UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

NRG Wholesale Generation LP
Entergy Mississippi, LLC

Docket No. EC19-63-000

ORDER AUTHORIZING DISPOSITION AND
ACQUISITION OF JURISDICTIONAL FACILITIES

(Issued September 19, 2019)

1. On March 1, 2019, pursuant to section 203(a)(1) of the Federal Power Act (FPA),[1] NRG Wholesale Generation LP (Wholesale Generation) and Entergy Mississippi, LLC (Entergy Mississippi) (together, Applicants) filed an application for authorization of a transaction in which Wholesale Generation will sell, and Entergy Mississippi will acquire, the Choctaw Generating Station (Choctaw) and associated facilities and equipment (Proposed Transaction).[2]

2. We have reviewed the Proposed Transaction under the Commission's Merger Policy Statement and part 33 of the Commission's regulations.[3] As discussed below, we authorize the Proposed Transaction as consistent with the public interest.

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[1] 16 U.S.C. § 824b(a)(1)(A), (B), (D) (2018).

[2] NRG Wholesale Generation LP and Entergy Mississippi, LLC, Joint Application for Transaction Authorization, Docket No. EC19-63-000 (filed Mar. 1, 2019) (Application).

[3] *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996) (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). *See also 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). *See also Transactions*
(continued ...)

I. Background

A. Description of Applicants

1. Entergy Mississippi

3. Applicants explain that Entergy Mississippi is a Texas limited liability company and an indirect subsidiary of Entergy Corporation, a holding company. Applicants state that Entergy Mississippi is a standalone public utility that is affiliated with the other Entergy Operating Companies[4] and other market-regulated power sales affiliates, which are referred to collectively as Entergy.[5]

4. Applicants add that Entergy Mississippi is a traditional franchised public utility that provides electric generation, transmission, distribution, and electric power service to retail customers in Mississippi, all of which reside in Midcontinent Independent System Operator, Inc. (MISO) Local Resource Zone 10.[6] Applicants state that Entergy Mississippi does not have any wholesale requirements customers.[7]

5. Applicants state that all of the Entergy Operating Companies, including Entergy Mississippi, are transmission-owning members of MISO. Applicants explain that MISO maintains functional control over the facilities of its transmission-owning members, including Entergy Mississippi, and provides open access transmission service over them pursuant to MISO's Open Access Transmission, Energy and Operating Reserve Markets

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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).

[4] Applicants explain that the Entergy Operating Companies are Entergy Arkansas, LLC; Entergy Louisiana, LLC; Entergy Mississippi; Entergy New Orleans, LLC; and Entergy Texas, Inc. Application at 7 n.11.

[5] *Id.* at 7.

[6] Applicants note that Entergy Mississippi owns 25 percent of the Independence Steam Electric Station generating facility in Arkansas, but all other Entergy Mississippi generating assets are located in Local Resource Zone 10. In addition, Entergy Mississippi's retail operations, including its ownership of generating assets, are subject to regulation by the Mississippi Public Service Commission (Mississippi Commission). *Id.* at 8 n.13.

[7] *Id.* at 7-8.

(continued ...)

Tariff (MISO Tariff). Applicants state that Entergy Mississippi recovers the costs of owning, operating, and maintaining its transmission facilities pursuant to a cost-based formula rate under the MISO Tariff that is on file with the Commission.[8]

6. Applicants also explain that Entergy Mississippi and the other Entergy Operating Companies participate in the energy and capacity markets administered by MISO pursuant to the MISO Tariff. However, neither Entergy Mississippi nor the other Entergy Operating Companies have made any sales in the Tennessee Valley Authority (TVA) balancing authority area in the last two years. Applicants add that the Entergy Operating Companies maintain cost-based and market-based rate schedules and tariffs on file with the Commission pursuant to which they make sales of capacity, energy, and ancillary services. Applicants state that, through a rate mechanism approved by the Mississippi Commission, all net revenues from Entergy Mississippi's wholesale capacity, energy, and ancillary services sales are credited back to Entergy Mississippi's retail customers.[9] Applicants note that the other Entergy Operating Companies are similarly required by their retail regulators to credit virtually all net revenues from their wholesale sales back to their retail customers. Applicants explain that, in addition to selling capacity, energy, and ancillary services in the MISO markets, Entergy Mississippi purchases wholesale capacity and energy in the MISO markets to help serve its customers.[10]

2. <u>Wholesale Generation</u>

7. Applicants state that Wholesale Generation, the owner of Choctaw, is a Delaware limited partnership and an exempt wholesale generator authorized to make wholesale sales of energy, capacity, and ancillary services at market-based rates. Applicants explain that the equity interests of Wholesale Generation are indirectly and wholly owned by GenOn Holdings, LLC (Holdings LLC). Applicants state that GenOn Holdings, Inc. (GenOn Holdings) is the managing member of Holdings LLC.[11]

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[8] *Id.* at 8 (citing *ITC Holdings Corp.*, 143 FERC ¶ 61,257 (2013)).

