

153 FERC ¶ 61,377
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Public Service Company of New Mexico
PNMR Development and Management Corporation

Docket No. EC15-213-000

ORDER AUTHORIZING ACQUISITION
OF JURISDICTIONAL FACILITIES

(Issued December 30, 2015)

1. On September 25, 2015, as amended on November 12, 2015, Public Service Company of New Mexico (PNM) and its affiliate, PNMR Development and Management Corporation (PNM Development) (together, Applicants) filed, pursuant to sections 203(a)(1)(D) and 203(a)(1)(B) of the Federal Power Act (FPA)¹ and Part 33 of the Commission's regulations,² an application requesting approval of a transaction whereby 100 percent of the ownership interests of Southern California Public Power Authority (Southern California Public Power), M-S-R Public Power Agency (M-S-R Public Power), City of Anaheim, California (Anaheim) and Tri-State Generation and Transmission Association, Inc. (Tri-State) (together, the Exiting Participants) in the San Juan Generating Station (San Juan Station), including Units 3 and 4 of the San Juan Station, and associated transmission interconnection facilities and rights, would be transferred to Applicants (Proposed Transaction).³ The Commission has reviewed the Proposed

¹ 16 U.S.C. § 824b(a)(1)(D) and (a)(1)(B) (2012).

² 18 C.F.R. pt. 33 (2015).

³ Joint Application for Authorization Pursuant to Section 203 of the Federal Power Act for Acquisition of Jurisdictional Facilities and Request for Expedited Consideration and a Shortened Comment Period, Docket No. EC15-213-000 (filed Sept. 25, 2015) (Application). Supplemental Information and Request for Expedited Consideration and a Shortened Comment Period, Docket No. EC15-213-000 (filed Nov. 12, 2015) (Supplemental Information Filing). Applicants state that since none of the Exiting Participants is a public utility subject to the Commission's jurisdiction under FPA

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Transaction under the Commission's Merger Policy Statement.⁴ As discussed below, we authorize the Proposed Transaction as consistent with the public interest.

I. Background

A. Description of the Parties to the Proposed Transaction

1. PNM

2. Applicants state that PNM is a direct, wholly owned public utility operating company subsidiary of PNM Resources, Inc. (PNM Resources). Applicants state that PNM is engaged in the generation, transmission and sale of electricity at wholesale in the western United States, and that, within the State of New Mexico, PNM is engaged in the generation, transmission, distribution and sale of electricity at retail. Applicants note that PNM's retail electric operations are regulated by the New Mexico Public Regulation Commission (New Mexico Commission).

3. According to Applicants, PNM owns or controls approximately 2,689 megawatts (MW) of generating capacity and owns or leases approximately 3,170 circuit miles of electric transmission lines, all of which are located in New Mexico and Arizona. Applicants state that PNM provides service over those transmission facilities pursuant to an open access transmission tariff that is on file with the Commission.⁵

section 201(e), 16 U.S.C. § 824e, none of the Exiting Participants is an applicant in this proceeding. Application at n.1.

⁴ See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). See also *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (cross-referenced at 120 FERC 61,060 (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 No. 642), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). See also *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

⁵ Application at 9-10.

2. PNM Development

4. Applicants state that PNM Development is a wholly owned subsidiary of PNM Resources. Applicants explain that, from November 2005 to June 2007, PNM Development held a one-third interest in the Luna Energy Facility in Southern New Mexico, but that this interest was transferred to PNM on June 29, 2007. Applicants note that PNM Development also temporarily owned a beneficial interest in a lease of a portion of Palo Verde Nuclear Generating Station Unit 2, which it transferred to PNM on July 24, 2009. Applicants state that, currently, PNM Development has no ownership of physical assets.⁶

B. Origin of the Proposed Transaction: Federal and State Environmental and Regulatory Requirements Related to the San Juan Station

5. Applicants state that the Proposed Transaction is a “critical component of a plan whose implementation will resolve numerous issues associated with complying with [the] environmental and regulatory requirements of several federal and state entities”⁷ related to the San Juan Station, a four-unit, coal-fired electric generating plant located in San Juan County, New Mexico with a net generation capacity of approximately 1,683 MW.⁸ According to Applicants, the San Juan Station is a joint participant project that is owned, in varying shares, by: PNM; Southern California Public Power; M-S-R Public Power; Anaheim; Tri-State; Tucson Electric Power Company (Tucson Electric); The City of Farmington, New Mexico (Farmington); the Incorporated County of Los Alamos, New Mexico (Los Alamos); and Utah Associated Municipal Power Systems (Utah AMPS) (collectively, the Participants). Applicants state that PNM operates the San Juan Station on behalf of all of the Participants, and ownership and operation of the San Juan Station are governed by the San Juan Project Participation Agreement (San Juan Participation Agreement).

6. Applicants explain that, in 2011, the United States Environmental Protection Agency (Environmental Protection Agency) issued a Federal Implementation Plan

⁶ *Id.* at 10.

⁷ *Id.* at 2-3.

