170 FERC ¶ 61,096
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

FirstEnergy Solutions Corp.
FirstEnergy Generation, LLC
FirstEnergy Nuclear Generation, LLC
FirstEnergy Generation Mansfield Unit 1 Corp.
Avenue Capital Management II, L.P.

Docket No. EC19-123-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES AND ACQUISITION OF SECURITIES

(Issued February 14, 2020)

1. On August 19, 2019,[1] pursuant to sections 203(a)(1) and (a)(2) of the Federal Power Act (FPA)[2] and part 33 of the Commission's regulations,[3] FirstEnergy Solutions Corp. (FES), together with its Commission-jurisdictional public utility subsidiaries, FirstEnergy Generation, LLC (FEG), FirstEnergy Generation Mansfield Unit 1 Corp. (FGMUC), and FirstEnergy Nuclear Generation, LLC (FEN and, collectively with FES, FEG, and FGMUC, Debtor Applicants), and Avenue Capital Management II, L.P. (Avenue) (together with Debtor Applicants, Applicants) filed an application requesting authorization for certain transactions in connection with the implementation of a plan of reorganization (Reorganization Plan) filed with the United States Bankruptcy Court for the Northern District of Ohio (Bankruptcy Court). Applicants seek Commission authorization for a series of transactions in which (i) funds and investment accounts managed by Avenue will acquire an approximately 15 percent indirect equity interest in Debtor Applicants, and (ii) funds and investment accounts managed by Nuveen Asset

[1] Application for Authorizations Pursuant to Section 203 of the Federal Power Act, Docket No. EC19-123-000 (Aug. 19, 2019) (Application).

[2] 16 U.S.C. §§ 824b(a)(1) and 824b(a)(2) (2018).

[3] 18 C.F.R. pt. 33 (2019).

Management, LLC (Nuveen) will acquire an approximately 35 percent indirect equity interest in Debtor Applicants (collectively, the Proposed Transaction).

2. We have reviewed the Proposed Transaction under the Commission's Merger Policy Statement.[4] As discussed below, we authorize the Proposed Transaction as consistent with the public interest.

3. We note that the Proposed Transaction is part of larger Reorganization Plan filed in the Bankruptcy Court, and certain parties to this proceeding request that the Commission consider the broader impact of that Reorganization Plan, particularly FES's proposed rejection of certain Commission-jurisdictional power purchase agreements (Jurisdictional PPAs), as part of our section 203 review. As explained below, our review under section 203 is focused on the Proposed Transaction itself, and we address only the specific issues considered under our section 203 public interest review.

4. We emphasize that our section 203 public interest review is distinct from our public interest review under FPA section 206, in which that concept arises in the context of the *Mobile-Sierra* doctrine as a means of ensuring just and reasonable rates.[5] The Commission has not yet addressed FES's proposed rejection of the Jurisdictional PPAs, as contemplated by the recent decision by the United States Court of Appeals for the

[4] *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996) (cross-referenced at 77 FERC ¶ 61,263) (Merger Policy Statement), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997); *see also FPA Section 203 Supplemental Policy Statement*, 120 FERC ¶ 61,060 (2007) (Supplemental Policy Statement), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008); *Transactions Subject to 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).

[5] *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 344 (1956) (*Mobile-Sierra*). As the Commission has explained, under *Mobile-Sierra*, in determining whether contracts, such as the ones at issue under the Reorganization Plan, should be amended, the Commission considers "whether the modification of the contracts would be required by the public interest." *NextEra Energy, Inc. v. Pac. Gas & Elec. Co.*, 167 FERC ¶ 61,096, at P 23 (2019).

Sixth Circuit (Sixth Circuit).[6] Therefore, the Commission's approval of the Proposed Transaction does not constitute any finding regarding any aspect of the Reorganization Plan and the Restructuring Support Agreement (RSA), and should not be read as an endorsement of any position in any related proceedings, including in any proceeding in which the Commission is a party. Finally, our approval here is without prejudice to the Commission continuing to pursue its concurrent jurisdiction position[7] in subsequent litigation concerning FES's bankruptcy, or in other bankruptcy-related proceedings.

I. Background

A. Description of Parties

1. Debtor Applicants

a. FES

5. Applicants state that FES is a direct, wholly owned subsidiary of FirstEnergy Corp. (FirstEnergy), and a market-regulated public utility that, including through its subsidiaries, develops, owns, and operates electric generating facilities and markets power in competitive wholesale and retail markets. Applicants state that FES has market-based rate authorization and is not a franchised public utility with captive customers.[8] Applicants state that in accordance with Schedule 2 of the PJM Interconnection, L.L.C. (PJM) Open Access Transmission Tariff, FES receives a cost-based revenue requirement under its Rate Schedule FERC No. 1 for the provision of reactive supply and voltage control service (Reactive Service) from a fleet of generation resources in PJM owned by FES's subsidiaries FEG and FEN.[9]

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[6] *In re FirstEnergy Solutions Corp.*, 945 F.3d 431 (2019) (Sixth Circuit's December Opinion).

[7] *See NextEra Energy, Inc. v. Pac. Gas & Elec. Co*, 166 FERC ¶ 61,049 and *Exelon Corp. v. Pac. Gas & Elec. Co*, 166 FERC ¶ 61,053, *reh'g denied*, *NextEra Energy, Inc. v. Pac. Gas & Elec. Co.*, 167 FERC ¶ 61,096 (2019).

[8] Application at 6 (citing *FirstEnergy Solutions Corp.*, Docket No. ER19-454-000 (Jan. 30, 2019) (delegated order)).

[9] *Id.* at 6-7.

b. <u>FEG</u>

6. Applicants state that FEG is a direct, wholly owned subsidiary of FES, and owns the following electric generating facilities, all of which are located in PJM: (i) the approximately 830 megawatt (MW) Bruce Mansfield Plant, a coal-fired facility in Shippingport, Pennsylvania; (ii) the approximately 2,223 MW W.H. Sammis Plant, a coal-fired facility in Stratton, Ohio; and (iii) the approximately 24 MW Eastlake Unit 6, a combustion turbine facility located in Eastlake, Ohio.[10] Applicants state that FEG is authorized by the Commission to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates, and it sells the entire output of its generating facilities to FES.[11]

c. <u>FGMUC</u>

7. Applicants state that FGMUC is a direct, wholly owned subsidiary of FEG. FEG previously assigned its leasehold interest in 94 percent of Mansfield Unit 1 to FGMUC, but Applicants explain that Mansfield Unit 1 was deactivated in February 2019. Applicants state that FGMUC previously sold the entire output from its interest in Mansfield Unit 1 to FEG pursuant to a power purchase agreement, which Applicants represent will be terminated in connection with implementation of the Reorganization Plan such that FGMUC's only jurisdictional facility will be its market-based rate tariff.[12]

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[10] Applicants note that the Commission has approved a transaction in which FEG, or a subsidiary of FEG (currently anticipated to be FGMUC), will acquire the Pleasants Power Station, an approximately 1,300 MW coal-fired electric generating facility located in Pleasant County, West Virginia, from Allegheny Energy Supply Company, LLC, a wholly-owned subsidiary of FirstEnergy. *Allegheny Energy Supply Co., LLC*, 167 FERC ¶ 62,025 (2019). Applicants state that Debtor Applicants expect that the acquisition of the Pleasants Power Station by FEG or a subsidiary of FEG will occur on the same day as the consummation of the Proposed Transaction. Application at 7-8.

[11] Application at 8 (citing *FirstEnergy Generation, LLC*, Docket No. ER13-785-000 (Mar. 5, 2013) (delegated order accepting Notice of Succession).

