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

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

NV Energy, Inc. Docket No. EC13-113-000
Sierra Pacific Power Company
Nevada Power Company

ORDER AUTHORIZING INTERNAL CORPORATE REORGANIZATION

(Issued November 26, 2013)

1. On May 31, 2013, NV Energy, Inc. (NV Energy); Sierra Pacific Power Company (Sierra Pacific); and Nevada Power Company (Nevada Power) (collectively, Applicants) filed an application[1] under 203(a)(1)(B) of the Federal Power Act (FPA)[2] requesting authorization for an internal corporate reorganization under which Sierra Pacific will merge into Nevada Power (Proposed Transaction). The Commission has reviewed the Proposed Transaction under the Commission's Merger Policy Statement.[3] As discussed below, we will authorize the Proposed Merger as consistent with the public interest.

[1] Application for Approval of Internal Corporate Reorganization under Section 203 of the Federal Power Act (Application).

[2] 16 U.S.C. § 824b (2012).

[3] *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). *See also FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement). *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).

I. Background

A. Description of the Parties

2. Applicants state that Sierra Pacific is a vertically integrated public utility that generates, transmits and distributes electric energy throughout northern Nevada. Sierra Pacific operates a transmission system in northern Nevada and owns and operates approximately 1,500 megawatts (MW) of generation. Sierra Pacific provides transmission service pursuant to an open access transmission tariff (OATT) and provides wholesale power services to various customers within its service territory. Sierra Pacific also operates as a local distribution company and provides natural gas service to customers in Reno and Sparks, Nevada.

3. Applicants state that Nevada Power is a vertically integrated public utility that generates, transmits and distributes electric energy in Las Vegas and surrounding areas in southern Nevada. Nevada Power operates a transmission system in southern Nevada and owns and operates approximately 4,537 MW of generation. Nevada Power provides transmission service pursuant to an OATT and provides wholesale power services to various customers within its service territory.

4. Both Sierra Pacific and Nevada Power are owned by NV Energy, a public utility holding company. Sierra Pacific and Nevada Power do business as NV Energy in Nevada.

B. Description of the Proposed Transaction

5. Applicants state that the Proposed Transaction is an internal corporate reorganization. Pursuant to the Plan of Merger and Merger Agreement (Merger Agreement), Nevada Power, as the surviving corporation, will assume all debts, liabilities, FERC-jurisdictional contracts, and assets of Sierra Pacific.[4]

6. Applicants state that, since the 1999 merger that resulted in the affiliation of Sierra Pacific and Nevada Power,[5] the two companies have had no direct interconnection between their regulated service territories, and have operated as two separate balancing authority areas (BAAs).[6] Applicants further state that, in January 2006, Applicants

[4] Application at 10. Applicants state that Nevada Power, the surviving company, will amend its articles of incorporation to change its name to NV Energy Operating Company.

[5] *Sierra Pac. Power Co. and Nevada Power Co.*, 87 FERC ¶ 61,077 (1999), *reh'g denied*, 88 FERC ¶ 61,058 (1999) (1999 Merger Order).

[6] Application at 4.

announced a plan that proposed to interconnect the Nevada Power and Sierra Pacific systems through the construction and operation of the One Nevada Transmission Line, known as "ON Line."[7] Applicants elected to pursue the ON Line as a joint development project with Great Basin Transmission, LLC (Great Basin), with which Applicants have executed a Transmission Use and Capacity Exchange Agreement (TUA) approved by the Commission.[8] Under the terms of the TUA, the ON Line portion of the project (referred to as "Phase 1") is a 235-mile, 500 kilovolt transmission line from northern Nevada at the Robinson Summit Substation, south to Nevada Power's Harry Allen substation. Phase 1 will be jointly owned by Applicants, which collectively own a 25 percent ownership interest, and Great Basin, which owns a 75 percent ownership interest.[9] The TUA also provides for the development of separate northern and southern extensions of the ON Line (referred to as "Phase 2") at Great Basin's option. Applicants state that, following completion of Phase 1, Applicants will have the right to 100 percent of the ON Line capacity, including that associated with Great Basin's ownership share, until the Phase 2 facilities are built.[10]

7. Applicants state that the ON Line was originally expected to be completed and in service by December 31, 2012.[11] However, Applicants state that due to certain delays, the in-service date of the ON Line is now anticipated by December 31, 2013.[12]

II. Notice of Filing and Responsive Pleadings

8. Notice of the Application was published in the *Federal Register*, 78 Fed. Reg. 34,658 (2013), with interventions and protests due on or before July 30, 2013.

