151 FERC ¶ 61,015
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.

Wisconsin Energy Corporation Docket No. EC14-126-000
Integrys Energy Group, Inc.

ORDER AUTHORIZING PROPOSED MERGER

(Issued April 7, 2015)

1. On August 15, 2014, Wisconsin Energy Corporation (Wisconsin Energy) and Integrys Energy Group, Inc. (Integrys) (together, Applicants) filed an application under sections 203(a)(1) and 203(a)(2) of the Federal Power Act (FPA)[1] requesting that the Commission approve a merger and disposition of assets pursuant to which Wisconsin Energy will acquire Integrys (Proposed Merger).[2] As discussed below, we have reviewed the Proposed Merger under the Commission's Merger Policy Statement[3] and authorize the Proposed Merger under FPA section 203 as consistent with the public interest.

[1] 16 U.S.C. §§ 824b(a)(1), (2) (2012).

[2] Joint Application for Authorization of Disposition of Jurisdictional Assets and Merger under Sections 203(a)(1) and 203(a)(2) of the Federal Power Act, Docket No. EC14-126-000 (Aug. 15, 2014) (Application).

[3] *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), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008) (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*

(continued...)

I. Background

A. Description of Applicants

1. Wisconsin Energy

2. Wisconsin Energy, a Wisconsin corporation, has an energy utility segment and a non-utility segment. According to Applicants, the utility segment consists of Wisconsin Electric Power Company (Wisconsin Electric) and Wisconsin Gas LLC (Wisconsin Gas) (operating together as We Energies), and the non-utility segment consists primarily of W.E. Power, LLC (We Power), which owns and leases generation to Wisconsin Electric. Applicants also state that Wisconsin Energy has an ownership interest in American Transmission Company, LLC (ATC), which owns electric transmission facilities formerly owned by Wisconsin Electric and other utilities in Wisconsin, Michigan, Illinois, and Minnesota.

2. Wisconsin Electric and Wisconsin Gas

3. Wisconsin Electric and Wisconsin Gas serve approximately 1,128,300 electric customers and 1,079,800 gas customers in Wisconsin, respectively. Applicants state that Wisconsin Electric and Wisconsin Gas also serve approximately 445 steam customers in metropolitan Milwaukee and that these utilities are subject to the regulation of the Public Service Commission of Wisconsin (Wisconsin Commission). Additionally, Wisconsin Electric's retail electric service is subject to regulation by the Michigan Public Service Commission (Michigan Commission).[4]

4. Applicants explain that there is no retail choice for electric customers in Wisconsin, and that Wisconsin Electric provides bundled retail electric service to its Wisconsin retail electric customers. They also state that Michigan allows some retail customers to choose their electric supplier but that all other retail customers continue to receive bundled retail service. Applicants assert that Wisconsin Electric provides distribution and customer service functions in Michigan regardless of the customer's power supplier. Additionally, Applicants state that Wisconsin Electric sells wholesale electric power into the Midcontinent Independent System Operator, Inc. (MISO) market, the PJM Interconnection, L.L.C. (PJM) market, and to various other customers, including

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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).

[4] Application at 4.

municipal utilities, electric cooperatives, energy marketers, other investor-owned utilities, and municipal joint action agencies. They state that, in 2013, wholesale sales accounted for approximately 19.7 percent of Wisconsin Energy's total electric energy sales and 8.7 percent of its total electric operating revenues. Applicants state that Wisconsin Electric owns or leases approximately 6,340 megawatts (MW) of generation, which it supplements through spot purchases in the MISO energy markets and through long-term power purchase agreements for 1,270 MW of capacity.[5]

5. Applicants state that Wisconsin Gas and Wisconsin Electric's gas operations have authority to provide retail natural gas distribution service in designated parts of Wisconsin and to transport customer-owned gas. Further, Applicants state that Wisconsin Electric's steam utility generates, distributes, and sells steam supplied by its Valley Power Plant, a coal-fired cogeneration facility, and the Milwaukee County Power Plant. Additionally, they state that Wisconsin Electric operates a district steam system in downtown Milwaukee and near Milwaukee's south side, which supplies steam from the Valley Power Plant. Wisconsin Electric also operates the Milwaukee County Power Plant's steam production and distribution facilities in Wauwatosa, Wisconsin.[6]

3. We Power

6. According to Applicants, through its wholly-owned subsidiaries, We Power has designed and built approximately 2,350 MW of new generation in Wisconsin, the majority of which it leases to Wisconsin Electric under long-term leases. Applicants state that this operating structure serves to address Wisconsin Electric's electric supply needs by increasing its Wisconsin generating capacity with a diversified fuel mix.[7]

4. Integrys

7. Integrys, a Wisconsin corporation, is a diversified energy holding company whose wholly-owned subsidiaries provide products and services in regulated and non-regulated energy markets. Applicants state that Integrys owns approximately 2,730 MW of generation (summer rated capacity), consisting primarily of coal and natural gas-fired generation, and that Integrys supplements its internally generated power supply with long-term power purchase agreements, totaling approximately 190 MW of capacity.[8]

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[5] *Id.* at 5.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 7.

Integrys' electric utility segment includes the electric utility operations of Wisconsin Public Service Corporation (Wisconsin Public Service) and Upper Peninsula Power Company (UPPCo).[9] Wisconsin Public Service's retail rates are subject to the regulation of the Wisconsin Commission and the Michigan Commission. Wisconsin Public Service provides service to customers in northeastern Wisconsin and an adjacent portion of Michigan's Upper Peninsula. UPPCo's customers are also located in Michigan's Upper Peninsula.

8. Applicants state that Integrys' natural gas utility segment includes the regulated natural gas utility operations of Minnesota Energy Resources Corporation, Michigan Gas Utilities Corporation, North Shore Gas Company, The Peoples Gas Light and Coke Company (Peoples Gas Light), and Wisconsin Public Service (collectively, Integrys Gas Utilities). They further state that Integrys' regulated natural gas utility retail rates are subject to regulation by the Illinois Commerce Commission, the Minnesota Public Utilities Commission, the Michigan Commission, and the Wisconsin Commission. According to Applicants, these regulated natural gas utilities provide service to approximately 1,698,000 customers in Chicago and its northern suburbs, northeastern Wisconsin and an adjacent portion of Michigan's Upper Peninsula, various communities in Minnesota, and the southern part of lower Michigan. Applicants note that most of these natural gas customers are located in the PJM footprint. According to Applicants, all of the Integrys Gas Utilities offer gas transportation service, and some offer interruptible natural gas sales. They further state that transportation customers purchase natural gas directly from third-party natural gas suppliers and use the Integrys Gas Utilities' distribution systems to transport gas to the customers' facilities. Applicants further state that Minnesota Energy Resources Corporation and Peoples Gas Light each hold a Hinshaw blanket certificate under section 284.224 of the Commission's rules and regulations[10] and each offers transportation services in interstate commerce. Additionally, Minnesota Energy Resources Corporation and North Shore Gas Company each hold one or more service area determinations under section 7(f) of the Natural Gas Act. Furthermore, Peoples Gas Light and Michigan Gas Utilities Corporation own gas storage facilities in MISO. Peoples Gas Light owns underground storage and a liquefied natural gas peaking storage facility that operates pursuant to state regulation, which it

[9] In January 2014, Integrys announced an agreement to sell UPPCo to Balfour Beatty Infrastructure Partners LP. Consequently, Applicants did not include UPPCo as an applicant and did not include UPPCo's assets in the market power analysis. The Commission approved the transaction, which closed on August 14, 2014. *Upper Peninsula Power Co.*, 148 FERC ¶ 61,133 (2014).