[12] *Id*. (citing *FirstEnergy Generation Mansfield Unit 1 Corp.*, Docket No. ER10-1453-000 (Aug. 9, 2010) (delegated order)). Applicants state that FGMUC has not made sales pursuant to its market-based rate authority since Mansfield Unit 1 deactivated in February 2019. However, Applicants state that it is expected that FEG will assign its right to acquire the Pleasants Power Station to FGMUC, and if FGMUC acquires the Pleasants Power Station, FGMUC will sell the entire output of the facility pursuant to its market-based rate authority.

d. FEN

8. Applicants state that FEN is a direct, wholly owned subsidiary of FES, and owns three nuclear generating facilities: (i) the approximately 1,808 MW Beaver Valley Power Station in Shippingport, Pennsylvania; (ii) the approximately 894 MW Davis-Besse Nuclear Power Station in Oak Harbor, Ohio; and (iii) the approximately 1,240 MW Perry Nuclear Power Plant in Perry, Ohio. Applicants state that FEN is authorized by the Commission to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates and sells the entire output from its nuclear generation facilities to FES.[13]

2. Avenue

9. Applicants state that Avenue is a wholly owned subsidiary of Avenue Capital Group, a global investment firm controlled by two individuals. Avenue indirectly owns Avenue Energy Opportunities Fund AIV LP (Avenue Energy Fund I) and Avenue Energy Opportunities Fund II AIV LP (Avenue Energy Fund II), which in turn indirectly own a portfolio of approximately 2,740 MW of electric generation. Applicants state that each of the Avenue-affiliated project companies described below operates the power plant associated with its name.[14]

10. Applicants state that Middle River Power I LLC (MRP I) is a wholly owned, direct subsidiary of Avenue Energy Fund I. CP Crane, LLC is a direct, wholly owned subsidiary of MRP I. CP Crane, a potential development project, is a retired coal facility near Baltimore, Maryland that may be converted to an approximately 160 MW dual fuel peaking facility.[15]

11. Applicants state that Middle River Power II LLC (MRP II) is owned by (i) Avenue Energy Fund I and (ii) Avenue SO MRP II, LLC. MRP II directly owns MRP Genco Holdings, LLC, which in turn directly owns MRP Generation Holdings, LLC. MRP Generation Holdings, LLC directly owns High Desert Power Project, LLC (High Desert),[16] Big Sandy Peaker Plant, LLC (Big Sandy) and Wolf Hills Energy, LLC (Wolf Hills). Big Sandy, an approximately 342 MW natural gas-fired facility in Kenova, West

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[13] *Id*. at 8-9 (citing *FirstEnergy Nuclear Generation, LLC*, Docket No. ER13-713-000 (Feb. 11, 2013) (delegated order)).

[14] *Id*. at 9.

[15] *Id*.

[16] Applicants note that Avenue owns less than 100 percent of High Desert (approximately 27 percent as of December 2018). *Id*.

Virginia, and Wolf Hills, an approximately 250 MW natural gas-fired facility in Bristol, Virginia, operate within PJM. High Desert, an 852 MW natural gas-fired facility in San Bernardino County, California, operates in the Southwest region. High Desert Solar is a 108 MW solar facility in San Bernardino County, California that is currently under development.[17]

12. Applicants also state that Middle River Power III LLC (MRP III) is a direct, wholly owned subsidiary of Avenue Energy Fund II. MRP III indirectly owns MRP San Joaquin Energy, LLC. MRP San Joaquin Energy, LLC owns three electric generating facilities in the Southwest region: (i) Tracy, a 330 MW natural gas-fired combined cycle electric generating facility in Tracy, California; (ii) Hanford, a 97 MW natural gas-fired facility in Hanford, California; and (iii) Henrietta, a 96 MW natural gas-fired facility in Lemoore, California.[18]

13. Applicants also state that Middle River Power IV LLC (MRP IV) is a direct, wholly owned subsidiary of Avenue Energy Fund II. CalPeak Power LLC is an indirect subsidiary of MRP IV that is the sole owner of, and directly holds 100 percent of the equity interests in: (i) CalPeak Power-Border, LLC, which owns a 60.5 MW natural gas-fired facility in San Diego, California; (ii) Calpeak Power-Enterprise, LLC, which owns a 58.9 MW natural gas-fired facility in Escondido, California; (iii) CalPeak Power-Vaca Dixon, LLC, which owns a 60.5 MW natural gas-fired facility in Vacaville, California; and (iv) CalPeak Power-Panoche, LLC, which owns a 60.5 MW natural gas-fired facility in Firebaugh, California, all of which operate in the Southwest region.[19]

14. Applicants state that MRP Midway Holdings, LLC directly owns Midway Peaking, LLC, which owns a 139.8 MW natural-gas fired facility in Fresno County, California, in the Southwest region. Applicants also state that Malaga Power Holdings, LLC owns Malaga Power, LLC, a 121 MW natural gas-fired facility in Fresno County, California, in the Southwest region.[20]

15. Applicants state that Avenue Energy Fund I and Avenue Energy Fund II directly own Avenue Coso Holdings, LLC, which directly owns less than 100 percent of CGP Holdings, LLC. CGP Holdings, LLC directly owns Coso Geothermal Power Holdings, LLC, which operates the following plants in the Southwest region, all of which are located on the Naval Air Weapons Station at China Lake in California: (i) Coso

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[17] *Id*. at 9-10.

[18] *Id*. at 10.

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

[20] *Id*. at 11.

Geothermal BLM, a 90 MW geothermal facility; (ii) Coso Geothermal Navy I, a 92.2 MW geothermal facility; and (iii) Coso Geothermal Navy II, a 90 MW geothermal facility.[21]

3. Nuveen

16. Nuveen and the Nuveen Investment Advisers provide investment management services in the United States and are registered investment advisers under the Investment Advisers Act of 1940.[22] In their ordinary course of business, the Nuveen Investment Advisers engage in the purchase and sale of voting securities of companies on behalf of managed funds and accounts pursuant to investment management contracts between the funds/accounts and the Nuveen Investment Advisers.

17. Applicants state that, other than the anticipated future ownership interest described below, the Nuveen Investment Advisers do not own or control (i) any facilities used for the generation, sale, transmission, or distribution of electric energy; or (ii) any facilities used for the production, gathering, storage, liquefaction, sale, transportation, or distribution of natural gas or other fuel inputs to electric generation.

18. Applicants represent that Nuveen is an indirect, wholly owned subsidiary of Teachers Insurance and Annuity Association of America (TIAA), a legal reserve life insurance company established under the insurance laws of the State of New York. TIAA wholly owns 730 Carroll, LLC, which, in turn, owns approximately 40 percent of Carroll County Energy Holdings, LLC (CCEH). CCEH, in turn, owns Carroll County Energy LLC, which owns an approximately 683 MW natural gas-fired electric generating facility in Ohio. TIAA is also affiliated with Catalina Solar Lessee, LLC, which leases and operates a 100 MW solar generating facility in California, and Otay Landfill Gas LLC, which owns qualifying facilities in California with a combined capacity of 10.7 MW. Applicants explain that neither TIAA nor any of its affiliates directly or indirectly owns or controls a 10 percent or greater voting interest in any operational electric generating facilities other than those listed in the Application. Applicants state that TIAA and its affiliates do own passive interests of 10 percent or greater in entities that own or control electric generating facilities, but do not have any rights to make decisions with respect to the day-to-day management of these entities. Applicants state that, therefore, TIAA and its affiliates are passive investors in such entities and are not deemed to be affiliated with such entities under the Commission's regulations.[23]

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[21] *Id*.

[22] 15 U.S.C. §§ 80b-1-80b-21 (2018).

[23] Application at 12-13.

