

163 FERC ¶ 61,005
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

Jurisdictional Regional Equipment Sharing for
Transmission Outage Restoration Participants

Docket No. EC18-32-000

ORDER AUTHORIZING ACQUISITION AND DISPOSITION
OF JURISDICTIONAL FACILITIES

(Issued April 3, 2018)

1. On December 13, 2017, the jurisdictional Regional Equipment Sharing for Transmission Outage Restoration Agreement (RESTORE Agreement) participants (Applicants)¹ submitted an application for prior authorization under sections 203(a)(1)(A) and (B) of the Federal Power Act (FPA)² and Part 33 of the Commission's regulations³

¹ Applicants state they are the FPA-jurisdictional signatories to the RESTORE Agreement and include the following: Ameren Services Company (as agent for Union Electric Company, d/b/a Ameren Missouri, Ameren Illinois Company, and Ameren Transmission Company of Illinois); American Transmission Company, LLC; Duke Energy Florida, LLC; Duke Energy Kentucky, Inc.; Duke Energy Indiana, LLC; Duke Energy Ohio, Inc.; Duquesne Light Company; Entergy Services, Inc. (on behalf of Entergy Arkansas, Inc.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; and Entergy Texas, Inc.); Florida Power & Light Company; International Transmission Company d/b/a ITC*Transmission*; ITC Midwest LLC; LG&E and KU Energy LLC; Michigan Electric Transmission Company, LLC; PPL Electric Utilities Corporation; Southern Company Services Inc. (as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company and Mississippi Power Company); and South Carolina Electric & Gas Company. Applicants note that Duke Energy Carolinas, LLC and Duke Energy Progress, LLC intend to execute the RESTORE Agreement as soon as applicable state utility commission requirements are satisfied. Jurisdictional Signatories to the RESTORE Agreement, Joint Application for Prior Authorization for the Disposition and Acquisition of Jurisdictional Transmission Facilities at n.1, Docket No. EC18-32-000 (Dec. 13, 2017) (Application).

² 16 U.S.C. § 824b (a)(1)(A) and (B) (2012).

for the disposition and acquisition of jurisdictional transmission facilities under the RESTORE Agreement as described in the Application (Proposed Transactions). Applicants also request partial waiver of the Commission's affiliate pricing rules.⁴

2. We have reviewed the Proposed Transactions under the Commission's Merger Policy Statement.⁵ As discussed below, we authorize the Proposed Transactions as consistent with the public interest, and we accept and rely on Applicants' commitment to submit the proposed informational filings.⁶ We also grant the requested waiver of the affiliate pricing rules.

3. The resilience of the bulk power system continues to be a priority for the Commission.⁷ By providing pre-authorization of the Proposed Transactions, this order enhances the resilience of the bulk power system by enabling Applicants to provide mutual assistance to one another following an emergency or natural disaster more quickly and efficiently, thereby improving their ability to recover from such events, limiting the duration of transmission outages, and protecting customers.

³ 18 C.F.R. pt. 33 (2017).

⁴ 18 C.F.R. § 35.44 (2017).

⁵ *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996) (Merger Policy Statement), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997); *see also FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008). *See also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). *See also Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

⁶ The Commission does not intend to notice or act on these filings.

⁷ *See, e.g., Grid Resilience in Regional Transmission Organizations and Independent System Operators*, Docket No. AD18-7-000 (proceeding to evaluate the resilience of the bulk power system in the regions operated by regional transmission organizations and independent system operators).

I. Background

A. The RESTORE Agreement

1. Overview

4. Applicants state that the RESTORE Agreement was designed for the efficient and timely bilateral transfer of electric transformers and other critical transmission-related equipment (Qualifying Equipment⁸) following defined catastrophic emergencies or other natural disasters (Triggering Events⁹), in order to provide mutual assistance in connection with the restoration of secure and reliable grid operations. Applicants explain that the purpose and expected effect of the RESTORE Agreement is to enhance the reliability and resilience of the electric transmission grid on a cost-effective basis, which will contribute to lower overall costs of service to customers.¹⁰