[10] 18 C.F.R. § 284.224 (2014).

uses to provide interstate services pursuant to its Hinshaw blanket certificate. Furthermore, Applicants state that Michigan Gas Utilities Corporation owns an underground storage facility that is subject to state regulation.[11]

5. Integrys Energy Services

9. Integrys Energy Services, Inc. (Integrys Energy Services), a direct wholly-owned Integrys subsidiary, is a diversified nonregulated retail energy supply and services company that primarily sells electricity and natural gas in deregulated markets and invests in energy assets with renewable attributes. It is also a Commission-authorized power marketer and has all the licenses necessary to conduct business in the states where it operates. Integrys Energy Services and its subsidiaries market electricity and natural gas in various retail markets in Illinois, Ohio, and Michigan. Applicants state that, on July 29, 2014, Integrys and Exelon Generation Company, LLC entered into an agreement pursuant to which Exelon Generation Company, LLC will purchase the outstanding shares of Integrys Energy Services in a stock and cash transaction unrelated to the Proposed Merger. While Applicants expect this transaction to close before the Proposed Merger's consummation, they have included Integrys Energy Services' generation in their competition analysis.[12]

6. Other Integrys Public Utility Affiliates

10. Applicants state that Combined Locks Energy Center, LLC (Combined Locks LLC), an indirect wholly-owned subsidiary of Integrys and an exempt wholesale generator (EWG) with market-based rate authorization, owns the 51 MW Combined Locks Energy Center, a natural gas cogeneration facility in Combined Locks, Wisconsin. Applicants state that Combined Locks LLC controls approximately 46 MW of the generation facility and has the option to purchase an additional 5 MW from the steam host. They also state that Wisconsin Public Service has a 50 percent interest in Wisconsin River Power Company, which owns and operates two hydroelectric facilities with a combined capacity of 35 MW and an oil-fired combustion turbine generation facility with a summer rating of 12.4 MW. Applicants state that the Commission has granted Wisconsin River Power Company market-based rate authorization and that Wisconsin Public Service provides services to and purchases energy from Wisconsin

[11] Application at 8.

[12] *Id.* at 10. This transaction was approved by delegated order and closed on November 1, 2014. *Integrys Energy Group, Inc.*, 148 FERC ¶ 62,206 (2014).

River Power Company and receives net proceeds from energy sales into MISO from Wisconsin River Power Company.[13]

11. Additionally, Applicants note that WPS Power Development, LLC (WPS Power), an indirect, wholly-owned Integrys subsidiary with market-based rate authorization, directly owns 100 percent of Integrys Solar, LLC, which, in turn, directly owns a 50 percent interest in INDU Solar Holdings, LLC. These WPS Power subsidiaries own and operate several solar distributed generation projects in California, Pennsylvania, New Jersey, Arizona, and Massachusetts. Applicants assert that many of these projects, which have a combined capacity of 36.4 MW, are Qualifying Facilities. Additionally, Applicants state that WPS Power directly owns 100 percent of Winnebago Energy Center, LLC, an entity that owns and operates a 6.4 MW landfill gas-to-energy generation station in Rockford, Illinois, the output of which it sells at wholesale into PJM. Winnebago Energy Center, LLC has filed a notice of self-certification for Qualifying Facility status with the Commission.[14]

7. ATC

12. According to Applicants, ATC owns maintains, monitors, and operates electric transmission systems previously owned by Wisconsin Electric, Integrys, and other utilities in Wisconsin, Michigan, Illinois, and Minnesota. Integrys has also transferred the transmission facilities owned by its utility subsidiaries to ATC. MISO maintains operational control of ATC's transmission system. Wisconsin Electric and Integrys are non-transmission owning members of MISO. Wisconsin Energy's subsidiaries own approximately 26 percent of ATC, and ATC's corporate manager, ATC Management, Inc. (ATC Management).[15] Integrys currently owns approximately 34 percent of ATC and ATC Management.

B. The Proposed Merger

13. Applicants state that, pursuant to a June 22, 2014 merger agreement, Integrys' shareholders will receive common stock at a fixed exchange ratio of 1.128 Wisconsin Energy shares plus $18.58 in cash per Integrys share which, based on Wisconsin Energy's June 20, 2014 closing price, total consideration amounts to $71.47 per Integrys

[13] Application at 11.

[14] *Id.* at 12.

[15] *Id.* at 6.

share with a consideration mix of 74 percent stock and 26 percent cash, for a total value of $9.1 billion.

14. Additionally, Applicants state that the Proposed Merger will occur in two steps. In the first, a newly-formed wholly-owned Wisconsin Energy subsidiary will merge with and into Integrys, and the separate corporate existence of this subsidiary will cease. Immediately after this step, Applicants state that there will be a second merger between Integrys and a second newly-formed wholly-owned Wisconsin Energy subsidiary (Second Subsidiary) where Integrys will merge with and into the Second Subsidiary. Upon completion of this step, Second Subsidiary will be a wholly-owned Wisconsin Energy subsidiary and renamed WEC Energy Group, Inc.[16]

15. Applicants assert that as part of the Proposed Merger, Integrys Business Support, LLC, the Integrys centralized service company, will be renamed WEC Business Support, LLC and upon obtaining necessary regulatory approvals, waivers, and determinations, may provide services to Wisconsin Electric and Wisconsin Gas on the same terms provided to Integrys' regulated electric and gas utilities.

