

169 FERC ¶ 61,175
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Public Service Company of Colorado
SWG Colorado, LLC

Docket No. EC19-115-000

ORDER AUTHORIZING
DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued December 3, 2019)

1. On July 23, 2019, as amended September 19, 2019, Public Service Company of Colorado (PSCo), along with SWG Colorado, LLC (SWG Colorado) (together, Applicants) filed an application pursuant to section 203 of the Federal Power Act (FPA)¹ requesting authorization for PSCo to acquire 100 percent of the equity interests in SWG Colorado, which owns an approximately 80 megawatt (MW) non-operational electric generation facility located in Boulder, Colorado (Facility) (Proposed Transaction).²
2. We have reviewed the Proposed Transaction under the Commission's Merger Policy Statement.³ As discussed below, we authorize the Proposed Transaction as consistent with the public interest.

¹ 16 U.S.C. § 824b (2018).

² Joint Application for Authorization under Section 203 of the Federal Power Act and Requests for Limited Waivers and Confidential Treatment, Docket No. EC19-115-000 (filed July 23, 2019) (Application). *See also* Informational Filing to Joint Application for Authorization under Section 203 of the Federal Power Act and Request for Shortened Comment Period, Docket No. EC19-115-000 (filed Sept. 19, 2019) (Supplement).

³ *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996) (Merger Policy Statement) (cross-referenced at 77 FERC ¶ 61,263), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997); *see also FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008); *Transactions Subject to*

I. Background

A. Description of Applicants

1. PSCo

3. Applicants state that PSCo is a vertically integrated electric utility serving portions of Colorado, including the Denver metropolitan area. According to Applicants, PSCo provides cost-based electric utility services to approximately 1.5 million retail and wholesale electric customers, and cost-based natural gas retail sales and intrastate natural gas transportation services as a local distribution company to approximately 1.4 million natural gas customers. Applicants state that PSCo is a wholly owned subsidiary of Xcel Energy Inc. (Xcel Energy), a publicly traded utility holding company.⁴

4. Applicants explain that, as of December 2018, PSCo owns or purchases, under long-term contracts, approximately 10,660 MW of generation in the Western Interconnection. Applicants state that PSCo also makes wholesale requirements electric sales to six cooperative or municipal load-serving utilities at regulated, cost-based formula rates on file with the Commission under PSCo's Assured Power and Energy Requirements Tariff (Assured Power Tariff). According to Applicants, Colorado does not have a retail choice program for electric consumers and PSCo's retail customers are served under cost-based regulation. Accordingly, Applicants state that those customers are considered captive customers for purposes of the Commission's regulations. Applicants represent that PSCo has market-based rate authority, but not within the PSCo Balancing Authority Area (BAA).⁵

5. With respect to transmission, Applicants explain that PSCo operates the PSCo BAA and is a member of the Western Electricity Coordinating Council. Applicants state that PSCo also owns jurisdictional transmission facilities and provides access to its transmission system under the Xcel Energy Operating Companies Joint Open Access Transmission Tariff (Xcel Energy OATT).

FPA Section 203, Order No. 669, 113 FERC ¶ 61,315 (2005), *order on reh'g*, Order No. 669-A, 115 FERC ¶ 61,097, *order on reh'g*, Order No. 669-B, 116 FERC ¶ 61,076 (2006); *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000) (cross-referenced at 93 FERC ¶ 61,164), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001).

⁴ Application at 3-5.

⁵ *Id.* at 3-4.