5. Applicants state that parties to the RESTORE Agreement include both Applicants, as Commission-jurisdictional public utilities, and non-public utilities and government-owned utilities (collectively, with Applicants, the RESTORE Participants). The RESTORE Agreement includes a total of 28 participating utilities. All of the RESTORE Participants have voluntarily committed to be bound by the agreement, after a two year initial period after joining, and may withdraw from the agreement at any time on one year's notice. Applicants note that, like the spare transformer agreement addressed by the Commission in *Electric Edison Institute*,¹¹ utilities are free to deploy their transformers for their own use or to voluntarily transfer them to another utility with which they have a formal or informal sharing or mutual assistance agreement as needed,

⁸ See Application, Exhibit A: Restore Agreement at § I.CC. The scope of equipment to be nominated and exchanged under the RESTORE Agreement is currently limited to transformers of various classes, but the agreement allows for other types of equipment, such as breakers or switches, to be included in the future. Application at 8.

⁹ Restore Agreement at § I.JJ.

¹⁰ Application at 1-2.

¹¹ *Electric Edison Institute on behalf of the Jurisdictional Signatories to the Spare Transformer Sharing Agreement*, 116 FERC ¶ 61,280, at P 22 (2006) (*EEI*). In *EEI*, the Commission addressed, among other things, applicants' request for blanket authorization under FPA section 203 for any jurisdictional public utility party to the Spare Transformer Sharing Agreement (STEP Agreement) to engage in future transfers of transformers pursuant to the agreement, including transfers of transformers by public utilities to their affiliates.

subject to the obligation to replace the transformers within a time period consistent with the RESTORE Agreement.¹²

6. Applicants state that the importance of a strategic transformer reserve has been identified in recent studies and reports, including the Department of Energy's March 2017 Strategic Transformer Report to Congress (DOE Report).¹³ The DOE Report, which was submitted to Congress as required by the Fixing America's Surface Transportation Act (FAST Act),¹⁴ recommended "encouraging and supporting an industry-based option driven by voluntary industry actions and North American Electric Reliability Corporation's Reliability Standard CIP-014-2 requirements, which were approved by the [Commission]."¹⁵ Applicants represent that they entered into the RESTORE Agreement in the spirit of providing a proactive industry-based option consistent with, and in furtherance of, the policies, principles, and priorities identified by Congress and the Department of Energy.

7. With respect to governance of the RESTORE Agreement, Applicants explain that the agreement provides for two standing committees, the Operating Committee and the Technical Committee. The Operating Committee's responsibilities include, but are not limited to, providing executive oversight and management to the program, reviewing and voting on amendments or modifications to the RESTORE Agreement, and making determinations regarding whether a Triggering Event has occurred. The Operating Committee must have one member from each RESTORE Participant in the program, with each participant's member rotating as chairperson and serving one term of twelve months. The Technical Committee's primary responsibilities include, but are not limited to, providing technical coordination, review, and confirmation of program requirements (including RESTORE Participant compliance with Equipment¹⁶

¹² Application at 19-20.

¹³ U.S. Department of Energy, Strategic Transformer Reserve: Report to Congress (March 2017), <https://energy.gov/sites/prod/files/2017/04/f34/Strategic%20Transformer%20Reserve%20Report%20-%20FINAL.pdf>.

¹⁴ Pub. L. No. 114-94, 129 Stat. 1780.

¹⁵ Application at 6 (quoting DOE Report at p. ii).

¹⁶ RESTORE Agreement at § I.K.

contribution requirements), and preparing recommendations to the Operating Committee regarding, among other things, the creation of and update to Equipment Classes.¹⁷

2. Purchases and Sales Pursuant to the RESTORE Agreement

8. Applicants explain that, pursuant to the RESTORE Agreement, each RESTORE Participant will be responsible for purchasing or otherwise acquiring, storing, maintaining, and replacing its own Spare Equipment¹⁸ in accordance with Prudent Utility Practices.¹⁹ RESTORE Participants will designate specific Spare Equipment to be listed as available under and subject to the RESTORE Agreement. By electing to participate in any Equipment Class and identifying and nominating Spare Equipment for inclusion in that class, a RESTORE Participant agrees to sell, subject to the terms and conditions of the RESTORE Agreement, the Spare Equipment to another RESTORE Participant exercising its Call Rights²⁰ after a Triggering Event.²¹

