

150 FERC ¶ 61,232
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Dynegy Resource I, LLC
Duke Energy Commercial Asset Management, LLC and
its Public Utility Subsidiaries
Duke Energy Retail Sales, LLC

Docket No. EC14-141-000

ORDER AUTHORIZING ACQUISITION AND
DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued March 27, 2015)

1. On September 11, 2014, as amended February 6, 2015, Dynegy Resource I, LLC (Dynegy Resource I), Duke Energy Commercial Asset Management, LLC (DECAM) and its public utility subsidiaries,¹ and Duke Energy Retail Sales, LLC (Duke Retail),² collectively, Applicants, filed a joint application requesting Commission authorization under section 203 of the Federal Power Act (FPA)³ for Dynegy Resource I to acquire all

¹ The public utilities are Duke Energy Conesville, LLC (Duke Conesville), Duke Energy Killen, LLC (Duke Killen), Duke Energy Miami Fort, LLC (Duke Miami Fort), Duke Energy Stuart, LLC (Duke Stuart), Duke Energy Zimmer, LLC (Duke Zimmer), Duke Energy Dicks Creek, LLC (Duke Dicks Creek), Duke Energy Fayette II, LLC (Duke Fayette), Duke Energy Hanging Rock II, LLC (Duke Hanging Rock), Duke Energy Lee II, LLC (Duke Lee), and Duke Energy Washington II, LLC (Duke Washington). Collectively, DECAM's public utilities are referred to as the Project Companies.

² DECAM, the Project Companies and Duke Retail are referred to as the Duke Applicants.

³ 16 U.S.C. § 824b (2012). Applicants seek Commission approval under FPA sections 203(a)(1)(A) and 203(a)(1)(B) for the changes in control over the Duke Applicants and their Commission-jurisdictional assets that will occur as a result of the Proposed Transaction.

of the membership interests of DECAM and Duke Retail (Proposed Transaction).⁴ As a result of the Proposed Transaction, Dynegy Resource I will acquire ownership of the Project Companies, which own certain generation facilities in PJM Interconnection, L.L.C. (PJM) that are described in further detail below. The Commission has reviewed the Application under the Commission's Merger Policy Statement.⁵ As discussed below, we authorize the Proposed Transaction as consistent with the public interest, subject to Dynegy's compliance with the terms and conditions of the settlement agreement between Dynegy and the PJM Market Monitor.

⁴ Joint Application for Authorization Under Section 203 of the Federal Power Act, EC14-141-000 (Sept. 11, 2014) (Application). As discussed in further detail below, on February 6, 2015, Applicants submitted a response to a request for additional information from the Director of Electric Power Regulation – West and a settlement agreement resolving issues raised by the market monitor for the PJM Interconnection, L.L.C. (PJM Market Monitor) in this proceeding and Docket No. EC14-140-000. Docket No. EC14-140-000 addresses an application concurrently filed by Dighton Power, LLC, Elwood Energy LLC (Elwood Energy), EquiPower Resources Management, LLC, Kincaid Generation, L.L.C., Lake Road Generating Company, L.P., Liberty Electric Power, LLC, MASSPOWER, Milford Power Company, LLC, Richland-Stryker Generation LLC, Brayton Point Energy, LLC (collectively, the ECP Utilities) and Dynegy Inc. (Dynegy) requesting Commission authorization under FPA section 203 for Dynegy to indirectly acquire: (1) 100 percent of the equity interests in the aforementioned utilities, other than Elwood Energy; and (2) 49.5 percent of the equity interests in Elwood Energy, together with an option to acquire an additional 0.5 interest. That proposed transaction is referred to as the Proposed ECP Transaction. The Commission is issuing concurrently with this order an order approving the Proposed ECP Transaction. *Dynegy, Inc.*, 150 FERC ¶ 61,231 (2015).

⁵ See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). See also *FPA Section 203 Supplemental Policy Statement*, 72 Fed. Reg. 42,277 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007) (*Supplemental Policy Statement*). See also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). See also *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

I. Background

A. Description of Applicants and Other Relevant Entities

1. Dynergy Resource I and Other Relevant Entities

2. Applicants explain that Dynergy Resource I is a Delaware limited liability company and an indirect wholly-owned subsidiary of Dynergy, a Delaware corporation that sells electric energy, capacity, and ancillary services through various subsidiaries. Applicants state that Dynergy Resource I was formed for the purpose of acquiring the membership interests of DECAM and Duke Retail.⁶

3. According to Applicants, through Dynergy, Dynergy Resource I is affiliated with two entities that own or control generation facilities in PJM: Dynergy Kendall Energy, LLC, an Exempt Wholesale Generator that owns and operates an approximately 1,140 megawatt (MW) (summer rating) generating facility in Kendall, Illinois; and Ontelaunee Power Operating Company, LLC (Ontelaunee Power), an Exempt Wholesale Generator that owns and operates a natural gas-fired electric generating facility with a net capacity of 466 MW (summer rating) in Ontelaunee, Pennsylvania. Applicants state that other Dynergy subsidiaries own or control facilities in the Midcontinent Independent System Operator, Inc. (MISO) and the New York Independent System Operator, Inc. (NYISO) geographic markets, which are first-tier markets to PJM.⁷

4. Applicants note that upon completion of the Proposed ECP Transaction, Dynergy Resource I will become affiliated with the following entities in the PJM market:

- Elwood Energy an Exempt Wholesale Generator that owns and operates an approximately 1,350 MW (summer rating) natural gas-fired facility in Elwood, Illinois;
- Kincaid Generation, L.L.C., an Exempt Wholesale Generator that owns and operates an approximately 1,158 MW (summer rating) coal-fired facility in Kincaid, Illinois (Kincaid Facility);
- Liberty Electric Power, LLC, an Exempt Wholesale Generator that owns and operates an approximately 541 MW (summer rating) natural gas-fired facility in the Borough of Eddystone, Pennsylvania; and

⁶ Application at 3.

⁷ *Id.*

- Richland-Stryker Generation LLC, an Exempt Wholesale Generator that owns and operates an approximately 369 MW (summer rating) natural gas- and oil-fired generating facility in Defiance, Ohio and an approximately 17 MW (summer rating) oil-fired facility near Stryker, Ohio.⁸

2. The Duke Applicants

5. Applicants explain that DECAM is an Ohio limited liability company and a power marketer that has been authorized by the Commission to make wholesale sales of electric capacity, energy, and certain ancillary services at market-based rates. According to Applicants, Duke Energy SAM, LLC (Duke SAM) owns all of the membership interests in DECAM; Duke Energy Ohio, Inc. (Duke Ohio) owns all of the membership interests in Duke SAM.⁹

6. Applicants state that Duke Retail, a Delaware limited liability company, is a Certified Retail Electric Service Provider in Ohio that serves retail electric and gas customers with energy and other energy services at competitive rates. Like DECAM, Duke Retail has been authorized by the Commission to make wholesale sales of electric capacity, energy, and certain ancillary services at market-based rates. Applicants state that Duke Energy Commercial Enterprises, Inc. (Duke Commercial Enterprises) owns all of the membership interests in Duke Retail; Duke Commercial Enterprises is a wholly-owned subsidiary of Cinergy Investments, Inc. (Cinergy Investments). Applicants note that both Duke Ohio and Cinergy Investments are wholly-owned subsidiaries of Cinergy Corp. (Cinergy), which is a wholly-owned subsidiary of Duke Energy Corporation (Duke Energy), a Delaware corporation and public utility holding company headquartered in Charlotte, North Carolina.¹⁰ Applicants state that, together with its subsidiaries, Duke Energy is a diversified energy company with both regulated and

⁸ Application at 4.

