye asserts that the reliability concerns cited by PJM, including the need for additional voltage support in the Cleveland area of ATSI's transmission system, were precipitated entirely by FirstEnergy's own decision to deactivate generating facilities before the end of their depreciable lives, or any government-imposed deadlines, because environmental regulations had purportedly rendered them less likely to be dispatched and thus, presumably, less profitable. Buckeye states that the effect of the proposed solution to the impending low voltage conditions requiring additional voltage support created by that unilateral decision is to shift the risk of recovering the undepreciated cost of the no-longer-profitable generating facilities, as well as the risk of remediating latent environmental problems in the transferred structures, from FE GenCo (i.e., FirstEnergy's shareholders) to the customers taking transmission service in the ATSI zone of PJM.¹⁵ Buckeye states that its concerns relate to whether it is appropriate and consistent with the public interest to allow the Applicants to shift to ATSI's transmission customers not only the undepreciated costs of FE GenCo's no-longer-profitable power islands and appurtenant assets, but also the substantial risk and cost of remediating and disposing of preexisting asbestos and chemicals at the facilities.

18. Buckeye questions whether the proposed conversion of units to synchronous condensers is the most cost-effective and expedient means of providing the voltage support that the ATSI transmission system will need upon deactivation of the generating units. Buckeye states that if FirstEnergy does not want to continue operating its units and maintain the voltage support that they provide, then it is appropriate that FirstEnergy's shareholders should share in the consequential costs through adjustment to the purchase price.¹⁶ Buckeye requests that the Commission condition its approval upon either removing ATSI's environmental remediation obligation or reducing the asset purchase price by the present value of the obligation which Applicants quantified at nearly \$7 million.

19. In response to Buckeye, Applicants argue that the transmission rate recovery issues raised by Buckeye are premature and irrelevant to this proceeding, which concerns only the consistency of the proposed transaction with the Commission's standard for approval under section 203.¹⁷

¹⁴ Application at 15.

¹⁵ Buckeye Protest at 6.

¹⁶ *Id.* at 8.

¹⁷ Applicants' Response at 6-7.

Applicants state that ATSI believes that the Transferred Assets and the cost of converting the Transferred Assets into synchronous condensers are appropriately recoverable in its transmission rates. However, Applicants state that this question is not at issue in this proceeding. Applicants assert that the Commission will have the opportunity to address any concern that Buckeye may have regarding ATSI's recovery of those costs through the annual update process contained in ATSI's formula rate.

20. The PSEG Companies are not opposed to Applicants' request to transfer the assets or Applicants' request to recover the cost of the assets through ATSI's formula rate. However, PSEG Companies state that the proposed transaction presents a case of first impression for the Commission to address whether facilities that historically were operated as generators, but that will no longer provide energy or capacity, should be allowed to receive full cost-of-service treatment for the provision of reactive services and thus should not be constrained by the currently-effective AEP methodology for recovery of costs for providing reactive power.¹⁸

21. PSEG Companies state that in light of the fact that ATSI will seek to include costs related to the transfer of the assets and their conversion to synchronous condensers in ATSI's transmission formula rates, where it would then obtain cost-of-service treatment subject to any prudence challenges, they question whether generators providing reactive service should be afforded the opportunity to fully recover their costs. Specifically, PSEG Companies state that their reactive power Tariff recovers costs in accordance with the AEP methodology, which does not represent full cost-of-service recovery. PSEG Companies claim that, under the AEP methodology, cost recovery is limited to three components of a generation plant related to the production of reactive power: (i) the generator and its exciter; (ii) accessory electric equipment that supports the operation of the generator-exciter; and (iii) the remaining total production investment required to provide real power and operate the exciter.¹⁹ PSEG Companies contend that the AEP decision made it clear that, because these plant items produce both real and reactive power, generators' reactive power Tariffs should develop and apply an allocation factor to sort the annual revenue requirements of these components between real and reactive power production.²⁰ PSEG Companies therefore seek clarification from the Commission that similarly-situated generators should be eligible to recover all of their costs associated with providing reactive service should they no longer be providing both real and reactive power, and that the AEP method would not be controlling in such cases.

22. In response to PSEG Companies, Applicants state that the complaint about the AEP methodology has nothing to do with their section 203 application. Applicants argue that the proposed transaction that is the subject of the Application cannot present the particular rate issue

¹⁸ PSEG Protest at 2 (citing *American Electric Power Service Corp.*, 88 FERC ¶ 61,141 (1999) (AEP Order)).

¹⁹ *Id.* at 6-7.

