114 FERC ¶ 61,255
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Union Electric Company d/b/a AmerenUE	Docket Nos. EC06-56-000
Aquila Piatt County Power L.L.C.	ER06-410-000
MEP Flora Power, LLC	
Aquila Merchant Services	

ORDER AUTHORIZING DISPOSITION
AND ACQUISITION OF FACILITIES

(Issued March 10, 2006)

1. On December 28, 2005, Union Electric Company d/b/a AmerenUE (AmerenUE), MEP Flora Power, LLC (MEP Flora), Aquila Piatt County Power L.L.C. (Aquila Piatt County), and Aquila Merchant Services, Inc. (Aquila Merchant Services) (collectively, Applicants) filed an application under sections 203[1] and 205[2] of the Federal Power Act (FPA). They request Commission authorization of the disposition and acquisition of certain jurisdictional facilities and generating facilities and approval of the rates, terms, and conditions for the sale of electric capacity and energy. The application requests authorization of: (a) under section 203 of the FPA, the sale of MEP Flora's and Aquila Piatt County's interest in two generating facilities, the Raccoon Creek and Goose Creek generating facilities (the Aquila Facilities), to AmerenUE (the Asset Sale), (b) under section 203 of the FPA, the assignment to AmerenUE of a power sale agreement between Aquila Merchant Services and Illinois Power Company d/b/a/AmerenIP (AmerenIP) (the Contract Assignment), and (c) under section 205 of the FPA, sales by AmerenUE to Ameren IP under the power purchase and sale agreement (Power Purchase Agreement).

[1] 16 U.S.C. § 824b (2000) *amended by* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982-83 (2005) (EPAct 2005).

[2] 16 U.S.C. § 824d (2000).

2. The Commission has reviewed the application pursuant to section 203 of the FPA, the Merger Policy Statement,[3] and section 205 of the FPA. The Commission will authorize the proposed transactions, as we find that they satisfy section 203 of the FPA because they will not have an adverse effect on competition, rates, or regulation and are thus consistent with the public interest; also, the proposed transactions 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. The transactions also satisfy the Commission's concerns under section 205 of the FPA because the proposed power sales are structured in a manner that satisfies the Commission's concerns regarding affiliate abuse. Accordingly, the Commission will authorize the requested transactions.

Background

3. The Goose Creek Energy Center is a six-unit, 510 megawatt (MW) gas-fired generating facility located in Piatt County, Illinois. It is connected with transmission lines belonging to AmerenIP. The Raccoon Creek Energy Center is a four-unit, 340 MW gas-fired generating facility located in Clay County, Illinois, and is interconnected with the transmission lines of Central Illinois Public Service Company d/b/a AmerenCIPS (AmerenCIPS).

4. AmerenUE provides retail electric service to approximately 1.2 million customers and natural gas service to approximately 130,000 customers in central and eastern Missouri. In addition to its own holdings, AmerenUE maintains a 40 percent interest in Electric Energy, Inc., the owner of a 1,005 MW generating facility. AmerenUE operates as a single control area with its affiliate AmerenCIPS and is a transmission-owning member of the Midwest Independent Transmission System Operator, Inc. (Midwest

[3] *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (Dec. 30, 1996); FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); *see also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,983 (Nov. 28, 2000), FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (Mar. 23, 2001), 94 FERC ¶ 61,289 (2001) (Order No. 642); *Transactions Subject to FPA Section 203*, Order No. 669, 71 Fed. Reg. 1,348 (Jan. 6, 2006), FERC Stats. & Regs. ¶ 31,200 (2006), *reh'g pending*.

ISO).[4] AmerenUE makes sales at wholesale pursuant to its market-based rate tariff on file with the Commission. AmerenUE is a wholly-owned subsidiary of Ameren Corporation (Ameren), a holding company.[5] Ameren does not directly own or operate any facilities subject to the Commission's jurisdiction and does not own any significant assets other than the stock of its subsidiaries. Ameren is the parent of four public utility operating companies: Central Illinois Light Company d/b/a AmerenCILCO, AmerenCIPS, AmerenUE, and AmerenIP (collectively, the Ameren Operating Companies).

5. Aquila Piatt County, a limited liability company, was formed to own, operate, and market the output of the Goose Creek Energy Center. That output is currently sold to either AmerenIP or into the Midwest ISO market. Aquila Piatt County has authority to sell energy and capacity at market-based rates.

6. MEP Flora, a limited liability company, was formed to own, operate, and market the output of the Raccoon Creek Energy Center. That output is currently sold into the Midwest ISO market. MEP Flora has authority to sell energy and capacity at market-based rates.