⁹ *Id.* at 5.

¹⁰ Concurrently with the Application, Duke Ohio submitted a petition for declaratory order requesting that the Commission declare that FPA section 305(a), 16 U.S.C. § 825d(a) (2012), is not a bar to an internal corporate reorganization that will result in the upstream distribution of the ownership interests in Duke SAM from Duke Ohio to Cinergy Corporation (Cinergy) (Proposed Reorganization). Duke Ohio states that at the conclusion of the Proposed Reorganization, Duke Ohio's ownership interests in Duke SAM, and, consequently, Duke Ohio's indirect interests in the Project Companies, will be distributed to Cinergy. The Commission is issuing concurrently with this order an order granting Duke Ohio's petition. *Duke Energy Ohio, Inc.*, 150 FERC ¶ 61,233 (2015).

unregulated utility operations, and supplies, delivers, and processes energy for customers in the United States and some international markets.¹¹

7. Applicants state that the only generation facilities owned by the Duke Applicants are those owned by DECAM through the Project Companies.¹² Applicants explain the ownership structure of the Project Companies as follows. DECAM owns all of the membership interests of DECAM Generation HoldCo, LLC (DECAM HoldCo), which in turn owns all the membership interests in DECAM Coal FinCo, LLC (DECAM Coal) and DECAM Gas Gen FinCo, LLC (DECAM Gas). DECAM Coal and DECAM Gas own all of the membership interests in the Project Companies, all of which are Exempt Wholesale Generators.

8. Applicants describe the Project Companies in which DECAM Coal owns all of the membership interests as follows:

- Duke Conesville owns a 40 percent undivided interest in Unit 4 at the Conesville Station, an approximately 780 MW (summer rating) coal-fired facility in Conesville, Ohio.
- Duke Killen owns a 33 percent undivided interest in the Killen Station, an approximately 618 MW (summer rating) coal-fired facility in Wrightsville, Ohio.
- Duke Miami owns (1) a 64 percent undivided interest in Units 7 and 8 at the Miami Fort Station, coal-fired units with a combined capacity of approximately 1,020 MW (summer rating) in North Bend, Ohio; and (2) the Miami Fort CT Station, an approximately 57 MW (summer rating) oil-fired facility in North Bend, Ohio.
- Duke Stuart owns a 39 percent undivided interest in the Stuart Station, an approximately 2,317 MW (summer rating) coal-fired facility in Aberdeen, Ohio.

¹¹ Application at 5-6.

¹² Applicants note that the Project Companies acquired their assets from Duke Ohio through two divestiture transactions approved by the Commission under FPA section 203. *Id.* at 6 (citing *Cinergy Corp.*, 140 FERC ¶ 61,180 (2012); *Cinergy Corp.*, 126 FERC ¶ 61,146, *order granting clarific'n*, 128 FERC ¶ 61,102 (2009)).

- Duke Zimmer owns a 46.5 percent undivided interest in the W.H. Zimmer Generating Station, an approximately 1,300 MW (summer rating) coal-fired facility in Moscow, Ohio.¹³

9. Applicants describe the Project Companies in which DECAM Gas owns all of the membership interests as follows:

- Duke Dicks Creek owns and operates an approximately 136 MW (summer rating) natural gas-fired facility in Middletown, Ohio.
- Duke Fayette owns and operates an approximately 628 MW (summer rating) natural gas-fired facility in Masontown, Pennsylvania.
- Duke Hanging Rock owns and operates an approximately 1,252 MW (summer rating) natural gas-fired facility in Irontown, Ohio.
- Duke Lee owns and operates an approximately 568 MW (summer rating) natural gas-fired facility in Dixon, Illinois.
- Duke Washington owns and operates an approximately 626 MW (summer rating) natural gas-fired facility in Beverly, Ohio.¹⁴

B. The Proposed Transaction

10. Applicants state that the terms of the Proposed Transaction are set out in the Purchase and Sale Agreement, dated as of August 21, 2014, by and among Duke SAM, Duke Commercial Enterprises, and Dynegy Resource I (the Purchase Agreement). Applicants explain that, pursuant to the Purchase Agreement, Dynegy Resource I will acquire all of the membership interests of DECAM from Duke SAM and all of the membership interests of Duke Retail from Duke Commercial Enterprises in exchange for a purchase price of \$2.8 billion, subject to certain adjustments.¹⁵ According to Applicants, upon consummation of the Proposed Transaction, the Duke Applicants will be indirect, wholly-owned subsidiaries of Dynegy.

¹³ *Id.* at 7.

¹⁴ *Id.* at 8.

¹⁵ *Id.* at 9.

II. Notice of Filing and Responsive Pleadings

11. Notice of the Application was published in the *Federal Register*, 79 Fed. Reg. 56,349 (2014), with interventions and protests due on or before October 2, 2014. The PJM Market Monitor filed a timely motion to intervene in this proceeding, and subsequently filed, on September 16, 2014, a motion to consolidate this proceeding with Docket No. EC14-140-000, regarding the Proposed ECP Transaction, and to extend the comment date in both proceedings to November 10, 2014. Applicants filed an answer opposing the motion to consolidate and to extend the comment date established for the Application. On September 30, 2014, the Commission granted the PJM Market Monitor's motion to extend the comment date in this proceeding to and including November 10, 2014.

12. PJM filed a timely motion to intervene. The PJM Market Monitor filed timely comments.¹⁶ On November 21, 2014, Applicants filed a motion for leave to answer and answer to the PJM Market Monitor's comments.¹⁷ On December 9, 2014, the PJM Market Monitor filed an answer to Applicants' answer.¹⁸ On December 12, 2014, Applicants filed a response to the PJM Market Monitor's answer.¹⁹

13. On January 16, 2015, the Director of Electric Power Regulation – West requested that Applicants provide additional information with respect to the Application (Request

¹⁶ Comments of the Independent Market Monitor for PJM, Docket Nos. EC14-140-000 and EC14-141-000 (not consolidated) (Nov. 10, 2014) (PJM Market Monitor Comments). These comments were cross-filed in the proceeding on the Proposed ECP Transaction, Docket No. EC14-140-000.

¹⁷ Motion for Leave to Answer and Answer, Docket No. EC14-141-000 (Nov. 21, 2014) (Applicants Answer).

¹⁸ Answer and Motion for Leave to Answer of the Independent Market Monitor for PJM, Docket Nos. EC14-140-000 and EC14-141-000 (not consolidated) (Dec. 9, 2014) (PJM Market Monitor Answer).