⁸ *Id.* at n.3. Applicants note that the San Juan Station is connected to a 345 kilovolt (kV) switchyard that is connected to seven 345 kV transmission lines. Those transmission lines connect to Colorado, Arizona, the Four Corners Power Plant, and PNM’s transmission system in north central New Mexico. *Id.* at 11.

requiring the use of selective catalytic reduction equipment as Best Available Retrofit Technology for the San Juan Station to meet federal Clean Air Act regional haze requirements. Applicants state that, subsequent to that finding, PNM, in its capacity as San Juan Operating Agent, the Environmental Protection Agency, and the State of New Mexico entered into negotiations which eventually yielded a term sheet setting forth an alternative to the selective catalytic reduction equipment that would meet regional haze requirements for the San Juan Station; provide additional collateral environmental benefits; and, in PNM's opinion, be less costly than the selective catalytic reduction option originally proposed by the Environmental Protection Agency (Term Sheet). Applicants state that, among other things, the Term Sheet provided for the installation of selective non-catalytic reduction technology on Units 1 and 4 of the San Juan Station in early 2016, and the retirement of Units 2 and 3 of the San Juan Generating Station by December 31, 2017 (BART Alternative).

7. Applicants note that, while the regulatory and court procedures related to the Federal Implementation Plan and the BART Alternative were proceeding, the California legislature enacted statutes, and the California Energy Commission promulgated regulations, which the three Participants that are California public agencies indicated could limit their ability to enter into certain life extension projects for coal-fired power plants such as the San Juan Station (the California Requirements).

8. Applicants state that, in 2014, the Environmental Protection Agency approved the BART Alternative and New Mexico's Regional Haze State Implementation Plan (which approved the BART Alternative) (Regional Haze Plan), and issued a final rule withdrawing the Federal Implementation Plan (EPA Final Rule). According to Applicants, pursuant to the EPA Final Rule, selective non-catalytic technology must be installed on Units 1 and 4 of the San Juan Station by January 31, 2016, and Units 2 and 3 of the San Juan Station must cease operation by December 31, 2017.

9. Applicants state that, after issuance of the EPA Final Rule, they and the other Participants attempted to reach consensus regarding how to comply with and implement the requirements of the EPA Final Rule and the California Requirements.⁹ Applicants

⁹ Applicants describe the negotiations as "complex and prolonged" as they necessitated (1) "reaching consensus with nine co-owning Participants with competing, divergent interests and lengthy internal approval processes"; (2) "simultaneously negotiating and drafting numerous complex co-dependent agreements that included the complete overhaul of the ownership, cost allocations, operations and governance of [the San Juan Station]"; (3) "defending adverse litigation challenging an element of the plan"; and (4) "renegotiating the ownership restructuring of [the San Juan Station] due to the

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explain that mediated negotiations began in January 2014 and concluded in July 2015 with the execution by the Participants of the San Juan Restructuring Agreement (Restructuring Agreement) and other related agreements.

10. Applicants explain that the Restructuring Agreement provides for the implementation of the BART Alternative, including the restructuring of the San Juan Station ownership interests, rights, cost responsibilities, and fuel supply arrangements. Specifically, Applicants state that, pursuant to the Restructuring Agreement, PNM Development will become a party to the revised San Juan Participation Agreement that, among other things, allocates cost responsibilities for the implementation of the BART Alternative among those Participants who will continue as owners of the San Juan Station once the Proposed Transaction is consummated.¹⁰ Applicants also state that the Restructuring Agreement provides that, simultaneously with the retirement of San Juan Units 2 and 3 on December 31, 2017, Applicants will acquire 100 percent of the interests of the Exiting Participants in the San Juan Station, including the interests in Unit 3 (which will be shut down on or about December 31, 2017) and Unit 4, and further amend the San Juan Participation Agreement to reflect the new ownership of that facility.¹¹

C. Description of the Proposed Transaction

11. Applicants explain that the Restructuring Agreement is expected to take effect on or about December 31, 2015, but that it does not become effective until the last to occur of several conditions precedent (Effective Date).¹² Applicants state that, on the Effective

late decision by one Participant to withdraw from the originally proposed restructuring plan.” *Id.* at 3-4.

¹⁰ Applicants note that this modification to the San Juan Participation Agreement, referred to as the San Juan Restructuring Amendment, was filed with the Commission on August 21, 2015 in Docket No. ER15-2504-000, pursuant to FPA section 205. *Id.* at n.4.

¹¹ *Id.* at 4.

¹² The conditions precedent are: (1) receiving Commission approval of the Application under FPA section 203; (2) receiving Commission approval of the San Juan Restructuring Amendment under FPA section 205 (*see supra* note 10); (3) receiving from the New Mexico Commission approval of the abandonment by PNM of San Juan Units 2 and 3, and a certification of public convenience and necessity for PNM to acquire additional ownership of Unit 4; and (4) the effective date of the new coal supply agreement for the San Juan Station. *Id.* at 5.

Date, the provisions of the San Juan Restructuring Amendment will take effect, and PNM Development will become a party to the San Juan Participation Agreement and assume certain financial obligations under that agreement, but will not become a Participant or acquire any ownership, capacity or power rights associated with the San Juan Station until the occurrence of the Exit Date, described below, which is expected to be on or about December 31, 2017. Applicants note that the Restructuring Amendment provides for cost allocation and responsibility of the Participants and PNM Development for certain capital improvements to the San Juan Station necessary to implement the Regional Haze Plan and the EPA Final Rule.