9. Any RESTORE Participant affected by a Triggering Event that seeks to purchase Spare Equipment under the program must provide prompt notice to the Operating Committee. Applicants state that, no later than five days after receipt of such notice, the Operating Committee will determine if the event is a Triggering Event and notify the affected RESTORE Participant and the Technical Committee. When a Triggering Event occurs, each affected RESTORE Participant may exercise its Call Rights by submitting a request to purchase Spare Equipment to the Technical Committee. The Technical Committee will make a recommendation to the Operating Committee as to which Spare

¹⁷ *Id.* § I.L.

¹⁸ *Id.* § I.HH.

¹⁹ *Id.* § I.AA.

²⁰ *Id.* § I.D.

²¹ Any RESTORE Participant may sell, retire, or otherwise dispose of Qualifying Equipment at any time, subject to the obligation to use commercially reasonable efforts to replace such equipment as soon as practicable, but no more than 18 months after the date of such disposition. The RESTORE Agreement does, however, prohibit the exercise of such rights in the aftermath of a Triggering Event and requires RESTORE Participants to promptly notify the Operating Committee so that other participants may be given prior notice that the Spare Equipment is unavailable during its Replacement Period. *See* §§ I.EE and III.C.4.

Equipment, if any, from the Pool in the applicable Equipment Class should be purchased by each affected RESTORE Participant.²²

10. An affected RESTORE Participant that exercises its Call Rights must provide notice to the contributing RESTORE Participants designated by the Operating Committee and all other RESTORE Participants in the applicable Equipment Class. On receipt of that participant's notice, the seller of the Qualifying Equipment must sell the equipment specified by the Operating Committee to the RESTORE Participant.²³ The Purchase Agreement states that Qualifying Equipment must be purchased at net cost, the Purchase Price²⁴ plus Reimbursable Costs²⁵ based on information reasonably available to sellers at the time of Closing.²⁶

²² Application at 10-11. Pools include all designated Spare Equipment from all Participants in the Equipment Class. As discussed in further detail below, unlike other spare transformer programs, under the RESTORE Agreement there is no separate or independent storage facility for any Pool. Each RESTORE Participant is responsible for acquiring, storing, and maintaining its own designated Spare Equipment in accordance with the terms of the RESTORE Agreement. *Id.* § I.Y.

²³ The terms and conditions of these purchases and sales must adhere, in all material respects, to the Form of Purchase and Sale Agreement (Purchase Agreement) in Appendix D of the RESTORE Agreement.

²⁴ Purchase Price includes, among other things, all reasonable costs or expenses reasonably incurred, or that would be reasonably incurred, by a seller to replace the purchased spare equipment with another piece of Qualifying Equipment of like type and specifications under ordinary and customary business conditions; any and all transportation costs associated with the delivery of such replacement equipment; and other direct acquisition costs and out-of-pocket costs reasonably incurred by a seller. Application at 12-13. *See also* Purchase Agreement at § 1.1.

²⁵ Reimbursable Costs include, among other things, all reasonable costs and expenses of a seller, if any, to move, prepare or otherwise ready the purchased spare equipment for transport to buyer; other direct acquisition costs and out-of-pocket costs and expenses reasonably incurred by a seller to effect the transfer of the purchased spare equipment to a buyer; the cost and expense to assign any warranties applicable to the purchased spare equipment in accordance with a purchase and sale agreement; and a seller's tax liability, if any, attributable to the sale of the purchased spare equipment. *Id.*

²⁶ Purchase Agreement at § 2.7.