¹⁹ Limited Answer, Docket No. EC14-141-000 (Dec. 12, 2014) (Applicants Limited Answer). In the limited answer, Applicants conclude that the issues raised by the PJM Market Monitor have been fully addressed by the Application and Applicants' answer. As a result, Applicants advised the Commission that they would not submit a substantive response to the PJM Market Monitor's answer.

for Additional Information). On February 6, 2015, Applicants filed a response to the Request for Additional Information (Applicants Feb 6 Response).²⁰

14. Simultaneously with their response to the Request for Additional Information, Applicants also submitted a settlement agreement among Dynegy, Dynegy Resource I and the PJM Market Monitor that satisfies the concerns raised by the PJM Market Monitor regarding the Proposed Transaction and the Proposed ECP Transaction (Supplemental Filing).²¹ Notices of Applicants Feb 6 Response and the Supplemental Filing were published in the *Federal Register*, 80 Fed. Reg. 8303 (2015), with interventions and protests due on or before February 23, 2015. None were filed.

III. Discussion

A. Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,²² the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure²³ prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We accept the answers because they have provided information that assisted us in our decision-making process.

17. We decline to grant the PJM Market Monitor's motion to consolidate this proceeding with Docket No. EC14-140-000, regarding the Proposed ECP Transaction. In general, the Commission consolidates proceedings only if a trial-type evidentiary hearing

²⁰ Response to Request for Additional Information and Request for Shortened Comment Period, Docket Nos. EC14-140-000, EC14-141-000 (Feb. 6, 2015).

²¹ Supplemental Filing Regarding Settlement with the Independent Market Monitor for PJM Interconnection, L.L.C. at 1-2, Docket Nos. EC14-140-000, EC14-141-000 (Feb. 6, 2015). The Commission considers a settlement agreement filed prior to a dispositive order as an amendment to the application. *See BHE Holdings Inc.*, 133 FERC ¶ 61,231, at P 12, n.7 (2010).

²² 18 C.F.R. § 385.214 (2014).

²³ 18 C.F.R. § 385.213(a)(2) (2014).

is required and there are common issues of law and fact.²⁴ We conclude that consolidating this proceeding with Docket No. EC14-140-000 is not appropriate because there are no issues relating to the Proposed Transaction that are being set for a trial-type evidentiary hearing.

B. The Proposed Transaction

1. Standard of Review Under FPA Section 203

18. 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.²⁵ The Commission's analysis of whether a transaction is 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.²⁶ 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."²⁷ The Commission's regulations establish verification and informational requirements for entities that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.²⁸

²⁴ See, e.g., *Duke Energy Corp.*, 136 FERC ¶ 61,245, at P 33 (2011); *Startrans IO, L.L.C.*, 122 FERC ¶ 61,253, at P 25 (2008); *Terra-Gen Dixie Valley*, 132 FERC ¶ 61,215, at P 44, n.74 (2010).

²⁵ 16 U.S.C. § 824b(a)(4) (2012). With respect to other regulatory approvals, Applicants state that they will be providing notice to the Federal Trade Commission and to the Department of Justice pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976. Application, Exhibit L: Other Regulatory Approvals. Our findings under FPA section 203 do not affect those agencies' evaluation of the Proposed Transaction pursuant to their respective statutory authority.

²⁶ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

²⁷ 16 U.S.C. § 824b(a)(4) (2012).

²⁸ 18 C.F.R. § 33.2(j) (2014).

2. Analysis Under FPA Section 203

a. Effect on Competition

i. Applicants' Analysis

(a) Horizontal Competition

19. Applicants assert that the Proposed Transaction will not have an adverse effect on horizontal competition in the PJM market, which they claim is the only geographic market relevant to the Proposed Transaction since that is where all of Applicants' generation is located.²⁹ Applicants base this claim on a "2ab analysis" (2ab Analysis) of the Proposed Transaction.³⁰ Applicants explain that section 33.2(a)(2) of the Commission's regulations exempts applicants from submitting a horizontal market power analysis in accordance with Appendix A of the Commission's Merger Policy Statement³¹

²⁹ Applicants explain that even though Dynegy Resource I is affiliated with Ontelaunee Power, which owns a generating facility in the PJM East submarket, none of the Project Companies' generation is located in any recognized submarket of PJM, and therefore no analysis of any PJM submarket is required. Application at n.33.

³⁰ The 2ab Analysis is a simplified market power analysis that approximates the Herfindahl-Hirschman Index (HHI) change in a market. Specifically, if a equals the market share of buyers and their affiliates, and b equals the market share of the entities being acquired by buyers, one may approximate the HHI change resulting from a hypothetical transaction because $(a + b)^2 - (a^2 + b^2) = a^2 + b^2 + 2ab - (a^2 + b^2) = 2ab$. $2ab$ represents the change in HHI of the individual firm without considering the market HHI. *Horizontal Merger Guidelines*, 87 Fed. Reg. at 41,558, n. 18 (1992). See also *NRG Yield, Inc.*, 148 FERC ¶ 61,109, at n.12 (2014).

³¹ To demonstrate that a transaction is consistent with the public interest, applicants under FPA section 203 typically perform an Appendix A analysis, also referred to as a Delivered Price Test or Competitive Analysis Screen, to determine the pre- and post-transaction market shares from which the market concentration or HHI change can be derived. The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are considered to be unconcentrated; markets in which the HHI is greater than or equal to 1,000 but less than 1,800 points are considered to be moderately 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
(continued...)

if the combining entities “do not currently conduct business in the same geographic markets or . . . the extent of the business transaction in the same geographic markets is *de minimis*.”³² Applicants argue that the Proposed Transaction qualifies for the *de minimis* exemption because Dynegy Resource I and its affiliates have a market share of approximately 0.9 percent in PJM and the Project Companies have a market share of approximately 3.2 percent in PJM. Applicants conclude that the combined post-transaction market share of approximately 4.1 percent satisfies the *de minimis* standard established by the Commission, and therefore they were exempted from submitting a Delivered Price Test.

20. According to Applicants, the 2ab Analysis shows that the Proposed Transaction would result in an HHI increase of fewer than six points. They also note that the 2ab Analysis actually overstates the effect of the Proposed Transaction because it does not account for the fact that Duke Energy’s affiliates will continue to own other generation in the PJM Balancing Authority Area following consummation of the Proposed Transaction.³³ Applicants state that an analysis that takes into account Duke Energy’s continued presence in PJM shows that the Proposed Transaction would result in an approximately one point increase in HHI.³⁴

21. Applicants note further that Dynegy Resource I’s affiliates own or control generation in first-tier markets, including MISO; hold firm transmission reservations from MISO into PJM; and that some of those affiliates that own generation in MISO have capacity obligations through PJM’s Reliability Pricing Model Capacity Market (PJM Capacity Market). Applicants contend that, even taking these factors into account and assuming the Proposed ECP Transaction closes simultaneously with the Proposed

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).

³² Application at 10 (citing 18 C.F.R. § 33.2(a)(2) (2014)).

³³ As Applicants note, the 2ab calculation can overstate a post-transaction HHI change if the parties to the transaction retain ownership of capacity in the relevant market. The retained capacity could have the effect of reducing the post-transaction change in HHI because it reduces applicants’ post-transaction market share.

³⁴ Application at 11.