12. Applicants explain that, on the Exit Date, the Exiting Participants will, pursuant to the terms of Restructuring Amendment, transfer 100 percent of their ownership interests in the San Juan Station, including interests in Unit 3 (which will be shut down on or about December 31, 2017) and Unit 4, to Applicants. Specifically, Applicants state that, on the Exit Date, Southern California Public Power Authority and Tri-State will convey all of their respective interests in the San Juan Station to PNM, and M-S-R and Anaheim will convey all of their interests in the San Juan Station to PNM and PNM Development. Applicants state that these transfers will result in approximately 132 MW of capacity in Unit 4 being transferred to PNM (resulting in PNM owning an additional 26.025 percent of Unit 4) and approximately 65 MW of capacity in Unit 4 being transferred to PNM Development (resulting in PNM Development owning 12.815 percent of Unit 4). Applicants state that the Exit Date will not occur, and the Proposed Transaction will not be consummated, prior to the cessation of operation of San Juan Units 2 and 3 in accordance with the Regional Haze Plan and the EPA Final Rule.¹³

13. Upon completion of the transfers, Applicants state that the ownership of Units 1 and 2 of the San Juan Station will remain at 50 percent PNM and 50 percent Tucson Electric, whereas the remaining Participants will hold the following ownership interests in Units 3 and 4 of the San Juan Station:¹⁴

¹³ *Id.* at 13-14.

¹⁴ Applicants note that although Units 2 and 3 of the San Juan Station will be retired on December 31, 2017, there will be continuing obligations associated with the ownership of those units.

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<u>Participant</u>	<u>Unit 3</u>	<u>Unit 4</u>
PNM	100.00 %	64.482%
PNM Development	0.000%	12.815%
Tucson Electric	0.000%	0.000%
Farmington	0.000%	8.475%
Los Alamos	0.000%	7.200%
Utah AMPS	0.000%	7.028%
<u>Total:</u>	100.000%	100.000%

14. Applicants also explain that PNM is a party to a pending proceeding before the New Mexico Commission wherein PNM and certain parties entered into and filed a supplemental stipulation related to the San Juan Station (Supplemental Stipulation). Applicants state that, if approved by the New Mexico Commission, the Supplemental Stipulation, among other things, authorizes PNM to acquire the 65 MW of San Juan Unit 4 that is currently anticipated to be acquired by PNM Development under the Restructuring Agreement.¹⁵ Applicants state that, at this time, PNM is uncertain how and when PNM would exercise its rights under that authority if it is granted, but Applicants commit to notify the Commission: (1) if the Supplemental Stipulation is approved by the New Mexico Commission; and (2) if, and how, PNM elects to exercise the authorization. Applicants commit further that if PNM elects to enter into a separate transaction for which additional authorization from the Commission is required, it will obtain such additional authorization from the Commission. Applicants state that such a transfer would not, in any case, affect the approval requested in the Application since their market power analysis already considers the combined capacity of all of PNM's affiliates to be under common control.

15. In summarizing the Proposed Transaction in terms of generation interests that Applicants will acquire and lose as a result of the Proposed Transaction, Applicants state that the retirement of San Juan Units 2 and 3, as required by the Regional Haze Plan and the EPA Final Rule, will reduce the total San Juan Station capacity controlled by PNM from 783 MW to 497 MW. After accounting for both of the 132 MW of San Juan Unit 4 acquired by PNM and the approximately 65 MW of San Juan Unit 4 capacity to be acquired by PNM Development, or, as noted above, by PNM, Applicants note that the

¹⁵ *Id.* at 15. This amount is in addition to the 132 MW for which PNM has requested a certificate of public convenience and necessary from the New Mexico Commission. *See* P 12, *supra*.

total capacity controlled by PNM and its affiliates will decrease by approximately 221 MW as a result of the Proposed Transaction, from 783 MW to 562 MW.¹⁶

16. Finally, Applicants note that, in consideration for the costs to restructure the ownership of the San Juan Station and for the restructuring of the rights and obligations of the remaining Participants, the Restructuring Agreement provides that the Exiting Participants will pay a restructuring fee of \$8,800,000 to the remaining Participants in the San Juan Station (Applicants, Tucson Electric, Farmington, Los Alamos, and Utah AMPS).¹⁷

II. Notice of Filings

17. Notice of the Application was published in the *Federal Register*, 80 Fed. Reg. 60,666 (2015), with interventions and protests due on or before November 24, 2015. Notice of the Supplemental Information Filing was published in the *Federal Register*, 80 Fed. Reg. 72,428 (2015), with interventions and protests due on or before November 24, 2015.

18. Motions to intervene were filed by Navopache Electric Cooperative, Inc. (Navopache Cooperative), M-S-R Public Power, New Energy Economy, and Anaheim. Tucson Electric filed a motion to intervene and comments in support of the Proposed Transaction.

III. Discussion

A. Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

¹⁶ This amount includes the 50 percent ownership interest in San Juan Unit 1, or approximately 170 MW, and the approximately 77 percent ownership interest in San Juan Unit 4, or 392 MW.

¹⁷ Application at 16.