[9] Specifically, Applicants explain that Entergy Mississippi passes to retail customers MISO market settlements in the energy, congestion, losses, uplift, and ancillaries categories through its retail rate Rider ECR-4. Entergy Mississippi also credits to retail customers any MISO-related revenues that do not constitute fuel or purchased energy for fuel adjustment purposes through its retail MISO Rider. *Id.* at 9 n.16.

[10] *Id.* at 9.

[11] *Id.*

(continued ...)

8. Applicants explain that GenOn Holdings succeeded to GenOn Energy as part of a bankruptcy reorganization plan of GenOn Energy and certain of its affiliated debtors. Applicants state that GenOn Energy was a wholly owned subsidiary of NRG Energy, Inc. (NRG), which has other subsidiaries that own or control generation facilities in the MISO market. Applicants add that GenOn Holdings' subsidiaries ceased being affiliated with NRG when the reorganization was completed on December 14, 2018.[12] Lastly, Applicants note that none of Wholesale Generation or any of its affiliates owns or controls generation facilities in the MISO balancing authority area.[13]

B. Description of the Proposed Transaction

1. Choctaw

9. Applicants state that Choctaw is an approximately 810 megawatt (MW) natural gas-fired, combined cycle gas turbine generating plant located in the TVA balancing authority area on the border of the Entergy Mississippi and TVA transmission systems near the town of French Camp, Mississippi. Applicants explain that Choctaw has 500 kilovolt transmission lines interconnected with both systems and existing generator interconnection agreements with Entergy Mississippi and TVA.[14]

10. Applicants explain that Choctaw was developed as a merchant generating facility but has struggled economically since achieving commercial operation in July 2003. Applicants point out that these economic challenges resulted in a three-year period, from July 2004 to May 2007, during which the entire plant was mothballed and a seven-year period, from August 2010 to December 2017, during which one of the three combustion turbines was out of service. Applicants add that Choctaw has been and continues to be uneconomic as a merchant facility, and will continue to be uneconomic as a merchant facility for the foreseeable future.[15]

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[12] Applicants state that GenOn and certain of its subsidiaries, including Wholesale Generation, filed for Chapter 11 bankruptcy in June 2017. Applicants explain that, upon implementing the reorganization plan of GenOn Energy and its affiliated debtors, shares of GenOn Holdings' common stock, as well as the membership interests of Holdings LLC issued to holders of GenOn Holdings' Class B common stock, were issued to former holders of GenOn Entergy's senior notes. *Id.* at 10 & n.18.

[13] *Id.* at 10.

[14] *Id.*

[15] *Id.* at 11 (citing Testimony of Darren J. Olagues, Attachment DO-1 at ¶¶ 7-8,

(continued ...)

11. Applicants state that, as a condition of the Proposed Transaction, Wholesale Generation will move Choctaw out of the TVA balancing authority area and into the MISO balancing authority area, where Entergy Mississippi's service territory and load obligations are located. Applicants explain that, absent the Proposed Transaction, Wholesale Generation would not move Choctaw out of TVA and into MISO in a merchant capacity. Wholesale Generation states that it expects MISO prices will continue to be lower than TVA prices in the future and that MISO capacity prices will not make up the difference. Wholesale Generation states that moving Choctaw to MISO would create resource adequacy obligations that would create incremental risk and limit options for Choctaw. Applicants explain that, as a result, unless the Proposed Transaction is consummated, there is a high likelihood that Choctaw will be sold to a buyer outside of MISO or mothballed, making it unavailable as a MISO supply resource.[16]

2. Entergy Mississippi's Need for Additional Generating Capacity

12. Applicants explain that Entergy Mississippi's 2015 Integrated Resource Plan identified the need for additional generating capacity in Local Resource Zone 10.[17] Applicants state that, although Entergy Mississippi began developing plans in 2016 to build a new combined-cycle generating facility by 2027, generating facility retirements accelerated the need for the new facility, prompting Entergy Mississippi to move the target date up to 2023. Applicants explain that Entergy Mississippi's 2018 Integrated Resource Plan continued to identify a need to construct this new generating facility in Local Resource Zone 10 by 2023 to satisfy its customers' capacity and energy needs, meet planning reserve and MISO resource adequacy requirements, and account for accelerated generation facility retirements.[18]

13. Applicants explain that, in 2017, Wholesale Generation, on an unsolicited basis, invited Entergy Mississippi to participate in a solicitation process for offers to buy

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10-22).