2. SWG Colorado

6. According to Applicants, SWG Colorado is a special purpose company that owns and previously operated the Facility, which is located within the PSCo BAA on property that is leased from PSCo. Applicants represent that SWG Colorado is an exempt wholesale generator (EWG) under the Public Utility Holding Company Act of 2005 (PUHCA 2005),⁶ and has been authorized by the Commission to sell energy, capacity, and ancillary services at market-based rates. Applicants explain that SWG Colorado previously sold the entire capacity and electric output of the Facility to PSCo pursuant to a long-term firm power purchase agreement that terminated on September 30, 2012. Applicants explain further that the Facility became non-operational in January 2015 and that the turbines were removed from it in April 2015. Applicants clarify that, except for its market-based rate tariff and EWG self-certification, SWG Colorado does not have any other tariffs or certifications on file with the Commission.⁷

7. Applicants state that SWG Colorado is a wholly owned direct subsidiary of Southwest Generation Operating Company, which is a wholly owned direct subsidiary of Southwest Generation Holding Company, II, LLC, which in turn is a wholly owned direct subsidiary of Southwest Generation Parentco, LLC (SWG Parentco). Applicants explain that IIF BH Investment, LLC (IIF Investment) directly owns 100 percent of the voting securities in SWG Parentco, and that IIF Investment is a wholly owned direct subsidiary of IIF US Holding LP (IIF US Holding). According to Applicants, IIF US Holding is an infrastructure investment fund managed and controlled by its general partner, IIF US Holding GP, LLC, which is owned by three private individuals (IIF GP Owners). Applicants state that, in addition to SWG Colorado, IIF US Holding indirectly owns or controls approximately 356.5 MW of electric generation facilities located in the PSCo BAA.⁸

8. Applicants explain that the IIF GP Owners also own IIF US Holding 2 GP, LLC, the general partner of IIF US Holding 2 LP (IIF US Holding 2), an infrastructure investment fund that invests in, among other things, electric generation facilities. Applicants state that IIF US Holding 2 indirectly owns or controls a 10 percent or greater

⁶ 42 U.S.C. §§ 16451-63 (2018).

⁷ Application at 6.

⁸ *Id.* at 6-7.

voting interest in certain generation facilities throughout the United States, including approximately 120 MW in the PSCo BAA.⁹

B. The Proposed Transaction

9. Applicants state that the Proposed Transaction is the result of an all-source request for proposals (RFP) process in which PSCo sought to acquire cost-effective generation resources to meet its future system needs and ensure reliability of electric service for both wholesale and retail customers pursuant to Colorado’s Electric Resource Plan process (Colorado Electric Resource Plan).¹⁰ Applicants state that SWG Colorado was selected as one of the winning bidders in response to the “Company Ownership RFP,” which was reserved for proposed projects that would lead to PSCo ownership of the selected resource. According to Applicants, PSCo is required to seek state commission approval for the acquisition of and cost recovery for the Facility.¹¹ Applicants represent that they will submit the state application roughly in parallel with the Application.¹²

II. Notice of Filing

10. Notice of the Application was published in the *Federal Register*, 84 Fed. Reg. 36,912 (2019), with interventions and protests due on or before September 23, 2019. None was filed.

11. Notice of the Supplement was published in the *Federal Register*, 84 Fed. Reg. 52,082 (2019), with interventions and protests due on or before October 15, 2019. None was filed.

III. Discussion

A. FPA Section 203 Standard of Review

12. FPA section 203(a)(4) requires the Commission to approve proposed dispositions, consolidations, acquisitions, or changes in control if the Commission determines that the proposed transaction will be consistent with the public interest.¹³ The Commission’s

⁹ *Id.* at 7.

¹⁰ *Id.* at 10.

¹¹ *Id.* at 12.

¹² *Id.* at 11-12.

¹³ 16 U.S.C. § 824b(a)(4).

analysis of whether a proposed 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.¹⁴ FPA section 203(a)(4) also requires the Commission to find that the proposed 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.”¹⁵ The Commission’s regulations establish verification and informational requirements for entities that seek a determination that a proposed transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.¹⁶

B. Analysis of the Proposed Transaction

1. Effect on Competition

a. Applicants’ Analysis

i. Horizontal Competition

13. Applicants argue that the Proposed Transaction will not have an adverse effect on horizontal competition in the PSCo BAA and two of its first-tier markets: the Public Service Company of New Mexico (PNM) BAA and Western Area Power Administration – Colorado-Missouri (WACM) BAA.¹⁷ Applicants performed a Delivered Price Test¹⁸ to

¹⁴ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

¹⁵ 16 U.S.C. § 824b(a)(4).