B. Substantive Matters**1. Standard of Review under FPA Section 203**

20. FPA section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest.¹⁸ 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.¹⁹ FPA 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."²⁰ The Commission's regulations establish verification and information requirements for applicants that seek a

¹⁸ 16 U.S.C. § 824b(a)(4). With respect to other regulatory actions and orders, Applicants state that a filing is currently pending with the New Mexico Commission for the requisite approvals from that commission in connection with the Proposed Transaction. In addition, Applicants state that they have conducted a preliminary analysis to determine whether the Proposed Transaction would require the submission of a notification pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and have determined that the Proposed Transaction would not be reportable as it does not satisfy the Size of Transaction Test. Application, Exhibit L: Status of Regulatory Actions and Orders. Subsequent to the Application, Applicants notified the Commission that the New Mexico Commission issued a final order granting the authorizations required under the New Mexico Public Utility Act for the Proposed Transaction. Our findings under FPA section 203 do not affect those agencies' evaluation of the Proposed Transaction pursuant to their respective statutory authority.

¹⁹ *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 at 30,111, *Merger Policy Statement*, Order No. 592-A, 79 FERC ¶ 61,321. *See also*, FERC Stats. & Regs. ¶ 31,253 (cross-referenced at 120 FERC ¶ 61,060). *See also* Order No. 642, FERC Stats. & Regs. ¶ 31,111, *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289. *See also Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200, *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.

²⁰ 16 U.S.C. § 824b(a)(4).

determination that a transaction will not result in inappropriate cross-subsidization or a pledge or encumbrance of utility assets.²¹

2. Analysis of the Proposed Transaction

a. Effect on Competition

i. Applicants' Analysis

(a) Horizontal Competition

21. Applicants argue that the Proposed Transaction will not have an adverse effect on horizontal competition. In support of this claim, Applicants submitted a Delivered Price Test to show that the Proposed Transaction will not have an adverse impact on horizontal competition in any relevant market. Applicants explain that the Delivered Price Test is an analytical method used to evaluate potential horizontal market power that considers both economics and physical transmission constraints to determine the potential generation supply available to a destination market. Specifically, Applicants state that the Delivered Price Test measures market concentration using the Herfindahl-Hirschman Index (HHI).²² Applicants state that since the San Juan Station is located within the PNM Balancing Authority Area, they considered the PNM Balancing Authority Area and first-tier interconnected Balancing Authority Areas in their Delivered Price Test. In addition, Applicants explain that although the Delivered Price Test evaluates Economic Capacity

²¹ 18 C.F.R. § 33.2(j).

²² 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 concentrated; and markets in which the HHI is greater than or equal to 1,800 points are considered to be highly concentrated. 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 the relevant screen and warrants further review. Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,129; *see also Analysis of Horizontal Market Power under the Federal Power Act*, 138 FERC ¶ 61,109 (2012) (affirming the Commission's use of the thresholds adopted in the Merger Policy Statement).

and Available Economic Capacity,²³ in analyzing the results of the Delivered Price Test, Applicants focused on the Available Economic Capacity measure as it is more appropriate for vertically integrated utilities with retail load obligations and no retail competition.²⁴

22. In the Supplemental Information Filing, Applicants submitted a revised Delivered Price Test that, according to Applicants, addresses guidance provided by the Commission in an unrelated order that clarified Delivered Price Tests and Simultaneous Import Limit studies submitted in the context of filings for market-based rate authority (Revised Delivered Price Test).²⁵ Applicants explain that the Revised Delivered Price Test is based on updated calculations of the Simultaneous Import Limits and includes updates consistent with the PNM MBR Order.²⁶ Applicants state that the Revised Delivered Price Test demonstrates that the aggregate effect of these revisions to the Delivered Price Test submitted with the Application are inconsequential, and that Applicants' original

²³ Economic Capacity is the amount of capacity that could compete in the relevant market given market prices, running costs, and transmission availability, and Available Economic Capacity is based on the same factors as Economic Capacity but accounts for native load obligations and adjusts transmission availability accordingly. *See, e.g. Wisconsin Energy Corp.*, 151 FERC ¶ 61,015, at n.35 (2015), *Dynegy Resource I, LLC*, 150 FERC ¶ 61,232, at n.48 (2015).

²⁴ Application at 20-21.

²⁵ Supplemental Information Filing at 1. Applicants refer to *Public Serv. Co. of New Mexico*, 153 FERC ¶ 61,060 (2015) (PNM MBR Order), which addressed a notice of change in status filed by PNM and a request by PNM for market-based rate authority in the PNM Balancing Authority Area. *See* PNM MBR Order, 153 FERC ¶ 61,060 at P 1. Applicants note that the PNM MBR Order issued after they filed the Application. Supplemental Information Filing at n.4.