11. Notwithstanding these obligations, any RESTORE Participant that is affected by a Triggering Event, or has one or more Affiliates²⁷ that are affected by the same Triggering Event, will be permitted to use its own Spare Equipment for its or its Affiliate's own bona fide internal needs arising from the event. The terms of the Purchase Agreement would not apply in such circumstances. Further, a RESTORE Participant in such circumstances would be obligated to sell all remaining Spare Equipment to other affected RESTORE Participants who exercise Call Rights in accordance with the RESTORE Agreement's terms and conditions.²⁸

3. The RESTORE Agreement and Existing Spare Transformer Agreements

12. Applicants explain that the RESTORE Agreement is intended to supplement and complement existing spare transformer agreements and programs such as those addressed by the Commission in the *EEI* and *Grid Assurance LLC*²⁹ proceedings. Applicants state that, although the RESTORE Agreement is similar to those programs, there are some differences between the programs that allow the RESTORE Agreement to fill a niche not covered by existing programs.

13. According to Applicants, the RESTORE Agreement is similar to the STEP Agreement addressed in *EEI* in that participation is voluntary and open to participants that make certain contractual commitments and meet certain qualifications. The STEP Agreement, however, differs from the RESTORE Agreement by defining Triggering Events as Presidentially-declared states of emergencies. Applicants state that, by defining Triggering Events as “a catastrophic event creating an urgent grid need in which, for an extended period of time, a RESTORE Participant loses its ability to serve significant load, is at imminent risk for losing significant load, or cannot maintain grid stability,”³⁰ the RESTORE Agreement covers a wider scope of events than the STEP

²⁷ RESTORE Agreement at § I.A.

²⁸ Application at 13.

²⁹ In *Grid Assurance LLC*, 152 FERC ¶ 61,116 (2015) (*Grid Assurance*), the Commission addressed Grid Assurance LLC's (Grid Assurance) petition for declaratory order regarding Requirement 5 of Reliability Standard CIP-014-1 and the need for prior authorization under section 203. In *Grid Assurance LLC*, 154 FERC ¶ 61,244 (2016) (*Grid Assurance II*), the Commission addressed Grid Assurance's second petition for declaratory order regarding certain ratemaking issues under section 205, including the affiliate pricing rules. The Commission clarified *Grid Assurance II* in *Grid Assurance LLC*, 156 FERC ¶ 61,027 (2016) (order on clarification).

³⁰ Application at 14 (quoting RESTORE Agreement at § I.JJ).

Agreement.

14. Applicants also contrast the RESTORE Agreement to the Grid Assurance program. Applicants note that, instead of creating a standalone corporate entity like Grid Assurance to procure, store and maintain spare transformers available for purchase by participants, the RESTORE Agreement creates a contractual vehicle by which participants may nominate their own spare transformers (and potentially other equipment) to be available to others in the event of a Triggering Event. In addition, the Pool size for a given Equipment Class is determined as the greatest External Need³¹ of any RESTORE Participant in that class plus 20 percent of that External Need, thereby potentially adding more available Equipment to a given Equipment Class.

II. Notice of Filing and Responsive Pleadings

15. Notice of the Application was published in the *Federal Register*, 82 Fed. Reg. 60,390, with interventions and protests due on or before January 3, 2018.

16. Motions to intervene were filed by East Kentucky Power Cooperative, Inc. (East Kentucky), Hoosier Energy Rural Cooperative, Inc., Associated Electric Cooperative, Inc. (Associated Electric), Consumers Energy Company, Cooperative Energy, and the National Rural Electric Cooperative Association.

17. The Tennessee Valley Authority filed a motion to intervene in support of the Application.

18. East Kentucky and Associated Electric jointly filed comments in support of the Application.

III. Discussion

A. Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2017), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Substantive Matters under FPA Section 203

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

³¹ RESTORE Agreement at §§ I.M and III.A.1.a.

the proposed transaction will be consistent with the public interest.³² 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.³³ 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."³⁴ 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.³⁵

2. Analysis of the Proposed Transactions

a. Jurisdiction over the Proposed Transactions

i. Applicants' Request

21. Applicants request that the Commission grant pre-authorization, under FPA sections 203(a)(1)(A) and (B), of the Proposed Transactions. Applicants note that, in *Grid Assurance*, the Commission "expressly denied jurisdiction over some potential transactions that could occur under the RESTORE Agreement,"³⁶ but that the Commission declined to address jurisdiction over others in *EEI*.³⁷ Applicants clarify

³² 16 U.S.C. § 824b(a)(4) (2012). Approval of the Proposed Transactions may be required by other regulatory agencies pursuant to their respective statutory authorities before the Proposed Transactions may be consummated. Our findings under FPA section 203 do not affect those agencies' evaluation of the Proposed Transactions pursuant to their respective statutory authorities.