¹⁶ 18 C.F.R. § 33.2(j) (2019).

¹⁷ Application, Exhibit J: Affidavit of Julie R. Solomon and Matthew E. Arenchild at 12 (Solomon and Arenchild Affidavit). Applicants do not deem the Southwest Power Pool, Inc. (SPP) market a relevant geographic market because, even though it is a first-tier market to PSCo, SPP is interconnected to PSCo only via a 210 MW tie line. This line represents a 0.2 percent share of the SPP market capacity of approximately 90,000 MW.

¹⁸ The Delivered Price Test determines the pre- and post-transaction market shares from which the change in market concentration, or the change in the Herfindahl-Hirschman Index (HHI), due to a proposed transaction can be derived. The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are considered

analyze the effect of the Proposed Transaction on competition under the Economic Capacity and Available Economic Capacity measures¹⁹ in the relevant geographic markets.²⁰ Applicants argue that, given PSCo's retail load obligations, the Available Economic Capacity measure is more appropriate for purposes of assessing the effect of the Proposed Transaction on competition.

14. Applicants state that, under the base case of their Delivered Price Test, post-transaction market concentration under the Available Economic Capacity measure in the PSCo BAA ranges from unconcentrated in three time periods to moderately concentrated in five time periods, and to highly concentrated in two time periods.²¹ Applicants' Delivered Price Test for the base case under the Available Economic Capacity measure

to be unconcentrated; markets in which the HHI is greater than or equal to 1,000 points, but less than 1,800 points, are considered to be moderately concentrated; markets in which the HHI is greater than or equal to 1,800 points are considered to be highly concentrated. In the Merger Policy Statement, the Commission adopted the 1992 Federal Trade Commission/Department of Justice Horizontal Merger Guidelines, which state that 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 its 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).

¹⁹ 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 deducts the supplier's native load obligation from its capacity and adjusts transmission availability accordingly. *Wis. Energy Corp.*, 151 FERC ¶ 61,015, at P 25 (2015).

²⁰ Applicants provide several sensitivity analyses that consider the effect of the Proposed Transaction on competition under different factual scenarios, such as whether the Facility is added to the PSCo BAA in May 2020 or May 2022, and whether other load and resource changes occur in the PSCo BAA, including the retirement of Unit 1 of the Comanche Generating Station. Application at 17. As explained below, because the base case of the Delivered Price Test provides the most conservative assessment of the effect of the Proposed Transaction on competition, we focus on that scenario.

²¹ In the Supplement, Applicants provide additional Delivered Price Tests using revised simultaneous transmission import limit values. According to Applicants, the changes to those values have no material impact on their analysis. Supplement, Supplemental Affidavit of Julie R. Solomon and Matthew E. Arenchild at 2.

shows a single market power screen failure (a change of 90 points in a highly concentrated market) and two additional screen failures in the plus-ten percent price sensitivity.²² Applicants state that there are no market power screen failures in the PNM and WACM markets under either the Available Economic Capacity or Economic Capacity measures.²³

15. Applicants argue that other factors demonstrate that PSCo lacks the ability or incentive to withhold output in order to drive up market prices, and that the Proposed Transaction remains in the public interest under FPA section 203.

16. First, Applicants state that the Facility was selected through a competitive procurement process that was overseen and mandated by the Colorado Public Utilities Commission (Colorado Commission) and driven by the need to ensure adequate service to load. According to Applicants, the Colorado Commission requires PSCo to submit resource plans to ensure that it can reliably serve its native load. Applicants add that most of the new generation PSCo has acquired to meet its load requirements through its most recent resource plan is renewable generation. Applicants explain that PSCo has included gas generation in its resource plan, including the Facility, to help offset the variable nature of that renewable generation and the retirement of coal-fired generation at the Comanche Generating Station. Applicants explain that gas-fired generation has the ability to be dispatched to address fluctuations in the supply of energy from variable generation and is critical to ensuring system reliability and the reliability of service to wholesale requirements customers and end users as the PSCo generation fleet undergoes a transition towards greater reliance on renewable generation.²⁴