7. Both Aquila Piatt County and MEP Flora are indirect, wholly-owned subsidiaries of Aquila Merchant Services. Aquila Merchant Services conducts merchant energy operations, including energy trading in various markets.

8. Aquila Merchant Services is a wholly-owned subsidiary of Aquila, Inc. (Aquila), an electric utility supplying power at retail and wholesale in parts of Colorado, Kansas, and Missouri. Aquila is also a natural gas distribution company, providing retail natural gas service to 893,000 natural gas customers in Iowa, Minnesota, Nebraska, Colorado, Kansas, Michigan, Missouri, and South Dakota.

[4] All of the generation owned or controlled by AmerenUE is located in the Midwest ISO footprint and is subject to the Midwest ISO's Day 2 energy markets. A Day 2 market is a market that uses locational marginal pricing in its economic dispatch algorithm.

[5] The Application describes Ameren as a registered holding company under the Public Utility Holding Company Act of 1935, which has been repealed. *See* EPAct 2005 § 1263, 119 Stat. at 974; *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, Order No. 667, 70 Fed. Reg. 75,592 (Dec. 20, 2005), FERC Stats. & Regs. ¶ 31,197 (2005).

9. Applicants state that the Asset Sales are under the "Asset Purchase and Sale Agreement by and between MEP Flora Power, LLC and Union Electric Company d/b/a AmerenUE," and the "Asset Purchase and Sale Agreement by and between Aquila Piatt County Power, L.L.C. and Union Electric Company d/b/a AmerenUE."

Notice And Interventions

10. Notice of the Application was published in the *Federal Register*, 71 Fed. Reg. 3077 (2006), with interventions and protests due on or before January 23, 2006. The Missouri Joint Municipal Electric Utility Commission (Missouri Municipal) filed a timely motion to intervene and protest. Applicants filed an answer on February 7, 2006, to which Missouri Municipal filed a reply on February 17, 2006. On March 6, 2006, Applicants filed a response to Missouri Municipal's February 17 reply.

Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[6] the timely, unopposed motion to intervene serves to make the entity that filed it a party to this proceeding. Under Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,[7] answers to protests and replies to answers are not accepted unless otherwise ordered by the decisional authority. The Commission will accept Applicants' answer because it provided information that assisted in our decision-making process. The Commission is not persuaded to accept Missouri Municipal's February 17 reply or Applicants' March 6 response and will, therefore, reject them.

B. Section 205 Analysis

12. The primary issue in reviewing Applicants' filing under section 205 of the FPA is whether the proposed power sales are structured in a manner that satisfies the Commission's concerns regarding affiliate abuse. In *Boston Edison Co. Re: Edgar Electric Energy Co.*,[8] the Commission stated that, in cases where affiliates are entering

---

[6] 18 C.F.R. § 385.214 (2005).

[7] 18 C.F.R. § 385.213(a)(2) (2005).

[8] 55 FERC ¶ 61,382 (1991).

into market-based rate sales agreements, it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is not distorted.

13. Here, the price, terms, and conditions of the Power Purchase Agreement were entered into between Aquila Merchant Services and AmerenIP, non-affiliates, and are the result of arms-length negotiations between the two parties. Applicants state that no affiliate abuse issues are raised because Ameren will simply continue sales under the existing terms and conditions. Furthermore, the parties to the agreement state that they will not extend the term of the Power Purchase Agreement or alter any of its other terms without receiving the requisite Commission approval. Based on these representations, the Commission finds that Applicants satisfy the Commission's concerns with regard to affiliate abuse.

14. The Commission grants Applicants' request that section 205 authorization be permitted to become effective as of the Asset Sale's closing date in order to allow the sale of power from the Goose Creek facility to AmerenIP to continue once the underlying transaction has been approved and is consummated.

C. Section 203 Analysis

15. Section 203(a)(4) of the Federal Power Act, as amended, provides that "the Commission shall approve the proposed disposition, consolidation, acquisition, or change in control, if it finds that the proposed transaction will be consistent with the public interest."[9] The Commission's analysis under the Merger Policy Statement and Order No. 669 of whether a consolidation is consistent with the public interest has generally involved consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation. In addition, EPAct 2005 requires that the Commission approve a proposed transaction that "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."[10]

[9] EPAct 2005 § 1289, 119 Stat. 982-83, to be codified at 16 U.S.C. § 824b(a)(4).

[10] Id.

1. Effect on Competition

a. Horizontal Competitive Issues

i. Applicants' Analysis

16. Mr. Rodney Frame of Analysis Group, Inc. analyzed the effect of the Asset Sale on competition for the Applicants. Mr. Frame identifies non-firm energy as the relevant product associated with the transaction. He concludes that the Asset Sale will not harm competition. He also states that the Contract Assignment will not result in a change in ownership or control of generation, and does not raise any of the Commission's traditional concerns about an adverse effect on competition.