²⁰ *Id.* at 7 (citing AEP Order, 88 FERC ¶ 61,141 at PP 29-30).

that vexes the PSEG Companies, even in a subsequent section 205 proceeding. Applicants explain that ATSI is a transmission-only company that owns no generation assets. Applicants state that ATSI will not seek to recover the costs of the Transferred Assets and conversion costs in generation charges subject to the AEP policy, but in transmission rates. Applicants state that if the PSEG Companies wish to challenge the AEP policy, they have several available options. Applicants state that the PSEG generating affiliates could file amendments to their reactive power rate schedules under section 205 employing the new methodology that they consider appropriate and defend their proposed methodology in that proceeding. Applicants state that, in the alternative, the PSEG Companies could file a petition for a declaratory order to obtain the generic statement they seek modifying the AEP policy.²¹ Applicants argue that the Commission should reject the PSEG Companies' improper attempt to insert their extraneous issue into this proceeding.

c. Commission Determination

23. We note that our analysis of rate effects under section 203 of the FPA differs from the analysis of whether rates are just and reasonable under section 205 of the FPA. Our focus here is on the effect that the proposed transaction will have on rates, whether that effect is adverse, and whether any adverse effect will be offset or mitigated by benefits that are likely to result from the transaction.²² While it appears that the proposed transaction will have an effect on rates, as Applicants indicate that ATSI intends to include the purchase price of the transferred generation facilities and any conversion costs in its transmission rates, we find that the proposed transaction will not have an adverse effect on rates, as discussed more fully below.

24. Applicants state that PJM found that there would be significant reliability concerns regarding the ATSI transmission system supporting the Cleveland area as a result of planned generator retirements, and PJM determined that there was a need for numerous transmission upgrades, including additional voltage support in that area. Applicants state that PJM has indicated that a portion of the voltage support will be needed by June 1, 2013 with additional support by December 1, 2013 and at later periods over the next 18 months. Applicants note that the proposal to convert the Transferred Assets in question into synchronous condensers was approved by the PJM Board of Directors on May 17, 2012. Prior to approval by the PJM Board of Directors, PJM Staff recommended the proposed conversions in an April 27, 2012 meeting of PJM's Transmission Expansion Advisory Committee.²³ As part of their recommendation, PJM

²¹ Applicants' Response at 8.

²² See *ITC Midwest LLC*, 133 FERC ¶ 61,169, at P 23 (2010); *ALLETE, Inc.*, 129 FERC ¶ 61,174, at P 19 (2009); *Startrans IO, L.L.C.*, 122 FERC ¶ 61,307, at P 25 (2008); *ITC Holdings Corp.*, 121 FERC ¶ 61,229, at P 120 (2007).

²³ See <http://pjm.com/~media/committees-groups/committees/teac/20120427/20120427-teac-reliability-analysis-update-conference-call.ashx>.

Staff also considered an alternative proposal from an unaffiliated entity to build a 345 kV line in Ohio from the Conesville to the Star substations. However, PJM Staff determined that the proposed line would not relieve the need for other proposed solutions (including the proposed conversions) needed to address the reliability issues stemming from planned generator retirements in the FEGenCo region. Accordingly, PJM Staff recommended against the alternative proposal.²⁴

25. Applicants state, and no party disputes, that conversion of the units to synchronous condensers is the most cost-effective and expedient means of providing the voltage support that the ATSI transmission system will need in the Cleveland area upon the deactivation of these and other generating units and that the conversion of the units to synchronous condensers is a more economical, effective and expedient solution than the installation of new static var compensators.²⁵ In particular, Applicants state: “The conversion of the Transferred Assets to synchronous condensers can be completed for approximately \$60 million. This amount, when added to the transfer price of the Transferred Assets (which, as discussed above, is approximately \$21.5 million) results in an overall cost for 1,385 MVAR of voltage support distributed across six devices (i.e. units) of approximately \$81.5 million. That amount is substantially less than the approximate \$120 million cost to purchase and install the [static var compensators] necessary to provide the equivalent voltage support.”²⁶ Applicants also represent that synchronous condensers, based on the conversion of the deactivated generating units, can be brought on line more quickly than new static var compensators could be installed.²⁷

26. Based on the evidence in the record as discussed above, including the approval from PJM and reliability benefits from the proposed conversion, we find that the proposed transfer of the generating units and their conversion to synchronous condensers will not have an adverse effect on rates.

²⁴ See *id.* at 31-33.

²⁵ Applicants list several advantages that synchronous condensers have over static var compensators, including maintaining higher short circuit levels than if the generators were deactivated with the plants, short-term overload capability to produce more reactive power, reactive capability not impacted by system voltage level, and negligible harmonic and resonance issues. Application at 7.

²⁶ Application at 8.