³³ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

³⁴ 16 U.S.C. § 824b(a)(4).

³⁵ 18 C.F.R. § 33.2(j) (2017).

³⁶ Application at n.6 (citing *Grid Assurance*, 152 FERC ¶ 61,116 at P 19, and *EEI*, 116 FERC ¶ 61,280 at P 35).

³⁷ Applicants in *EEI* requested that the Commission clarify that (1) transfers by jurisdictional public utilities of transformers that have not been energized do not require FPA section 203 authorization, and (2) public utilities do not need FPA section 203 authorization to acquire transformers from non-jurisdictional utilities because such transfers do not merge or consolidate the public utility's facilities with those of the (*continued ...*)

that they do not seek any declaratory order nor expressly raise jurisdictional issues in the Application, but “instead simply seek pre-authorization for all required transactions under the RESTORE Agreement that may be jurisdictional.”³⁸

22. Applicants request pre-authorization subject to them filing two informational filings for each Proposed Transaction: the first submitted within 30 days following a Commission-jurisdictional transaction, providing the information required by Part 33 of the Commission’s regulations; the second within six months after the close of such transactions, when the final terms of the transactions have been established, consistent with the terms of the RESTORE Agreement (the Informational Filings). Applicants represent that this commitment is consistent with the commitments the Commission accepted in pre-authorizing transactions in *EEI*.³⁹

ii. Commission Determination

23. As discussed in further detail below, we grant Applicants’ request for pre-authorization under FPA sections 203(a)(1)(A) and (B) for a Proposed Transaction, and we accept and rely on Applicants’ commitment to submit the Informational Filings. As Applicants note, in *Grid Assurance*, the Commission found that it did not have FPA section 203 jurisdiction over certain transactions that would occur pursuant to a spare transformer program. Specifically, the Commission granted Grid Assurance’s petition for declaratory order and declared that prior authorization under section 203 was not required for sales or purchases from Grid Assurance of spare transmission equipment that is not in service at the time of the transfer.⁴⁰ In *EEI*, the Commission provided FPA section 203 authorization of some transactions pursuant to the STEP Agreement but declined to address jurisdictional issues related to others.

24. As the definition of Spare Transformer in the RESTORE Agreement includes transformers that may be in service on a RESTORE Participant’s system, we believe that at least some of the transactions pursuant to the RESTORE Agreement could be jurisdictional. Accordingly, we find that authorization under section 203 is necessary for a Proposed Transaction. As discussed in further detail below, as the Proposed Transactions are consistent with the public interest, we provide pre-authorization for them under FPA sections 203(a)(1)(A) and (B), and we accept and rely on Applicants’ commitment to submit the Informational Filings.

selling utility. *EEI*, 116 FERC ¶ 61,280 at PP 33-34.

³⁸ Application at n.6.

³⁹ *Id.* at 15 (citing *EEI*, 116 FERC ¶ 61,280 at P 22).

⁴⁰ *Grid Assurance*, 152 FERC ¶ 61,116 at P 18.

b. Effect on Competition

i. Applicants' Analysis

25. Applicants claim that the Proposed Transactions will not have an adverse effect on competition. According to Applicants, because the RESTORE Agreement does not involve the transfer of generation facilities it will not increase any RESTORE Participant's market share of generation.