B. Bankruptcy and Reorganization Plan

19. Applicants state that on March 31, 2018, FES and each of its direct and indirect subsidiaries, including FEG, FGMUC, and FEN (collectively, Debtors),[24] voluntarily filed petitions for relief under Chapter 11 of the Bankruptcy Code with the Bankruptcy Court. While FES remains wholly owned by FirstEnergy, on September 26, 2018, the Bankruptcy Court approved a settlement agreement among Debtors, FirstEnergy, and certain creditor groups that, among other things, provides for Debtors to implement a separation of their businesses from the businesses of FirstEnergy and its non-debtor affiliates, including a cancellation of FirstEnergy's equity interest in FES. Applicants also state that on January 23, 2019, Debtors entered into the RSA with certain creditor groups, pursuant to which the parties to the RSA agreed to support a plan that contemplates Debtor Applicants' continued ownership and operation of their retail and wholesale energy businesses, including their fleet of generation assets, following emergence from bankruptcy.[25]

20. Applicants state that the Reorganization Plan resolves the outstanding claims against, and interests in, Debtor Applicants, including the outstanding claims held by Avenue and Nuveen (collectively, the Acquiring Funds). The Acquiring Funds currently are holders of secured and unsecured bond claims, and certain other claims, against certain Debtor Applicants. Applicants explain that in exchange for full and final discharge of their unsecured claims against Debtor Applicants, the Acquiring Funds will receive a distribution of common stock in a new, yet-to-be-named holding company (New HoldCo) that will directly or indirectly own 100 percent of the equity interests in Debtor Applicants.[26]

21. Applicants state that once the Bankruptcy Court confirms the Reorganization Plan and other required regulatory approvals are obtained, including the Commission authorization requested herein, and the effective date of the Reorganization Plan occurs,

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[24] Applicants state that the debtors in the relevant Chapter 11 cases also include FE Aircraft Leasing Corp. (FEALC), a direct, wholly-owned subsidiary of FES; Norton Energy Storage L.L.C. (NES), a direct, wholly-owned subsidiary of FEG and an indirect subsidiary of FES; and FirstEnergy Nuclear Operating Company (FENOC), a direct, wholly-owned subsidiary of FirstEnergy. Because FEALC, NES, and FENOC are not Commission-jurisdictional public utilities, they are not Applicants in the Application. References to "Debtors" include the Debtor Applicants along with FEALC, NES, and FENOC. *Id*. at 1, n.4.

[25] *Id*. at 4.

[26] *Id*. at 3-5.

Debtors will emerge from bankruptcy. Applicants state that all claims against Debtors will be resolved in accordance with the terms of the Reorganization Plan.[27]

C. Description of the Proposed Transaction

22. Applicants explain that under the Proposed Transaction, provided for under the Reorganization Plan, in exchange for full and final discharge of the Acquiring Funds' and certain other debt holders' unsecured claims against certain Debtors, the Acquiring Funds and certain other debt holders will receive a distribution of the common stock of New HoldCo, which will in turn directly or indirectly own the equity of Debtor Applicants. This conversion from debt in Debtors to equity in New HoldCo will result in funds and accounts managed by Nuveen (Acquiring Nuveen Funds)[28] indirectly owning approximately 35 percent (and not more than 40 percent) of the equity of Debtor Applicants, and funds and accounts managed by Avenue (Acquiring Avenue Funds) indirectly owning approximately 15 percent (and not more than 20 percent) of the equity of Debtor Applicants.[29] Applicants state that no other entity (other than New HoldCo

[27] *Id*. at 6.

[28] Applicants state that the Acquiring Nuveen Funds are: Nuveen All-American Municipal Bond Fund; Nuveen Kansas Municipal Bond Fund; Nuveen Louisiana Municipal Bond Fund; Nuveen Limited Term Municipal Fund; Nuveen Enhanced Municipal Value Fund; Nuveen Ohio Municipal Bond Fund; Nuveen Pennsylvania Municipal Bond Fund; Nuveen High Yield Municipal Bond Fund; Nuveen Intermediate Duration Municipal Term Fund; Nuveen Select Maturities Municipal Fund; Nuveen Intermediate Duration Quality Municipal Term Fund; Nuveen Intermediate Duration Municipal Bond Fund; Nuveen Municipal High Income Opportunity Fund; Nuveen Pennsylvania Municipal Value Fund; Nuveen Pennsylvania Investment Quality Municipal Fund; Nuveen Short Duration High Yield Municipal Bond Fund; Nuveen Strategic Municipal Opportunities Fund; Nuveen Ohio Quality Income Municipal Fund; Nuveen AMT Free Municipal Credit Income Fund; Nuveen Select Tax-Free Income Portfolio; Nuveen Select Tax-Free Income Portfolio 2; Nuveen Select Tax-Free Income Portfolio 3; Nuveen Municipal Credit Income Fund; Nuveen Wisconsin Municipal Bond Fund; and Nuveen Municipal 2021 Target Term Fund. In addition, the Acquiring Nuveen Funds includes the Nuveen Investment Advisers. *Id*. at 5.

[29] Applicants explain that the exact indirect equity ownership percentage in Debtor Applicants that will be held by the Acquiring Funds at the time of consummation of the Proposed Transaction is not yet known and could be affected by various factors. Therefore, Applicants seek authorization for the Avenue and Nuveen Acquiring Funds each to acquire up to an additional 5 percent (i.e., up to 20 percent and 40 percent, respectively), with their exact ownership interests in Debtor Applicants being reported to the Commission within 30 days following consummation of the Proposed Transaction.

itself) will directly or indirectly own more than 10 percent of the equity of Debtor Applicants upon their emergence from bankruptcy.

II. Notice of Filing and Responsive Pleadings

23. Notice of the Application was published in the *Federal Register*, 84 Fed. Reg. 44,611 (2019), with interventions and protests due on or before October 18, 2019. Motions to intervene were filed by PJM, Ohio Valley Electric Corporation and its subsidiary, Indiana-Kentucky Electric Corporation (collectively, OVEC), Louisville Gas and Electric Company and Kentucky Utilities Company (together, LG&E/KU), Buckeye Power, Inc. (Buckeye Power), and Wolverine Power Supply Cooperative, Inc. (Wolverine). On October 18, 2019, OVEC, LG&E/KU, and Buckeye Power and Wolverine filed comments. On October 24, 2019, the Office of the Ohio Consumers' Counsel filed a motion to intervene out of time. On October 29, 2019, Applicants filed a motion for leave to answer and answer to OVEC's comments (Applicants Answer). On November 5, 2019, OVEC filed a motion for leave to answer and answer to Applicants Answer (OVEC Answer). On November 6, 2019, Applicants filed a motion for leave to answer and answer to OVEC Answer. On January 14, 2020, Debtor Applicants filed a letter encouraging the Commission to issue an order as expeditiously as possible authorizing the Proposed Transaction. On January 16, 2020, OVEC replied to Debtor Applicants' letter asserting that the Application is materially incomplete.

III. Discussion

A. Procedural Matters

24. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We also grant the Office of the Ohio Consumers' Council's motion to intervene out of time given the early stage of the proceeding, its interest in the proceeding and the absence of undue prejudice or delay.

25. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[30] prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We accept the answers because they have provided information that assisted us in our decision-making process.

Id. at 2 and n.10.

[30] 18 C.F.R. § 385.213(a)(2) (2019).

B. Substantive Matters

1. FPA Section 203 Standard of Review

26. 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.[31] The Commission's 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.[32] 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."[33] 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.[34]

27. The Proposed Transaction that we review below consists of the conversion of debtholders' interests to common stock. This Proposed Transaction is part of a larger Reorganization Plan filed in the Bankruptcy Court with issues that are ripe for review in other fora.[35]

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[31] 16 U.S.C. § 824b(a)(4) (2018).

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

[33] 16 U.S.C. § 824b(a)(4).

[34] 18 C.F.R. § 33.2(j).

[35] 16 U.S.C. § 824b(a)(4). Approval of the Proposed Transaction is also required by other regulatory agencies pursuant to their respective statutory authority before the Proposed Transaction 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.

2. Analysis of the Proposed Transaction

a. Effect on Horizontal Competition

i. Applicants' Analysis

28. Applicants argue that the Proposed Transaction will not have an adverse effect on horizontal competition in the PJM market. Applicants performed a Delivered Price Test[36] to analyze the effect of the Proposed Transaction on competition under the Economic Capacity and Available Economic Capacity measures[37] in PJM. Applicants explain that they analyzed competitive effects using both the Economic Capacity and Available Economic Capacity measures, but argue that the Economic Capacity measure is more appropriate for purposes of assessing the effect of the Proposed Transaction on competition, given that the Commission has attached relatively more weight to the results of Economic Capacity analyses in substantially restructured markets.[38]

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[36] 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 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; s*ee 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] 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).

[38] Application Ex. J at 11.