9. Timely motions to intervene were filed by Truckee Donner Public Utility District, Bonneville Power Administration, Nevada Cogeneration Associates #1 and Nevada Cogeneration Associates #2, Cargill Power Markets LLC, the Barrick Mines, and Plumas-Sierra Rural Electric Cooperative.

10. Timely motions to intervene and comments were filed by Deseret Generation and Transmission Co-operative, Inc. (Deseret) and the Office of the Nevada Attorney

[7] *Id.* at 5, n.1.

[8] *Id.* at 6 (citing *Nevada Power Co.*, 133 FERC ¶ 61,166 (2010)).

[9] *Id.* at 6.

[10] *Id.* at 7.

[11] *Id.* at 8.

[12] *Id.* at 9.

General, Bureau of Consumer Protection (Nevada BCP). The Public Utilities Commission of Nevada (Nevada Commission) filed a notice of intervention, comments and request to file supplemental comments. The Colorado River Commission of Nevada and the Southern Nevada Water Authority (River Commission and Water Authority) filed a timely motion to intervene and comments or, in the alternative, protest. Timely motions to intervene and protest were filed by Las Vegas Power Company, LLC (Las Vegas Power) and Ormat Nevada Inc. and ORNI 47 LLC (together, Ormat).

11. Applicants filed an answer on August 14, 2013.

12. Liberty Utilities (CalPeco Electric) LLC (Liberty Utilities) filed a motion to intervene out-of-time on September 30, 2013.

13. Applicants submitted supplemental information on October 21, 2013.

III. Discussion

A. Procedural Issues

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the notice of intervention and timely unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,[13] the Commission will grant Liberty Utilities' unopposed, late-filed motion to intervene, given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[14] prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept Applicants' answer because it has provided information that assisted us in our decision-making process.

B. Standard of Review under Section 203

16. Section 203(a)(4) of the FPA requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest. The Commission's analysis of whether a transaction will be 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.[15] Section 203(a)(4) also requires the

[13] 18 C.F.R. § 385.214(d) (2013).

[14] 18 C.F.R. § 385.213(a)(2) (2013).

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

Commission to find that the 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."[16] The Commission's regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.[17]

C. Analysis under Section 203

1. Effect on Competition

17. Applicants state that the Proposed Transaction will have no adverse effect on competition, noting that the Commission has consistently held that internal corporate reorganizations involving entities that are already affiliated do not have adverse effects on competition.[18]

a. Effect on Horizontal Competition

i. Applicants' Analysis

18. Applicants assert that, because no generating assets will be entering or leaving the NV Energy corporate family as a result of the Proposed Transaction, no horizontal competitive screen analysis is required under the Commission's regulations.[19] Nevertheless, noting that the Nevada Commission is required under Nevada law to undertake an analysis of the effects of the Proposed Transaction on competition in the markets for energy services and products, Applicants filed an "abbreviated" competitive analysis focused on the effect of the merger of the two BAAs in which Nevada Power and Sierra Pacific currently operate (based on completion of the ON Line) in terms of access to competitive supply and relevant market conditions and regulations that prevent the Applicants from exercising market power in either wholesale or retail markets.[20]

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[16] 16 U.S.C. § 824b(a)(4) (2012).

[17] 18 C.F.R. § 33.2(j) (2013).

[18] Application at 12 (citing, among other decisions, *Ameren Corp.*, 131 FERC ¶ 61,240, at P 18 (2010)).

[19] *Id.* at 13 (citing 18 C.F.R. § 33.3(a)(1)).

[20] *Id.* at 13 and Attachment C at 2.