[16] *Id.* at 11-12 (citing Testimony of Darren J. Olagues, Attachment DO-1 at ¶¶ 3, 18-19, 20-21, 35-39).

[17] *Id.* at 2, 12. Applicants explain that Entergy Mississippi's integrated resource planning process considers a range of factors, including Entergy Mississippi's projected peak load requirements plus a 12 percent planning reserve margin and MISO's annual resource adequacy requirements, and actual and potential generating facility deactivations or retirements. *Id.* at 12 n.29.

[18] *Id.* at 12-14.

(continued ...)

Choctaw. According to Applicants, based on Entergy's resource needs and the advantage of acquiring Choctaw instead of constructing a new generating facility, Entergy Mississippi elected to participate in that process. Applicants state that they ultimately entered into an Asset Purchase Agreement in August 2018 and that, following the execution of the Asset Purchase Agreement, Entergy Mississippi ceased its efforts to build a new combined-cycle gas turbine facility.[19]

3. Terms of the Proposed Transaction

14. Applicants state that the terms of the Proposed Transaction are set forth in the Asset Purchase Agreement. Applicants explain that the Proposed Transaction is structured as a sale of Choctaw and related assets for a negotiated aggregate purchase price of $314 million, subject to adjustments prescribed by the Asset Purchase Agreement. Specifically, Applicants explain that Entergy Mississippi plans to undertake certain upgrades to Choctaw after the Proposed Transaction is complete to support Choctaw's performance and reliability, which are expected to cost approximately $87 million. Applicants state that, as a result, Entergy Mississippi's total investment to acquire and upgrade Choctaw is estimated to be approximately $401.4 million.[20]

15. Applicants explain that Choctaw is a dually interconnected facility, having interconnections with TVA's French Camp Substation and Entergy Mississippi's Wolf Creek substation in MISO. Applicants state that, under its generator interconnection agreement with Entergy Mississippi, Choctaw has 810 MW of Network Resource Interconnection Service that allows facility output to be deliverable on the MISO transmission system. Applicants explain that Entergy Mississippi will acquire the existing MISO and TVA generator interconnection agreements as part of the Proposed Transaction. Applicants state that, in addition, as a condition of the Proposed Transaction, Choctaw must be moved from the TVA balancing authority area to the MISO balancing authority area and MISO must recognize Choctaw as an internal resource at the Choctaw point of interconnection with the MISO system.[21]

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[19] Applicants add that, if Entergy Mississippi is unable to complete the Proposed Transaction, Entergy Mississippi believes that its only viable alternative will be to resume the prior efforts to develop a new combined-cycle gas turbine generating facility. *Id.* at 14-15.

[20] *Id.* at 15 & n.38.

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

II. Notice of Filing

16. Notice of the Application was published in the *Federal Register*, 84 Fed. Reg. 9323 (2019), with interventions and protests due on or before April 30, 2019. On May 3, 2019, the Mississippi Commission filed an out-of-time motion to intervene.

17. On May 16, 2019, Commission staff issued a deficiency Letter (Deficiency Letter). Applicants submitted a response to the Deficiency Letter (Response) on June 14, 2019. Notice of the Response was published in the *Federal Register*, 84 Fed. Reg. 29,192 (2019), with interventions and protests due on or before July 5, 2019. None were filed.

18. On August 5, 2019, Applicants filed a supplement with an update to Exhibit M of the Application (Supplement). Notice of the Supplement was published in the *Federal Register*, 84 Fed. Reg. 40,043 (2019), with interventions and protests due on or before August 15, 2019. None were filed.

III. Discussion

A. Procedural Matters

19. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2019), we grant the late-filed motion to intervene given the Mississippi Commission's interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

B. Substantive Matters

1. FPA Section 203 Standard of Review

20. 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.[22] 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.[23] FPA section 203(a)(4) also requires the

[22] 16 U.S.C. § 824b(a)(4). Approval of the Proposed Transaction is also required by other regulatory agencies pursuant to their respective statutory authorities before the Proposed Transaction may be consummated. *See* Application at Ex. L. Our findings under FPA section 203 do not affect those agencies' evaluation of the Proposed Transaction pursuant to their respective statutory authorities.

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

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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."[24] 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.[25]

2. Analysis of the Proposed Transaction

a. Effect on Horizontal Competition

i. Applicants' Analysis

21. Applicants argue that the Proposed Transaction will not have an adverse effect on horizontal competition in the MISO or MISO South relevant geographic markets.[26] Applicants explain that their analysis focuses on the competitive impacts for short-term energy sales, capacity, and ancillary services.[27]

22. As a threshold matter, Applicants argue that the only relevant geographic market for purposes of evaluating the Proposed Transaction's effect on competition is the MISO market. Applicants explain that, under Commission precedent, the relevant geographic market for a proposed transaction is the area in which the two merging entities compete for customers.[28] Applicants assert that MISO is the only market in which the sales by Choctaw and Entergy Mississippi and its affiliates overlap; therefore, Applicants analyze the MISO market as the relevant geographic market.[29]

23. Applicants performed a Delivered Price Test, also referred to as an Appendix A analysis or Competitive Analysis Screen, to evaluate the Proposed Transaction's effect on

[24] 16 U.S.C. § 824b(a)(4).