²⁷ Applicants state that the lead time for ordering and installing static var compensators is a minimum of approximately eighteen months, which means they would not be available to meet the June 1, 2013 and December 1, 2013 in-service dates needed for the additional voltage support. Applicants state that the conversion to synchronous condensers could be completed to meet those in-service dates. Application at 8.

27. Moreover, Applicants state that “[t]o the extent ATSI’s acquisition of these assets could affect rates for transmission service, ATSI makes the following ‘hold harmless’ commitment. For a period of five years, ATSI will not seek to include [t]ransaction-related costs in its filed transmission revenue requirements unless it can demonstrate [t]ransaction-related savings equal to or in excess of the [t]ransaction-related costs.”²⁸ We accept Applicants’ hold-harmless commitment, as further discussed below.

28. As noted above, Buckeye argues that ATSI should not be able to include the full purchase price of the assets at issue in its transmission rates. We agree with Applicants that Buckeye’s concerns about costs and rate recovery issues are prematurely raised in this proceeding and should be deferred to a subsequent rate proceeding. Any determination of whether the purchase price, the costs of the proposed conversion, environmental remediation costs or ground lease costs can be included in transmission rates will be made in a subsequent rate filing. We make no determination here as to whether the purchase price of the Transferred Assets or any future costs are or will be prudently incurred or as to whether any transmission rates to be proposed by ATSI are just and reasonable.

29. Nevertheless, we disagree with Applicants’ suggestion that the purchase price and conversion costs of the facilities at issue can be included in rates through the annual update process contained in ATSI’s *currently approved formula rate*. ATSI’s current formula rate does not include any accounts or components that would allow for recovery of the costs at issue. If ATSI wishes to recover in its transmission formula rates the purchase price, conversion costs, environmental remediation costs or ground lease costs related to the Transferred Assets, then ATSI must first make a filing with the Commission under section 205 of the FPA.

30. We accept Applicants’ commitment to hold harmless transmission customers from transaction-related costs for a period of five years to the extent that such costs exceed savings related to the proposed transaction.²⁹ If Applicants seek to recover transaction-related costs through their transmission rates within five years of consummation of the proposed transaction, 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, then that compliance filing must be filed in the FPA section 205 docket in which the formula rate was approved by the Commission, as well as the instant section

²⁸ *Id.* at 15.

²⁹ Regarding formula rates, the Commission has found that a hold harmless commitment is enforceable and administratively manageable if customers have an opportunity to scrutinize costs before they are included in the formula rate, and therefore are able to alert the Commission to costs that might be transaction-related. *See Exelon Corp.*, 138 FERC ¶ 61,167, at P 120 (2012); *ITC Midwest LLC*, 133 FERC ¶ 61,169 at PP 24-25; *FirstEnergy Corp.*, 133 FERC ¶ 61,222, at P 63 (2010); *PPL Corp.*, 133 FERC ¶ 61,083, at PP 26-27 (2010).

203 docket.³⁰ We also note that, if Applicants seek to recover transaction-related costs in a filing whereby they are 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.³¹ The Commission will notice such filings for public comment. As part of the section 203 component of 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 proposed transaction, in addition to any requirements associated with filings made under section 205. Such a hold harmless commitment will protect customers' transmission rates from being adversely affected by the proposed transaction.

31. The Commission will be able to monitor Applicants' hold harmless commitment under its authority under section 301(c) of the FPA³² and the books and records provision of the Public Utility Holding Company Act 2005,³³ and the commitment is fully enforceable based on the Commission's authority under section 203 of the FPA.

32. We will reject PSEG Companies' request that the Commission clarify that similarly-situated generators should be eligible to recover all of their costs associated with providing reactive service should they no longer be providing both real and reactive power, and that the AEP method would not be controlling in such cases. We find that this request is beyond the scope of this proceeding, which relates only to whether Applicants can transfer the assets at issue under section 203(a)(1) of the FPA. Any issues related to the rate treatment of the assets at issue will be addressed in a future rate proceeding.³⁴

33. We will reject Buckeye's request to condition our approval upon either removing ATSI's environmental remediation obligation or reducing the asset purchase price by the present value of the obligation. We find that such conditions are unnecessary to satisfy the Commission's requirements pursuant to section 203(a)(1) of the FPA. We will consider the environmental remediation obligation when Applicants file a rate case to recover such costs.

³⁰ In this case the filing would be a compliance filing in both the section 203 and 205 dockets.

³¹ In this case the filing would be a compliance filing in the section 203 docket, but a rate application in the section 205 docket.

³² 16 U.S.C. § 825(c).

³³ 42 U.S.C. § 16452 (2006).

³⁴ See *Allete, Inc.*, 129 FERC ¶ 61,174, at P 19 (2009) (analysis of rate effects under section 203 is distinct from whether rates are just and reasonable under section 205).