26. Applicants also argue that the Proposed Transactions will not adversely affect transmission service because the RESTORE Participants provide transmission service pursuant to their own respective Open Access Transmission Tariffs or pursuant to the tariffs of independent system operators or regional transmission organizations. Applicants observe that the Proposed Transactions would "simply allow the purchasers to expedite the process of restoring/stabilizing electric service, which should be considered pro-competitive by facilitating the ability of electric transactions to occur."⁴¹

ii. Commission Determination

27. In analyzing whether a proposed transaction will adversely affect horizontal competition, the Commission examines the effects on concentration in the relevant geographic markets and whether the proposed transaction otherwise creates the incentive and ability to engage in behavior harmful to competition, such as withholding of generation.⁴²

28. Based on Applicants' representations, we find that the Proposed Transactions will not have an adverse effect on horizontal competition. The Proposed Transactions do not involve any change in ownership or control of any generating facilities. Accordingly, the Proposed Transactions will not have any impact on concentration in any relevant market and therefore will not have an adverse impact on horizontal competition.⁴³

29. 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

⁴¹ Application at 18.

⁴² *Nev. Power Co.*, 149 FERC ¶ 61,079, at P 28 (2014).

⁴³ *EEL*, 116 FERC ¶ 61,280 at P 24 (noting that proposed transactions did not raise market power concerns as the transactions did not affect generation assets).

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.⁴⁴

30. Based on Applicants' representations, we find that the Proposed Transactions will not have an adverse effect on vertical competition. The Commission has previously found that anticompetitive effects are unlikely to arise with regard to transactions that only involve the transfer of transmission facilities.⁴⁵ Because the Proposed Transactions are limited to equipment needed to replace existing facilities and restore service such that there is no change in the market or the ability to access inputs to generation, and do not involve the transfer of generation facilities or inputs to electric power generation, we find that they will not have an adverse effect on vertical competition.⁴⁶

c. Effect on Rates

i. Applicants' Analysis

31. Applicants explain that, under the RESTORE Agreement, a buyer will pay the seller the seller's replacement cost, which the Commission has stated is reasonable in similar transactions.⁴⁷ According to Applicants, because buyers' customers will benefit from the Proposed Transactions through the quicker and more efficient restoration of service, it is reasonable that they should bear the costs of replacing transformers or Qualifying Equipment as permitted through a buyer's rate filing under FPA section 205 or existing transmission formula rate on file with the Commission.⁴⁸ Applicants state

⁴⁴ *Upstate N.Y. Power Producers, Inc.*, 154 FERC ¶ 61,015, at P 15 (2016); *Exelon Corp.*, 138 FERC ¶ 61,167, at P 112 (2012).

⁴⁵ *See, e.g., Tucson Electric Power Co.*, 151 FERC ¶ 61,089, at P 30 (2015) (*Tucson Electric*); *ITC Holdings Corp.*, 143 FERC ¶ 61,256, at P 60 (2013).

⁴⁶ *Tucson Electric*, 151 FERC ¶ 61,089 at P 30. *See also Idaho Power Co.*, 151 FERC ¶ 61,233, at P 33 (2015); *EEI*, 116 FERC ¶ 61,280 at P 24 (noting that transfers did not increase ability or incentive to use control over transmission facilities to harm competition in wholesale markets because participating utilities provided transmission service pursuant to open access transmission tariffs).

⁴⁷ Application at 18 (citing *EEI*, 116 FERC ¶ 61,280 at PP 47-48).

⁴⁸ Applicants note that the Commission has found that similar expenditures are a permissible resiliency element under the physical security plan implemented pursuant to the North American Electric Reliability Corporation's (NERC) Reliability (*continued ...*)

that the recovery of costs associated with the Proposed Transactions in Commission-jurisdictional rates will be addressed in separate filings under FPA section 205, to the extent applicable, or through any applicable formula rates and any necessary filings or informational filings associated with those formula rates.⁴⁹

32. Applicants claim that, by participating in the RESTORE Agreement to pool resources and share Spare Equipment, each RESTORE Participant will achieve greater reliability at the same or lower cost than it would have incurred if it were to incur the entire burden of purchasing an equally sufficient amount of transformers on its own. Citing *EEI*, Applicants conclude that any rate impacts are more than offset by the value of the reliability gains provided, as well as the cost savings obtained by avoiding any individual effort.⁵⁰

ii. Commission Determination

33. Based on Applicants' representations, we find that the Proposed Transactions will not have an adverse effect on rates. As Applicants note, the RESTORE Agreement will enable a RESTORE Participant to achieve greater reliability at the same or lower cost than it would have if it were to incur the entire burden of purchasing an equally sufficient amount of transformers on its own. We agree and find that the Proposed Transactions will not have an adverse effect on rates.