[25] 18 C.F.R. § 33.2(j) (2019).

[26] MISO South, as well as MISO Midwest, correspond to the terms First Planning Area and Second Planning Area, as defined in sections 1.F and 1.S of the MISO Tariff. MISO, FERC Electric Tariff, Definitions, § 1.F (45.0.0); *see also id.*, § 1.S (49.0.0).

[27] Application at 20.

[28] *Id.* at 21-22 (citing Attachment JM-1 at 17).

[29] *Id.* at 22.

(continued ...)

competition for short-term energy sales in the MISO market.[30] Applicants explain that they analyzed competitive effects using both the Economic Capacity and Available Economic Capacity measures,[31] but argue that, given Entergy Mississippi's retail load obligations, Available Economic Capacity is a more appropriate measure.[32] Applicants argue that their Delivered Price Test for MISO shows that, after Entergy Mississippi's acquisition of Choctaw, the MISO market is unconcentrated, with post-transaction HHI levels below 700 in all ten time periods under both the Economic Capacity and Available Economic Capacity measures.[33] Applicants assert that these HHI levels are below the Commission's initial screen threshold of a post-transaction HHI of 1,000 or higher.[34]

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[30] 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).

[31] 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. *See Wis. Energy Corp.*, 151 FERC ¶ 61,015, at P 25 (2015).

[32] Application at 21 (citing *Nev. Power Co.*, 113 FERC ¶ 61,265, at P 15 (2005); *Kan. City Power & Light Co.*, 113 FERC ¶ 61,074, at PP 31, 35 (2005)).

[33] *Id.* at 22 (citing Attachment JM-1 at 6, 45-46).

[34] *Id.* (citing Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,129).

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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 Entergy Mississippi or its affiliates having market power for short-term energy sales in the MISO market.[35]

24. Applicants argue that MISO South is not a relevant geographic submarket for purposes of evaluating the Proposed Transaction. They assert this is the case notwithstanding the Sub-Regional Power Balance Constraint[36] that can limit transfers of energy from MISO Midwest into MISO South.[37] Applicants assert that one reason MISO South is not a relevant geographic market is that it is becoming a predominantly net exporting region and that exporting regions are not relevant destination markets under Commission precedent. Applicants argue that new low-cost generation sources being constructed in MISO South and the movement of Choctaw into MISO South will only make MISO South more of a net exporting region in the future.[38]

25. Applicants also provide data in support of their assertion that MISO South is not a relevant geographic market. For example, Applicants present data showing that, in 2018, the Sub-Regional Power Balance Constraint was binding into MISO South in only two percent of day-ahead hours and 1.5 percent of real-time hours.[39] Applicants argue further that their evidence indicates that the Sub-Regional Power Balance Constraint is less likely to bind at all in the future.[40] In addition, Applicants present data that they argue shows neither price separation between MISO Midwest and MISO South nor evidence of frequently binding transmission constraints at historical seasonal peaks.

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[35] *Id.*

[36] The Sub-Regional Power Balance Constraint, or the Regional Directional Transfer, represents the total transmission capability between MISO Midwest and MISO South. *See Midcontinent Indep. Sys. Operator, Inc.*, 164 FERC ¶ 61,129, at P 5 (2018).

[37] Application at 23-24 (citing Attachment JM-1 at 18-41).

[38] *Id.* at 24-25.

[39] *Id.* at 25-26 & n.81.

[40] *Id.* at n.83.

(continued ...)

Based on this evidence, Applicants assert that the Commission should not consider MISO South to be a relevant geographic market.[41]

26. Nevertheless, Applicants examine MISO South as a separate market because the Commission identified it as such for a recent transaction.[42] Applicants' analysis for the Available Economic Capacity base case reflects unconcentrated and moderately concentrated results and shows two screen failures in the Shoulder Peak and Winter Super Peak periods.[43] Applicants' analysis for the -10 percent case reflects one screen failure in the Winter Super Peak period, whereas their analysis for the +10 percent case reflects two screen failures in the Shoulder Peak and the Winter Peak periods.[44] Applicants argue that these results are non-systematic screen failures, i.e., they do not present a consistent pattern across time periods and/or markets, in markets that are highly concentrated, and where the entity seeking the approval has a significant share of the market.[45]