16. Additionally, Applicants note that, upon the Proposed Merger's closing, the combined company will own 60 percent of the ATC member interests and ATC Management's shares. Applicants explain, however, that they have no desire to expand their influence over ATC's management, operations, or planning activities of ATC. For this reason, Applicants commit that following the Proposed Merger's closing, "on all matters involving ATC Management or ATC that require a vote of ATC Management's owners (including the election of ATC Management's directors), the combined company

[16] Applicants state that they structured the Proposed Merger in two steps for federal income tax purposes. It is their intention that the two steps will qualify as a single tax-free reorganization "that will be treated as a forward subsidiary structure," which would allow Wisconsin Energy to use a larger cash consideration while still allowing the Proposed Merger to be tax-free for Integrys' shareholders. Application at n.10. They state, however, that if the Proposed Merger fails to qualify as a tax-free reorganization, the two steps would be viewed independently. Consequently, Wisconsin Energy would be treated as if it is purchasing Integrys' stock in a taxable transaction that would be taxable to Integrys' shareholders. Applicants state that if they only used a single-step forward subsidiary merger and the Proposed Merger failed to qualify as a reorganization, Wisconsin Energy would be treated as purchasing Integrys' assets in a taxable transaction, which would trigger both a corporate-level and shareholder-level tax for Integrys and its shareholders, respectively. Applicants thus contend that the two steps ensure that, if the Proposed Merger does not constitute a reorganization, Integrys can avoid a corporate level tax even if Integrys' shareholders are taxable. *Id.*

will independently vote only 34 [percent] of ATC Management's shares."[17] Applicants argue that, as a result of this commitment, they have provided "important assurances . . . that . . . Applicants will not be able to dominate the management, operations, or planning activities of ATC."[18] Applicants ask the Commission to accept and explicitly incorporate this commitment into an order approving the Proposed Merger.

II. Notice of Filing and Responsive Pleadings

17. Notice of the Application was published in the *Federal Register*, 79 Fed. Reg. 50,907 (2014), with interventions and protests due on or before October 17, 2014. WPPI Energy, Consumers Energy Company, ATC, Wisconsin Power and Light Company, Cloverland Electric Cooperative, Verso Paper Corp., Xcel Energy Services Inc., and Dairyland Power Cooperative filed timely motions to intervene. The Wisconsin Commission filed a notice of intervention. Tilden Mining Company L.C. (Tilden Mines), Michigan Governor Rick Snyder and Michigan Attorney General Bill Schuette (collectively Michigan), and Great Lake Utilities filed timely motions to intervene and protests. On October 28, 2014, Michael Moody, Michigan Assistant Attorney General, Environment, Natural Resources, and Agriculture Division filed comments in this proceeding on behalf of Governor Rick Snyder, Attorney General Bill Schuette, U.S. Representative Fred Upton and U.S. Representative Dan Benishek (collectively, Michigan Representatives).[19] Also on October 28, 2014, Applicants filed an answer to the protests. On October 23, 2014, Michigan State Senator Carol M. Viventi forwarded a copy of Michigan Senate Resolution No. 187 to the Commission Chairman, urging the Commission to reverse its acceptance of MISO's proposed system support resource cost allocation tariff. On November 11, 2014, Michigan filed an answer to Applicants' answer. On November 26, 2014, Applicants filed an answer to Michigan's answer.

18. On November 19, 2014, Commission staff sent Applicants a letter requesting additional information regarding Applicants' allegation that the Wisconsin and Upper Michigan System (WUMS) region is not a relevant geographic submarket to be analyzed with regard to the Proposed Merger (Information Request). On December 18, 2014, Applicants submitted a timely response to the Information Request (Response). Notice of the Response was published in *Federal Register*, 79 Fed. Reg. 78,849 (2014), with interventions and protests due on or before January 19, 2015.

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[17] *Id.* at 15.

[18] *Id.* at 16.

[19] Michigan Representatives October 28, 2014 Comments (Michigan Representatives Comments).

19. On January 16, 2015, Michigan informed the Commission that it has reached an agreement in principle with Applicants and other interested parties that would resolve Michigan's concerns with the Proposed Merger and, accordingly, Michigan "will not oppose the [Proposed Merger], and do[es] not intend to file further pleadings in this matter." [20] On January 20, 2015, Tilden Mines similarly informed the Commission that, based on a series of agreements between Tilden Mines, Michigan, and other entities, Tilden Mines "have no objection to the Commission's approval of the [Proposed Merger]."[21] We interpret Michigan's and Tilden Mines' statements in this regard to mean that they no longer protest the Proposed Merger. As a result, we do not describe or address their protests, or answers to those protests, in this order.

III. Discussion

A. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[22] the notice of intervention, and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.[23] We also consider the comments submitted by Michigan Representatives as part of the record.[24]

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[20] January 16, 2015 Letter to Commissioners from Michigan Attorney General and Governor at 2.

[21] Letter to Commissioners from Tilden Mining Company, L.C. and Empire Mining Partnership at 2.

[22] 18 C.F.R. § 385.214 (2014).

[23] We also consider the letters submitted by Ms. Melanie Cook of Sault Ste. Marie, Michigan, Mr. Jeremy Oja, Mayor of Norway, Michigan, Ms. Trisha Plante, City Clerk of Norway, Michigan, and Mr. Ray D. Anderson, City Manager of Norway, Michigan, all of which were not originally submitted in this proceeding.

[24] The comments filed by the Michigan Representatives in this proceeding and in Docket Nos. ER14-2860, ER14-2863, ER14-1242, ER14-1243, ER14-2952-000, EL14-34-000, EL14-103-000, and EL14-104-000 raise issues related to the operation of the Presque Isle Plant. The Commission addressed the Michigan Representatives' Comments in *Pub. Serv. Comm'n of Wisconsin v. Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,104 (2015) and *Tilden Mining Co. L.C. v. Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,105 (2015).

21. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[25] prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept Applicants' October 28 answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

1. Standard of Review Under FPA Section 203

22. 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.[26] 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.[27] 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."[28] 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.[29]

[25] 18 C.F.R. § 385.213(a)(2) (2014).

[26] 16 U.S.C. § 824b(a)(4) (2012). Approval of the Proposed Merger is also required by other regulatory agencies pursuant to their respective statutory authority before the Proposed Merger may be consummated. *See* Application Exhibit L. Our findings under FPA section 203 do not affect those agencies' evaluation pursuant to their respective statutory authority.

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

[28] 16 U.S.C. § 824b(a)(4) (2012).

[29] 18 C.F.R. § 33.2(j) (2014).