Transaction, their analysis shows a 21 point HHI increase. Applicants conclude that such an increase would not raise concerns in a highly concentrated market, let alone a market like PJM that is “unconcentrated, or, at most, moderately concentrated.”³⁵

(b) Vertical Competition

22. Applicants state that the Proposed Transaction does not raise any vertical market power concerns because none of Dynegy Resource I, its affiliates or the Duke Applicants owns or controls transmission facilities other than those necessary to connect generation to the grid in the relevant market, and because the Proposed Transaction does not involve a change in control over any such facilities.³⁶ In addition, Applicants state that none of Dynegy Resource I, its affiliates or the Duke Applicants owns or controls inputs to electricity products that could be used to erect barriers to entry, and that the Proposed Transaction does not involve any inputs to electricity products.³⁷

ii. PJM Market Monitor Comments and Responsive Pleadings

23. The PJM Market Monitor submits an alternative analysis and comments that consider both the Proposed Transaction and the Proposed ECP Transaction together as one transaction. The PJM Market Monitor’s analysis takes the form of a report based on market structure metrics that it examines in order to quantify the expected impact of the proposed transactions on constraint-defined markets within PJM. The PJM Market Monitor explains that it made use of actual dispatch, offer and availability data to define the relevant markets, and to examine the effects of the proposed transactions on those

³⁵ *Id.* Applicants note that if the Proposed ECP Transaction is assumed to be consummated first, the HHI increase drops from 21 points to approximately 16 points. *Id.* n.41.

³⁶ Applicants note that one of Dynegy Resource I’s affiliates, Electric Energy Inc. (Electric Energy), owns and controls transmission facilities in its own balancing authority area, which is interconnected with MISO and the Tennessee Valley Authority and Louisville Gas and Electric Company/Kentucky Utilities balancing authority areas. Applicants assert that Electric Energy’s transmission facilities do not present any vertical market power concerns with respect to the Proposed Transaction because they are not located in, and do not interconnect with, PJM, the relevant geographic market, and because Electric Energy has an open access transmission tariff on file (Electric Energy Tariff). *Id.* n.44.

³⁷ *Id.* at 12.

markets using concentration ratios and pivotal supplier indices.³⁸ The PJM Market Monitor states that it evaluates the effect of the proposed transactions using three metrics: market share; HHI; and the Three Pivotal Supplier Test, a “residual supplier index used in the PJM markets to define locational market power.”³⁹

24. Based on its analysis, the PJM Market Monitor concludes that the proposed transactions would significantly increase concentration in specific, highly-concentrated locational energy markets; have a significant effect on the market for regulation service; and increase concentration in portions of the PJM Capacity Market.⁴⁰ The PJM Market Monitor argues that the Commission should require behavioral mitigation measures to address the issues identified by its alternative analysis.

25. Specifically, the PJM Market Monitor recommends that if the Commission approves the Proposed Transaction and the Proposed ECP Transaction, it should require the entity resulting from the proposed transactions to make cost-based offers in the energy, capacity, and regulation service markets. In addition, the PJM Market Monitor recommends that the entity be required to continue to offer the same units and quantities historically offered into the PJM regulation service market because participation in that market is voluntary, and one way to exercise market power is simply not to offer. The PJM Market Monitor further recommends that Dynegy be required, absent “catastrophic failure or significant regulatory changes which make continued operation of a resource uneconomic,”⁴¹ to offer its resources into the PJM Capacity Market. The PJM Market Monitor also recommends that Dynegy be required to provide at least 18 months notice to it and PJM of any planned resource retirements due to a failure to clear the PJM Capacity Market. Finally, the PJM Market Monitor recommends that, in order to limit further the effect on market structure of a recently approved transaction involving the creation of Talen Energy Corporation (Talen Energy), Dynegy be added to the list of participants ineligible to purchase the Talen Energy resources identified as Option 1 or Option 2

³⁸ PJM Market Monitor Comments at 2.

³⁹ PJM Market Monitor Comments, Attachment: Review and Analysis of Dynegy’s Proposed Purchase of Duke and ECP Assets at 10 (PJM Market Monitor Report). The Three Pivotal Supplier Test can be used to evaluate a market participants’ residual supply index, which is the measure of the extent to which one or more generation owners are pivotal suppliers in a market. *Id.* at 9.

⁴⁰ PJM Market Monitor Comments at 2.

⁴¹ PJM Market Monitor Report at 2.

assets in the application requesting approval of the Talen Energy transaction.⁴² According to the PJM Market Monitor, after consummating the Proposed Transaction and the Proposed ECP Transaction, Dynegy would, based on the criteria for exclusion proposed by the PJM Market Monitor in Talen Energy proceeding, be ineligible to acquire the Talen Energy assets.⁴³

26. Applicants dispute the PJM Market Monitor's analysis of and conclusions regarding the Proposed Transaction. In addition to evaluating the PJM Market Monitor's specific claims regarding the effect of the Proposed Transaction on the PJM energy, capacity, and regulation service markets, Applicants assert that the PJM Market Monitor's analysis was flawed. Among other things, Applicants allege that the PJM Market Monitor fails to provide adequate evidentiary support of its claims and merely summarizes the results of its alternative analysis rather than providing sufficient support for Applicants, or the Commission, to replicate its analysis. In addition, Applicants fault the PJM Market Monitor for allegedly not providing any standard for evaluating the significance of the results of its alternative analysis. Applicants also claim that the PJM Market Monitor does not explain how the proposed behavioral market power mitigation measures are tailored to addressing the alleged adverse competitive impacts of the Proposed Transaction, or why existing mitigation under the PJM Open Access Transmission Tariff (PJM Tariff) is inadequate to address those impacts.

27. The PJM Market Monitor disputes Applicants' response and rejects their assertion that its alternative analysis should not be considered by the Commission. The PJM Market Monitor asserts that the Commission accepts and considers analyses based on more granular and precise market definitions, and that, within organized markets, data is available to define markets based on how units are evaluated and actually dispatched, and that data should be used.⁴⁴ The PJM Market Monitor claims that the confidentiality of the data was not a legitimate rationale for rejecting its analysis, and suggests that Applicants could request access to the data and supporting workpapers pursuant to a

⁴² *PPL Corp.*, 149 FERC ¶ 61,260 (2014). In the Talen Energy proceeding, applicants committed to a mitigation plan that consists of alternative divestiture options, Option 1 and Option 2. Each option comprises two sets of generating plants and is designed to mitigate concerns raised by the Talen Energy transaction in the PJM 5004/5005 submarket. *Id.* P 43.

⁴³ PJM Market Monitor Report at 2.