27. Regarding the capacity market in MISO, Applicants assert that the Proposed Transaction will not affect competition because Choctaw has not made sales in that market and it is highly unlikely that it would do so absent the Proposed Transaction. Applicants contend that the Proposed Transaction does not represent a case where a transaction eliminates a potential competitor whose entry was imminent; rather, it involves a single asset that is not planned to be sold in the MISO capacity market and whose participation in the MISO capacity market would be both highly unlikely and demonstrably uneconomic. Applicants assert that, in those circumstances, it is well-settled that a transaction has no adverse effect on competition.[46]

28. As to MISO ancillary services markets, Applicants argue that the Proposed Transaction will have no effect because Choctaw currently is an external resource to MISO and therefore not eligible to provide ancillary services to MISO. Applicants explain that moving Choctaw from TVA to MISO will make Choctaw eligible to

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[41] *Id.* at 26.

[42] *Id.* (citing *Bayou Cove Peaking Power, LLC*, 165 FERC ¶ 61,226, at PP 68-70 (2018) (*Bayou Cove*)).

[43] Applicants describe the season/load periods they analyzed using different terms than the ones herein.

[44] Application at 26.

[45] *Id.* at 28-29.

[46] *Id.* at 35-36 (citing *IES Utils., Inc.*, 81 FERC ¶ 61,187, at 61,827-28 (1997)).

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participate in MISO ancillary services markets, thereby increasing supplies in those markets and creating benefits that would not be realized but for the Proposed Transaction.[47]

ii. Response to Deficiency Letter

29. In the Deficiency Letter, Commission staff requested further information regarding Applicants' representations. Among other things, Commission staff requested: (1) a competitive analysis of the Proposed Transaction's effect on competition in the TVA balancing authority area; and (2) an analysis of the effect of the Proposed Transaction on competition in the MISO Planning Resource Auction for Local Resource Zone 10.

30. In their Response, Applicants argue that such an analysis of the TVA balancing authority area is not required because Entergy Mississippi and its affiliates do not own generation interconnected with TVA and do not sell capacity and energy into TVA. Nevertheless, Applicants provide the requested Delivered Price Test, which showed a single screen failure under the Available Economic Capacity measure in the Shoulder Peak period for the +10 percent price sensitivity. Applicants contend that this screen failure does not indicate a competitive concern because it occurs only in the unlikely case that Wholesale Generation continues to operate Choctaw as a merchant facility, is non-systematic, is not caused by an increase in Entergy entities' market shares, and is only minimally over the threshold for a moderately concentrated market. Applicants thus assert that their analysis demonstrates that the Proposed Transaction will not have an anticompetitive effect in the TVA balancing authority area.[48]

31. Regarding the Proposed Transaction's effect on competition in the MISO Planning Resource Auction for Local Resource Zone 10, Applicants reiterate that, but for the Proposed Transaction, Choctaw would not participate in MISO because it has higher returns by staying in TVA or being mothballed. Applicants emphasize that, by bringing Choctaw into MISO, the Proposed Transaction will expand supplies and lower prices.[49]

32. Applicants provide a pivotal supplier analysis in support of this argument.[50] Based on this analysis, Applicants argue that they pass the pivotal supplier test for

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[47] *Id.* at 34-35.

[48] Response at 3-7 (citing Attachment JM-16).

[49] *Id.* at 14.

[50] Applicants note that they made several substitutions to perform the analysis. Specifically, they note that they used unforced capacity as the measure of capacity *(continued ...)*

capacity in Local Resource Zone 10, even with Entergy Mississippi's acquisition of Choctaw.[51]

iii. Commission Determination

33. 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.[52]

34. We first address the geographic market relevant to the Proposed Transaction. We emphasize that properly defining and measuring each relevant geographic market is required to evaluate whether a proposed transaction adversely affects competition.[53] In determining whether an alternative geographic market should be relevant for purposes of analyzing a proposed transaction, the Commission examines "whether there are frequently binding transmission constraints during historical seasonal peaks examined in the screens and at other competitively significant times that prevent competing supply from reaching customers within the [proposed alternative geographic market]."[54] The Commission

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instead of nameplate or seasonal capacity, the Planning Resource Margin Requirement instead of load, and the Capacity Import Limit instead of the Simultaneous Import Limit used for energy. Applicants used data from the most recent MISO Planning Resource Auction for the 2019/2010 planning year and conducted their pivotal supplier analysis in the format used for market-based rate applications. *Id.*

[51] *Id.* at 14-15. Applicants note that Entergy Mississippi and its affiliates have no Uncommitted Imports allocated to them because they are net short of capacity outside of Local Resource Zone 10. *Id.* at n.49.