2. Analysis of the Proposed Merger

a. Effect on Horizontal Competition

i. Applicants' Analysis

23. Applicants state that all of their generation capacity is entirely within MISO, with the exception of a "minor amount" of renewable energy that Integrys owns in other markets.[30] They state that the only generation overlap is in MISO. While Applicants concede that most of their generation is in the WUMS region of MISO, Applicants state that they did not think it was necessary to analyze WUMS as a separate MISO submarket.[31] On this point, they argue that the Commission declined to require evaluation of WUMS as a separate submarket in 2005 and that, in 2013 the Commission rejected an intervener's request that the applicants in that proceeding analyze a separate MISO submarket.[32] Applicants also reason that there are numerous interconnections into WUMS from several locations so that congestion on one WUMS interconnection does not cause WUMS as a whole to separate from the rest of MISO or PJM. Additionally, Applicants state that their analysis of market price data between WUMS and the rest of MISO shows that, in most periods, prices in WUMS are lower than prices in MISO.[33]

24. Applicants note that, at the end of 2013, Entergy Corporation and Cleco Corporation joined MISO in what is now the MISO South region. Applicants state that their analysis includes MISO South as part of the MISO market but that, as a sensitivity, they also performed an analysis of "Classic MISO," which does not include MISO South.[34] Applicants performed their competition analysis of the energy market using Economic Capacity and Available Economic Capacity analyses and identified no competitive concerns in either analysis.[35] With regard to Available Economic Capacity

[30] Application at 17-18.

[31] *Id.* at 18.

[32] *Id.* (citing *Wisc. Elec. Power Co.*, 110 FERC ¶ 61,340, at PP 19-20 (2005); *Ameren Energy Generating Co.*, 145 FERC ¶ 61,034, at P 55 (2013)).

[33] *Id.* at 19.

[34] *Id.* at 20.

[35] *Id.* Economic Capacity is the amount of capacity that could compete in the relevant market given market prices, running costs, and transmission availability, and

(continued...)

in MISO as a whole, Applicants state that their analysis indicates that, after the Proposed Merger's consummation, the Herfindahl-Hirschman Index (HHI)[36] is below 1,000 and the resulting HHI change is 2 points or less in all season/load periods. They thus conclude that there are no screen violations in the Available Economic Capacity analysis. Applicants also conclude from their Economic Capacity analysis of MISO that, at the end of the Proposed Merger, the market remains unconcentrated in every season/load period, and the highest HHI change is 13 points. Applicants assert that they also performed a number of sensitivities, including the plus 10 percent energy price, which results in an HHI change below 3 points under the Available Economic Capacity analysis and 14 points under the Economic Capacity analysis; and minus 10 percent energy price sensitivities, which results in an HHI change below 2 points under the Available Economic Capacity analysis and 12 points under the Economic Capacity analysis. They also concluded that these studies demonstrated no competitive issues.[37]

25. Applicants also assert that the Classic MISO Available Economic Capacity analysis results in an unconcentrated market in three of ten season/load periods. Additionally, Applicants conclude that Classic MISO post-merger would be "no more than moderately concentrated in every period" with HHI increases that are no higher than 4 points in any period and with no resulting screen violations.[38] Furthermore, Applicants

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Available Economic Capacity is based on the same factors as Economic Capacity but accounts for native load obligations and adjusts transmission availability accordingly.

[36] 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).

[37] Application at 22.

[38] *Id.* at 23.

state that as a result of the Proposed Merger, under the Economic Capacity analysis for Classic MISO markets remain unconcentrated in all periods, with the largest increase at only 25 points.[39] Applicants assert that they also performed a number of sensitivities, including the plus 10 percent energy price sensitivity, which results in an HHI change below 5 points under the Available Economic Capacity analysis and an HHI change of fewer than 27 points under the Economic Capacity analysis; and minus 10 percent energy price sensitivities, which result in an HHI change below 4 points under the Available Economic Capacity analysis and an HHI change of 25 points under the Economic Capacity analysis.

26. Moreover, Applicants state that there are no market power concerns in the MISO capacity markets. To support this contention, they assert that MISO requires utilities to either choose to self-schedule, enter into bilateral contracts, or participate in the voluntary annual auction to satisfy their capacity obligations. Applicants state that all of their capacity resources are located in Local Resource Zone 2, which is cleared as part of a broader region consisting of most of MISO North and Central (Local Resource Zones 2-7). Applicants further state that they found a maximum HHI change of 24 points in the market for capacity bids into the voluntary auctions in those zones and that this change is well below the screening thresholds in highly concentrated markets. Additionally, Applicants evaluated the level and change of concentration in the Summer Super Peak 1 time period for their Economic Capacity analysis of Classic MISO. They evaluated Classic MISO because all of Applicants' MISO capacity is in this region. They also argue that Summer Super Peak 1 represents a reasonable proxy because this period corresponds to the highest one percent of summer peak load hours, when nearly all capacity is considered economic. Applicants then increased the assumed market price higher so that virtually all capacity in Classic MISO would be considered economic. They state that this analysis shows that the post-merger HHI in Classic MISO is 427, which represents an unconcentrated market, and the change is only 24 points, confirming that the Proposed Merger does not create a competitive issue in the MISO capacity markets.[40]

27. Finally, Applicants conclude that the Proposed Merger should not have any material adverse effect on the MISO ancillary services markets. To support this conclusion, they first state that because MISO jointly optimizes ancillary services markets for regulation and contingency reserves with the real-time energy market, these ancillary services markets are "very much integrated with competitive conditions in the

[39] *Id.* at 24.

[40] *Id.* at 25.

energy markets."[41] Applicants also note that prices in the energy market often set the price for regulation, the "highest quality operating reserve."[42] Consequently, Applicants reason that the fact that the Proposed Merger will have no adverse effect on the MISO energy markets suggests that the Proposed Merger will not have an adverse effect on the ancillary service markets. Additionally, Applicants state that the MISO ancillary services are "over-supplied" and that Applicants have traditionally "provided only approximately ten percent of reserves cleared in the MISO markets."[43]

ii. Protests

28. Great Lakes Utilities disagrees with Applicants' decision to not analyze WUMS as the "proper geographic market."[44] Great Lakes Utilities argues that, given the fact that the MISO Independent Market Monitor (Market Monitor) considers WUMS a Narrow Constrained Area, the Commission should reject Applicants' market power analysis.[45] It also argues that if the Commission does not reject the Application, a hearing is necessary to resolve all factual issues.

iii. Answer

29. Applicants argue that the Market Monitor, not the Commission, designates Narrow Constrained Areas and that these designations are for local market power mitigation purposes and not for measuring any market participant's market power. They further argue that the designation of a Narrow Constrained Area does not constitute sufficient grounds for analyzing WUMS as a separate geographic market. Instead, Applicants assert that protestors must demonstrate that transmission constraints have led to material price separation between WUMS and the rest of MISO. Moreover, Applicants argue that their representative analysis showed no sustained, material price separation in WUMS and that WUMS prices tend to be lower than the rest of MISO.[46] Additionally,

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[41] *Id.* at 26.

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

[43] *Id.* at 27.

[44] Great Lakes Utilities Protest at 19-20.

[45] *Id.* at 19-20.

[46] Applicants October 28 Answer at 8.