29. Applicants submit that their Delivered Price Test for PJM shows that the market is unconcentrated, with post-transaction HHI levels below 600 in all 10 time periods under both the Economic Capacity and Available Economic Capacity measures. Applicants assert that these HHI levels are below the Commission's initial screen threshold of a post-transaction HHI of 1,000 or higher. Applicants also conducted sensitivity analyses that consider the effect of higher or lower prices and conclude that the results are not materially different. Applicants thus contend these results demonstrate that the Proposed Transaction is unlikely to result in an adverse effect on horizontal competition in the PJM market.[39]

30. Applicants represent that the Proposed Transaction will not have an adverse impact on PJM ancillary services markets. Applicants submit that the Proposed Transaction will decrease concentration in PJM's Reliability Pricing Mechanism capacity market by 12 points, indicating a lack of competitive concern. Applicants add that the Proposed Transaction raises no concerns in the regulation, primary reserves, or supplemental reserves markets, because PJM has deemed market performance to be competitive in all of these markets.[40]

ii. <u>Comments</u>

31. OVEC states that it is an investor-owned utility that operates two coal-fired generating power plants – Kyger Creek in Ohio and Clifty Creek in Indiana (Power Stations) – which have a combined capacity of approximately 2,400 MW. OVEC explains that it is owned by several public utilities and electric power cooperatives or their affiliates. OVEC and its owners or their affiliates (Sponsoring Companies) are parties to the Inter-Company Power Agreement (OVEC Agreement), a cost-based wholesale power contract setting forth the rates, terms, and conditions of the wholesale sale of electricity by OVEC to the Sponsoring Companies. OVEC states that its entire generating capacity is available to the Sponsoring Companies under the OVEC Agreement. OVEC states that the OVEC Agreement, originally entered into on July 10, 1953, was amended and restated in its entirety on March 13, 2006, and again on September 10, 2010, with a term that extends through June 30, 2040.[41]

32. OVEC states that the OVEC Agreement constitutes a Commission-filed, cost-based power agreement.[42] OVEC explains that under the OVEC Agreement, OVEC

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[39] *Id.* Ex. J at 16-17.

[40] *Id*. Ex. J at 18 (citing *2018 State of the Market Report for PJM*, Section 10, at 445).

[41] OVEC Comments at 2-3.

[42] *Id*. at 3 (citing *Ohio Valley Elec. Corp*., Docket Nos. ER11-3181-000, ER11-

must make available energy available to each Sponsoring Company in proportion to said Sponsoring Company's power participation ratio. OVEC states that each Sponsoring Company is obligated to pay its *pro rata* share based on its power participation ratio of OVEC's fixed and operating costs over the term of the contract – including the costs of additions, upgrades, repairs, employee benefits, postretirement benefits obligations, and the eventual decommissioning of the Power Stations at the end of their lifespans – regardless of whether it elects to take its share of available power and energy. OVEC states that obligations under the OVEC Agreement are several and not joint and several, so no Sponsoring Company is required to cover any other Sponsoring Company's failure to pay its share of OVEC's operating or decommissioning costs. OVEC states that, prior to the bankruptcy, FES was responsible for 4.85 percent of OVEC's delineated costs and expenses.[43]

33. OVEC explains that on March 26, 2018, OVEC initiated a complaint proceeding with the Commission (Complaint Proceeding) asserting and seeking a finding that FES's anticipated rejection of the OVEC Agreement in its impending bankruptcy proceedings would violate the filed rate doctrine because of the considerable impact on both the OVEC Agreement's express terms and the public interest. OVEC states that on April 1, 2018, FES filed an adversary proceeding, seeking and obtaining an *ex parte* temporary restraining order and a preliminary injunction to enjoin the Commission from continuing the Complaint Proceeding or initiating its own proceeding with respect to the OVEC Agreement and nine other power purchase agreements (PPAs) sought to be rejected by the Debtors. OVEC states that following a hearing on May 11, 2018, the Bankruptcy Court entered a preliminary injunction against the Commission and a Memorandum Decision Supporting Order Granting Preliminary Injunction (together, Preliminary Injunction Order). OVEC explains that the Bankruptcy Court enjoined the Commission from initiating or continuing any proceeding, and from issuing any order, to require FES to continue performing under the PPAs in any manner that would interfere with the Bankruptcy Court's jurisdiction to rule on a motion for rejection or limiting FES to seeking abrogation of the PPAs under the FPA.[44]

34. OVEC states that on August 9, 2018, the Bankruptcy Court entered an order authorizing the Debtors' rejection of the OVEC Agreement (Rejection Order). OVEC states that in issuing the order, the Bankruptcy Court adopted in full its findings and conclusions in the Preliminary Injunction Order, and reaffirmed that the Commission remained enjoined from conducting any public interest determination as to the rejection of the OVEC Agreement. OVEC explains that following the entry of the Preliminary

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3440-000 and ER11-3441-000 (May 23, 2011) (delegated order)).

[43] *Id*. at 4.

[44] *Id*. at 5-6.

Injunction Order, the Debtors have not taken any steps or action at the Commission in connection with the OVEC Agreement and that FES has not sought any regulatory review or approval from the Commission relating to the OVEC Agreement. OVEC states that following the entry of the Rejection Order, FES ceased performance of its obligations under the OVEC Agreement.[45] OVEC explains that it appealed the Preliminary Injunction and Rejection Orders (together, Appellate Proceedings) directly to the Sixth Circuit.[46]

35. With regard to the Application, OVEC argues that the Application "appears to be deficient in several respects, meaning that [Applicants] have failed to submit a 'completed application' ripe for Commission consideration under section 33.11 of the Commission's regulations."[47] OVEC states that a number of issues that arise from the unique circumstances associated with the FES bankruptcy and the associated restructuring transaction should be, but were not, addressed in Applicants' competitive impact analysis. OVEC states that the competitive impact analysis of the PJM energy market included in the Application makes assumptions about the owned assets of FirstEnergy and its affiliates that are inconsistent with other sources of information FES has previously submitted to the Commission.

36. More specifically, OVEC states that the generating assets at issue include FES's ownership interests in the OVEC Clifty Creek and Kyger Creek power plants under the OVEC Agreement. OVEC states that FES requested that the Bankruptcy Court reject its interest in the OVEC Agreement, and while FES's energy market analysis assumes that FirstEnergy and its affiliates hold rights to 3.5 percent of OVEC assets, its most recent triennial market power study states that these companies have shares in OVEC equal to 8.35 percent (FES (4.85 percent), Allegheny Energy Supply (3.01 percent) and Monongahela Power (.49 percent)). OVEC states that Applicants provides no explanation for this discrepancy.[48]

37. OVEC also explains that FES is a party to eight renewable energy PPAs that FES requested that the Bankruptcy Court reject, but the energy market analysis used to evaluate the Proposed Transaction assumes that most of these agreements are assigned to

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[45] *Id*. at 6-7.

[46] The Sixth Circuit's December Opinion was issued on December 12, 2019 as part of the Appellate Proceedings.

[47] OVEC Comments at 12 (citing 18 C.F.R. § 33.11 (2019)).

[48] *Id*. at 20.

the owner of the PPA instead of the counterparty (FES). OVEC states that Applicants likewise provide no explanation for this discrepancy.[49]

38. OVEC also states that Applicants rely on an internal FES forecast of load obligations rather than publicly available retail load auction results to support the available economic capacity prong of its energy market competitive impact analysis, and Applicants do not explain either the basis for this assumption or how it compares to the publicly available retail load auction results, which are relied on for the other companies. OVEC also states that there is another defect arising from Applicants' reliance on the FES load forecast (vs. the state auction results), saying that it appears to understate the FES load obligations used in the available economic capacity analysis.[50]

39. OVEC explains that Applicants' capacity market analysis relied on a 2018 study year and assumed a PJM-wide geographic market, but the Application does not address how the Commission's likely restructuring of the PJM capacity market might affect Applicants' capacity market analysis.[51] OVEC argues that Applicants' failure to address that question renders Applicants' analysis incomplete. OVEC argues that the Application also ignores FES's own criticisms of the current PJM capacity market design, where FES said it believed the fundamental flaws and "major gaps" in that market design would "continue to plague its markets" absent substantial market design reform.[52]

40. OVEC argues that prices within certain Locational Deliverability Areas (including FES) could be higher than the actual clearing price, which suggests that there are narrower geographic markets than the PJM-wide geographic market Applicants examined. OVEC argues that the effect of an FPA section 203 proposal on relevant submarkets is part of the Commission's evaluation of whether the proposal is consistent with the public interest. OVEC states that Applicants' capacity market study should have evaluated the competitive impact of the Proposed Transaction in the narrower geographic

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[49] *Id*. at 21.

[50] *Id.* at 21-22.