⁴⁴ PJM Market Monitor Answer at 2-4.

protective agreement, and that the Commission could independently request and review the data.⁴⁵

28. With respect to the results of its analysis, the PJM Market Monitor confirms them, reiterating its conclusion that they demonstrate that the proposed transactions will have significant anti-competitive effects on the identified markets. The PJM Market Monitor also disagrees with Applicants' argument that the PJM Market Monitor's proposed market power mitigation measures are overly broad and that PJM's market power mitigation eliminates the need for behavioral mitigation in the energy market. The PJM Market Monitor explains that while it plays a significant role in implementing PJM's market power mitigation program and in assisting market participants in developing cost inputs, neither it nor PJM has the ability to prevent an offer because they believe it is excessive and involves a potential exercise of market power. Further, the PJM Market Monitor states that the mitigation rules for the PJM market apply only to local constraints and market power, and that the mitigation rules do not address aggregate market power that affects the entire PJM market. The PJM Market Monitor also reiterates its claim that the proposed transactions would have a significant anti-competitive effect on the PJM regulation service market.⁴⁶

iii. Applicants' Response to the Request for Additional Information and Settlement Agreement with the PJM Market Monitor

29. In the Request for Additional Information, Applicants were directed to perform a Delivered Price Test for the PJM market and the AP South, 5004/5005, and PJM East submarkets because Applicants' 2ab Analysis did not adequately address whether the Proposed Transaction and the Proposed ECP Transaction raise horizontal market power issues in PJM.⁴⁷

30. Applicants performed a Delivered Price Test for the PJM market, as directed, and argue that the results of the Delivered Price Test confirm that the proposed transactions will not have an adverse impact on competition in the PJM market. Specifically, Applicants state that under the Economic Capacity measure,⁴⁸ the proposed transactions

⁴⁵ *Id.* at 5.

⁴⁶ *Id.* at 26.

⁴⁷ Request for Additional Information at 4.

⁴⁸ Each supplier's "Economic Capacity" is the amount of capacity that could compete in the relevant market given market prices, running costs, and transmission availability. "Available Economic Capacity" is based on the same factors but subtracts

(continued...)

will result in HHI increases of 16 points or less in an unconcentrated market and a post-transaction market share of less than seven percent.⁴⁹ Applicants state that, under the Available Economic Capacity measure, the proposed transactions would result in an HHI increase of 59 points or less in an unconcentrated market and a post-transaction market share of less than 11 percent.⁵⁰

31. Applicants also provide the results of the Delivered Price Test for the PJM submarkets they were directed to study, PJM East, 5004/5005, and AP South, and conclude that those results confirm their claim that the proposed transactions will not have any adverse effect on competition in any relevant PJM submarket. For the PJM East submarket, which Applicants assert is the only relevant submarket,⁵¹ the proposed transactions result in an HHI increase of 17 points or less under the Economic Capacity measure in a moderately concentrated market, and a post-transaction market share of less than six percent. Under the Available Economic Capacity measure, the proposed transactions result in an HHI increase of 47 points or less in an unconcentrated market, and a post-transaction market share of less than nine percent.⁵² According to Applicants, the results of the Delivered Price Test for the 5004/5005 and AP South submarkets under the Economic Capacity and Available Economic Capacity measures also show that the proposed transactions will not have an adverse effect on competition in those submarkets.⁵³

the supplier's native load obligation from its capacity and adjusts transmission availability accordingly.

⁴⁹ Applicants Feb 6 Response at 3.

⁵⁰ *Id.*

⁵¹ Applicants state that the PJM East submarket is the only submarket in which any of Applicants or their relevant affiliates own or control generation facilities. Applicants Feb 6 Response at 3.

⁵² *Id.*

⁵³ Under the Economic Capacity measure, the HHI changes in the 5004/5005 and AP South submarkets range from five points to one point in moderately concentrated markets; under the Available Economic Capacity measure, the HHI changes in the 5004/5005 and AP South submarkets range from 16 to three points in moderately concentrated and unconcentrated markets, respectively. Applicants Feb 6 Response, Attachment A: Second Supplemental Solomon Affidavit at Tables 4-5, 8-9.

32. In addition to submitting the Delivered Price Test, Dynegy and Dynegy Resource I submit a settlement agreement which they have entered into with the PJM Market Monitor (Settlement Agreement). According to Dynegy and Dynegy Resource I, the PJM Market Monitor has authorized them to represent: (1) that the Settlement Agreement “satisfies all of the concerns raised by [the PJM Market Monitor]” in this proceeding and Docket No. EC14-140-000, regarding the Proposed ECP Transaction; and (2) that the PJM Market Monitor “has no further comments regarding, and does not oppose approval of” the applications for approval of the proposed transactions, subject to Dynegy’s compliance with the terms of the Settlement Agreement.⁵⁴

33. As noted above, the PJM Market Monitor alleges that the Proposed Transaction and the Proposed ECP Transaction raise competitive concerns, but that appropriate market power mitigation measures would resolve those concerns.⁵⁵ According to Dynegy and Dynegy Resource I, the Settlement Agreement sets forth several structural and behavioral commitments that resolve the PJM Market Monitor’s concerns. The Settlement Agreement states that if the orders issued by the Commission approving the proposed transactions are conditioned upon Dynegy’s compliance with the terms and conditions of the Settlement Agreement, then the PJM Market Monitor will not object to the proposed transactions.⁵⁶

34. Under the Settlement Agreement, Dynegy agrees to adopt obligations that are very similar, if not identical, to the market power mitigation measures suggested by the PJM Market Monitor in its comments. The structural commitment established in the Settlement Agreement, for example, adopts the market power mitigation measure related to the Talen Energy transaction recommended by the PJM Market Monitor.⁵⁷ The Settlement Agreement requires, for example, that Dynegy not acquire from Talen Energy any of the resources identified as Option 1 or Option 2 assets, or any asset sold to comply with the divestiture obligations set out in *PPL Corp.*, the Commission’s order approving the Talen Energy transaction.

⁵⁴ Supplemental Filing at 1-2. Dynegy and Dynegy resource I also note that the PJM Market Monitor supports Applicants’ request for a 15-day comment period for Applicants Feb 6 Response. *Id.* at 2.

⁵⁵ *See supra* P 25.

⁵⁶ Supplemental Filing, Attachment A: The Settlement at 1 (Settlement Agreement).

⁵⁷ *See supra* P 25.

35. The behavioral commitments established in the Settlement Agreement are also similar to the PJM Market Monitor's recommended market mitigation measures. The commitments cover Dynegy's participation in the PJM Capacity Market, retirement of generating units, and offers by Dynegy in the PJM energy and ancillary services markets. Except as otherwise stated in the Settlement Agreement, the behavioral commitments apply to generating units owned and controlled by Dynegy that are located within PJM or pseudo-tied to PJM,⁵⁸ and the behavioral commitments will apply for seven years from the date of the closing of the transactions.⁵⁹

36. With respect to offers by Dynegy in the PJM Capacity Market, the Settlement Agreement requires that Dynegy "continue to offer all of its generating units in the [PJM Capacity Markets] in accordance with the then-current tariff governing such offers."⁶⁰

37. The Settlement Agreement also addresses uprates of generating units by Dynegy. The Settlement Agreement states that, should Dynegy wish to uprate a unit and such uprate would not materially change the operational characteristics of the unit, such uprate will be subject to the PJM Market Seller Offer Caps, as defined in Attachment DD of the PJM Tariff for existing units. The Settlement Agreement notes that Dynegy will not be limited in pursuing any Minimum Offer Price Rule exemptions if the offer is less than the offer cap. The Settlement Agreement also states that should Dynegy wish to uprate a unit and the uprate would materially change the operational characteristics of the unit (for example, uprating a simple cycle combustion turbine to a combined cycle unit), such offer will be subject to the PJM Market Seller Offer Caps, as defined in Attachment DD of the PJM Tariff. Under the terms of the Settlement Agreement, in these circumstances Dynegy will also not be limited in pursuing any Minimum Offer Price Rule exemptions allowed if the offer is less than the offer cap. The Settlement Agreement states further that if the PJM Market Monitor does not agree with the offer based on the Settlement Agreement, the Settlement Agreement does not create an obligation for Dynegy to offer the proposed uprate into a PJM capacity auction, provided, however, that Dynegy will have the right to seek approval from the Commission, and if the Commission grants its

⁵⁸ Supplemental Filing, Settlement Agreement at § 2.