19. Applicants explain that, under the Commission's typical analytical approach for analyzing wholesale markets, the focus is on the change in market concentration (as measured by the change in HHI) resulting from the combination of two unaffiliated companies within a "static" market definition.[21] In this regard, however, Applicants state that there is difficulty in examining HHI changes when the scope and size of the market change, such as will occur as a result of the Proposed Transaction, because the pre-transaction consists of two markets (i.e., two separate BAAs) while the post-transaction market consists of a single, combined market (or BAA).[22] As a result, Applicants state that the appropriate focus of the competitive analysis lies on some of the Delivered Price Test metrics but not on the change in HHI. More specifically, Applicants' competitive analysis focused on (i) whether parties in the two BAAs would have more or less competitive supplies as a result of the Proposed Transaction, (ii) whether the size of the resulting BAA market is more or less than either or both of the pre-transaction markets, and (iii) how concentrated is the resulting market.[23]

20. Based on this analytical approach, Applicants state that, due to the ON Line, customers in Northern Nevada will have the ability to import an additional 275 MW while customers in Southern Nevada will be able to import an additional 2 MW, benefiting from the additional ability to access external market supply.[24] Applicants also

[21] *Id.*, Attachment C at 9. The Commission's Appendix A analysis, also referred to as a Delivered Price Test or Competitive Analysis Screen, measures the pre- and post-transaction market shares, from which the market concentration or Herfindahl-Hirschman Index (HHI) change 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 but less than 1,800 points are considered to be moderately concentrated; and markets in which the HHI is greater than or equal to 1,800 points are considered to be highly concentrated. In a horizontal merger, an increase of more than 50 HHI points in a highly concentrated market or an increase of 100 HHI points in a moderately concentrated market fails its screen and warrants further review. Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,129; *see also Analysis of Horizontal Market Power under the Federal Power Act*, 138 FERC ¶ 61,109 (2012) (affirming the Commission's use of the thresholds adopted in the Merger Policy Statement).

[22] *Id.*, Attachment C at 11.

[23] *Id.* at 11-12.

[24] *Id.* at 12.

explain that the Proposed Transaction results in markets that are moderately concentrated in all but two season/load periods.[25] Applicants point to the market share of NV Energy, which ranges from one to 37 percent in the 10 season/load periods (without consideration of generation retirements). Applicants claim that these market shares are within tolerance levels accepted by the Commission in previous cases. Finally, Applicants note that, due to the ON Line, the overall market share is larger as measured by available economic capacity following the Proposed Transaction relative to the pre-ON Line Sierra Pacific market and larger for all season/load periods except the shoulder season relative to the pre-ON Line Nevada Power market.[26]

21. Applicants also point to other qualitative factors that address whether the Applicants will have the ability or incentive to withhold supplies in order to drive up prices in their market. First, Applicants note that both Sierra Pacific and Nevada Power rely on purchased power to serve a significant portion of their load. Second, Applicants note that neither Sierra Pacific nor Nevada Power has authority to make wholesale sales at market-based rates in their BAAs. Third, Applicants state that any margins from wholesale sales will be credited fully to retail customers through a fuel adjustment clause or other adjustment, so that NV Energy shareholders cannot profit from sales at higher prices. Lastly, Applicants state that Nevada Power has no wholesale requirements customers that are served under any long-term arrangement and, going forward, any short-term in-BAA opportunity sales will be at cost-based rates.[27]

ii. Protest

22. In its protest, Ormat states that Applicants' analysis begins with the flawed premise that the Proposed Transaction is merely a corporate reorganization. According to Ormat, in order to win approval for the 1999 merger of Sierra Pacific and Nevada Power, the applicants committed to the Nevada Commission to divest all of their generating assets in response to the restructuring requirements that were then in place in Nevada, and also stated that they did not intend to interconnect the Nevada Power and Sierra Pacific systems.[28] However, as Ormat notes, the companies never divested their generation assets and are now planning to integrate their operations through the ON Line.

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[25] *Id*. at 14.

[26] *Id*., Attachment C at 16.

[27] *Id*. at 14 - 15.

[28] Ormat at 9 (citing 1999 Merger Order, 87 FERC ¶ 61,077 at 61,333).