[51] *Id.* at 22 (citing *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018)).

[52] *Id.* at 22-23 (citing *PJM Interconnection, L.L.C.*, Protest and Comments of FirstEnergy Services Company and East Kentucky Power Cooperative, Inc. on PJM Capacity Repricing and MOPR-EX Alternative Proposals, Docket No. ER18-1314-000, at 10, 11-13 (May 7, 2018)).

market or explained why such an evaluation would not be necessary. OVEC argues that, without addressing this issue, Applicants' competitive analysis is incomplete.[53]

41. Buckeye Power and Wolverine state that they agree with OVEC that the Application does not employ a complete competitive analysis.[54]

iii. Answers

42. Applicants assert that OVEC's arguments that the Application is deficient are "an effort to delay the issuance of an order in this proceeding and thereby attempt to increase its leverage in the Debtors' chapter 11 bankruptcy proceeding."[55] Applicants state that the Application does not, and need not, seek Commission authorization for the Reorganization Plan or any other issue properly before the Bankruptcy Court, other than with respect to the Proposed Transaction described in the Application. Applicants explain that the only aspect of the Reorganization Plan to trigger the Commission's FPA section 203 review, and hence the sole reason for filing the Application, is the cancellation of FirstEnergy's direct and indirect ownership of Debtor Applicants and the issuance of New HoldCo's equity to the Acquiring Funds, which is the aspect of the Plan that will result in an indirect transfer of control of Debtor Applicants (i.e., the Proposed Transaction). Applicants state that no other aspects of the Reorganization Plan are subject to Commission approval under FPA section 203.[56]

43. With regard to the effect on horizontal competition, Applicants assert that the Proposed Transaction has a deconcentrating effect on competition. Applicants dismiss OVEC's arguments that FES's 4.85 percent share of the OVEC generation and the eight PPAs also rejected in bankruptcy should have been included in the analysis. Applicants state that the OVEC Agreement and the PPAs were not included because they were rejected in bankruptcy and unrelated to the change in control that would result from the Proposed Transaction. Applicants further state that inclusion of the OVEC share and the PPAs would not have a material effect on the competition analysis.[57]

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[53] *Id*. at 23.

[54] Buckeye Power and Wolverine Comments at 4.

[55] Applicants Answer at 2.

[56] *Id*. at 6-7.

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

44. With respect to OVEC's contention that use of FES's internal forecast of load obligations is inconsistent with other estimates of load obligations, Applicants state that Ms. Julie Solomon explains in a supplemental affidavit that "the fact is that for PJM, the data available to estimate and forecast load obligations for individual entities is limited[,] and the auction results . . . require a host of assumptions to estimate loads."[58] As to OVEC's related argument that Ms. Solomon understated the FES load obligations, Ms. Solomon explains that "if FES's actual forecast differs from the calculation of load obligations using publicly-available data, it is merely confirmation of the difficulty of estimating load obligations from limited public data, particularly for some of the competitive auctions that do not always report specific numbers for the number of tranches or size of tranches won."[59] Had she "used higher load obligations for FES," she asserts, "FirstEnergy's Available Economic Capacity pre-transaction would have been lower, post-transaction FES's Available Economic Capacity would have been lower, and the amount of overall Available Economic Capacity in the market would have been lower."[60] According to Ms. Solomon, this would produce "lower market shares for both [FirstEnergy] and FES, a smaller contribution to the HHI, and clearly would not have led to any screen failures" in the Delivered Price Test.[61]

45. Regarding OVEC's allegation that Applicants failed to address how the Commission's likely restructuring of the PJM capacity market might affect its capacity market analysis, Ms. Solomon explains that "PJM has suspended all auction activities and deadlines relating to PJM Reliability Pricing Model Base Residual Auctions ('BRA[s]') until [the Commission] establishes new rules," so "it is reasonable to focus an analysis based on resources identified for the most recent BRA."[62] Applicants assert that the Commission implicitly accepted similar analyses in approving FPA section 203 applications in the past year.[63]

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[58] *Id*. at 14 (citing Supplemental Affidavit of Julie R. Solomon at 5 (Supplemental Solomon Affidavit)).

[59] *Id*.

[60] *Id*. at 14-15 (citing Supplemental Solomon Affidavit at 5).

[61] *Id*.

[62] *Id*. (citing Supplemental Solomon Affidavit at 6).

[63] *Id*. (citing *Chief Conemaugh Power II, LLC*, 168 FERC ¶ 62,171 (2019); *Cobalt Power, L.L.C.*, 168 FERC ¶ 62,005 (2019); *Dominion Energy Fairless, LLC*, 165 FERC ¶ 62,154 (2018)).

iv. Commission Determination

46. 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.[64]

47. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on horizontal competition. We agree with Applicants that Economic Capacity is the more relevant measure of market concentration in restructured markets. Overall, the Proposed Transaction decreases market concentration because Debtor Applicants will become unaffiliated with 3,825 MW of generation in PJM owned by other FirstEnergy affiliates, and will gain an affiliation with only 1,233 MW. Since the market presence of the larger entity (i.e., FirstEnergy) decreases as a result of the Proposed Transaction, while that of the smaller entities (i.e., Avenue, Nuveen, and their respective affiliates) increases, the market becomes more evenly distributed as a result of the Proposed Transaction and overall market concentration as measured by HHI decreases. Further, we find that the change in HHI levels in the relevant market is below the threshold for competitive concerns and does not warrant further review.

48. OVEC argues that Applicants should have included in the competitive analysis a 4.85 percent share of the OVEC generation and the other PPAs also rejected in bankruptcy. We need not address the merits of this argument because, even if OVEC's argument were accepted, we would not find that the Proposed Transaction has an adverse competitive effect. Including these contracts in FES's pre-transaction market share would serve to increase pre-transaction market share, and in turn, show larger decreases in the HHIs for Economic Capacity and Available Economic Capacity due to the Proposed Transaction. The inclusion of these contracts in the competitive analysis therefore would show the Proposed Transaction to pass the Commission's screens by even greater amounts.

49. We also are not persuaded by OVEC's arguments regarding FES's load obligations. We note that in a restructured market where the connection between generation and load is not always clear, the Economic Capacity measure of capacity is more relevant to our competition analysis than the Available Economic Capacity measure of capacity. However, if OVEC were correct that FES is understating its load obligations, the effect of this understatement would be to decrease FES's Available Economic Capacity and therefore cause lower post-transaction HHI values in a less concentrated market. Finally, we dismiss OVEC's argument regarding the need to study

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[64] *Nev. Power Co.*, 149 FERC ¶ 61,079, at P 28 (2014).

potential capacity market changes in PJM because such an analysis would be based on speculation, as no rules have been finalized.

b. Effect on Vertical Competition

i. Applicants' Analysis

50. Applicants represent that the Proposed Transaction will not have an adverse impact on vertical market power. Applicants state that the Proposed Transaction does not involve any transfer of control over transmission facilities other than the limited facilities necessary to interconnect Debtor Applicants' generation facilities to the grid. Moreover, neither Nuveen nor Avenue, nor any of their affiliates, own or control any transmission facilities that are used for the transmission of electricity in interstate commerce in the United States, except for the limited and discrete interconnection facilities required to connect individual generation facilities to the transmission grid. Applicants further state that none of Debtor Applicants or any of their affiliates, nor Nuveen nor Avenue nor any of their affiliates, own or control any other inputs to fuel supplies, fuel delivery systems, or other essential inputs to electricity products or electric power production that could be used to erect barriers to entry in any relevant market.[65]

ii. Commission Determination

51. 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.[66]

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[65] Application at 21.

[66] *Upstate N.Y. Power Producers*, 154 FERC ¶ 61,015, at P 15 (2016); *Exelon Corp.*, 138 FERC ¶ 61,167, at P 112 (2012). While OVEC appears to argue that rejection of the OVEC Agreement would increase costs for competitors of the New HoldCo created by the Proposed Transaction, OVEC did not raise those concerns in connection with vertical competition. In any event, we reiterate that this order does not address the proposed rejection of the OVEC Agreement.

52. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on vertical competition. Applicants represent that the Proposed Transaction does not involve any transfer of control over transmission facilities. Further, neither Nuveen nor Avenue, nor any of their affiliates, own or control any transmission facilities that are used for the transmission of electricity in interstate commerce in the United States. This eliminates any increased ability of Debtor Applicants to impede competition in the upstream market. Finally, none of Debtor Applicants nor any of their affiliates, nor Nuveen nor Avenue nor any of their affiliates, own or control any other inputs to fuel supplies, fuel delivery systems, or other essential inputs to electricity products or electric power production that could be used to erect barriers to entry in any relevant market.

c. Effect on Rates

i. Applicants' Analysis

53. Applicants state that the Proposed Transaction will have no adverse effect on the wholesale rates of electric energy sold by Debtor Applicants or those of any other entity. Applicants explain that both before and after the Proposed Transaction is consummated, wholesale sales of electric energy, capacity, and ancillary services by Debtor Applicants are and will continue to be made pursuant to their market-based rate tariffs. Applicants argue that the Commission has established that market-based wholesale power sales do not raise concerns about a transaction's possible adverse effect on rates.[67] Although FES also makes reactive service sales under its Rate Schedule FERC No. 1, Applicants state that there is no mechanism in that rate schedule that would allow for the pass-through of any costs that might be associated with the Proposed Transaction.[68]

54. Applicants explain that Avenue is affiliated with various entities that own or control electric generating facilities, certain of which provide reactive service. However, Applicants state that the Proposed Transaction does not impact such generating facilities, and the Proposed Transaction will not affect the rates charged for such reactive service. Applicants therefore state that there are no wholesale or transmission customers whose rates could be adversely impacted by the Proposed Transaction.[69]

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[67] Application at 22 (citing *NorAm Energy Servs., Inc.*, 80 FERC ¶ 61,120, at 61,382-83 (1997)).

[68] *Id*.

[69] *Id*.

ii. Comments

55. OVEC states that Applicants must not only show that the Proposed Transaction will have no adverse effect on Applicants' own rates; they must also demonstrate that the Proposed Transaction will have no adverse effect on the wholesale rates of any other entity.[70] OVEC states that "while Applicants assert that the [Proposed Transaction] will have no impact on *their* rates for their wholesale sales of energy, capacity and ancillary services, [. . .] the Application is entirely silent on the effect the [Reorganization] Plan (and transactions contemplated thereby) would have on the rates charged by or to *other* entities – particularly OVEC, the Sponsoring Companies, and their retail customers."[71] OVEC explains that FES's rejection of the OVEC Agreement has created a shortfall causing OVEC's operational costs to increase by millions of dollars annually, and OVEC's borrowing costs have similarly increased to cover the shortfall and account for a lowered credit rating. OVEC states that the adverse effect on OVEC's credit rating and its borrowing costs will not be limited to OVEC, but will also increase costs to OVEC's wholesale customers, and the Sponsoring Companies' retail customers. OVEC argues that the Application is incomplete and that the Commission should not consider the Application until Applicants "adequately identify and quantify the adverse impact on the rates of OVEC, its constituent Sponsoring Companies, and their respective retail customers, and demonstrate, if they can, whether there are any countervailing benefits to the affected ratepayers."[72]

56. Buckeye Power and Wolverine state that they agree with OVEC that the Application does not identify the effect Applicants' Reorganization Plan will have on wholesale and retail power rates of third parties, including OVEC, its wholesale customers, including Buckeye and Wolverine, and the retail rates of their respective members.[73]

iii. Answers

57. Applicants respond that Commission precedent makes clear that "the Commission's intent is to protect applicants' captive customers from a proposed transaction's potential adverse rate impact, not to protect the financial interests of any and

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[70] OVEC Comments at 14 (citing Application at 22).

[71] *Id*. (emphasis in original).

[72] *Id*. at 15.

[73] Buckeye Power and Wolverine Comments at 4.

all parties doing business with the applicants."[74] Applicants state that when examining a proposed transaction's effect on rates, the Commission limits its analysis to the effect that the "proposed *transaction itself*"[75] will have on rates and whether that effect is adverse, and specifically, the Commission evaluates the transaction's effect on the rates of the *applicants'* customers, not the rates of unaffiliated third parties.[76] As for the "proposed transaction itself," Applicants argue that the Application appropriately seeks Commission authorization for the change in control of Debtor Applicants, and does not seek authorization for the Reorganization Plan as a whole, rejection of the OVEC Agreement, or any other matter emanating from the Debtors' chapter 11 proceeding. Applicants explain that "[s]uch matters are not part of the 'transaction itself' under Commission review because, simply, they are not jurisdictional."[77]

58. Applicants also claim that OVEC makes "the wholly novel, and completely unsupported, argument that the Application is deficient because Applicants did not address the potential rate impact that the [Reorganization] Plan would have on unaffiliated third parties—namely, on OVEC and its customers."[78] Applicants assert that OVEC does not cite any authority to support its position, and that under longstanding precedent and practice, the Commission considers only the rate impacts on customers of the applicants and their affiliates.[79]

59. Applicants also note that OVEC's "effect on rates" argument fails because OVEC is not a wholesale customer of FES, and that it is FES that is a wholesale customer of OVEC. Applicants maintain that the Commission's analysis focuses on the applicant's wholesale customers, and OVEC cites no authority to the contrary.[80]

60. In its Answer, OVEC states that Applicants' narrow view of the Commission's FPA section 203 responsibilities "cannot be squared with their own previously-stated

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[74] Applicants Answer at 9.

[75] *Id*. at 10 (citing *Policy Statement on Hold Harmless Commitments*, 155 FERC ¶ 61,189, at P 5 (2016)) (emphasis added by Applicants).

[76] *Id*. (emphasis added by Applicants).

[77] *Id*. at 11.

[78] *Id*.

[79] *Id*.

[80] *Id*. at 12.

understanding."[81] OVEC states that Applicants assert in their Answer that FPA section 203 review of the Proposed Transaction's effect on rates looks only at the rates of the Applicants and their wholesale customers, but "as the Applicants themselves earlier acknowledged, they must also demonstrate that'"[t]he transaction will have no adverse effect on the wholesale rates of electric energy sold by Debtor applicants or those of any other entity.'"[82]

iv. Commission Determination

61. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on rates, and we reject OVEC and Buckeye Power and Wolverine's arguments that the Application is incomplete with respect to the effect on rates. As stated by Applicants, both before and after the Proposed Transaction is consummated, wholesale sales of electric energy, capacity, and ancillary services by Debtor Applicants are and will continue to be made pursuant to their market-based rate tariffs. Although FES also makes reactive service sales under its Rate Schedule FERC No. 1, Applicants represent that there is no mechanism in that rate schedule that would allow for the pass-through of any costs that might be associated with the Proposed Transaction.[83] Applicants also note that while Avenue is affiliated with various entities that own or control electric generating facilities, certain of which provide reactive service, the Proposed Transaction does not impact such generating facilities, and the Proposed Transaction will not affect the rates charged for such reactive service. Therefore, there are no wholesale or transmission customers whose rates could be adversely impacted by the Proposed Transaction itself.[84]

62. The proposed rejection[85] of the OVEC Agreement is not a part of the Proposed Transaction, and therefore not part of the Commission's analysis under FPA section 203. Our determination that the effect of the proposed rejection of the OVEC Agreement on the rates of other entities (OVEC, the Sponsoring Companies, and/or their retail customers) is not part of our analysis of the Proposed Transaction's effect on rates. The

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[81] OVEC Answer at 3.

[82] *Id*. at 3-4 (citing Application at 22).

[83] *Id*.

[84] *Id*.

[85] On December 12, 2019, after the pleadings in this docket were submitted, the Sixth Circuit issued the December Opinion that, among other things, remanded the issue of the rejection of the OVEC Agreement to the Bankruptcy Court. We therefore refer to the rejection of OVEC Agreement as the "proposed rejection."