17. As required by Order No. 642, Applicants present an Appendix A analysis in which Applicants' consultant states that, in order to provide a conservative estimate of the effects of the Asset Sale, his analysis treats the acquisition of the Aquila Facilities and the acquisition of the 640 MW NRG Audrain Generating Company electric generation facility as a single transaction.[11] He states that this is a conservative approach because it causes larger transaction-induced changes than if he had examined the two transactions sequentially.[12]

18. In his analysis of non-firm energy markets, Applicants' consultant uses Economic Capacity and Available Economic Capacity, as defined in the Merger Policy Statement, as proxies to represent a supplier's ability to participate in the market.[13] The consultant states that because the three assets being transferred are peaking facilities that typically operate only during high demand periods, the study analyzes only the extreme peak

---

[11] *See Union Electric Co. d/b/a AmerenUE*, Docket No. EC06-55-000, 114 FERC ¶ 61,254 (2006) (issued concurrently with instant order).

[12] Frame Affidavit, Appendix 4 at 21.

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

during the summer for the Midwest ISO footprint.[14] Additionally, the consultant provides a separate analysis that focuses just on peaking facilities[15] in the Midwest ISO.[16]

19. Applicants' consultant states that in order to determine the market-clearing prices for the extreme peak in the summer, he used hour-by-hour forward price estimates provided by Ameren for the Ameren control area.[17] These estimates were developed using the Midas multi-region production cost model.[18] Because this analysis would show the Aquila Facilities and the Audrain Facility to be out-of-the-money[19] at all times, even

---

[14] Because the generation facilities at issue here and most of the generation capacity owned by AmerenUE and its affiliates are in the Midwest ISO region, and because the Midwest ISO has implemented Day 2 centralized energy markets and a centralized unit commitment and dispatch process, Mr. Frame use the Midwest ISO region as the relevant geographic market. Additionally, Mr. Frame notes that the Midwest ISO footprint was one of the geographic markets examined by the Commission in its recent order approving the merger of Duke Energy Corporation and Cinergy Corporation. 113 FERC ¶ 61,297 (2005) (*Duke/Cinergy*).

[15] Mr. Frame defines "peaking facilities" to include combustion turbines, internal combustion engines and pumped storage hydroelectric facilities that are "in-the-money" at the competitive market price level being analyzed. "In-the-money" means that the cost of running the facility is less than the revenue received from selling its power.

[16] Mr. Frame states that he provided such an analysis as a further demonstration that Ameren's acquisition of the Aquila Facilities and the Audrain Facility does not present competitive concerns by giving Ameren "too strong" a position with the Midwest ISO on the high-priced portion of the supply curve.

[17] Frame Affidavit, Appendix 4 at 32. Mr. Frame states that the Ameren control area contains the loads of Ameren's AmerenUE and AmerenCIPS subsidiaries, all of AmerenUE's electric generation capacity, virtually all of Ameren Energy Generating Company's electric generation capacity, Aquila's Raccoon Creek Energy Center and the Audrain Facility.

[18] The Midas production cost model develops price forecasts based on the cost of the marginal production unit plus a capacity scarcity adder. These results are then benchmarked using current market quotes for the Cinergy hub.

[19] This means that the cost of running the facility exceeds the revenue that would be earned from selling its power. Thus, it is not economical to operate.

the summer extreme peak, Applicants' consultant increased the summer extreme peak market-clearing price to a level equal to the highest variable cost per megawatt-hour (MWH) of all three facilities being acquired. He says that this required an increase in the market-clearing price of approximately 18 percent. He used oil, coal and natural gas costs taken from the same model, and assumed a price of $1 per million British thermal units for nuclear plants.[20] He states that he conservatively assumed that zero imports could enter the Midwest ISO footprint from the outside and he counted Ameren generation in a control area neighboring the Midwest ISO as being in the Midwest ISO footprint.