Applicants state that a high level of market concentration is not relevant to the determination of whether or not a region qualifies as a submarket.[47]

iv. Deficiency Letter and Response

30. Commission staff sought additional information on the relevant geographic markets that Applicants analyzed and additional data to support the use of Classic MISO as the relevant geographic market.

31. In their Response, Applicants argue that: (1) the congestion data used to define Narrow Constrained Areas should not be used for market power analyses; (2) there is rarely more than one constraint on the flowgates into WUMS; and (3) the prices between WUMS and the rest of MISO are highly correlated.

32. First, Applicants explain that the congestion data used by the Market Monitor to define Narrow Constrained Areas focuses on individual constraints that could produce local price increases, not constraints that limit flows into WUMS as a whole. Rather, Applicants explain that the Market Monitor examines congestion on all of the 300 flowgates within WUMS when determining whether WUMS should be a Narrow Constrained Area.[48]

33. Additionally, Applicants explain that the congestion information used to designate a Narrow Constrained Area does not require the Commission to establish a separate geographic submarket within a Regional Transmission Operator (RTO), because a Narrow Constrained Area designation does not explain whether those constraints occur during historical seasonal peaks examined in the screens and other competitively significant times. According to Applicants, Narrow Constrained Area data also does not provide information regarding the duration of the transmission constraints.[49]

34. Applicants explain that the transmission constraints on the flowgates into WUMS are infrequent and sporadic and rarely occur on the major flowgates simultaneously, with 70 hours over the years 2011, 2012, and 2013 where more than one flowgate was constrained.[50] They thus conclude that such constraints do not cause WUMS to separate

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

[48] Response to Deficiency Letter at 3.

[49] *Id.* at 4.

[50] *Id.* at 5, Supplemental Affidavit at 9.

from the rest of MISO. Furthermore, Applicants note that there is a high correlation between prices in WUMS and the surrounding MISO hubs as shown by correlation coefficients ranging from .78-.89.[51] Applicants note that there is a significant amount of generation on the "WUMS side" of each flowgate in addition to the generation within WUMS with at least an additional 24,993 MW of installed generation capacity outside of WUMS but inside of the interconnection facility.[52] Thus, Applicants conclude that WUMS should not be newly classified as a submarket but should continue to be considered as part of the broader MISO market.[53]

v. Commission Determination

35. As discussed below, we find that the Proposed Merger will not have an adverse effect on horizontal competition. First, we find that the appropriate relevant geographic markets for analyzing the Proposed Merger are MISO and Classic MISO, rather than a newly designated submarket within MISO. The Commission has stated that "the critical issue in defining relevant geographic markets is identifying the sellers who can physically and economically compete in a market.[footnote omitted] Where transmission constraints are binding such that no additional imports from outside the region are possible, the region should be defined as a separate relevant geographic market."[54] When the combined assets are located in an RTO/Independent System Operator (ISO), the Commission will typically consider the "geographic region under the control of the RTO/ISO *as the default relevant geographic market . . ., unless the Commission already has found* the existence of a submarket."[55] The Commission has further stated that proposals to use an alternative geographic market must include a "demonstration

[51] *Id.* at 6, Supplemental Affidavit at 16.

[52] *Id.* at 5, Supplemental Affidavit at 12.

[53] *Id.* at 5, Supplemental Affidavit at 18.

[54] *FirstEnergy Corp.*, 133 FERC ¶ 61,222, at P 52 (2010) (*FirstEnergy*).

[55] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 235, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012).

regarding whether there are frequently binding transmission constraint[s] during historical seasonal peaks and other competitively significant times that prevent competing supply from reaching [customers] within the proposed alternative geographic market."[56] The Commission has asserted that this demonstration "could be made by providing evidence of binding transmission constraints or price separation data."[57]

36. Applicants have demonstrated that WUMS is not an area that has shown an increase in frequently binding transmission constraints during historical peaks and other competitively significant times that prevent competing supply from reaching customers within the proposed alternative geographic market.[58] Additionally, Applicants' analysis demonstrates that the designation of a Narrow Constrained Area, by itself, is not sufficient for the Commission to consider WUMS a separate geographic submarket for purposes of assessing horizontal market power. Applicants' reason for this contention is that additional generation on the "WUMS side" is available if binding constraints limit available generation on a specific interface. Additionally, Applicants' analysis of MISO's data indicates that none of the five interconnections into WUMS is frequently binding and that, when there was a constraint on a single interface, the other interfaces did not suffer simultaneous constraints. Further, we note Applicants' assertion that where price separation exists, WUMS prices tend to be lower than MISO prices, which supports Applicants' contention that excess generation exists in WUMS. For these reasons, we will not consider WUMS a separate MISO submarket at this time.

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[56] *NRG Energy Holdings, Inc.*, 146 FERC ¶ 61,196, at P 80 (2014) (*NRG Holdings*); *Exelon Corp.*, 138 FERC ¶ 61,167, at P 32 (2012) (*Exelon*); *see also Ameren Energy Generating Co.*, 145 FERC ¶ 61,034 at P 55; *FirstEnergy*, 133 FERC ¶ 61,222 at P 52.

[57] *NRG Holdings*, 146 FERC ¶ 61,196 at P 80; *Exelon*, 138 FERC ¶ 61,167 at P 32. The Commission rejected a proposal to consider a separate market where no historical sales data supported a claim that buyers were limited to suppliers within that submarket. *Boralex Livermore Falls LP*, 122 FERC ¶ 61,033, at P 37 (2008), *order on reh'g*, 123 FERC ¶ 61,279 (2008) (*Boralex*). The Commission has also rejected an alternative geographic market proposal despite the lack of price correlation between prices within the proposed submarket and prices outside the submarket where there was no evidence of "persistent binding transmission constraints." *AEP Power Mktg., Inc.*, 124 FERC ¶ 61,274, at P 25 (2008) (*AEP Power*).

[58] *See AEP Power*, 124 FERC ¶ 61,274 at PP 24-25 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 268). *See also Boralex*, 123 FERC ¶ 61,279 at P 25.

37. Before addressing the conclusions that can be drawn from the results of the delivered price test, we first note certain flaws in Applicants' delivered price test. For example, Applicants failed to include transmission costs when considering competitive generation from outside of MISO. Nevertheless, we were able to correct this error in the delivered price test model and obtain results that are not materially different from those produced by Applicants.

38. Applicants' delivered price test and price sensitivity analyses, as adjusted by the Commission, demonstrate that the Proposed Merger passes the Commission's screens in all time periods and load conditions under both Economic Capacity and Available Economic Capacity measures in the Classic MISO market, the smallest relevant geographic market where Applicants own or control overlapping generation. The Proposed Merger results in HHI changes that range from 4 to 24 points under the Economic Capacity measure and from 0 to 4 points under the Available Economic Capacity measure in the base case. Applicants' results do not differ materially when using prices that are 10 percent higher and 10 percent lower. We therefore conclude that the Proposed Merger will not adversely affect horizontal competition in the relevant geographic market.