17. Second, Applicants contend that, because the additional gas-fired capacity from the Facility will help ensure reliable service to native load customers, the competitive effect of the Proposed Transaction is not substantially different from the likely alternative should the Proposed Transaction not occur. Applicants maintain that if PSCo is unable to purchase the interests in SWG Colorado, it would still need an equivalent amount of new generation capacity to meet its resource needs. Applicants argue that alternatives such as building new gas-fired generation or purchasing the capacity of additional gas-fired generation on a long-term firm basis would have the same competitive effects as the Proposed Transaction.²⁵

²² Application at 19.

²³ Solomon and Arenchild Affidavit at 5.

²⁴ Application at 23.

²⁵ *Id.* at 24.

18. Third, Applicants represent that the Proposed Transaction will not eliminate a competitor. Applicants state that the Facility has not operated since early January 2015 and that the turbines were removed from the Facility in April 2015. As a result, Applicants conclude that SWG Colorado has not been a competitor of any wholesale power seller, including PSCo, for more than four years.²⁶

19. Fourth, Applicants argue that PSCo lacks the ability or incentive to withhold output in order to drive up market prices within the PSCo BAA, the only BAA in which Applicants' analysis identifies a screen failure, because it does not have market-based rate authority in the PSCo BAA.²⁷

20. Fifth, Applicants submit that other regulatory obligations reduce PSCo's incentives and opportunities to raise market prices. According to Applicants, the Joint Dispatch Agreement between PSCo, Black Hills Colorado Electric, LLC, Platte River Power Authority, and Colorado Springs Utilities provides for certain limited wholesale sales by PSCo in the PSCo BAA of Joint Dispatch Energy and Deficit Energy. Applicants explain that all operational PSCo facilities must be designated to provide energy under this agreement, thereby preventing PSCo from withholding capacity from the market in any circumstance where its capacity is needed under the Joint Dispatch Agreement.²⁸ Applicants also assert that the limitations on wholesale trading activities imposed by the Colorado Commission reduce any incentive to exercise market power. Specifically, Applicants explain that, under rules established by the Colorado Commission, resources that are used to serve native load, such as the Facility, are first reliably optimized to serve native load. Applicants state that, after that obligation is fulfilled, if a sale can be made from a PSCo resource consistent with criteria established by the Colorado Commission (the sale must be at a price above the projected incremental cost of production), then it must be made from those resources and 90 percent of the profits go to ratepayers.²⁹

ii. Vertical Competition

21. Applicants represent that the Proposed Transaction will not have an adverse impact on vertical competition. According to Applicants, the Proposed Transaction does not involve a combination of transmission assets or a change in control over transmission

²⁶ *Id.* at 25.

²⁷ *Id.*

²⁸ *Id.* at 26.

²⁹ *Id.* at 27.

assets, or other upstream assets such as natural gas pipelines. Applicants explain that, aside from limited interconnection facilities necessary to connect the Facility to the transmission system, the Proposed Transaction does not involve any upstream inputs into electric generation products and will not change the vertical competitive landscape or affect PSCo's ability or incentive to erect barriers to entry by new suppliers. Applicants add that PSCo provides transmission service over its facilities, including interconnection facilities, pursuant to the Xcel Energy OATT.³⁰

b. Commission Determination

22. In analyzing whether a proposed transaction will adversely affect horizontal competition, the Commission examines the effects on concentration in the generation markets and whether the proposed transaction otherwise creates the incentive and ability to engage in behavior harmful to competition, such as withholding of generation.³¹

23. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on horizontal competition. The Commission's regulations require the submission of a "horizontal Competitive Analysis Screen if, as a result of the proposed transaction, a single corporate entity obtains ownership or control over the generating facilities of previously unaffiliated merging entities."³² The Commission is normally concerned with cases where there are systemic screen failures, that is, where screen failures "present a consistent pattern across time periods and/or markets."³³ The Commission has indicated that systemic screen failures in markets that are highly concentrated and where an entity seeking authorization has a significant share of the market are a cause for concern. In this proceeding, the single screen failure under the Available Economic Capacity measure in the base case, the most conservative of the

³⁰ *Id.* at 28.