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

[53] DOJ/FTC, *Horizontal Merger Guidelines*, at 6 (Apr. 1992, *revised*, Apr. 1997), https://www.ftc.gov/sites/default/files/attachments/merger-review/hmg.pdf.

[54] *Exelon Corp.*, 138 FERC ¶ 61,167, at P 32 (2012) (*Exelon*) (citing *AEP Power Mktg., Inc.*, 124 FERC ¶ 61,274, at PP 24-25 (2008) (citing *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 119 FERC ¶ 61,295, at P 268, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 123 FERC ¶ 61,055, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, 125 FERC ¶ 61,326 (2008), *order on reh'g*, Order

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stated that this could be demonstrated "by providing evidence of binding transmission constraints or price separation data."[55]

35. Based on the evidence in the record, we agree with Applicants that MISO South currently is not a relevant geographic market for purposes of evaluating the Proposed Transaction's effect on competition and will not be considered a submarket. While we acknowledge that, in *Bayou Cove*, the Commission found that MISO South should be considered a submarket,[56] the record in this proceeding includes new evidence based on changing circumstances. Notably, Applicants' data shows that, in 2018, the Sub-Regional Power Balance Constraint was binding into MISO South in only two percent of day-ahead hours and 1.5 percent of real-time hours.[57] Applicants also present evidence that the trend of fewer binding hours is likely to continue, given new generation coming online south of the Sub-Regional Power Balance Constraint, including the addition of Choctaw to MISO South. Therefore, consistent with our policy of evaluating relevant geographic markets on a case-by-case basis,[58] we consider only the MISO-wide market to

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No. 697-C, 127 FERC ¶ 61,284 (2009), *order on reh'g*, Order No. 697-D, 130 FERC ¶ 61,206 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub nom. Public Citizen, Inc. v. FERC*, 576 U.S. 934 (2012))).

[55] *NRG Energy Holdings, Inc.*, 146 FERC ¶ 61,196, at P 80 (2014); *see also Exelon*, 138 FERC ¶ 61,167 at P 32. However, the Commission has consistently declined to establish submarkets where an applicant or intervenor presented only evidence of price separation, but no evidence of binding transmission constraints. *See, e.g.*, *AEP Power Mktg., Inc.*, 124 FERC ¶ 61,274 at P 24 ("The requirement to address transmission constraints was found to be a 'necessary condition' for those advocating adoption of an alternative geographic market."); *see also NRG Energy, Inc.*, 141 FERC ¶ 61,207, at P 80 (2012) (finding South of Path 15 to not be a submarket because "there is no evidence in the record of ongoing persistent binding transmission constraints that would not allow competing suppliers to enter the South of Path 15 submarket.").

[56] *Bayou Cove*, 165 FERC ¶ 61,226 at P 66.

[57] Application at 25-26 & n.81. In contrast, the record in *Bayou Cove* indicates that, for 2017, the Sub-Regional Power Balance Constraint was binding into MISO South for 11.5 and 9.1 percent of hours in the day-ahead and real-time markets, respectively. *Bayou Cove*, 165 FERC ¶ 61,226 at P 54.

[58] *See* Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,118. As the Commission explained in Order No. 697-A, "[w]here the Commission makes a specific finding that there is a submarket within [a regional transmission organization (RTO) or independent system operator (ISO)], that submarket becomes the default relevant geographic market for sellers located within the submarket for purposes of the market *(continued ...)*

be the relevant geographic market for purposes of assessing the Proposed Transaction's effect on competition.[59]

36. We also agree that the TVA balancing authority area is not a relevant geographic market. As Applicants explain, Entergy Mississippi and its affiliates and Wholesale Generation do not have overlapping resources in the TVA balancing authority area. As such, under the Commission's regulations, the TVA balancing authority area is not required to be evaluated here as a relevant geographic market.[60]

37. We also find that the Proposed Transaction is unlikely to have an adverse effect on competition in the MISO market for short-term energy sales. Applicants' Delivered Price Test indicates that, under the Available Economic Capacity measure, the MISO market remains unconcentrated in all season/load periods with market HHI levels ranging from 354 points to 643 points in the base case. Under the Economic Capacity measure, the MISO market also remains unconcentrated in all season/load periods with market HHI levels ranging from 443 points to 565 points. In addition, the results of the Delivered Price Test for both Economic Capacity and Available Economic Capacity during all season/load periods in the price sensitivity analyses provided by Applicants are not materially different.

38. We further find that the Proposed Transaction is unlikely to adversely affect competition in the MISO capacity market or in Local Resource Zone 10. Applicants' pivotal supplier analysis shows that Entergy Mississippi is not a pivotal supplier in Local Resource Zone 10, even with its acquisition of Choctaw.