39. We also find that the Proposed Merger will not have an adverse effect on competition in the MISO capacity market. We note that capacity may be procured by either self-schedule, bilateral contracts, or through the MISO Planning Resource Auction. Applicants' capacity is located in MISO Resource Zone 2 which cleared at the same price as Zones 3-7. The Proposed Merger results in a change in HHI of 24 points in the Local Resource Zones 2-7. Based on the small change in HHI, we find the Proposed Merger will not have an adverse effect on competition in the MISO capacity market. Applicants confirm this conclusion using their delivered price test model with a hypothetical price of $1,000 to show low market concentration levels and HHI changes when all generators are considered in the market, which, in this case, serves to help confirm that the Proposed Merger will not have an adverse effect on horizontal competition in the MISO capacity market.

40. In the MISO ancillary services market, we find that, based on the evidence in the record, the Proposed Merger will not have an adverse effect on competition. We make this finding based upon the fact that Applicants have historically only provided approximately 10 percent of reserves cleared in the MISO markets, which does not create an adverse effect on competition.

b. Effect on Vertical Competition

i. Applicants' Analysis

41. Applicants state that the Proposed Merger will not increase the potential for abuse of market power with respect to the combination of electric and natural gas facilities. On

this point, they argue that neither Applicant owns or controls any interstate natural gas pipeline facilities. While they concede that they own natural gas local distribution and storage facilities and contractual transportation capacity rights on upstream interstate natural gas pipelines, Applicants state that, consistent with the Commission's finding in Order No. 697, there is a rebuttable presumption that local distribution facilities do not raise vertical market power concerns. In further support, Applicants note that all of the involved states that regulate Applicants' local natural gas distribution and storage facilities require the provision of services on a non-discriminatory basis that "forecloses any ability to disfavor competitors."[59] Applicants also state that most of the gas-fired generation service provided by Applicants' gas distribution systems is owned or controlled by the Applicants themselves. Therefore, there can be no concern that Applicants will use their combined gas facilities to disadvantage their own generation. Applicants note that Wisconsin Energy serves no gas-fired generation that it does not control via ownership or long-term contract. They state that Integrys serves one unaffiliated 246 MW merchant combined cycle unit and some small municipally-owned peaking units in Minnesota, Wisconsin, and Michigan. They state that, even if the applicable state non-discrimination regulations were deemed ineffective and these unaffiliated generators served by Applicants were deemed to be controlled by Applicants, addition of this limited generation capacity to Applicants' market share would not cause the MISO generation markets to be highly concentrated. Additionally, they state that Applicants will have no ability to use their natural gas facilities to prevent entry by new generation facilities because the applicable state non-discrimination requirements prevent such behavior and there is "ample ability" for new gas-fired generators to interconnect directly with interstate natural gas pipelines.[60]

42. Applicants also argue that their contractual capacity rights on upstream natural gas pipelines do not create vertical market power concerns. They reason that, among other things, Applicants use these rights to serve their natural gas distribution loads, and thus, the distribution customers, not Applicants, control the use of these rights. Additionally, Applicants state that, pursuant to interstate natural gas pipeline open access rules, Applicants cannot withhold pipeline capacity from the market that is not being used because such capacity is made available to other customers on an interruptible basis. Nevertheless, Applicants conducted an analysis of whether they could use these rights to exercise vertical market power. According to Applicants, the Commission has stated that "a necessary condition for a convergence merger to cause a vertical concern is that *both*

[59] Application at 29.

[60] *Id.* at 31.

the upstream (natural gas) and downstream (electric) markets are highly concentrated."[61] Applicants state that an analysis of the interstate natural gas pipelines that serve Classic MISO results in a post-merger HHI of 565, which represents an unconcentrated market. Additionally, they state that the post-merger upstream market for contract rights on interstate natural gas pipelines for delivery into Classic MISO produces an HHI of 327, which represents an unconcentrated market. Finally, Applicants state that the upstream natural gas storage market would have a post-Proposed Merger HHI of 717, which represents an unconcentrated market.[62]

43. Additionally, Applicants state that they have divested their transmission facilities to ATC. Although each of the Applicants has ownership interests in ATC, they have committed to limit their voting rights of ATC to the 34 percent already exercised by Integrys. As a result, Applicants conclude that the Proposed Merger will not increase their control over ATC. For this reason, they conclude that the Proposed Merger does not increase Applicants' ability to use ownership or control of transmission facilities to give them a competitive advantage. Finally, Applicants state that they do not possess market power with respect to control over sites for the construction of new generation capacity.[63]

ii. Protests

44. Great Lakes Utilities argues that Applicants' voluntary ATC voting restriction explicitly reserves Applicants' ability to use their full 60 percent ownership on "certain fundamental corporate matters necessary to protect the value of their investment," including those votes related to the possibility of a sale of all or most of ATC's assets, bankruptcy, merger, and "other similar types of transactions."[64] Great Lakes Utilities further argues that this voluntary commitment provides no clear mechanism for ensuring enforcement of this restriction and does not address concerns regarding the detrimental effect that the combination of Applicants' interests will have on ATC's independence. Additionally, it argues that the Proposed Merger will silence the voice of the areas of north central and northeastern Wisconsin served by Wisconsin Public Service. More specifically, it argues that the merger of these currently uncombined entities will decrease the diversity of viewpoints now involved in ATC decision-making processes. Great Lakes Utilities asserts that combining Applicants' ATC interests would play out similarly

[61] *Id.* at 32 (emphasis in original).

[62] *Id.* at 33.

[63] *Id.*

[64] Great Lakes Utilities Protest at 8 (citing Application at 14-15, n.11).

at the state or regional level with regard to transmission planning and construction. For example, Great Lakes Utilities argues that the possibility of eliminating Integrys from the ATC decision making structure "will mean that those Wisconsin loads outside traditional urban load pockets will be further marginalized."[65] For these reasons, it asks the Commission to reject Applicants' Application.[66]

iii. Answer

45. Applicants state that regardless of which entities control ATC and ATC Management, ATC's transmission facilities are under MISO's control, and the Proposed Merger will not change that fact.[67] For this reason, Applicants argue that the Proposed Merger cannot raise any vertical market power concerns through Applicants' ownership interests in ATC.

iv. Commission Determination

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

47. We find that the Proposed Merger will not have an adverse effect on vertical competition from the combination of generation and upstream natural gas inputs. We are satisfied that the Proposed Merger will not give Applicants the ability to withhold natural gas transportation to disadvantage rival generation as a result of the Proposed Merger. As Applicants note, because the only gas-fired generation served by Wisconsin Energy is either owned or controlled by Wisconsin Energy, Applicants will not have an incentive to withhold generation. Further, state regulation of Applicants' respective distribution systems limits Applicants' ability to withhold natural gas from generators.