d. Effect on Regulation

i. Applicants' Analysis

34. Applicants state that the transfers of Spare Equipment will not affect any RESTORE Participant's jurisdictional status, and all Commission-jurisdictional RESTORE Participants will continue to be subject to the Commission's regulations after the Proposed Transactions, as applicable. Further the Proposed Transactions do not affect the U.S. Securities and Exchange Commission's or state regulatory

authorities' regulation of Applicants and their affiliates, and that Applicants intend to abide by any applicable state regulatory requirements.

Standard CIP-014. *Id.* at 18-19.

⁴⁹ *Id.*

⁵⁰ *Id.* at 19 (citing *EEI*, 116 FERC ¶ 61,280 at P 26).

ii. Commission Determination

35. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap.⁵¹ As to whether a proposed transaction will have an effect on state regulation, the Commission explained in the Merger Policy Statement that it ordinarily will not set the issue of the effect of a proposed transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the proposed transaction. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission may set the issue for hearing and it will address such circumstances on a case-by-case basis.⁵² Based on Applicants' representations, we find no evidence that either state or federal regulation will be impaired by the Proposed Transactions. Finally, we note that no party alleges that regulation, state or federal, would be impaired by the Proposed Transactions, and no state commission has requested that the Commission address the issue of the effect on state regulation.

e. Cross-Subsidization

i. Applicants' Analysis

36. Applicants state that "the RESTORE Agreement does not place any encumbrances on utility assets for the benefit of an associate company."⁵³ Applicants state further that any transactions between regulated affiliate companies under the RESTORE Agreement would take place at Replacement Cost, as would any transactions between non-affiliated companies under the RESTORE Agreement. Applicants also note that the RESTORE Agreement does not contemplate any transactions with non-utility associate companies, and conclude that there is no reasonable opportunity for inappropriate cross-subsidization.⁵⁴

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

⁵² *Id.*

⁵³ Application at 19.

⁵⁴ Although Applicants commit to make informational filings that will include the information required by Part 33 of the Commission's regulations, we note that the Application does not include the verifications typically provided by FPA section 203

ii. Commission Determination

37. Based on Applicants' representations and the unique nature of the Proposed Transactions, we find that the Proposed Transactions 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. As Applicants explain, the RESTORE Agreement does not contemplate any transactions with non-utility associate companies, and the RESTORE Agreement establishes the price at which Proposed Transactions will occur. We also note that recovery of costs associated with the Proposed Transactions in Commission-jurisdictional rates will be addressed in separate filings under FPA section 205, or through any applicable formula rates and the necessary filings associated with those rates.⁵⁵

38. We find that Applicants have provided adequate assurance that the transactions will not result in cross-subsidization of a non-utility associate company in the same holding company as a RESTORE Participant or an encumbrance or pledge of utility assets. Our decision on this matter applies only to the facts in this case and in no way implies that future FPA section 203 applications may defer filing the required Exhibit M information. As to Applicants in this case, the Commission expects that such information will be submitted as part of the Informational Filings.⁵⁶

3. Other Considerations

39. Information and/or systems connected to the bulk power system involved in this transaction may be subject to reliability and cybersecurity standards approved by the Commission pursuant to FPA section 215.⁵⁷ 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,

⁵⁵ See *EEI*, 116 FERC ¶ 61,280 at P 31.

⁵⁶ See *id.* P 32.

⁵⁷ 16 U.S.C. § 824(o) (2012).

equipment, etc., must comply with all applicable reliability and cybersecurity standards. The Commission, NERC, or the relevant regional entity may audit compliance with reliability and cybersecurity standards.

40. 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 Transactions is based on such examination ability. In addition, applicants subject to the Public Utility Holding Company Act of 2005 (PUHCA 2005)⁵⁸ are subject to the record-keeping and books and records requirements of PUHCA 2005.