³¹ *Nev. Power Corp.*, 149 FERC ¶ 61,079, at P 28 (2014).

³² 18 C.F.R. § 33.3(a)(1) (2019).

³³ *See, e.g., Fla. Power & Light Co.*, 145 FERC ¶ 61,018, at P 45, n.59 (2013); *Bluegrass Generation Co., L.L.C.*, 139 FERC ¶ 61,094, at P 28 (2012).

scenarios analyzed by Applicants,³⁴ does not demonstrate a consistent pattern across various time periods, and therefore does not indicate potential harm to competition. Additionally, Applicants have demonstrated that PSCo lacks the ability or incentive to withhold output in order to drive up market prices.

24. In analyzing whether a proposed transaction presents vertical market power concerns, the Commission considers the vertical combination of upstream inputs, such as transmission or natural gas, with downstream generating capacity. As the Commission has previously found, transactions that combine electric generation assets with inputs to generating power (such as natural gas, transmission, or fuel) can harm competition if the transaction increases an entity's ability or incentive to exercise vertical market power in wholesale electricity markets. For example, by denying rival entities access to inputs or by raising their input costs, an entity created by a transaction could impede entry of new competitors or inhibit existing competitors' ability to undercut an attempted price increase in the downstream wholesale electricity market.

25. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on vertical competition. The Proposed Transaction does not involve a combination of transmission assets or a change in control over transmission assets, or other upstream assets such as natural gas pipelines. Aside from limited interconnection facilities necessary to connect the Facility to the transmission system, the Proposed Transaction does not involve any upstream inputs into electric generation products. We note that PSCo provides transmission service pursuant to the Xcel Energy OATT.

2. Effect on Rates

a. Applicants' Analysis

26. Applicants argue that the Proposed Transaction will not have an adverse effect on SWG Colorado's wholesale energy and transmission rates. Applicants explain that, because the Facility is not currently operational, SWG Colorado does not currently serve any customers under any wholesale energy or transmission rates. As a result, Applicants conclude that the Proposed Transaction will not have any effect on SWG Colorado's rates.

27. Applicants also contend that the Proposed Transaction will not have an adverse effect on PSCo's wholesale energy and transmission rates. First, Applicants note that,

³⁴ The base case considers the addition of the Facility to the PSCo BAA as it currently exists, without accounting for near term changes to the PSCo BAA, such as the retirement of Unit 1 of the Comanche Generating Station. *See, e.g.*, Application at 17.

under Commission policy, PSCo's wholesale customers served under agreements entered into under PSCo's market-based rate authority will not be adversely affected by the Proposed Transaction.³⁵

28. Second, Applicants maintain that wholesale requirements customers served under cost-of-service rates will also not be adversely affected by the Proposed Transaction.³⁶ According to Applicants, PSCo provides wholesale requirements service to certain cooperatives and two municipalities at cost-based formula rates under the Assured Power Tariff. Applicants explain that PSCo recovers the costs associated with the ownership and operation of generation facilities used to serve its wholesale requirements customers under that tariff. Applicants state that, following completion of the Proposed Transaction, the Facility will be added to PSCo's rate base and PSCo will recover the costs associated with the ownership and operation of the Facility from these customers as well as PSCo's retail customers. Applicants argue that, to the extent there may be an effect on rates under the Assured Power Tariff from adding the Facility to rate base, that effect is not adverse because there is no change to the formula rate itself (absent a filing by PSCo under FPA section 205³⁷); because the acquisition of the Facility is necessary to meet PSCo's planning reserve margin; and because, in the absence of acquiring the Facility, PSCo would need to purchase additional, materially more expensive replacement power given that the capacity from the Facility is needed for reliability.