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[65] *Id.* at 12.

[66] *Id.*

[67] Applicants October 28 Answer at 17 (citing *Exelon Corp.*, 138 FERC ¶ 61,167 at P 113; *Duke Energy Corp.*, 136 FERC ¶ 61,245, at P 161 (2012); *FirstEnergy*, 133 FERC ¶ 61,222 at PP 56-57; *PPL Corp.*, 133 FERC ¶ 61,083, at P 18 (2010)).

48. We also find that the Proposed Merger will not have an adverse effect on vertical competition from the combination of generation and transmission. The Commission has found that the combination of electric generation and transmission facilities will not give merger applicants an ability to exercise vertical market power where the transmission facilities will continue to be subject to a Commission-approved open access transmission tariff.[68] As the Commission has previously stated, both the ability and incentive to exercise vertical market power are necessary for a merger to harm competition.[69] Here, based on the evidence in this record, we find that ATC's ownership of Applicants' divested transmission facilities and Applicants' majority ownership of ATC will not have an adverse effect on vertical competition. We make this finding because ATC has turned over operation of these transmission facilities to an independent entity, MISO, eliminating Applicants' ability to favor dispatch of their generation. In addition, we accept Applicants' commitment to limit their voting rights to 34 percent with respect to their ownership in ATC. Applicants argue that, as a result of this commitment, they have provided "important assurances . . . that . . . Applicants will not be able to dominate the management, operations, or planning activities of ATC."[70]

c. Effect on Rates

i. Applicants' Analysis

49. Applicants note that they do not own any transmission facilities, and consequently, the Proposed Merger cannot adversely impact transmission rates. With respect to cost-based wholesale requirements and cost-based wholesale distribution service customers, Applicants commit for a period of five years to hold wholesale requirements customers and wholesale distribution service customers with cost-based rates harmless from merger-related costs in their cost-based wholesale requirements and wholesale distribution service rates except to the extent that Applicants can demonstrate that merger-related savings are equal to or in excess of the merger-related costs so included. Applicants state that, if they seek to recover merger-related costs through their formula rates, they will submit a compliance filing demonstrating how they are satisfying the hold harmless

[68] *See, e.g., Silver Merger Sub, Inc.*, 145 FERC ¶ 61,261, at P 46 (2013).

[69] *See, e.g., PPL Corp.*, 133 FERC ¶ 61,083, at P 18 (2010); *National Grid*, 117 FERC ¶ 61,080 at P 45; *American Electric Power Co.*, 90 FERC ¶ 61,242, at 61,788 (2000), *review denied sub nom. Wabash Valley Power Assn. v. FERC*, 268 F.3d 1105 (D.C. Cir. 2001). *See also* Order No. 642, FERC Stats. & Regs. ¶ 31,911.

[70] Application at 15-16.

commitment. If they attempt to recover such costs through fixed-rate contracts, they will make a section 205 filing that similarly details compliance with the commitment.[71]

ii. Protests

50. Great Lakes Utilities contends that the Commission should reject the Application because Applicants have failed to identify the precise subset of entities that will benefit from Applicants' hold harmless commitment. Additionally, it states that, in their Proposed Merger filing before the Wisconsin Commission, Applicants state that the "costs incurred to execute [the Proposed Merger] . . . are being borne by [Wisconsin Energy] and no recovery of those costs will be sought from customers."[72] It asks the Commission to not approve a hold harmless commitment for wholesale customers that does not mirror the hold harmless commitment made to retail customers. Furthermore, Great Lakes Utilities argues that Applicants fail to discuss the effect on rates and the eventual levelization of rates that will occur after Applicants' assets, operations, and costs merge. It notes that certain of Applicants' wholesale power contracts are cost-based rates that require an FPA section 205 filing to change, but they note that Applicants may seek to recover levelized costs from customers that take service under a market-based rate tariff, and that no FPA section 205 is necessary to recover these costs. Great Lakes Utilities states that even though the Merger Policy Statement requires Applicants to "propose appropriate rate protection for customers" to address concerns regarding a proposed transaction's effect on rates, Applicants did not approach Great Lakes Utilities or consult with it regarding any rate protection mechanisms.[73]

iii. Answer

51. Applicants state that nothing in the Commission's regulations requires the inclusion of a list of cost-based wholesale requirements customers with a merger application, but Applicants provide as Exhibit C to their answer a list of wholesale requirements customers who are served at cost-based rates and therefore are subject to the hold harmless commitment.[74] With respect to Great Lakes Utilities' concerns,

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[71] Application at 35.

[72] Great Lakes Utilities Protest at 15 (citing Application of Wisconsin Energy for Approval to Acquire the Stock of Integrys Energy Group, Inc., Docket No. 9400-YO-100, at 12 (Aug. 6, 2014)).

[73] *Id.* at 19.

[74] Section 33.2(c)(6) of the Commission's regulations requires 203 applicants to include a "description and location of wholesale power sales customers and unbundled

(continued...)

Applicants state that the Commission has found that its review of merger rate effects applies only to cost-based contracts with captive requirements customers because, where a marginal entity has market-based rate authority, the Commission has found that purchasers of power from such an entity are not captive and are free to negotiate contract terms that protect them from the rate consequences of mergers.[75] Applicants also contend that the Commission does not consider in its merger review increases that result from the operation of existing contract language that do not involve the recovery of transaction or transition costs.[76]

52. Finally, Applicants state that they have no obligation to offer the same hold harmless commitment that they offer in state commission merger proceedings and that the Commission decided in Order No. 642 not to involve itself in evaluating state retail effects of mergers where applicable state commissions have jurisdiction.[77]

iv. Commission Determination

53. We emphasize at the outset that our analysis of rate effects under section 203 of the FPA differs from the analysis of whether rates are just and reasonable under section 205 of the FPA. Our focus here is on the effect that the Proposed Merger will have on jurisdictional rates, whether that effect is adverse, and whether any adverse effect will be offset or mitigated by benefits that are likely to result from the Proposed Merger.[78]

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transmission services customers served by the applicant or parent companies, subsidiaries, affiliates and associated companies (to be identified as Exhibit F to the application)." 18 C.F.R. § 33.2(c)(6) (2014).

[75] Applicants October 28 Answer at 18 (citing *Ameren Energy Generating Co.*, 145 FERC ¶ 61,034 at PP 83-88).