39. In addition, based on Applicants' representations, we find that the Proposed Transaction is unlikely to adversely affect competition in the MISO ancillary services markets. As Applicants explain, Choctaw has not previously been used to provide ancillary services in MISO because it currently is an external resource to MISO.

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power analysis (both indicative screens and DPT)." Order No. 697-A, 123 FERC ¶ 61,055 at P 70. However, "intervenors or sellers can provide evidence to the contrary; thus, a submarket, like other default geographic markets, is a rebuttable default geographic market." Order No. 697-A, 123 FERC ¶ 61,055 at P 71.

[59] Given the data on binding transmission constraints, we need not rely on the price separation data submitted by Applicants.

[60] 18 C.F.R. § 33.3(a)(2) (2019).

(continued ...)

b. Effect on Vertical Competition

i. Applicants' Analysis

40. Applicants explain that the Proposed Transaction does not involve any electric transmission facilities, other than facilities used to interconnect generating facilities with the transmission grid, or any upstream inputs to electricity products. Applicants also state that the transmission facilities owned by the Entergy Operating Companies are under MISO's functional control and MISO provides open access transmission service over those facilities pursuant to the MISO Tariff. Applicants therefore contend that the Proposed Transaction will not increase any potential ability of Applicants to use their ownership of transmission facilities to give themselves an advantage in energy markets.[61]

41. In addition, Applicants state that the Commission considers whether applicants have the ability to erect barriers to entry by other suppliers in terms of such things as control of new capacity development other than those that may exist at the sites being acquired; control of fuel inputs to generation; and control of any equipment suppliers or facilities used to transport fuels or other inputs to generation. Applicants argue that Entergy Mississippi and its affiliates do not have dominant control over power plant sites for new capacity development in relevant markets.[62] Applicants state that, although some Entergy Operating Companies own natural gas transportation and storage facilities, Entergy Mississippi does not directly or indirectly own intrastate natural gas transportation and storage facilities. Applicants also explain that Entergy Mississippi and its affiliates do not control coal supplies or barges and rail cars used for the transportation of coal supplies, except rail cars leased solely to deliver fuel for its coal-fired generating plant. Applicants contend that there is nothing about the Proposed Transaction or the circumstances of Entergy Mississippi and its affiliates that would call into question the basis for the Commission's rebuttable presumption that ownership or control of intrastate natural gas transportation and storage facilities, coal supplies, or facilities used to transport coal supplies do not enable a seller to erect barriers to entry.[63]

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[61] Application at 38-39.

[62] *Id.* at 39.

[63] *Id.* at 39-40 (citing Order No. 697, 119 FERC ¶ 61,295 at P 425). Applicants also note that, in the Entergy Operating Companies' recent triennial market power update filing for the Central region in connection with their market-based rate authority, the Entergy Operating Companies and their affiliates made the requisite affirmative statement that they and their affiliates have not erected any barriers to entry into any geographic market and will not erect such barriers to entry. *Id.* at 40.

(continued ...)

ii. Commission Determination

42. 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.[64]

43. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on vertical competition. Entergy Mississippi's transmission assets are under the operational control of MISO and therefore cannot be used to exclude upstream generation from reaching downstream markets.[65] Further, Applicants' control over generation inputs is limited to natural gas transportation and storage facilities of which there are other options in the area. In addition, we find no evidence that Entergy Mississippi's leasing of rail cars solely for delivering fuel to a coal-fired generating facility could be used to erect a barrier to entry of competing suppliers.[66]

c. Effect on Rates

i. Applicants' Analysis

44. Applicants explain that, in assessing whether a proposed transaction may have an adverse effect on rates, the Commission's primary concern historically has been the protection of wholesale requirements customers and transmission customers.[67] Applicants state that Wholesale Generation sells the output of Choctaw exclusively at

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[64] *Upstate N.Y. Power Producers, Inc.*, 154 FERC ¶ 61,015, at P 15 (2016); *Exelon*, 138 FERC ¶ 61,167 at P 112.

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

[66] *See Upstate N.Y. Power Producers, Inc.*, 154 FERC ¶ 61,015 at P 16.