⁵⁹ *Id.* Section 2(d) states that if Dynegy believes that there is an "extraordinary change in circumstances" that calls into question whether certain of the commitments made by Dynegy in the Settlement Agreement should still be required, then Dynegy will work in good faith with the PJM Market Monitor to develop an appropriate and mutually agreeable amendment to the Settlement Agreement. *Id.* § 2(d).

⁶⁰ Supplemental Filing, Settlement Agreement at § 2(a)(i).

approval, Dynegy may submit the proposed offer in the PJM capacity auctions notwithstanding the lack of agreement by the PJM Market Monitor.⁶¹

38. The provisions in the Settlement Agreement relating to retirement state that Dynegy will not retire a unit unless certain conditions are met. Specifically, Dynegy will not retire a unit unless (i) Dynegy has offered such unit into the most recent base residual Reliability Pricing Model auction and the unit did not clear in that auction, in which case Dynegy will comply with the then-current PJM rules and procedures regarding retirement of units (PJM Retirement Rules), or (ii) Dynegy has supported retirement of a unit by documenting that the unit is not covering its going forward costs and the PJM Market Monitor agrees with Dynegy's conclusions.⁶² Dynegy is also required to provide to PJM and the PJM Market Monitor 90 days written notice, or whatever other notice period is required by the PJM Retirement Rules, before retiring any generating unit it owns. If after such notice PJM determines that there are no reliability issues associated with the retirement of the unit, Dynegy may retire it on the date provided in the notice. If, however PJM determines, in accordance with the PJM Retirement Rules, that there are reliability issues associated with the retirement of the unit and PJM requests that Dynegy enter into a Reliability Must Run agreement, Dynegy shall agree to provide reliability must run services from the date of retirement to a date requested by PJM that is no more than 18 months from the date of the retirement notification.⁶³ The Settlement Agreement also requires Dynegy to provide to the PJM Market Monitor, as expeditiously as possible after announcing the decision to retire any generating unit owned by Dynegy, an economic analysis supporting the retirement decision.⁶⁴

39. With respect to offers by Dynegy in the PJM energy markets, the Settlement Agreement provides that, for any unit or portion of a unit with a PJM capacity commitment, Dynegy's post-transaction market-based offers in PJM must be consistent with the actual minimums, maximums, and ramp rates of the units.⁶⁵ In addition, Dynegy is required to continue to set start up times such that the start-up time is a function only of the physical capability of each unit,⁶⁶ and no unit or part of a unit must be offered as

⁶¹ *Id.* § 2(a)(iv).

⁶² *Id.* § 2(a)(ii)(A).

⁶³ The Settlement Agreement states that these requirements do not apply to any unit that is pseudo-tied to PJM, or certain jointly owned facilities. *Id.* § 2(a)(ii).

⁶⁴ This provision also does not apply to pseudo-tied units. *Id.* § 2(a)(iii).

⁶⁵ *Id.* § 2(b)(i).

⁶⁶ *Id.* § 2(b)(ii).

“Max Emergency” continuously for more than one week except as necessary to comply with environmental restrictions or if otherwise approved by the PJM Market Monitor.⁶⁷

40. Finally, the Settlement Agreement states that, for regulation and synchronized reserve ancillary services from units owned by Dynegy on the day of the transactions, Dynegy will, for as long as such units are in operation, continue to offer “at least the same units and quantities historically offered into these markets.”⁶⁸ In addition, following the closing of the proposed transactions, Dynegy will commence a feasibility study to determine the ability of the Kincaid Facility to offer regulation and synchronized reserve ancillary services.

iv. Commission Determination

41. We find that the Proposed Transaction will not have an adverse effect on horizontal or vertical competition in the PJM market or its submarkets.

42. While we encourage parties to resolve their differences by settlement, and we are thus encouraged by Dynegy and the PJM Market Monitor’s resolution of their differences, our findings here are based on our own independent analysis of horizontal and vertical competition resulting from the Proposed Transaction, as amended⁶⁹ by the Settlement Agreement.⁷⁰

⁶⁷ *Id.* § 2(b)(iii).

⁶⁸ *Id.* § 2(c).

⁶⁹ *See*, fn.21, *supra*.

⁷⁰ As noted above, fn.60, *supra*, the Settlement Agreement provides for the possibility that it may be amended. Specifically, if Dynegy believes that there is an “extraordinary change in circumstances,” the Settlement Agreement imposes an obligation on Dynegy and the PJM Market Monitor to work in good faith to develop an appropriate and mutually agreeable amendment to the Settlement Agreement. We remind Dynegy that an amendment to the Settlement Agreement would constitute an amendment to its application for the approval of the Proposed Transaction under FPA section 203, and would therefore need to be submitted for approval by the Commission in this proceeding as an amendment to the Proposed Transaction.

43. After we corrected for incomplete and inaccurate data and coding errors,⁷¹ our analysis indicates that the Delivered Price Test and price sensitivity analyses demonstrate that the Proposed Transaction passes the market power screens in all time periods and load conditions under both the Economic Capacity and Available Economic Capacity measures in the PJM energy market and its submarkets. Therefore, we conclude that the Proposed Transaction will not adversely affect horizontal competition in the PJM energy market or any PJM energy submarket. Further, the Settlement Agreement imposes additional requirements on offers by Dynegy in the PJM energy markets.

44. With regard to the PJM capacity and ancillary services markets, Applicants made structural and behavioral commitments in the Settlement Agreement which address the concerns of the PJM Market Monitor. We find that, based on our independent analysis of the commitments in the Settlement Agreement, the Proposed Transaction will not adversely affect the capacity or ancillary services markets in PJM.⁷² For this reason, our authorization of the Proposed Transaction is subject to Dynegy's compliance with the terms and conditions of the Settlement Agreement.

45. Finally, we find that the Proposed Transaction will not have an adverse effect on vertical competition in the PJM market. As Applicants note, none of Dynegy Resource I, its affiliates, or the Duke Applicants owns or controls transmission facilities other than those necessary to connect generation to the grid, and the Proposed Transaction does not involve a change in control over any such facilities. Additionally, Applicants state that none of Dynegy Resource I, its affiliates or the Duke Applicants owns or controls inputs to electricity products that could be used to erect barriers to entry, and the Proposed Transaction does not involve any inputs to electricity products. Therefore, because the Proposed Transaction does not result in the combination of generation with either upstream or downstream inputs, it will not have an adverse effect on vertical competition.