²⁶ Specifically, in addition to using updated Simultaneous Import Limit values, the Revised Delivered Price Test addresses deficiencies addressed in the PNM MBR Order that relate to the following: (1) workpaper data integrity; (2) identification and inclusion of potential supply; (3) calculation of variable costs; (4) accounting for purchase contracts; (5) transmission rates; (6) calculating Available Economic Capacity; and (7) historical transaction data to corroborate results. Supplemental Information Filing at 3-7.

conclusion, that the Proposed Transaction does not result in material screen failures, remains valid.²⁷

23. Applicants state that the results of the Revised Delivered Price Test for the PNM Balancing Authority Area show that the post-Proposed Transaction amount of Available Economic Capacity, in MW, is less than the amount of Available Economic Capacity prior to the Proposed Transaction in every season/load period, which is consistent with the retirement of San Juan Units 2 and 3 and the acquisition of an additional share of the San Juan Station.²⁸ Applicants explain that while PNM will own less Available Economic Capacity after the Proposed Transaction closes, the market size is reduced due to the retirement of San Juan Units 2 and 3, thereby impacting PNM and other co-owners (including competing suppliers in the market) and resulting in an increase in market concentration from current levels. Applicants state, however, that during the season/load periods where market concentration increases, the changes in HHI for the Available Economic Capacity measure in the base case are less than 100 points for all periods in an unconcentrated or moderately concentrated market.²⁹ Applicants present screen failures

²⁷ *Id.* at 2.

²⁸ Supplemental Information Filing, Exhibit J-21: Supplemental Affidavit of Julie M. Carey at P 22 (Supp. Carey Aff.). Applicants also performed a Delivered Price Test for the Arizona Public Service Balancing Authority Area given PNM's ownership of generating capacity at the Four Corners and Palo Verde generating stations, and its power trading activities at those locations. Application, Exhibit No. J-1: Affidavit of Julie M. Carey at P 63 (Carey Aff). Applicants state that the impact of the Proposed Transaction on the Arizona Public Service Balancing Authority Area is "minimal" under both the Economic and Available Economic Capacity measures. *Id.* P 64. Applicants state that they likewise revised the Delivered Price Test for the Arizona Public Service Balancing Authority Area based on the PNM MBR Order and that the results of that study confirm the results of the original Delivered Price Test. Supplemental Information Filing, Supp. Carey Aff. at P 23.

²⁹ With respect to the results of the price sensitivities, Applicants note that "a few limited screen failures result across the price sensitivities" for the Available Economic Capacity measure, but claim that "these failures are not systematic and not indicative of concerns for market power." Supplemental Information Filing at 7-8.

in the shoulder super-peak under a 10 percent reduction in prices with an HHI change of 176 in a moderately concentrated market with a 4.7 percent market share.³⁰

24. Applicants assert that other relevant factors demonstrate a “limited ability and incentive to withhold generation to profitably increase market prices above competitive levels on a sustained basis.”³¹ First, Applicants argue that the San Juan Station is not well-suited to strategic withholding because it is baseload capacity and constitutes a substantial portion of PNM’s existing generation fleet. Applicants note that the Commission has recognized that “baseload capacity, such as the [San Juan Station], is generally not used for a withholding strategy since the capacity is located on the flat part of the supply curve and withholding output from that facility would not raise prices sufficiently to offset lost revenues or forgone sales.”³² Second, Applicants observe that the San Juan Station is also not suited to a withholding strategy because, even after the Proposed Transaction closes, the San Juan Station will continue to be a jointly-owned unit. As a result, Applicants explain that decisions regarding how the unit should be run will be coordinated among joint operators who could detect a withholding strategy and would be directly impacted by such a strategy.

25. Third, Applicants argue that current state regulations restrict any theoretical ability of PNM to raise market prices above competitive levels. According to Applicants, the New Mexico Commission requires that retail sales in the PNM Balancing Authority Area be made at cost-based rates; there is no retail competition in New Mexico, and “little likelihood that retail competition will be adopted in the foreseeable future.”³³ According to Applicants, beginning in 2017, PNM must return the entirety of any profit earned on off-system sales to New Mexico retail ratepayers, which Applicants argue eliminates any incentive to raise prices. Applicants state that PNM will not be permitted to retain off-system profits through 2019, at which point it may request a change.

³⁰ Supplemental Information Filing, Ex. J-22.

³¹ Application at 22.

³² Application, Carey Aff. at P 15 (citing *FirstEnergy Corp.*, 133 FERC ¶ 61,222, at PP 49-50 (2010); *USGen New England, Inc.*, 109 FERC ¶ 61,361, at P 23 (2004); *Ohio Edison Co.*, 94 FERC ¶ 61,291, at 62,044 (2001); *Commonwealth Edison Co.*, 91 FERC ¶ 61,036, at 61,134 (2000)).

³³ *Id.* P 16.

(b) **Vertical Competition**

26. Applicants claim that the Proposed Transaction does not raise any vertical market power concerns. First, Applicants note that the Proposed Transaction only involves the acquisition of an interest in an electric generating plant and appurtenant electric transmission facilities used for interconnecting the San Juan Station with the transmission system.³⁴ Additionally, Applicants state that the Proposed Transaction does not involve the acquisition of any natural gas or fuel oil transmission, distribution, or storage facilities. Applicants acknowledge that they will acquire ancillary equipment such as trucks, cars, dozers, fencing, and other physical assets as part of the Proposed Transaction, but explain that these facilities are “*de minimis* in nature” and do not enable them to erect barriers to entry by fuel suppliers and transportation facilities.³⁵ Applicants state that the Proposed Transaction does not create or enhance their ability, or their affiliates’ ability, to exercise market power in downstream electricity markets by control over the supply of natural gas or other inputs used by rival producers of electricity.