20. Applicants' consultant maintains that under the Commission's procedures for Delivered Price Test analyses, only long-term (*i.e.*, greater than one year in duration) purchases and sales should be reflected in the analysis, and then only if operational control of generation capacity is conveyed. Applicants' consultant states that Ameren has dispatch rights to 176 MWs of generation owned by Soyland Power Cooperative under a power supply agreement; certain dispatch rights to 159 MWs of generation capacity owned by members of the Resale Power Group of Iowa; a right to call on the energy from 14 MWs of capacity owned by the municipal systems in Kahoka and Marceline, Missouri; and exclusive rights to dispatch 14 MWs of capacity owned by the Jackson, Missouri municipal system. In addition, he states that Ameren-CILCO purchases 50 MWs from customer-owned generation sources.[21]

21. Applicants' result for economic capacity for the Midwest ISO footprint showed a transaction-induced Herfindahl-Hirschmann Index (HHI)[22] increase of 24 points, from 535 to 559. For available economic capacity, Applicants found an 89 point increase, from 451 to 540. Their analysis for peaking facilities showed a transaction-induced increase of 139 points, from 480 to 619. Applicants state that each of these markets is unconcentrated post-transaction, indicating that no further inquiry is required.[23]

---

[20] Frame Affidavit, Appendix 4 at 30.

[21] *Id.* at 34.

[22] HHI is a standard measure of market concentration.

[23] Frame Affidavit, Appendix 4 at 36. Mr. Frame states that had he not artificially increased the summer extreme peak competitive market-clearing price, the transaction-induced HHI change would be zero.

22. Applicants explain that while the Contract Assignment does not raise any of the Commission's traditional concerns with respect to horizontal competition, this assignment will result in the sale of power between affiliates. Applicants claim that this assignment does not raise any concerns regarding affiliate abuse though, because the Power Purchase Agreement was negotiated and entered into by non-affiliates – Aquila Merchant Services and AmerenIP – and is the result of arms-length bargaining between them. They argue that the Commission recognized in *Edgar* that when parties to an agreement are not affiliated with each other, there is no incentive for them to show undue preference. Thus, Applicants conclude that neither Aquila Merchant Services nor AmerenIP would have had any incentive to show undue preference to the other.

ii. **Protest**

23. Missouri Municipal objects to Applicants' Appendix A analysis on the grounds that the analysis does not consider transmission constraints, leading to an overly broad definition of the relevant geographic market.[24] If properly accounted for, says Missouri Municipal, these constraints would cause Applicants to fail the Commission's competitive screens.[25] Missouri Municipal further complains that Applicants' analysis does not take transmission constraints within the Midwest ISO into account, even though the analysis focuses on times of peak load, presumably when the system would be under the most stress and thus most congested. Missouri Municipal argues that Commission policies and obligations require that transmission constraints be taken into account in Appendix A analyses,[26] and thus Applicants are wrongly using the Midwest ISO footprint as the relevant geographic market to analyze the acquisition of the Aquila Facilities and the NRG Audrain facility.

24. Missouri Municipal argues that transmission constraints cause some or all of the Ameren control area to be separate geographic markets and should have been reflected in Applicants' analysis. It cites an earlier section 203 proceeding involving Ameren, Docket No. EC03-53-000, in which AmerenUE claimed that it could not depend on deliveries of power from the NRG Audrain facility within the Ameren control area due to

[24] Missouri Municipal Protest at 5-9. Missouri Municipal argues that transmission constraints in the Ameren region make it difficult for utilities such as itself to reach economic long-term and short-term power supplies.

[25] *Id.* at 12-13.

[26] *Id.*

constraints on Ameren's Bland-Franks line.[27] It further states that these transmission constraints apparently still exist, as evidenced by Applicants' testimony that only 578 MWs of the 640 MW Audrain Facility is deliverable to load. With respect to Aquila's Raccoon Creek Plant, Missouri Municipal cites constraints on Illinois Power's Coffeen-Roxford line, AmerenCIPS' Newton-Casey line and local 138 kV facilities. Missouri Municipal also cites Reliant's inability to deliver firm power from its Aurora Plant due to Reliant's inability to deliver power to the Ameren border as another example of transmission constraints relating to the Ameren control area.[28]

25. Missouri Municipal claims that the effect of transmission constraints on the Ameren system is also demonstrated by the Midwest ISO Transmission Expansion Plan 2005 (MTEP 2005).[29] In the portion of the plan addressing the Mid-America Interconnected Network, Inc. (MAIN) region of the Midwest ISO, Tables 6.2-2 and 6.2-3 show Phase 1 and Phase 2 study results and projects that address limiting conditions. Missouri Municipal maintains that nearly all of the listed projects involve one of the Ameren control areas.[30]

26. Missouri Municipal argues that the record in a past Ameren proceeding, Docket No. EC04-81-000, indicates that the transactions proposed here would violate the Delivered Price Test.[31] That transaction involved an increase of 203 MWs of capacity under Ameren's control and resulted in screen failures for economic capacity in the Ameren control area for all seasons/load levels. Missouri Municipal concludes that the current transaction's increase of nearly 1,300 MWs of capacity is highly likely to produce more serious Appendix A screen violations.