⁷¹ Before addressing the results of the Delivered Price Test, we note certain flaws in Applicants' Delivered Price Test. First, as submitted, Applicants' Delivered Price Test model could not be executed because Applicants did not include code in the "wkp – generation dataset" to effect the transfer of ownership of the generation units subject to the Proposed Transaction from "Duke Energy Corp" and "Energy Capital Partners" to "Dynegy Inc." As a result of omitting this code, Applicants' Delivered Price Test model did not produce the final changes in HHI that result from the change in ownership. Second, Applicants did not include complete and accurate load data in the working papers.

⁷² We note also that Applicants provide limited information regarding the effect of the Proposed Transaction on the PJM capacity and ancillary services markets.

b. Effect on Rates**i. Applicants' Analysis**

46. Applicants assert that the Proposed Transaction will not have an adverse effect on rates. Applicants state that they are not traditional utilities with captive retail or wholesale customers, or entities that provide unbundled transmission service. Applicants note that the Duke Applicants make sales exclusively pursuant to their market-based rate tariffs and other rate schedules on file with the Commission.

47. Applicants explain that the only cost-based rates collected by the Duke Applicants are those received by the Project Companies for Reactive Supply and Voltage Control from Generation Sources Service (Reactive Power) under Schedule 2 of the PJM Tariff, and by Duke Lee, Duke Miami Fort (with respect to the Miami Fort CT Station), Duke Hanging Rock, and Duke Washington for black start service provided pursuant to Schedule 6A of the PJM Tariff. Applicants assert that nothing in the Project Companies' Reactive Power revenue requirements or Schedule 2, Schedule 6A, or any other provision of the PJM Tariff, would allow the Project Companies to pass costs associated with the Proposed Transaction through to captive customers.⁷³

48. In response to the Request for Additional Information, Applicants clarify that after the proposed transactions close the Duke Applicants will continue to make wholesale sales exclusively under the terms of their market-based rate tariffs and cost-based rate schedules on file with the Commission.⁷⁴ In addition, Applicants state that none of them currently provides third-party transmission service or has any captive wholesale requirements customers. With respect to Dynegy, Applicants state that the company itself does not have any customers, but that it does have various public utility subsidiaries with customers. Applicants represent that Dynegy's existing public utility subsidiaries are not involved in, and their rates will be unaffected by, the Proposed Transaction and the Proposed ECP Transaction. According to Applicants, Dynegy's existing public utility subsidiaries make wholesale sales exclusively under the terms of their market-based rate tariffs, cost-based rate schedules on file with the Commission, and the Electric Energy Tariff.⁷⁵ Applicants state that none of the cost-based rate schedules under which Dynegy's subsidiaries make wholesale sales or the Electric Energy Tariff would allow for

⁷³ Application at 12-13.

⁷⁴ Applicants Feb 6 Response at 5.

⁷⁵ See *supra* n.36.

the pass through of costs related to the Proposed Transaction to captive customers.⁷⁶ Dynegy states that it is willing to commit, on behalf of itself and its public utility subsidiaries, “to hold its cost-based rate customers harmless from Transactions-related costs, absent a filing under Section 205 of the FPA demonstrating that Transaction-related costs are exceeded by Transaction-related savings.”⁷⁷

ii. Commission Determination

49. We agree with Applicants that the Proposed Transaction will not have an adverse effect on rates. The Proposed Transaction will not have an adverse effect on wholesale power rates because, except for a limited number of agreements identified by Applicants, Applicants do not make wholesale power sales at cost-based rates, and they will continue to make sales of electric energy pursuant to their market-based rate authorizations.⁷⁸ Further, those cost-based rate schedules identified by Applicants provide no mechanism through which the costs of the Proposed Transaction could be passed through to customers without a separate filing under FPA section 205, or provide for sales of power to a non-traditional utility affiliate.⁷⁹ In addition, the Proposed Transaction does not involve entities that provide unbundled transmission service and therefore will have no adverse effect on transmission rates. We also note that no customer has argued that consummation of the Proposed Transaction would have an adverse effect on rates.

50. We accept Dynegy’s commitment, on behalf of itself and its public utilities subsidiaries, to hold its cost-based rate customers harmless from costs related to the proposed transactions. We interpret Dynegy’s commitment to apply to all transaction-

⁷⁶ Applicants note that the cost-based rate schedules are either fixed-rate contracts that would not allow the pass-through of any costs of the proposed transactions without a separate filing under FPA section 205, 16 U.S.C. § 824d (2012), or, in the case of a long-term, cost-based contract for sales of energy by Midwest Electric Power, Inc. to Electric Energy, both of which are subsidiaries of Dynegy, provide for sales of power to a non-traditional utility affiliate. *Id.* n.25.

⁷⁷ Applicants Feb 6 Response at 6.

⁷⁸ See *Union Electric Co.*, 114 FERC ¶ 61,255, at P 45 (2006) (finding wholesale customers will not be adversely affected where Applicant provides wholesale service at market-based rates); *NorAm Energy Servs., Inc.*, 80 FERC ¶ 61,120, at 61,382-83 (1997) (stating that the Commission’s ratepayer protection concerns do not apply to customers charged market-based rates).

⁷⁹ See, e.g., *FirstEnergy Generation Corp.*, 94 FERC ¶ 61,177, at 61,613 (2001); *USGen Power Services, L.P.*, 73 FERC ¶ 61,302, at 61,846 (1995).

related costs, including costs related to consummating the proposed transactions and transition costs (both capital and operating) incurred to achieve transaction synergies, incurred prior to the consummation of the proposed transactions or after the proposed transactions' consummation.⁸⁰

51. The Commission has established that, where applicants make hold harmless commitments in the context of FPA section 203 transactions, in order to recover transaction-related costs, applicants must demonstrate offsetting benefits at the time they apply to recover those costs. The Commission has clarified its procedures for recovery of such costs under FPA sections 203 and 205.⁸¹ Consistent with those clarifications, and given the commitment by Dynegy to hold wholesale requirements and transmission customers harmless from transaction-related costs, if Dynegy seeks to recover transaction-related costs incurred prior to the consummation of the proposed transactions or after the consummation of the proposed transactions, then Dynegy must make that filing in a new FPA section 205 docket⁸² and submit that same filing as a concurrent informational filing in this FPA section 203 docket, and in Docket No. EC14-140-000, regarding the Proposed ECP Transaction.⁸³ The Commission will notice the new section 205 filing for public comment.

52. In the FPA section 205 proceeding, the Commission will determine first, whether Dynegy's public utility subsidiaries have demonstrated offsetting savings, supported by sufficient evidence, to customers served under Commission jurisdictional rate schedules such that recovery of transaction-related costs is consistent with the hold harmless commitment and, second, whether the resulting new rate is just and reasonable in light of all the other factors underlying the proposed new rate. In the FPA section 205 filing, Dynegy's public utility subsidiaries 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 transactions. Dynegy's public utility subsidiaries must show that the proposed rate is just and reasonable in addition to providing appropriate evidentiary support, such as reasonable documentation and estimates of the costs avoided, demonstrating that transaction-related costs have been offset by

⁸⁰ See, e.g., *Exelon Corp.*, 138 FERC ¶ 61,167, at P 118 (2012).