29. Applicants also claim that PSCo's transmission rates and customers will not be affected by the Proposed Transaction. Applicants note that PSCo serves its transmission service customers under the Xcel Energy OATT. In addition, Applicants explain that PSCo will, consistent with Commission policy, designate the generation interconnection facilities acquired pursuant to the Proposed Transaction as transmission serving generation facilities and treat them as production facilities for ratemaking purposes. Applicants conclude that, because none of the assets to be acquired will be classified as transmission assets for transmission cost-of-service ratemaking purposes, the Proposed Transaction will not have an adverse effect on PSCo's transmission rates.³⁸

³⁵ *Id.* at 29 (citing *Ameren Energy Generating Co.*, 145 FERC ¶ 61,034, at PP 83-89 (2013)).

³⁶ *Id.* at 30.

³⁷ 16 U.S.C. § 824d.

³⁸ Application at 30.

30. Applicants argue that ratepayer protections, such as a hold harmless commitment, are not necessary for the Proposed Transaction. Specifically, Applicants argue that the Proposed Transaction falls within those categories of transactions that the Commission has acknowledged may not require a hold harmless commitment. According to Applicants, in the Policy Statement on Hold Harmless Commitments,³⁹ the Commission stated that hold harmless commitments might not be necessary in connection with the purchase of a generating plant needed to ““serve the acquiring company’s customers or forecasted load within a public utility’s existing footprint, in compliance with a resource planning process, or to meet specified [North American Electric Reliability Corporation] standards.””⁴⁰

31. Applicants assert that the Proposed Transaction falls within such a category of transactions because it involves the purchase of a generating facility to address PSCo’s future documented utility need and to ensure the reliability of electric service for both wholesale and retail customers in furtherance of a state-approved resource planning process.⁴¹ Applicants add that, aside from serving PSCo’s future resource needs generally, gas-fired generators such as the Facility will also play a critical role in supporting the reliability of the PSCo system because of their dispatch characteristics. Applicants state that the flexibility of gas-fired generators will become increasingly important as the PSCo generation fleet shifts towards greater reliance on renewable generation. Applicants conclude that the Commission should find that ““non-quantifiable’ offsetting benefits conferred by the Proposed Transaction are in the public interest and do not require PSCo to offer a hold harmless commitment.””⁴²

32. To the extent the Commission does not agree that the benefits they describe will offset any potential rate increase to PSCo’s wholesale requirements customers resulting from the Proposed Transaction, Applicants state that PSCo is willing to make the same type of hold harmless commitment described in the Hold Harmless Policy Statement in order to alleviate any concerns regarding the potential impact of the Proposed Transaction on rates. Specifically, Applicants state that PSCo will agree to commit that, for a period of five years, wholesale power service customers will be held harmless from the rate effects of the Proposed Transaction. For that five-year period, Applicants explain that

³⁹ *Policy Statement on Hold Harmless Commitments*, 155 FERC ¶ 61,189 (2016) (Hold Harmless Policy Statement).

⁴⁰ Application at 31 (quoting Hold Harmless Policy Statement, 155 FERC ¶ 61,189 at P 5).

⁴¹ *Id.* at 31-32 (citing Hold Harmless Policy Statement, 155 FERC ¶ 61,189 at 8-12, 23-24).

⁴² *Id.* at 32.

PSCo would not include transaction-related costs, including costs incurred to effectuate the Proposed Transaction,⁴³ in its cost-based wholesale requirements, cost-based wholesale power, or cost-based wholesale distribution service rates, except to the extent PSCo could demonstrate that merger-related savings are equal to, or in excess of, all of the transaction-related costs in a separate FPA section 205 proceeding.⁴⁴ Applicants represent that the Commission has approved this type of hold harmless commitment on prior occasions and endorsed this approach in the Hold Harmless Policy Statement.⁴⁵

b. Commission Determination

33. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on rates. With respect to SWG Colorado's rates, as Applicants note, SWG Colorado does not currently serve any wholesale energy or transmission customers because the Facility is not operational. Accordingly, the Proposed Transaction cannot have any impact on rates paid by SWG Colorado customers because there are none.