27. Second, Applicants represent that PNM does not have “dominant control over power plant sites for new capacity development in relevant markets,”³⁶ and that nothing in the Proposed Transaction would give Applicants control over sites for rival generation plants or over any other inputs to electric generation. Applicants also state that they do not have the ability to prevent the siting of new generation facilities by competitors because land in the PNM Balancing Authority Area suitable for generation development is “abundant.”³⁷

ii. **Commission Determination**

28. We find that the Proposed Transaction will not have an adverse effect on competition and does not raise any horizontal or vertical market power issues.

³⁴ Applicants observe that even if any transmission facilities, other than the limited interconnection facilities already mentioned, were being transferred pursuant to the Proposed Transaction, all of PNM’s transmission facilities are subject to its open access transmission tariff. Application at 25.

³⁵ *Id.* at 24.

³⁶ *Id.* at 25.

³⁷ *Id.*

29. As noted by Applicants, in Order No. 642, the Commission stated it will look beyond the HHI screens if a transaction proposed under section 203 does not meet the HHI thresholds set forth in the Merger Policy Statement. The Commission clarified that applicants with screen failures could address market conditions beyond the change in HHI “such as demand and supply elasticity, ease of entry and market rules, as well as technical conditions, such as the types of generation involved.”³⁸ In the Supplemental Policy Statement, the Commission stated that “in horizontal mergers, if an applicant fails the Competitive Analysis Screen (one piece of the Appendix A analysis), the Commission’s analysis focuses on the merger’s effect on the merged firm’s ability and incentive to withhold output in order to drive up the market price.”³⁹

30. In section 203 transactions that involve generation acquisitions, where the incumbent utility is acquiring replacement generation capacity, there may be HHI screen failures even when the total amount of generation controlled by a transacting party is either static or reduced as the market shrinks but market shares grow. The Commission does not consider these screen failures in isolation.⁴⁰ Here, while we note that the Supplemental Information Filing addresses certain methodological and data deficiencies in the Delivered Price Test submitted with the Application, and follows certain guidance provided by the Commission in the PNM MBR Order, Applicants’ Revised Delivered Price Test sensitivity analyses show screen failures despite a net reduction in PNM’s generating capacity.

31. Notwithstanding the results of the Revised Delivered Price Test sensitivity analyses, Applicants argue that the Proposed Transaction will not create the ability and incentive for them to withhold output. They note that the San Juan Station will continue to be jointly-owned, which would allow detection of any withholding by a number of parties that would be adversely affected by price increases; and that, beginning in 2017, when the Proposed Transaction is scheduled to close, PNM must return the entirety of any profit earned on off-system sales to New Mexico retail ratepayers. The Commission has considered these factors, among others, in prior cases, and concluded that they limit the ability and incentive of applicants to engage in economic withholding.⁴¹

³⁸ *Duke Energy Corporation*, 136 FERC ¶ 61,245, at P 126 (2011).

³⁹ Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 60 (emphasis in original).

⁴⁰ *See Osprey Energy Center, LLC*, 152 FERC ¶ 61,066, at PP 33-37 (2015).

⁴¹ *See Arizona Pub. Serv. Co.* 141 FERC ¶ 61,154, at PP 32-33 (2012) (finding no ability and incentive to withhold in part because facility being acquired was jointly-

32. The Supplemental Information Filing also contains data that leads us to conclude that the Proposed Transaction will not eliminate meaningful competition in the PNM Balancing Authority Area. First, among the Exiting Participants, only Tri-State reported sales in the Electric Quarterly Reports for 2014. Second, Southern California Public Power, M-S-R, and Anaheim would more than likely be unable to continue making sales from the San Juan Station beyond the Exit Date irrespective of the Proposed Transaction since the California Requirements will prevent those parties from participating in life extension projects for facilities such as the San Juan Station. Third, Tri-State will retain the ability to compete in the PNM Balancing Authority Area as it owns Unit 3 of the Springerville Generating Station, which is interconnected to the Tucson Electric Balancing Authority Area, a first-tier market.⁴² Finally, no customer has alleged that the Proposed Transaction will meaningfully reduce competitive options.

33. For the foregoing reasons, we conclude that the Proposed Transaction will not have an adverse effect on horizontal competition.

34. We also agree with Applicants that the Proposed Transaction will not have an adverse effect on vertical competition. With respect to vertical competition, the Commission has found that combining electric generation assets with inputs to generating power (such as natural gas, transmission, or fuel) can harm competition if a transaction increases the ability or incentive of the parties to exercise vertical market power in wholesale electricity markets.⁴³ For example, by denying rival firms access to inputs or by raising their input costs, a 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 Applicants explain, however, the Proposed Transaction only involves the acquisition of an interest in an electric generating plant, the San Juan Station, and limited transmission facilities used for interconnecting the facility to the transmission system. In addition, Applicants have confirmed that the Proposed Transaction does not involve the acquisition of any input to generation, including natural

owned). *See also Wisconsin Energy Corp., Inc.*, 83 FERC ¶ 61,069, at 61,358 (1998) (finding that the ability to exercise market power was tempered by the fact that the transmission facilities used to deliver power were jointly-owned facilities).

⁴² *See* Springerville Generating Station, <http://www.srpnet.com/about/stations/springerville.aspx> (retrieved December 9, 2015).