---

[27] *Id.* at 9 n.5 (referring to Ameren Energy Generating Company's initial brief dated Dec. 1, 2003, at 63). Docket No. EC03-53-000 culminated in a Commission order affirming that the proposed disposition of facilities would have no adverse effect on rates and regulation. *Ameren Energy Generating Co.*, Opinion No. 473, 108 FERC ¶ 61,081 (2004).

[28] Missouri Municipal Protest at 10.

[29] *Available at* http://www.midwestiso.org/publish/Folder/3e2d0_106c60936d4_-75210a48324a?rev=1 (main report titled "MTEP 05 - Board Approved June 2005").

[30] *Id.* at 10-11.

[31] *Id.* at 12-13 (citing *Ameren Corp.*, 108 FERC ¶ 61,094 at P 27 (2004) (reporting Delivered Price Test results)).

27. Missouri Municipal suggests that the Commission require Applicants to supplement their filing to include and analyze transmission constraints. It also requests an investigation and a technical conference on the effect of transmission constraints on geographic markets and Ameren's generation market power. Missouri Municipal volunteers to take part in the solutions to these problems in the regions where it operates.[32]

iii. <u>Applicants' Answer</u>

28. Applicants disagree with Missouri Municipal's allegation that the existence of transmission constraints merits the use of a narrower geographic market than the Midwest ISO market used in Applicants' analysis. They rebut this claim by stating that Missouri Municipal offers no credible evidence to show that any such transmission constraints exist. For example, Missouri Municipal gives no indication that it or any of its members have been denied transmission service within the Midwest ISO region since the Midwest ISO's Day 2 market commenced operations. Accordingly, Applicants contend that Missouri Municipal's claims are nothing more than unsupported allegations that provide no basis for the relief it seeks.[33] Applicants further contest Missouri Municipal's claim by noting that the same MTEP 2005 referenced by Missouri Municipal indicates that all load within the Midwest ISO is deliverable except for the International Transmission Zone.

29. Applicants disagree with Missouri Municipal's claim that the MTEP concludes that the Ameren transmission system is constrained. The tables Missouri Municipal cites, 6.2.2 and 6.2.3, do not show any conditions that result in binding constraints. The conditions referred to in these tables are, in all but one case, NERC Category C, or multiple, contingencies, and further, the Midwest ISO has determined that all load in the control areas for the Ameren companies is deliverable in spite of these contingencies.[34] Applicants further argue that in the Day 2 market, the Midwest ISO uses security

---

[32] *Id.* at 13-14.

[33] Applicants' Answer at 10-11.

[34] Applicants' Answer at 11. Applicants note (*id.* at 12) that the only NERC Category B contingency listed in table 6.2.2, involves a low voltage facility that does not affect the availability of transmission service. Referring to NERC Standard TPL-002-0, a Category B contingency is an "event resulting in the loss of a single element," whereas a Category C contingency is/are "event(s) resulting in the loss of two or more (multiple) elements."

constrained economic dispatch over the entire Regional Transmission Operator (RTO) footprint and can dispatch around any limitation that may arise.[35]

30. Applicants argue[36] that Missouri Municipal's references to earlier Ameren proceedings are irrelevant to the instant application. Applicants note that the methodology used by AmerenUE in Docket No. EC03-53-000 is no longer used in the Midwest ISO with the advent of Day 2 markets. The Midwest ISO has effectively replaced the old methodology with deliverability tests for generators and load under the Midwest ISO Open Access Transmission and Energy Markets Tariff. Docket No. EC04-81 is similarly irrelevant, because the Midwest ISO's Day 2 markets were not in operation then, either.

31. Applicants argue that, given the absence of transmission constraints, using the Midwest ISO region as the relevant geographic market is consistent with Commission precedent. They state that the Commission has found that the use of an RTO region is appropriate when evaluating generation market power issues under both sections 203 and 205.[37] Applicants cite *PSEG Waterford Energy LLC*[38] and *Duke Energy Corp. and Cinergy Corp*.[39] as cases in which the Commission found the RTO to be the appropriate geographic market for section 203 purposes. In *AEP Power Marketing Inc*.,[40] and *Illinois Power Co. d/b/a AmerenIP*,[41] the Commission found that where an RTO has a Day 2 market with centralized dispatch and Commission-approved market monitoring functions, the presumed proper geographic market is the RTO region.[42] Applicants further claim that it would make no sense to find that the Midwest ISO is the appropriate geographic market for determining whether a company has market power in one context

---

[35] *Id.* at 12.

[36] *Id.* at 12-16.

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

[38] 112 FERC ¶ 61,308 (2005) (*PSEG Waterford*).

[39] 113 FERC ¶ 61,297 (2005) (*Duke/Cinergy*).