Commission has yet to address whether the proposed rejection of the OVEC Agreement is just and reasonable or in the public interest and intends to do so consistent with the Sixth Circuit's December Opinion and any future developments in Debtor Applicants' bankruptcy litigation. The Commission's finding regarding the effect of the Proposed Transaction on rates is not a finding as to whether the proposed rejection of the OVEC Agreement would be just and reasonable or in the public interest.

d. Effect on Regulation

i. Applicants' Analysis

63. Applicants state that Commission review of a jurisdictional transaction's effect on state or federal regulation is focused on ensuring that the transaction does not result in a regulatory gap.[86] Applicants explain that after the Proposed Transaction is consummated, Applicants will continue to be regulated by the Commission under the FPA to the same degree as before the Proposed Transaction, and will also continue to be subject to state regulation to the same degree as before the Proposed Transaction. Accordingly, Applicants state that the Proposed Transaction will not have an adverse effect on regulation.

ii. Comments

64. OVEC states that the Commission's review of a transaction's effect on regulation includes a determination of whether "federal regulation will be impaired" by the transaction.[87] OVEC argues that the Application fails to disclose that there is a dispute pending in front of the Sixth Circuit regarding whether rejection of a Commission-filed wholesale power agreement results in a modification of a filed rate and impairs the federal regulation it represents.

65. OVEC states that the impact of the Reorganization Plan on regulation under the FPA is one of the central disputes that is currently being addressed both in the Appellate Proceedings before the Sixth Circuit and in a separate appellate proceeding pending before the United States Court of Appeals for the Ninth Circuit (Ninth Circuit). OVEC argues that the Applicants' conclusion that approval of the Application will have no impact on regulation "presupposes the outcomes of both the Appellate Proceedings and the pending Ninth Circuit appeal in the Applicants' favor. The failure to disclose or

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[86] Application at 23 (citing Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124-25)).

[87] OVEC Comments at 17 (citing *Crius Energy Corp.*, 168 FERC ¶ 61,010, at P 31 (2019)).

discuss this disputed question pending in front of two circuit courts of appeal renders the Application incomplete."[88]

66. Buckeye Power and Wolverine state that they agree with OVEC that the Application does not identify the impact that authorization of the Proposed Transaction would have on regulation, specifically the Commission's regulatory oversight of the OVEC Agreement.[89]

iii. Answers

67. In their Answer, Applicants state that the Sixth Circuit litigation "implicates jurisdictional questions with respect to the rejection of wholesale power contracts in bankruptcy," and "while important to the bankruptcy proceeding, is irrelevant to the Commission's [s]ection 203 analysis of the proposed transfer of control of Debtor Applicants."[90] Applicants state that while they "recognize that the Commission itself has an interest in the outcome of the Sixth Circuit litigation, such interest cannot and should not form the basis for deviating from the Commission's well-established [s]ection 203 analytical framework."[91]

68. Applicants argue that OVEC does not explain how or why the pending Sixth Circuit litigation would result in a "regulatory gap" as between the states and the Commission, which has long been the Commission's focus under the "effect on regulation" prong of its FPA section 203 analysis.[92] Applicants assert that Commission authorization and consummation of the Proposed Transaction would not result in any entities or facilities that are currently subject to Commission or state jurisdiction becoming subject to the jurisdiction of a different regulator or evading both federal and state regulation, and that therefore Commission authorization and consummation of the Proposed Transaction would have no effect on regulation, let alone create any "regulatory gap." Applicants additionally state that no state commission has requested that the Commission address the effect of the Proposed Transaction on state regulation.[93]

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[88] *Id*. at 19.

[89] Buckeye Power and Wolverine Comments at 4.

[90] Applicants Answer at 16.

[91] *Id*.

[92] *Id*. (citing *Clearway Energy Grp. LLC*, 167 FERC ¶ 61,140, at P 19 (2019); Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 68,603-04).

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

69. OVEC responds that the Proposed Transaction cannot logically be viewed in isolation from the bankruptcy proceeding. OVEC argues that Applicants' reading of FPA section 203 is that the Commission's concern about the impact of an FPA section 203 transaction on regulation relates only to the impact of the transaction on creation of a gap between federal and state regulation, which would illogically require the Commission to conclude that it could never consider the impact of approving an FPA section 203 application on its own ability to regulate, no matter how significant.[94]

iv. Commission Determination

70. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap.[95] 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.[96] Here, no state has made such a request. Applicants explain that they will continue to be subject to state regulation to the same degree as before the Proposed Transaction. With respect to the effect of the Proposed Transaction on federal regulation, Applicants explain that after the Proposed Transaction is consummated, Applicants will continue to be regulated by the Commission under the FPA to the same degree as before the Proposed Transaction. Based on Applicants' representations, we find no basis to conclude that either state or federal regulation will be impaired by the Proposed Transaction.

71. We reject OVEC's arguments that Applicants' failure to include in their Application the disputed question over the rejection of the OVEC Agreement, which was pending in the Sixth Circuit at the time the Application was submitted, renders the Application incomplete. For purposes of our analysis under FPA section 203 of the effect of a proposed transaction on regulation, we look at whether the proposed transaction will result in a regulatory gap. Applicants have explained that Applicants will continue to be regulated by the Commission under the FPA and will continue to be subject to state regulation to the same degree as before the Proposed Transaction. The proposed rejection of the OVEC Agreement is not a part of the Proposed Transaction, but rather is a component of the larger restructuring, and thus is not at issue in this proceeding. Therefore, the impacts of FES's proposed rejection of the OVEC Agreement

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[94] OVEC Answer at 2-3.

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

[96] *Id.*

is not part of the Commission's analysis under FPA section 203 and will be considered and addressed in other proceedings.

72. We note that our determination that the impact of the proposed rejection of the OVEC Agreement is not part of our analysis of the Proposed Transaction's effect on regulation is limited to our analysis of the Proposed Transaction under FPA section 203. The Commission has yet to review, under FPA section 205 or 206, whether the proposed rejection of the OVEC Agreement is just and reasonable or in the public interest. The Commission intends to do so consistent with the Sixth Circuit's December Opinion and any future developments in Debtor Applicants' bankruptcy litigation. The Commission's finding regarding the effect of the Proposed Transaction on regulation is not a finding as to whether the proposed rejection of the OVEC Agreement would be just and reasonable or in the public interest.

e. Cross-Subsidization

i. Applicants' Analysis

73. Applicants explain that the Proposed Transaction does not involve a franchised public utility with captive customers, and that the Proposed Transaction therefore falls within the safe harbor for transactions that do not involve a franchised public utility.[97] Applicants state that in such cases, the Commission has found that there is no potential for harm to customers.[98]

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

[97] Application at 23 (citing Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 16).

[98] *Id*. at 24.

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 of the FPA.[99]

ii. Commission Determination

75. 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. We note that no party has argued otherwise.

f. Other Issues

i. Joint Ventures

(a) Applicants' Request

76. Applicants state that the Proposed Transaction will have no effect on any joint ventures, strategic alliances, or other business arrangements of Applicants, other than as described in the Application. Applicants request waiver of the requirement of section 33.2(c)(4)[100] of the Commission's regulations to file Exhibit D.[101]

(b) Comments

77. OVEC states that section 33.2(c)(4) of the Commission's regulations requires an applicant to include a description, inter alia, of "all joint ventures . . . or other business arrangements," whether "current" or "planned to occur within a year from the date of the filing," to which "the applicant or its parent companies, energy subsidiaries, and energy affiliates is a party, unless the applicant demonstrates that the proposed transaction does not affect any of its business interests."[102] OVEC states that this showing is to be included in Exhibit D to the application, but that Applicants request waiver of the requirement that they file Exhibit D because the Application will have no effect on any joint venture or other business arrangement.[103]

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[99] *Id.* at Ex. M.

[100] 18 C.F.R. § 33.2(c)(4) (2019).

[101] Application at 27.

[102] OVEC Comments at 15 (citing 18 C.F.R. 33.2(c)(4) (2019)).

[103] *Id*. at 16 (citing Application at 27).