⁴³ *See, e.g., Exelon Corp.*, 138 FERC ¶ 61,167, at P 112 (2012).

gas or fuel oil transmission, distribution, or storage facilities. Accordingly, we find that the Proposed Transaction will not have an adverse effect on vertical competition.⁴⁴

35. Additionally, we accept Applicants' commitments described in P 14, above. Applicants must notify the Commission (1) if the Supplemental Stipulation is approved by the New Mexico Commission, within 30 days of such approval; and (2) if, and how, PNM elects to exercise the authorization, within 30 days of such election. Finally, if PNM enters into a separate transaction related to the Supplemental Stipulation for which additional authorization from the Commission is required, PNM must obtain such additional authorization from the Commission, as required.

b. Effect on Rates

i. Applicants' Analysis

36. Applicants assert that the Proposed Transaction will not have an adverse impact on wholesale transmission service rates or on the rates charged to long-term wholesale customers.

37. First, Applicants note that PNM Development does not provide transmission services or have transmission customers, and does not currently make sales of power at wholesale or retail, nor have any power sales customers. Applicants state that any sales by PNM Development will be made subject to a not-yet-filed, Commission jurisdictional, cost-based rate. Second, Applicants explain that PNM provides wholesale transmission service pursuant to its open access transmission tariff, which includes cost-based rates for network and point-to-point transmission service. Applicants state that, consistent with Commission policy, PNM will designate all transmission serving generation facilities acquired pursuant to the Proposed Transaction (only limited interconnection facilities) as transmission serving generation facilities and will treat such transmission serving generation facilities as production facilities for ratemaking purposes. Applicants conclude that since none of the assets to be acquired as part of the Proposed Transaction will be classified as transmission assets for transmission cost-of-service ratemaking purposes, the Proposed Transaction will have no adverse effect on PNM's transmission or open access transmission service rates.⁴⁵

⁴⁴ See, e.g., *Osprey Energy Center, LLC*, 152 FERC ¶ 61,066 at P 39; *Florida Power & Light Co.*, 152 FERC ¶ 61,013, at PP 21-22 (2015).

⁴⁵ Application at 26 (citing *Bluegrass Generation Co, L.L.C.*, 139 FERC ¶ 61,094, at P 41 (2012) ("transmission customers will not be affected by the Proposed Transaction

38. Applicants also claim that the Proposed Transaction will have no effect on wholesale power rates. Applicants state that PNM provides wholesale requirements service to three wholesale requirements customers, The Jicarilla Apache Nation, Navopache Cooperative, and the City of Aztec, New Mexico, all of which are served under individual long-term contracts that have been approved by the Commission. Applicants state that the wholesale rates contained in these agreements are stated rates that will not be affected by the Proposed Transaction, and that these customers will continue to be served by PNM through those current wholesale contracts under the rates, terms and conditions of service as were in effect before the Proposed Transaction. Applicants state that PNM cannot change the rates charged to these customers without making an FPA section 205 filing with the Commission.⁴⁶

ii. Commission Determination

39. We agree with Applicants that the Proposed Transaction will not have an adverse effect on rates. As Applicants explain, PNM Development does not provide transmission services or have transmission customers, nor does it currently make sales of power at wholesale or retail or have any power sales customers. Further, any sales by PNM Development will be subject to Commission jurisdictional rates that Applicants have stated PNM Development will file at a later date. With respect to PNM, Applicants have explained that, for purposes of wholesale transmission rates, PNM will treat the limited interconnection facilities being transferred as part of the Proposed Transaction as production facilities for ratemaking purposes. Thus, PNM's transmission customers will not bear the costs of those facilities. The Proposed Transaction will also not have an adverse impact on PNM's wholesale requirements customers, as those customers receive service under long-term, Commission-approved contracts with stated rates whose terms will not change as a result of the Proposed Transaction and cannot change absent a filing under FPA section 205 with the Commission to change those rates.

40. For the foregoing reasons, we find that Applicants have demonstrated that the Proposed Transaction will not have an adverse effect on rates.

since the assets being transferred are not classified as transmission assets for cost-of-service ratemaking purposes.”)).

⁴⁶ *Id.* at 26-27.

c. Effect on Regulation

i. Applicants' Analysis

41. According to Applicants, the Proposed Transaction will not diminish or impair state or federal regulation. Applicants state that, after the Proposed Transaction is consummated, both the Commission and the New Mexico Commission will continue to have the same regulatory authority over PNM and the rates, terms, and conditions of service as they do today. Applicants also state that if PNM Development makes wholesale sales of power after it takes title of an interest in the San Juan Station, it will become subject to the jurisdiction of the Commission as a public utility when it files for authorization to make such sales.⁴⁷

ii. Commission Determination

42. 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.⁴⁸ We find no evidence that either state or federal regulation will be impaired by the Proposed Transaction. As Applicants explain, the Commission and the New Mexico Commission will retain the same jurisdiction over PNM and the rates, terms, and conditions of service as they do today. We note that no party alleges that regulation would be impaired by the Proposed Transaction, and that no state commission has requested that the Commission address the issue of the effect of the Proposed Transaction on state regulation. Finally, if PNM Development seeks to make wholesale power sales after acquiring an interest in the San Juan Station, it will be required to seek Commission authorization.

d. Cross-Subsidization

i. Applicants' Analysis

43. Applicants state that in Order No. 669, as modified by Order Nos. 669-A and 669-B, the Commission adopted regulations that require (1) the disclosure of existing pledges and/or encumbrances of utility assets for the benefit of an associate company, and (2) certain detailed showings concerning the proposed transaction.⁴⁹

⁴⁷ *Id.* at 27.