41. 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.⁵⁹ 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.

C. Waiver of the Affiliate Pricing Rules

1. Applicants' Request

42. Applicants explain that the RESTORE Agreement does not contemplate transactions between franchised public utilities and their market-regulated power sales affiliates or non-utility affiliates. Nevertheless, “for the avoidance of doubt and consistent with Commission precedent,”⁶⁰ Applicants request that the Commission grant waiver from the affiliate pricing restrictions under 18 C.F.R. § 35.44(b)(2), which limits the price of purchases of non-power goods and services by traditional franchised public utilities with captive customers from their market-regulated power sales affiliates or non-utility affiliates to prices that do not exceed market. Applicants note that the Commission has granted such waivers in the past, even outside of the declaratory judgment context.

⁵⁸ 42 U.S.C. § 16451 *et seq.* (2012).

⁵⁹ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005). *See* 18 C.F.R. § 35.42 (2017).

⁶⁰ Application at 17.

2. Commission Determination

43. The chief concern that gave rise to section 35.42(b)(2) is that “a franchised public utility and an affiliate may be able to transact in ways that transfer benefits from the captive customers of the franchised public utility to the affiliate and its shareholders.”⁶¹ The Commission explained that it sought to “ensure that captive customers of franchised public utilities do not inappropriately cross-subsidize the activities of non-utility affiliates (such as an affiliated construction services firm, real estate company, legal services companies, fuel supply companies, or other non-utility affiliates).”⁶² Although Applicants state that the RESTORE Agreement does not contemplate transactions between franchised public utilities and their market-regulated power sales affiliates or non-utility affiliates, they nevertheless request waiver of § 35.44(b)(2).

44. We grant the requested waiver of section 35.44(b)(2). Although the RESTORE Agreement does not currently contemplate transactions between franchised public utilities and their market-regulated power sales affiliates or non-utility affiliates, we believe that waiver of section 35.44(b)(2) is appropriate. In the absence of the RESTORE Agreement, a RESTORE Participant would have to purchase a new transformer at market price, assuming availability of such equipment, which is not assured. The RESTORE Agreement not only limits all purchases to a net cost-based price established by the agreement,⁶³ but, even where such prices exceed the market price, provides certainty regarding the availability of Qualifying Equipment, thereby eliminating the uncertainty of whether such equipment would be available after a Triggering Event. Moreover, without the RESTORE Agreement, in addition to paying market price, a RESTORE Participant would likely have to accept the long lead time associated with ordering a new transformer and experience degraded system reliability

⁶¹ *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264, at P 4, *order on reh’g*, Order No. 707-A, FERC Stats. & Regs. ¶ 31,272 (2008).

⁶² *Id.* P 23.

⁶³ *See supra* P 9 and note 22. *See also Grid Assurance II*, 154 FERC ¶ 61,244 at P 51 (“We agree with Grid Assurance that concerns that captive customers of franchised public utilities may inappropriately cross-subsidize the activities of non-utility affiliates should not be implicated by such cost-based sales, especially where the pricing is dictated by the terms of Subscription Agreement.”).

in the interim.⁶⁴ For these reasons, and given the unique and limited circumstances of the RESTORE Agreement, the Commission grants waiver of section 35.44(b)(2).

The Commission orders:

(A) The Proposed Transactions are hereby authorized, as discussed in the body of this order, subject to Applicants following through on their commitments, which we accept, to submit the Informational Filings.

(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 Transactions 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 Transactions.

(G) Applicants shall file, within 30 days following a Commission-jurisdictional transaction, the information required by Part 33 of the Commission's regulations, as discussed in the body of this order.

(H) Applicants shall file the second informational filing within six months after the close of a Commission-jurisdictional transactions, when the final terms of

⁶⁴ See *EEI*, 116 FERC ¶ 61,280 at P 45. Although in *EEI* the Commission did not address the specific concern covered by section 35.44(b)(2), the Commission recognized that the pricing under the STEP Agreement was at least comparable to the price STEP participants might have to pay at market.

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the transaction have been established, consistent with the terms of the RESTORE Agreement, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Document Content(s)

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