34. We also conclude that the Proposed Transaction will not have an adverse effect on PSCo's wholesale energy and transmission rates. As to customers served under PSCo's market-based rate authority, we note that the Commission has concluded that where electricity is sold under market-based rates, a proposed transaction is unlikely to have an adverse impact on rates.⁴⁶ Accordingly, we find that the Proposed Transaction will not have an adverse effect on customers served under agreements entered into under PSCo's market-based rate authority.

35. We likewise find that the Proposed Transaction will not have an adverse effect on rates for customers under the cost-based Assured Power Tariff. As Applicants note, after consummating the Proposed Transaction, the Facility will be added to PSCo's rate base,

⁴³ Applicants clarify that transaction-related costs include, but are not limited to, those costs identified in the Hold Harmless Policy Statement. *Id.* at 33 (citing Hold Harmless Policy Statement, 155 FERC ¶ 61,189 at P 44).

⁴⁴ Applicants state that PSCo would also provide an informational filing in this docket.

⁴⁵ Applicants note that, to the extent there is an acquisition premium associated with the Proposed Transaction, PSCo will, consistent with Commission policy, submit a separate filing under FPA section 205 if it seeks to recover any acquisition premium from wholesale requirement customers. Application at 34.

⁴⁶ *The Dayton Power & Light Co.*, 160 FERC ¶ 61,034, at P 31 (2017).

and PSCo will recover the costs associated with the ownership and operation of the Facility pursuant to the Assured Power Tariff. Applicants acknowledge that addition of the Facility to rate base may affect rates under the Assured Power Tariff but argue that such an effect is not adverse because acquisition of the Facility is necessary to meet PSCo's planning reserve margin. Applicants also represent that if PSCo did not purchase the Facility, it would need to purchase additional, more expensive replacement power given that the capacity from the Facility is needed for reliability. We conclude, based on the evidence presented in this proceeding, that while placing the Facility into rate base may have an effect on rates, such an effect is not adverse given that the Facility is needed to meet PSCo's planning reserve margin and for reliability purposes. We note also that the acquisition of the Facility is the result of an all-source RFP held as part of the Colorado Electric Resource Plan. Finally, consistent with the Hold Harmless Policy Statement, we will not require PSCo to implement a hold harmless commitment, as proposed, because such ratepayer protection is not needed to show that the Proposed Transaction will not have an adverse effect on rates.⁴⁷

36. We also agree with Applicants that the Proposed Transaction will not have an adverse effect on PSCo's transmission rates. Applicants have explained that, for purposes of wholesale transmission rates, PSCo will treat the limited interconnection facilities of the Facility being transferred as part of the Proposed Transaction as production facilities for ratemaking purposes. Accordingly, PSCo's transmission customers will not bear the costs of those facilities, and the Proposed Transaction will not have any effect on PSCo's transmission rates.⁴⁸

3. Effect on Regulation

a. Applicants' Analysis

37. Applicants assert that the Proposed Transaction will not diminish or impair state or federal regulation. According to Applicants, the Commission's review of a transaction's effect on regulation is focused on ensuring that it does not result in a regulatory gap at the federal or state level. Applicants contend that these concerns are not present with respect to the Proposed Transaction because it only concerns the transfer of a Commission-

⁴⁷ Hold Harmless Policy Statement, 155 FERC ¶ 61,189 at PP 95-97; *see also Proposed Policy Statement on Hold Harmless Commitments*, 150 FERC ¶ 61,031, at PP 40-42 (2015).