[40] 107 FERC ¶ 61,018 (2004).

[41] 110 FERC ¶ 61,408 (2005).

[42] Applicants' Answer at 17-18.

(section 205 market-based rate proceedings) and then require the company to use a different geographic market when evaluating the same question in another (section 203 proceedings). This is especially the case given that AmerenUE will file a notice of change in status relating to their market-based rate authority pursuant to Order No. 652[43] to reflect the acquisition of the Aquila and NRG facilities.

32. Applicants maintain that nothing in *Duke/Cinergy* and *Exelon Corp.*[44] supports the use of a different geographic market for purposes of their Application. Those orders endorsed the use of locational submarkets as the relevant geographic market only when there are binding transmission constraints. In the case at hand, Applicants claim that there is no credible evidence of transmission constraints, and that the Commission accepted the analysis presented by the applicants in *Duke/Cinergy*, which concluded that that the Midwest ISO market, as a whole, was unconcentrated.[45] Applicants emphasize that the analysis in *Duke/Cinergy* supports the use of the Midwest ISO as the relevant geographic market, and explain that those applicants ultimately used a more limited geographic market (the Midwest ISO region excluding the Wisconsin-Upper Michigan System (WUMS) region, Iowa, Minnesota, and LG&E (Midwest ISO Submarket) to be conservative.[46] Applicants consider their analysis of peaking capacity to be similarly conservative.[47]

33. In addition to defending their main analysis, Applicants offer additional evidence that the Asset Sale will not hurt the Midwest ISO markets. They claim that the Asset Sale would pass all market power screens even if they were to use the smaller Midwest

[43] *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).

[44] 112 FERC ¶ 61,011 (2004).

[45] Applicants' Answer at 21.

[46] Id.

[47] Applicants also note that while the *Duke/Cinergy* analysis may have excluded WUMS and certain other regions that were deemed transmission constrained, the analysis in that case did not find any Ameren company control area to be transmission constrained. Furthermore, Applicants in the instant case point out that the *Duke/Cinergy* analysis included the Ameren companies in the Midwest ISO Submarket and the Midwest ISO-PJM Midwest markets considered. *Id.* at 21-22.

ISO Submarket that Duke/Cinergy used as their conservative relevant geographic market. In comparing their case to *Duke/Cinergy* in the context of the size of the Midwest ISO Submarket and its concentration, Applicants consider Ameren's, Aquila's, and NRG's generating capacity as measured by the HHI. In the Duke/Cinergy case, the consultant, Dr. William Hieronymus, determined that that the Midwest ISO Submarket concentration during summer extreme peak conditions had an HHI of 828.[48] Applicants state that when they adopt Dr. Hieronymus' summer extreme peak market-clearing price of $250, Ameren's share of Economic Capacity in the Midwest ISO Submarket is 15.0 percent, whereas the combined share of the NRG and Aquila Facilities is 1.35 percent. Approximating the HHI change for the Asset Sale as 2ab,[49] Applicants say that the HHI change due to this transaction for the Midwest ISO Submarket is 42.[50] Likewise, for Available Economic Capacity, Applicants find a transaction-induced HHI change of 44. Applicants thus conclude that the Asset Sale passes the Commission's competitive screens for the Midwest ISO Submarket.[51]

34. Applicants challenge Missouri Municipal's suggestion that the Midwest ISO Independent Market Monitor cannot address any market power issues that might arise from AmerenUE's acquisition of the Aquila and NRG facilities. The Independent Market Monitor can mitigate market power abuse, including the ability to develop screens and other indices to determine whether market power abuse or anti-competitive behavior has occurred, identify and report anticompetitive behavior to the Commission and other agencies, and recommend appropriate penalties.[52]

35. For these reasons, Applicants assert that neither additional studies nor a technical conference are necessary. They contend that the transmission solutions that Missouri Municipal claims are necessary are beyond the scope of this proceeding.

---

[48] This analysis is based on a total of 95,778 MWs of Economic Capacity.

[49] Where a and b are the pre-transaction shares of the combining assets.

[50] Applicants claim that even this change overstates the effect of the transaction on competition, because it assumes that Ameren will be acquiring all of NRG's generating capacity in the Midwest ISO Submarket, whereas there are 18 MWs that Ameren will not be acquiring.

[51] Applicants' Answer at 22-25.

[52] *Id.* at 19.

iv. Commission Determination

36. As discussed below, we find that Applicants have shown that neither the combination of their generation capacity resulting from the Asset Sale nor the Contract Assignment will harm competition in any relevant market.