78. OVEC argues that the Application fails to disclose that the OVEC Agreement is a joint venture arrangement to which FES is a party (albeit, having "rejected," i.e., thereby breached the OVEC Agreement). OVEC argues that the OVEC Agreement's unique cost-sharing structure makes it a joint venture arrangement, which Applicants are required to disclose in Exhibit D.[104]

79. OVEC states that Applicants "have not and cannot establish a basis for waiving the Exhibit D filing requirement, which is appropriate only where an applicant can represent that the terms of such transactions 'will be honored' after the transaction is consummated."[105] OVEC argues that Applicants can make no such representation here, where rejection of the OVEC Agreement inherently precludes FES's ability to honor the contract's terms or its regulatory obligations thereunder. OVEC states that Applicants have failed to provide the Commission with sufficient information to determine whether the public interest would be served by the consummation of the Proposed Transaction.[106]

80. Buckeye Power and Wolverine state that they agree with OVEC's argument that the Application does not identify affected joint ventures, particularly the OVEC Agreement.[107]

(c) Answers

81. Applicants state that while they dispute that the OVEC Agreement is a joint venture, "it is inconceivable that Applicants' failure to identify the OVEC [Agreement] should have any material impact on the Commission's [s]ection 203 analysis."[108] Applicants state that the OVEC Agreement was rejected in bankruptcy, and if the outcome of the Sixth Circuit litigation has any effect on that rejection, and, under those circumstances, it would be appropriate to identify the OVEC Agreement as a joint venture, description of that contract as a "joint venture" still would have no material effect on whether the Proposed Transaction is consistent with the public interest. Applicants state that the particular characterization of that contract is irrelevant to the

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[104] *Id*.

[105] *Id*. (citing *Orion Power Holdings, Inc*., 98 FERC ¶ 61,136, at 61,399 (2002)).

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

[107] Buckeye Power and Wolverine Comments at 2-3.

[108] Applicants Answer at 18.

Commission's analysis of the change in control that would result from the Proposed Transaction.[109]

82. OVEC argues in its Answer that Applicants themselves state that among matters "emanating from the Debtors' chapter 11 proceeding," Applicants acknowledge that while FES rejected the OVEC Agreement in the bankruptcy proceeding, the Sixth Circuit litigation could "affect that rejection." OVEC also states that Applicants concede that should that happen, "it would be appropriate to identify the OVEC [Agreement] as a joint venture."[110]

(d) <u>Commission Determination</u>

83. We deny OVEC's request to find the Application incomplete and grant Applicants' request for waiver of Exhibit D. Applicants have provided sufficient information for the Commission to analyze the Proposed Transaction's effect on competition, rates, regulation and cross-subsidization. The Proposed Transaction does not shift control over any facility governed by the OVEC Agreement. Applicants have complied with the information submission requirements of part 33 of the Commission's regulations or have requested waivers of certain of its provisions.[111]

ii. <u>Other Regulatory Approvals</u>

(a) <u>Comments</u>

84. OVEC states that section 33.2(i) of the Commission's regulations requires an applicant to identify any "licenses, orders, or other approvals" it is required to obtain "in connection with the proposed transaction."[112] OVEC states that Applicants acknowledge that the Application also will require approval by the Bankruptcy Court and the Nuclear Regulatory Commission, but claim that "[t]he [Proposed] Transaction does not require

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[109] *Id*.

[110] OVEC Answer at 2 (citing Applicants Answer at 18).

[111] Applicants requested limited waivers of 18 C.F.R. § 33.2(c)(4) (2019) requiring applicants to provide Exhibits A-C, E, G, H, K and L. In this instance we find that there is sufficient information in the Application for the Commission to conduct its public interest analysis. Therefore, Applicants' request for these waivers is hereby granted. *See, e.g., Bayou Cove Peaking Power*, 165 FERC ¶ 61,226, at P 129 (2018), *see also Empire Generating Co., LLC*, 169 FERC ¶ 61,043, at P 40 (2019).

[112] OVEC Comments at 24 (citing 18 C.F.R. § 33.2(i)).

orders or approvals from other regulatory bodies."[113] OVEC states that on this basis, Applicants ask the Commission to waive the requirement that they submit an Exhibit L, and OVEC states this request is unsupported.[114]

85. OVEC states that during one of the first meetings between FES and its creditors, FES noted that it held several radio licenses from the Federal Communications Commission (FCC). OVEC explains that entities or persons holding radio or other licenses from the FCC must obtain prior authorization from the FCC before any change in ownership arrangements. OVEC states that the Application does not state whether Applicants have already obtained any requisite approvals from the FCC. OVEC states that even if Applicants have already obtained the requisite approvals, the Application is nonetheless incomplete. OVEC states that the Commission's regulations are clear that identification of regulatory approvals the applicant is "required to obtain" includes not only approvals still needed, but approvals that have already been obtained.[115]

86. Buckeye Power and Wolverine state that they agree with OVEC that the Application does not identify all regulatory approvals.[116]

(b) <u>Answers</u>

87. Applicants respond that certain Debtor Applicants do in fact hold licenses from the FCC, and these licenses will be required to be transferred in connection with the Proposed Transaction. However, Applicants state that those transfers are generally processed automatically through an on-line portal without substantive review and with an anticipated one-day turnaround period.[117]

(c) <u>Commission Determination</u>

88. First, we do not find persuasive Applicants' implication that they need not list their need for FCC approval of license transfers in their Application simply because the FCC has a "one-day turnaround period" for such transfers. Section 33.2(i) of our regulations provides no such exemption, and Applicants are therefore instructed to include all regulatory approvals, including FCC approvals, and final court decisions when informing the Commission of the consummation of the Proposed Transaction.

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[113] *Id*. (citing Application at 30).

[114] *Id*.

[115] *Id*. (citing 18 C.F.R. § 33.2(i)).

[116] Buckeye Power and Wolverine Comments at 5.

[117] Applicants Answer at 17.

Nevertheless, the Commission does not find that Applicants' failure to provide this information in their Application has prevented the Commission from finding that the Proposed Transaction is consistent with the public interest under the standards of FPA section 203.

3. Other Considerations

89. 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.[118] 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, North American Electric Reliability Corporation, or the relevant regional entity may audit compliance with reliability and cybersecurity standards.

90. FPA section 301(c) 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 the Public Utility Holding Company Act of 2005 (PUHCA), 42 U.S.C. §§ 16451-63 (2018), are subject to the record-keeping and books and records requirements of PUHCA 2005.

91. 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.[119] 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 requirements of Order No. 652.

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[118] 16 U.S.C. § 824o (2018).

[119] 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).

<u>The Commission orders</u>:

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

(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) Applicants must include all regulatory approvals and final court decisions when informing the Commission of the consummation of the Proposed Transaction, as discussed in the body of this order.

(D) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever not pending or may come before the Commission.

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

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

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

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

By the Commission. Commissioner McNamee is dissenting with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

First Energy Solutions Corp.
Frist Energy Generation, LLC
First Energy Nuclear Generation, LLC
First Energy Generation Mansfield Unit 1 Corp.
Avenue Capital Management II, L.P.

Docket No. EC19-123-000

(Issued February 14, 2020)

McNAMEE, Commissioner, *dissenting*

1. Today's order authorizes a proposed transaction involving Avenue Capital Management II, L.P.'s and Nuveen Asset Management LLC's acquisition of indirect equity interest in FirstEnergy Solutions Corp., FirstEnergy Generation, LLC, FirstEnergy Nuclear Generation, LLC, FirstEnergy Generation Mansfield Unit 1 Corp. (Debtor Applicants). I am dissenting because I believe our approval is premature.

2. The proposed transaction is part of a larger Reorganization Plan filed by the Debtor Applicants in the Bankruptcy Court in the Northern District of Ohio, and subject to two pending appeals in the United States Court of Appeals for the Sixth Circuit. The first appeal raises questions related to the rejection of certain wholesale power contracts, including an agreement with Ohio Valley Electric Corporation (OVEC), and the Commission's jurisdiction over the rejection of those contracts.[1] The second appeal raises questions about the Commission's jurisdiction to address rate changes provided for in the Reorganization Plan.

3. The outcome of these appeals could affect the proposed transaction. Indeed, the Restructuring Support Agreement provides,"[i]f an adverse ruling in the PPA Appeal Proceeding occurs prior to the Effective Date, the Debtors may be unable to comply with the terms of the Plan Term Sheet, which provides that in no event shall either Reorganized FES or New FES assume the OVEC ICPA."[2]

4. In my opinion, the Commission should wait until it has received the benefit of further guidance from the courts. FPA section 203(a)(5) expressly permits the

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[1] The first appeal has resulted in a pending remand to the bankruptcy court as well as several pending requests for en banc review.

[2] Application at 245.

Commission to toll this proceeding an additional 180 days for good cause and I would have employed that provision here.

For these reasons, I respectfully dissent.

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Bernard L. McNamee
Commissioner