⁴⁸ *See, e.g., Pub. Serv. Co. of N.M.*, 153 FERC ¶ 61,377, at P 39 (2015).

jurisdictional public utility regulated by the Commission to another Commission-regulated public utility.⁴⁹

38. Applicants assert that, although SWG Colorado will surrender its market-based rate tariff and will no longer be an EWG after the Proposed Transaction closes, any sales of power to PSCo's distribution-level customers will be subject to the ratemaking jurisdiction of the Colorado Commission. Applicants acknowledge a general shift from federal to state level regulatory oversight over the Facility but claim there will be no regulatory gap because PSCo will remain fully regulated under the FPA and PUHCA 2005. Applicants note further that any sales from the Facility to the cooperative and municipal load serving utilities in the PSCo BAA that are PSCo's wholesale customers will continue to be subject to the Commission's regulatory oversight pursuant to a cost-based formula rate.⁵⁰

b. Commission Determination

39. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap.⁵¹ As to whether a proposed transaction will have an effect on state regulation, the Commission explained in the Merger Policy Statement that it ordinarily will not set the issue of the effect of a proposed transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the proposed 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.⁵² Based on Applicants' representations, we find no evidence that either state or federal regulation will be impaired by the Proposed Transaction. We note that no party has argued otherwise.

4. Cross-subsidization

a. Applicants' Analysis

40. Applicants assert that the Proposed Transaction will not result in proscribed cross-subsidization or the pledge or encumbrance of utility assets. According to Applicants,

⁴⁹ Application at 35.

⁵⁰ *Id.*

⁵¹ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

⁵² *Id.*

the Proposed Transaction falls within two of the three safe harbors the Commission identified in the Supplemental Policy Statement. First, Applicants claim that the Proposed Transaction is within the scope of the safe harbor for transactions involving only non-affiliates. Applicants state that the Proposed Transaction is an arm's length, bargained-for exchange between non-affiliates, PSCo and SWG Colorado. Applicants explain that the Commission has recognized that where the transacting parties are not affiliated, the potential for inappropriate cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company is generally not present.⁵³ Second, Applicants claim that the Proposed Transaction falls within the safe harbor for transactions that are subject to review by a state commission. Applicants state that the Commission has explained its intent to defer to state commissions where the state adopts or has in place ring-fencing measures to protect customers against inappropriate cross-subsidization or the encumbrance of utility assets for the benefit of the unregulated affiliates. Applicants explain that the Purchase and Sale Agreement pursuant to which it will acquire the Facility specifically includes a requirement to seek and obtain state regulatory approval from the Colorado Commission for, among other things, inclusion of transaction-related costs in PSCo's rate base and the recovery of prudently incurred costs in connection with the ownership and operation of the Facility.⁵⁴ Applicants also note that the Proposed Transaction arises from an RFP process held as part of the Colorado Electric Resource Plan, and that PSCo will also be filing an application with the Colorado Commission for a Certificate of Public Convenience and Necessity with regard to the Facility, which proceeding will also address state ratemaking concerns.⁵⁵

41. Finally, Applicants verify, in Exhibit M of the Application, that the Proposed Transaction does not present cross-subsidization concerns.

b. Commission Determination

42. Based on Applicants' representations, we find that the Proposed Transaction 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.

⁵³ Application at 36 (citing Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 19).

⁵⁴ *Id.* at 36-37 (citing Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 18).

⁵⁵ *Id.* at 37.

5. Other Considerations

43. Information and/or systems connected to the bulk system involved in this transaction may be subject to reliability and cybersecurity standards approved by the Commission pursuant to FPA section 215.⁵⁶ 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 cybersecurity standards. The Commission, the North American Electric Reliability Corporation, or the relevant regional entity may audit compliance with reliability and cybersecurity standards.

44. 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 Transaction is based on such examination ability. In addition, applicants subject to PUHCA 2005 are subject to the record-keeping and books and records requirements of PUHCA 2005.

45. Section 35.42 of the Commission's regulations 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.⁵⁷ To the extent that a transaction authorized under FPA section 203 results in a change in status, sellers that have market-based rates are advised that they must comply with the Commission's requirements.

The Commission orders:

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

⁵⁶ 16 U.S.C. § 824o.

⁵⁷ 18 C.F.R. § 35.42 (2019); *see also Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 110 FERC ¶ 61,097, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

(B) Applicants must inform the Commission of any material change in circumstances that departs from the facts or representations that the Commission relied upon in authorizing the Proposed Transaction within 30 days from the date of the material change in circumstances.

(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 not pending or may come before the Commission.

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

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

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

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

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

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.