37. Applicants' studies of the Midwest ISO footprint and the Midwest ISO Submarket demonstrate that the Asset Sale does not adversely affect horizontal competition. Under the tests for both Economic Capacity and Available Economic Capacity, Applicants have shown that neither the Midwest ISO footprint nor the Midwest ISO Submarket is concentrated either before or after accounting for the Asset Sale. Accordingly, the Asset Sale passes the Commission's horizontal competition screen under either analysis.

38. Although Missouri Municipal opposes Applicants' definition of the relevant geographic market, arguing that transmission constraints cause some or all of the Ameren control areas to be separate geographic markets, its arguments are unconvincing. First, the relevant market proposed by Missouri Municipal is not recognized by the Midwest ISO, which has not designated the Ameren control areas Narrow Constrained Areas.

39. Second, Missouri Municipal cites certain constraints previously identified by Applicants, but offers no evidence about when or how often those constraints are now binding, nor has it provided any analysis showing that the constraints are significant enough to define a geographic market smaller than the MISO Submarket. The mere existence of a constraint, of unidentified frequency and significance, does not establish the existence of a relevant geographic market

40. Third, even if we were to assume that the Ameren control areas were sufficiently constrained to cause them to be considered a relevant geographic market for this proceeding, transmission expansion construction currently underway by AmerenUE would alleviate such constraints. The MTEP Appendix A[53] demonstrates that AmerenUE is in the process of building a 345kV transmission line between Callaway and Franks, with an expected in-service date of December 1, 2006, which will reduce the congestion on the Bland-Franks line cited by Missouri Municipal.[54] This transmission expansion

---

[53] *See* MTEP Appendix A at A-3, *available at* http://www.midwestiso.org/publish/Document/3e2d0_106c60936d4_-75180a48324a/MTEP05_Appendix_A.pdf?action=download&_property=Attachment.

[54] In the interim, we expect the Midwest ISO's market monitor to alert us promptly of any circumstances that may warrant mitigation beyond that already imposed under the Midwest ISO's tariff.

meets Missouri Municipal's stated goal for the technical conference it proposes that the Commission conduct -- to address the transmission constraints Missouri Municipal claims adversely impact competitive conditions.[55] This also undermines Missouri Municipal's contention that the Ameren control areas are sufficiently constrained so as to be considered a separate geographic market for purposes of section 203.

41. Applicants have also shown that the Contract Assignment raises no issues with respect to horizontal competition. Because there will be no change in ownership or control of generation as a result of this assignment, it raises no traditional concerns with respect to horizontal competition. Because the Power Purchase Agreement was entered into by non-affiliates, it raises no concerns with respect to affiliate abuse, in accordance with the Commission's finding in *Edgar*.

2. Vertical Competitive Issues

i. Applicants' Analysis

42. Applicants state that neither the Asset Sale nor the Contract Assignment will create vertical market power. They say that the Commission's concern with regard to vertical market power generally arises in circumstances, not present here, in which the combined entity may restrict potential downstream competitors' access to upstream supply markets or increase potential competitors' costs. In addition, Applicants state that AmerenUE and other Ameren Operating Companies have transferred functional control of their transmission facilities to the Midwest ISO, mitigating vertical market power concerns.[56]

ii. Commission Determination

43. In mergers combining electric generation assets with inputs to generating power (*e.g.*, natural gas transmission or fuel supply assets) competition can be harmed if a merger increases the merged firm's ability or incentive to exercise vertical market power in wholesale electricity markets.[57] Here, Applicants have shown that the proposed transactions do not raise any of these concerns. AmerenUE and the other Ameren Operating Companies are members of the Midwest ISO, and have transferred functional

---

[55] Missouri Municipal Protest at 14.

[56] Application at 14-15, citing *PSEG Waterford*, 112 FERC ¶ 61,308 at P 32.

[57] *See* Order 642, FERC Stats. & Regs. ¶ 31,111 at 31,904.

control of their transmission facilities to the Midwest ISO. Consistent with our finding in *PSEG Waterford*, we find that turning over functional control of an applicant's transmission facilities to a Commission-approved RTO mitigates vertical market power concerns. The Commission notes that no protester raised vertical market power issues in this proceeding.