[76] *Id.* at 19 (citing *Duke Energy Corp.*, 113 FERC ¶ 61,297, at PP 118, 120, 123 (2005)).

[77] *Id.* (citing Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,918-19).

[78] *See, e.g.,* Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,123 (noting that an increase in rates "can be consistent with the public interest if there are countervailing benefits that derive from the transaction"); *see also ITC Midwest LLC*, 133 FERC ¶ 61,169, at P 24 (2010); *ALLETE, Inc.*, 129 FERC ¶ 61,174, at P 19 (2009); *Startrans IO, L.L.C.*, 122 FERC ¶ 61,307, at PP 25-28 (2008); *ITC Holdings Corp.*, 121 FERC ¶ 61,229, at PP 120-128 (2007).

54. Based on the record in this proceeding, we find that Applicants have shown that the Proposed Merger will not have an adverse effect on rates. We accept Applicants' commitment to hold cost-based wholesale requirements customers and cost-based wholesale distribution service customers harmless for five years from costs related to the Proposed Merger. We interpret Applicants' commitment to apply to all merger-related costs, including costs related to consummating the Proposed Merger and transition costs (both capital and operating) incurred to achieve merger synergies, incurred prior to the consummation of the Proposed Merger or in the five years after the Proposed Merger's consummation.[79]

55. The Commission has established that, where applicants make hold harmless commitments in the context of section 203 transactions, in order to recover merger-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.[80] Consistent with those clarifications, and given Applicants' commitment to hold cost-based wholesale requirements and cost-based wholesale distribution service customers harmless from merger-related costs, if any of Applicants seek to recover merger-related costs incurred prior to the consummation of the Proposed Merger or in the five years after the consummation of the Proposed Merger, then Applicants must make that filing in a new FPA section 205 docket[81] and submit that same filing as a concurrent informational filing in this FPA section 203 docket.[82] The Commission will notice the new section 205 filing for public comment.

56. In the FPA section 205 proceeding, the Commission will determine first, whether Applicants have demonstrated offsetting savings, supported by sufficient evidence, to customers served under Commission jurisdictional rate schedules such that recovery of merger-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, Applicants must: (1) specifically identify the merger-related costs they are seeking to recover; and (2) demonstrate that those costs are exceeded by the savings produced by the Proposed

[79] *See, e.g., Exelon*, 138 FERC ¶ 61,167 at P 118.

[80] *Exelon Corp.*, 149 FERC ¶ 61,148 at PP 106-109.

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

[82] Upon receipt, the Commission will not act on or notice the concurrent informational filing.

Merger. Applicants 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 merger-related costs have been offset by merger-related savings in order to recover those merger-related costs and comply with their hold harmless commitment. Those savings must be realized prior to, or concurrent with, any authorized recovery of merger-related costs, and cannot be based on estimates or projections of future savings, but must be based on a demonstration of actual merger-related savings realized by jurisdictional customers.[83] 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 merger.[84]

57. The Commission will be able to monitor Applicants' hold harmless commitment under its authority under FPA section 301(c)[85] and the books and records provision of the Public Utility Holding Company Act of 2005.[86] Moreover, the commitment is fully enforceable based on the Commission's authority under FPA section 203.

58. Finally, regarding retail rate concerns, in its section 203 analysis, the Commission does not examine the effect of a Proposed Merger on retail rates unless a state commission specifically asks the Commission to consider such rate impacts.[87] The role of the relevant state commissions is, among other things, to consider such effects.[88] Neither the Wisconsin Commission nor the Michigan Commission has requested an examination of retail rate impacts in the instant proceeding. Thus, we will not address Great Lakes Utilities' retail rate concerns here.

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[83] *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).

[84] *Exelon Corp.*, 149 FERC ¶ 61,148 at P 107.

[85] 16 U.S.C. § 825(c) (2012).

[86] 42 U.S.C. § 16452 (2012).

[87] *Mirant Corp.*, 111 FERC ¶ 61,425, at P 37 (2005).

[88] *See generally* Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,123 (contrasting state's role to handle retail issues and Commission's role to protect merging utilities' wholesale electricity and transmission customers).

d. Effect on Regulation

i. Applicants' Analysis

59. Applicants state that the Proposed Merger will not have an adverse impact on regulation because it will not affect the jurisdiction of the Commission or any state commission with jurisdiction over any of the Applicants, their affiliates, or subsidiaries, and that all affected state commissions will have the ability to review the Proposed Merger and take any steps necessary to protect their jurisdictions.[89]

ii. Commission Determination

60. We find no evidence that either state or federal regulation will be impaired by the Proposed Merger. The Proposed Merger will not create a regulatory gap at the federal level, and no state has alleged that it lacks the authority to review the Proposed Merger or raised concerns about the effect of the merger on state regulation. As to 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]

e. Cross-Subsidization

i. Applicants' Analysis

61. Applicants assert that, based on facts and circumstances known to them or that are reasonably foreseeable, the Proposed Merger will not result in, at the time of the Proposed Merger or in the future: (1) any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) any new issuance of securities by a traditional public utility associate company that has captive customers or that owns, or provides transmission service over, jurisdictional transmission facilities, for the benefit of an associate company; (3) any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) any new affiliate contracts

[89] Application at 37.

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

between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and service agreements subject to review under sections 205 and 206[91] of the FPA.[92]

ii. Commission Determination

62. We find that, based on Applicants' representations, the Proposed Merger will not result in the cross-subsidization of a non-utility associate company by a utility company, or in a pledge or encumbrance of utility assets for the benefit of an associate company. We note that no party has argued otherwise.

63. When a controlling interest in a public utility is acquired by another company, whether a domestic company or a foreign company, the Commission's ability to adequately protect public utility customers against inappropriate cross-subsidization may be impaired absent access to the parent company's books and records. Section 301(c) of the FPA gives the Commission authority to examine the books and records of any person who controls, directly or indirectly, a jurisdictional public utility insofar as the books and records relate to transactions with or the business of such public utility. The approval of the Proposed Merger is based on such examination ability.

3. Other Considerations

64. 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.[93] 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.

65. 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

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[91] 16 U.S.C. § 824e (2012).

[92] Application at Ex. M.

[93] *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).

Commission pursuant to FPA section 215.[94] Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information database, and operating systems. If affiliates, personnel or investors are not authorized for access to such information and/or systems connected to the bulk power system, a public utility is obligated to take the appropriate measures to deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, etc., must comply with all applicable reliability and cyber security standards. The Commission, North American Electric Reliability Corporation or the relevant regional entity may audit compliance with reliability and cyber security standards.

The Commission orders:

(A) The Proposed Merger 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 Merger.

(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 will comply with the commitments as interpreted and conditioned by the Commission in the body of this order.

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

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[94] 16 U.S.C. § 824o (2012).

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.