[67] Application at 40 (citing Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,914-15; Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,123; *New England Power Co.*, 82 FERC ¶ 61,179, at 61,659, *order on reh'g*, 83 FERC ¶ 61,275 (1998)).

market-based rates, which Applicants contend the Commission has found to eliminate concerns about any adverse impact on rates. Applicants explain that Entergy Mississippi does not have any wholesale requirements customers and they assert that the Proposed Transaction will not have any adverse effect on rates for the other Entergy Operating Companies' wholesale ratepayers. Applicants similarly contend that the Proposed Transaction will not have any adverse effect on rates for transmission customers taking service on transmission facilities owned by Entergy Mississippi or the other Entergy Operating Companies. Applicants explain that, with respect to transmission service rates, the only transmission facilities included in the Proposed Transaction are limited generator interconnection facilities associated with Choctaw and that these limited-purpose facilities are not integrated with the transmission grid and will not be included in Entergy Mississippi's transmission revenue requirements. As such, Applicants assert that Entergy Mississippi's acquisition of these generator interconnection facilities will not cause an adverse effect on transmission service rates.[68]

45. Nevertheless, Applicants explain that Entergy Mississippi makes a hold harmless commitment to ensure that its transmission customers will not be affected by the Proposed Transaction. Entergy Mississippi commits that it will not seek to include Proposed Transaction-related costs in excess of Proposed Transaction-related savings in its transmission or reactive power revenue requirements used to establish rates for Commission-jurisdictional transmission services for a period of five years after the Proposed Transaction is consummated. Applicants argue that the Entergy Operating Companies' hold harmless commitment is consistent with the Commission's policy and guidance on hold harmless commitments.[69]

ii. Commission Determination

46. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on rates. Entergy Mississippi has no wholesale requirements customers who could be forced to pay for increased costs resulting from the Proposed Transaction. In addition, we find that the Proposed Transaction will have no adverse effect on transmission rates. The only transmission facilities included in the Proposed Transaction are generator interconnection facilities, and the cost of those facilities will not be included in transmission rates.

47. Nevertheless, we accept Entergy Mississippi's commitment to hold transmission and reactive power customers harmless from costs related to the Proposed Transaction.

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[68] *Id.* at 40-41.

[69] *Id.* at 41-42 & n.149 (citing *Policy Statement on Hold Harmless Commitments*, 155 FERC ¶ 61,189 (2016) (Hold Harmless Policy Statement)).

(continued ...)

We interpret its hold harmless commitment to apply to all transaction-related costs, including costs related to consummating the Proposed Transaction, incurred prior to the consummation of the Proposed Transaction, or in the five years after the Proposed Transaction's consummation in accordance with the Commission's policy on hold harmless commitments.[70]

d. Effect on Regulation

i. Applicants' Analysis

48. Applicants argue that the Proposed Transaction will not have any adverse effect on the effectiveness of retail or federal regulation. Applicants explain that, with respect to retail regulation, Entergy Mississippi requires approval for the Proposed Transaction from the Mississippi Commission and has filed for that approval, which is currently pending. Applicants add that, following completion of the Proposed Transaction, Entergy Mississippi will remain under the regulatory oversight of the Mississippi Commission in the same manner as it is currently subject to retail regulation. Applicants state that, similarly, Entergy Mississippi will remain under the Commission's regulatory oversight in the same manner as it is currently subject to Commission regulation.[71]

ii. Commission Determination

49. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap.[72] 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.[73] Based on Applicants' representations, we find no evidence that either state or federal regulation will be impaired by the Proposed Transaction. Finally, we note that no party alleges that regulation, state or federal, would be impaired by the Proposed Transaction, and no state

[70] *See generally* Hold Harmless Policy Statement, 155 FERC ¶ 61,189.

[71] Application at 42.

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

[73] *Id.*

(continued ...)

commission has requested that the Commission address the issue of the effect on state regulation.

e. Cross-Subsidization

i. Applicants' Analysis

50. Applicants contend that the Proposed Transaction falls within one of the "safe harbors" identified by the Commission for proposed transactions that are unlikely to raise cross-subsidization concerns, specifically the safe harbor for proposed transactions involving only non-affiliates.[74]

51. 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 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.[75]

ii. Commission Determination

52. 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.

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[74] Application at 42-43 (citing Supplemental Policy Statement, 120 FERC ¶ 61,060 at PP 14-15, 19).

[75] Supplement at 3-5.

(continued ...)

3. Other Considerations

53. 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.[76] 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.

54. 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 Public Utility Holding Company Act of 2005 (PUHCA 2005)[77] are subject to the record-keeping and books and records requirements of PUHCA 2005.

55. Order No. 652 requires that sellers with market-based rate authority timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.[78] 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.

<u>The Commission orders</u>:

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

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[76] 16 U.S.C. § 824o (2018).

[77] 42 U.S.C. § 16451 *et seq*. (2012).

[78] *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). *See* 18 C.F.R. § 35.42 (2019).

(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) If Entergy Mississippi seeks to recover transaction-related costs through their transmission or reactive power rates, they must make a new FPA section 205 filing and submit concurrently an informational filing in the instant FPA section 203 docket. In the FPA section 205 filing, Applicants must: (1) specifically identify the transaction-related costs they are seeking to recover; and (2) demonstrate that those costs are exceeded by the savings produced by the Proposed Transaction.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.