3. Effect on Rates

i. Applicants' Analysis

44. Applicants argue that the Asset Sale will have no impact on wholesale sales or existing FERC-jurisdictional transmission rates. Applicants state that AmerenUE provides jurisdictional wholesale service to various customers in Missouri, and that while the specific terms of each relevant contract vary, in each instance the rates charged are market-based rates negotiated pursuant to AmerenUE's market-based rate authority. Applicants maintain that these contract rates are not affected by AmerenUE's cost of service and, thus, will not be affected by the Asset Sale. Applicants argue that the Asset Sale will have no adverse effect on the existing FERC-jurisdictional transmission service rates of AmerenUE or the other Ameren Operating Companies, because these entities are all members of the Midwest ISO and their transmission rates are determined in accordance with the provisions of the Midwest ISO Energy Market Tariff.[58] They argue that none of the terms of the Power Purchase Agreement, including the pricing terms, will be changed by the Contract Assignment. Further, none of AmerenUE's wholesale power sales customers have contracts that are affected by AmerenUE's costs of acquiring power, and these customers will not be affected by the assignment. Consequently, the Contract Assignment will have no adverse effect on rates.

ii. Commission Determination

45. The Commission finds that Applicants have shown that the proposed transactions will not adversely affect wholesale power rates or transmission rates. Consistent with Order 669,[59] because AmerenUE provides wholesale service at market-based rates negotiated pursuant to AmerenUE's market-based rate authority, and these contract rates are not affected by AmerenUE's cost of service, AmerenUE's wholesale customers will not be adversely affected by the proposed transactions. With respect to transmission rates, the Commission notes that AmerenUE and the other Ameren Operating Companies

---

[58] Application at 15-16.

[59] FERC Stats. & Regs. ¶ 31,200 at P 166.

are already members of the Midwest ISO and their transmission rates are determined in accordance with the provisions of the Midwest ISO's Energy Market Tariff.

4. Regulation

a. Applicants' Analysis

46. Applicants argue that the proposed transactions will not have any effect on the nature of federal or state regulation. Applicants state that AmerenUE and the other Ameren Operating Companies will continue to be subject to the Commission's jurisdiction under Part II of the FPA. Applicants state that the Asset Sale will not affect state regulation because (1) the Kansas Corporation Commission, which is the relevant regulatory agency for the only state agency with authority over the sale transaction, will review the transaction, and (2) following the completion of the Asset Sale and the inclusion of the Aquila Facilities into AmerenUE's rate-base operations, the Aquila Facilities will be subject to the jurisdiction of the Missouri Public Service Commission with respect to retail electric rates.[60]

b. Commission Determination

47. Applicants have demonstrated that the proposed transactions do not raise any concerns with respect to regulation. We find that the proposed transactions will not adversely affect federal regulation because Applicants and the Power Purchase Agreement will continue to be subject to the Commission's jurisdiction. Furthermore, Applicants have shown that the proposed transactions will not impair the ability of any state commission to regulate any of Applicants. We note that no state commission protested the proposed transaction.

5. Cross Subsidization

a. Applicants' Analysis

48. Applicants verify that the proposed transactions do not result in, now or in the future: (1) transfers of facilities between a traditional utility associate company with wholesale or retail customers served under cost-based regulation and an associate company; (2) new issuances of securities by a traditional utility associate company with wholesale or retail customers served under cost-based regulation for the benefit of an associate company; (3) new pledges or encumbrances of assets of a traditional utility

[60] Application at 16-17.

associate company with wholesale or retail customers served under cost-based regulation for the benefit of an associate company; or (4) new affiliate contracts between non-utility associate companies and traditional utility associate companies with wholesale or retail customers served under cost-based regulation, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA. Applicants therefore contend that there is no need for a detailed examination of cross-subsidization and encumbrance concerns as to the Asset Sale. Applicants state that even though the Contract Assignment will result in a contract between associate companies, the Contract Assignment merely results in the continuation without modification of the existing Power Purchase Agreement negotiated by AmerenIP and Aquila Merchant Services. Thus, there is no possibility of affiliate abuse and no new affiliate contract between a non-utility associate company and traditional public utility associate company with customers served under cost-based regulation.

b. Commission Determination

49. As demonstrated by the description above, the proposed transactions do not raise any concerns with respect to cross subsidization and have therefore complied with the requirements of Order No. 669.[61]

The Commission orders:

(A) Applicants' request for authorization to make sales from AmerenUE to AmerenIP under the Power Purchase Agreement is granted, as discussed in the body of this order.

(B) The proposed section 203 transactions are authorized upon the terms and conditions and for the purposes set forth in the application.

(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.

---

[61] Order 669, FERC Stats. & Regs. ¶ 31,200 at P 169.

(E) The Commission retains authority under sections 203(b) and 309[62] of the FPA to issue supplemental orders as appropriate.

(F) Applicants must submit their proposed final accounting within six months of the consummation of the transactions. The accounting submission should provide all transaction-related accounting entries made to the books and records of AmerenUE along with appropriate narrative explanations describing the basis for the entries.

(G) Applicants shall notify the Commission within 10 days of the date that the transactions have consummated.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

[62] 16 U.S.C. § 825h (2000).