4. Effect on Regulation

a. Applicants' Analysis

34. With respect to the effect of the proposed transaction on regulation, Applicants state that FE GenCo and ATSI will remain subject to regulation by the Commission after the proposed transaction closes to the same extent each was regulated before the closing of the proposed transaction. Applicants also state that the Transferred Assets will be placed under the functional control of PJM, a Commission jurisdictional Regional Transmission Organization (RTO). In addition, Applicants state that the Commission will continue to have jurisdiction over the use of and access to the Transferred Assets, which will be subject to the terms of the PJM OATT.

b. Commission Determination

35. We find that neither state nor federal regulation will be impaired by the proposed transaction. The Commission's review of a transaction's effect on regulation is focused on ensuring that the transaction does not result in a regulatory gap at the federal level or the state level. We find that the proposed transaction will not create a regulatory gap at the federal level because the Commission will retain its authority over Applicants. 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

36. Applicants state, 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 proposed transaction or in the future: (1) any transfers 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 issuances of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of 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 facilities, for the benefit of an associate company; or (4) any new affiliate contracts between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA.

b. Commission Determination

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

D. Accounting Analysis

1. Applicants' Request

38. Applicants state that the portion of the Transferred Assets that is necessary for the synchronous condenser conversion, operation and maintenance will be transferred at the asset's original cost, less accumulated depreciation through the date of closing. Applicants indicate that the original cost of these assets is \$74,065,070 and the related accumulated depreciation at the closing date will be \$52,574,714. They also state that the portion of the Transferred Assets consisting of the remainder of the equipment, fixtures and other contents of the transferred buildings will be transferred at FE GenCo's net book value at closing, which will be zero. Applicants indicate that the \$21,490,356 purchase price of the assets necessary for the synchronous condenser conversion, operation and maintenance equals the assets' original cost less accumulated depreciation.³⁵ Applicants state that the purchase price does not reflect write-downs, i.e., impairments, taken in 2010 and 2011 on the Transferred Assets due to the anticipated impact of the new environmental regulation on the economic viability of the assets as generating units. Applicants did not indicate the amount of the impairment loss recorded by FE GenCo prior to the transfer. Further, ATSI proposes to record the \$21,590,356 purchase price in Account 107, Construction Work in Progress. Finally, Applicants state that the transferred assets are not considered to be an operating unit or system since the transferred assets will require conversion for their original intended use as generation equipment to a new use as transmission equipment.

2. Commission Determination

39. ATSI's proposed accounting entries record the Transferred Assets necessary for the synchronous condenser conversion and operation and maintenance at an amount equal to the assets' original cost less accumulated depreciation. As a result, the Transferred Assets recorded on ATSI's books do not reflect the impairment losses FE GenCo took in 2010 and 2011. FE GenCo recorded impairment losses under generally accepted accounting principles to recognize a decline in the economic viability of the generating units. The impairment losses do not necessarily represent a write-off mandated by the Commission because it has yet to determine whether the impairment loss should be recognized for ratemaking purposes. Under the Commission's accounting regulations an impairment loss is generally determined after the Commission has made a finding as to whether utility plant is impaired for ratemaking purposes. This proceeding concerning an application for approval under section 203 is not the appropriate proceeding to address the rate recovery of the Transferred Assets, including the amount previously impaired. Finally, we find that the Transferred Assets should be recorded on ATSI's books at their original cost together with related amounts of accumulated depreciation, which may be adjusted pending the outcome of a future section 205 filing. Any amounts not authorized for rate recovery in that future section 205 filing must be used to write-down the book value of the Transferred Assets on ATSI's books.

³⁵ See Exhibit I, Asset Purchase Agreement, Article 8, Purchase Price.

40. ATSI must submit its final accounting entries within six months of the date that the transaction is consummated, and the accounting submissions shall provide all the accounting entries and amounts related to the transaction along with narrative explanations describing the basis for the entries.³⁶

E. Other Considerations

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

The Commission orders:

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

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

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

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

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

³⁶ ATSI's proposed accounting entries should include, among other items, accounting entries related to deferred income tax accounts and details on the determination of the original cost and accumulated depreciation of the Transferred Assets.

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

(G) Applicants shall account for the proposed transaction in accordance with Electric Plant Instruction No. 5 and Account 102 of the Uniform System of Accounts. Applicants shall submit its final accounting entries within six months of the date that the proposed transaction is consummated, and the accounting submission shall provide all the accounting entries and amounts related to the proposed transaction along with narrative explanations describing the basis for the entries.

(H) If Applicants seek to recover transaction-related costs through their transmission formula rates, they must first submit a compliance filing in this docket that details how they are satisfying the hold harmless requirement in addition to a section 205 filing. 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 proposed transaction.

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.