⁴⁸ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

⁴⁹ Application at 28.

44. With respect to the first element, Applicants verify that there are no existing pledges and/or encumbrances of traditional utility assets for the benefit of an associate company related to the Proposed Transaction. Applicants represent that the traditional utility assets owned by PNM are not pledged or otherwise encumbered for the benefit of the company's affiliates. With respect to the second element, Applicants claim that no cross-subsidization concerns will arise as a result of Proposed Transaction given that the transaction falls within two safe harbors established by the Commission in the Supplemental Policy Statement and Applicants' verifications in Exhibit M of the Application.

45. Applicants state that in the Supplemental Policy Statement, the Commission determined that transactions subject to review by a state commission, such as the Proposed Transaction, are unlikely to raise cross-subsidization concerns. Applicants also assert that since the Proposed Transaction is a transfer of assets between non-affiliated entities, it falls within the safe harbors established in the Supplemental Policy Statement, and satisfies the required showing that cross-subsidization will not occur.⁵⁰

46. Although Applicants assert that they fall within two of the Commission's safe harbors related to cross-subsidization, Applicants nevertheless verify, in Exhibit M to the Application, that based on the facts and circumstances known to them or that are reasonably foreseeable, the Proposed Transaction will not result in, at the time of the Proposed Transaction or in the future, cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company.⁵¹ In support of this claim, Applicants state the Proposed Transaction will not 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

⁵⁰ *Id.* at 30.

⁵¹ Application, Exhibit M: Explanation Providing Assurance that the Transaction Will Not Result in Cross-Subsidization or Pledge or Encumbrance of Utility Assets.

that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and service agreements subject to review under FPA sections 205 and 206.

ii. Commission Determination

47. Based on the representations in the Application, we find that the Proposed Transaction will not result in inappropriate 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.

C. Accounting Analysis

48. Attachment 1 of the Application includes *pro forma* accounting entries recording PNM's acquisition of interests in San Juan Units 3 and 4 from Exiting Participants. PNM proposes to clear the acquisition through Account 102, Electric Plant Purchased or Sold, and record the original cost of the assets and related accumulated depreciation on its books. PNM proposes to record a negative acquisition adjustment, in Account 114, Electric Plant Acquisition Adjustments, representing the net book value of the acquired interests in San Juan Units 3 and 4, since PNM will acquire the transferred assets for zero dollars. PNM proposes to reclassify the negative acquisition adjustment recorded in Account 114 to Account 108, Accumulated Provision for Depreciation of Electric Utility Plant.

49. The proposed recording of the assets on PNM's books at depreciated original cost is consistent with the Commission's Uniform System of Accounts.⁵² Also, the Commission has held that negative acquisition adjustments should be cleared to Account 108.⁵³ PNM must submit final accounting entries in accordance with EPI No. 5 and Account 102 within six months of the date that the Proposed Transaction is consummated, and the accounting submissions must provide all the accounting entries and amounts related to the purchase along with narrative explanations describing the basis for the entries.

⁵² Electric Plant Instruction (EPI) No. 5, Electric Plant Purchased or Sold, and Instructions to Account 102, Electric Plant Purchased or Sold, 18 C.F.R. Part 101 (2015).

⁵³ See, e.g., *Southwestern Pub. Serv. Co.*, 23 FERC ¶ 61,153 (1983).

D. Other Considerations

50. Order No. 652 requires that sellers with market-based rate authority timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.⁵⁴ To the extent that the foregoing authorization results in a change in status, applicants that have market-based rates are advised that they must comply with the requirements of Order No. 652. In addition, Applicants shall make any appropriate filings under section 205 of the FPA to implement the Proposed Transaction.

51. Information and/or systems connected to the bulk power system involved in the Proposed Transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to FPA section 215.⁵⁵ 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, 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 authorizing the Proposed Transaction.

⁵⁴ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, order on reh'g, 111 FERC ¶ 61,413 (2005). See 18 C.F.R. § 35.42.

⁵⁵ 16 U.S.C. § 824o.

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(C) Applicants shall notify the Commission: (1) if the Supplemental Stipulation is approved by the New Mexico Commission, within 30 days of such approval; and (2) if, and how, PNM elects to exercise the authorization, within 30 days of such election. If PNM elects to enter into a separate transaction related to the Supplemental Stipulation for which additional authorization from the Commission is required, PNM must obtain such additional authorization from the Commission, as required.

(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, to the extent that they have not already done so, shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction.

(H) PNM shall account for the Proposed Transaction in accordance with Electric Plant Instruction No. 5 and Account 102, Electric Plant Purchased or Sold of the Uniform System of Accounts. Applicants shall submit their 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 transfer along with narrative explanations describing the basis for the entries.

(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.

Document Content(s)

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