⁸¹ *Exelon Corp.*, 149 FERC ¶ 61,148, at PP 106-109 (2014).

⁸² The Commission will not authorize the recovery of transaction-related costs in an annual informational filing under existing formula rates.

⁸³ Upon receipt, the Commission will not act on or notice the concurrent informational filing.

transaction-related savings in order to recover those transaction-related costs and comply with its hold harmless commitment. Those savings must be realized prior to, or concurrent with, any authorized recovery of transaction-related costs, and cannot be based on estimates or projections of future savings, but must be based on a demonstration of actual transaction-related savings realized by jurisdictional customers.⁸⁴ The Commission will consider rates not to be “just and reasonable” if they include recovery of costs subject to a hold harmless commitment made in connection with an FPA section 203 application and if applicants fail to show offsetting savings due to the transaction.⁸⁵

53. The Commission will be able to monitor Dynegy’s hold harmless commitment under its authority under FPA section 301(c)⁸⁶ and the books and records provision of the Public Utility Holding Company Act of 2005.⁸⁷ Moreover, the commitment is fully enforceable based on the Commission’s authority under FPA section 203.

c. Effect on Regulation

i. Applicants’ Analysis

54. Applicants state that the Proposed Transaction will not adversely affect the effectiveness of federal or state regulation as their regulatory status will remain unchanged, and the Proposed Transaction will not create any regulatory gaps.⁸⁸ Applicants also state that the Proposed Transaction will not affect the extent to which any state authority can regulate retail rates.

ii. Commission Determination

55. We find no evidence that either state or federal regulation will be impaired by the Proposed Transaction. The Commission’s review of a transaction’s effect on regulation focuses on ensuring that it does not result in a regulatory gap at the federal or state level.⁸⁹

⁸⁴ See *Audit Report of National Grid, USA*, Docket No. FA09-10-000 (Feb. 11, 2011) at 55; see also *Ameren Corp.*, 140 FERC ¶ 61,034, at PP 36-37 (2012).

⁸⁵ *Exelon Corp.*, 149 FERC ¶ 61,148 at P 107.

⁸⁶ 16 U.S.C. § 825(c) (2012).

⁸⁷ 42 U.S.C. § 16452 (2012).

⁸⁸ Application at 13.

⁸⁹ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

We find that the Proposed Transaction will not create a regulatory gap at the federal level. As to regulation at the state level, the Commission explained in the Merger Policy Statement that it ordinarily will not set the issue of the effect of a transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the transaction. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission may set the issue for hearing and it will address such circumstances on a case-by-case basis.⁹⁰ No state has requested that the Commission address the effect of the Proposed Transaction on state regulation.

d. Cross-Subsidization

i. Applicants' Analysis

56. Applicants state that, except for the incidental involvement of Duke Ohio and Duke Kentucky described in further detail below, the Proposed Transaction falls within the scope of the safe harbor for transactions that do not involve a franchised public utility with captive customers, and thus does not present any issue with respect to cross-subsidization. Applicants also assert that the Proposed Transaction is a “*bona fide*, arm’s length, bargained-for exchange between non-affiliated entities,”⁹¹ and that under such circumstances, the Commission has recognized that there is no potential for harm to customers.⁹²

57. According to Applicants, section 6.21 of the Purchase Agreement contemplates that certain of the Project Companies will enter into contracts with Duke Ohio and Duke Kentucky. Applicants note, however, that entry into such contracts is only mandatory following the consummation of the Proposed Transaction, at which time the Project Companies will not be affiliated with Duke Ohio or Duke Kentucky. Applicants assert that even if the contracts were regarded by the Commission as affiliate contracts, they do not raise cross-subsidization concerns for the following reasons.

58. Duke Conesville, Duke Killen, Duke Miami Fort, Duke Stuart, Duke Zimmer, and Duke Dicks Creek will enter into generator interconnection agreements with PJM and Duke Ohio. Applicants assert that since these agreements will be filed with the Commission for review and approval under FPA section 205, they will not pose any cross-subsidization issues.

⁹⁰ *Id.* at 30,125.

⁹¹ Application at 14.

⁹² *Id.* (citing *Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 at P 15).

59. Duke Zimmer may enter into a coal ash disposal agreement with Duke Beckjord, LLC (Duke Beckjord), related to the Beckjord Station (Ash Disposal Agreement).⁹³ Applicants assert that the Ash Disposal Agreement meets the Commission's standard for affiliate sales of non-power goods and services since the disposal fee is benchmarked to the local market price.⁹⁴

60. Finally, Duke Miami Fort will enter into an Operation and Maintenance Agreement for the Miami Fort facility (Operation and Maintenance Agreement) with Duke Kentucky, which Applicants state is a continuation of an existing agreement previously approved by the Kentucky Public Service Commission (Kentucky Commission). Applicants explain that the agreement is being modified in anticipation of the Proposed Transaction to reflect terms and conditions "more suitable for a contract with a third party."⁹⁵ Applicants state that the agreement does not pose cross-subsidization concerns because it will not be entered into unless approved by the Kentucky Commission as not posing risk of harm to captive customers.

61. Applicants verify that the Proposed Transaction will not now, or in the future, result in: (1) 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) new issuances of securities by traditional public utility associate companies that have captive customers or that own or provide transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) new pledges or encumbrances 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) new affiliate contracts between non-utility associate companies and traditional public utility associate companies that have captive customers or that own or provide transmission service over jurisdictional transmission facilities,

⁹³ Application, Exhibit M: Cross-Subsidization and Encumbrance of Utility Assets at 2 (Exhibit M) (citing *Cinergy Corp.*, 140 FERC ¶ 61,180, at P 25, Ordering Paragraph A (2012)). Pursuant to previous Commission authorization, Duke Ohio contributed the Beckjord Station to Duke Beckjord, a wholly-owned subsidiary of Duke Energy, in December 2014. See Notice of Consummation at 1, Docket No. EC12-90-000 (Dec. 10, 2014).

⁹⁴ Application, Exhibit M at 2.

⁹⁵ *Id.* at 3.

other than non-power goods and service agreements subject to review pursuant sections 205 and 206⁹⁶ of the FPA.

ii. Commission Determination

62. 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. Specifically, based on Applicants' representations in Exhibit M of the Application, we find that Applicants have demonstrated that the agreements contemplated by the Purchase Agreement do not raise concerns regarding inappropriate cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company, as the agreements will be agreements between non-affiliated entities following the Proposed Transaction. We also note that no party has argued otherwise.

e. Other Considerations

63. 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.⁹⁷ To the extent that the foregoing authorization results in a change in status, Applicants are advised that they must comply with the requirements of Order No. 652. In addition, Applicants shall make any appropriate filings under FPA section 205 to implement the Proposed Transaction.

64. Information and/or systems connected to the bulk power system involved in this transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to FPA section 215.⁹⁸ 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

⁹⁶ 16 U.S.C. § 824e (2012).

⁹⁷ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005). *See* 18 C.F.R. § 35.42 (2014).

⁹⁸ 16 U.S.C. § 824o (2012).

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, subject to Dynegy's compliance with the terms and conditions of the Settlement Agreement, 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.

(C) 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.

(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.

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

(G) 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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