Thus, Ormat argues that the proper starting point for a competition analysis is to evaluate the Proposed Transaction as if it were a new combination of non-affiliates.[29]

23. Ormat also argues that Applicants' market concentration analysis is based on undocumented assumptions about simultaneous import limits and import and export capabilities into Nevada. Ormat notes that these assumptions could understate market concentrations and not accurately show the changes to HHI resulting from the Proposed Transaction. Ormat notes that the Applicants' "internal" analyses were not attached to the public version of the Application, and argues that the Commission should require Applicants to fully support this critical part of their analysis.[30] Ormat also notes that Applicants' analysis appears to assume that the market will have transmission access to the ON Line for imports and exports, but Applicants have failed to explain and support their assumptions and analysis. Further, Ormat notes that Applicants have not disclosed their claim in another proceeding to have the right to reserve 100 percent of their portion of post-Phase 2 ON Line capacity for native load needs.[31]

iii. Applicants' Response

24. Applicants argue that there is no precedent or factual basis for the Commission to treat the Applicants as non-affiliates, as requested by Ormat. Applicants argue that, regardless of how the Commission evaluated the 1999 merger, the Applicants are *now* affiliates and their consolidation raises no market power issues. They argue that the Proposed Transaction neither eliminates competitors nor provides Applicants access to any new generation resources, and Applicants will offer open-access transmission service at OATT rates and terms ultimately approved by the Commission.[32]

25. With respect to the non-public workpapers supporting Applicants' competitive analysis (filed as Attachment C to the Application), Applicants state that parties could request access to any non-public information by executing the protective agreement filed as Attachment D to the Application. Applicants argue that Ormat cannot argue that it was denied access to non-public information if it did not bother to submit the protective agreement. Applicants also state that their economic consultant did, in fact, explain the inputs for her analysis in her affidavit. Finally, Applicants argue that their consultant analyzed energy imports from markets that are first tier to Nevada Power and Sierra

[29] *Id.* at 10.

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

[31] *Id.* at 11-12, 14-16. Ormat quotes statements made by Applicants in Docket No. ER13-1724-000.

[32] Applicants Answer at 14-15.

Pacific and would be delivered over external interfaces. Since ON Line will be an internal line once the companies operate as a single BAA, Applicants argue that the use of the ON Line capacity for its own native load is not relevant to the consultant's analysis of imports over the companies' external interfaces.[33]

iv. Commission Determination

26. In analyzing whether a transaction will adversely affect competition, the Commission examines its effects on concentration in the generation markets or whether the transaction otherwise creates an incentive to engage in behavior harmful to competition, such as withholding of generation (horizontal concerns). The Commission's regulations require the submission of a "horizontal Competitive Analysis Screen if, as a result of the proposed transaction, a single corporate entity obtains ownership or control over the generating facilities of previously unaffiliated merging entities."[34] In this case, the merger between Sierra Pacific and Nevada Power is an internal reorganization of two utilities that are already affiliated within the same holding company system. Hence, the Proposed Transaction will not result in any concentration in the generation markets and will not change the existing competitive incentives. Applicants explain that they provided a competitive analysis at Attachment C, which was prepared to fulfill a filing requirement in its application to the Nevada Commission. We note that the Commission's regulations do not require Applicants to file such an analysis in connection with an internal corporate reorganization such as the Proposed Transaction. Therefore, we make no findings regarding the competitive analysis. Given this, we will not address Ormat's specific objections to the manner in which Applicants' economic consultant prepared Attachment C.

27. Ormat would have the Commission evaluate the Proposed Transaction as if Sierra Pacific and Nevada Power were not affiliated. Ormat's argument is predicated on the Commission's finding in the 1999 Merger Order that the affiliation of Nevada Power and Sierra Pacific did not pose any competitive concerns, based on the Commission's understanding at that time that the two companies intended to divest their generation assets as required by the Nevada Commission as part of Nevada's electric retail restructuring process. As noted, the generation divestiture was never completed.

28. At the time of the 1999 merger, Nevada had enacted legislation requiring utilities in Nevada to divest their generation. In furtherance of that process, Nevada Power entered into agreements for the sale of certain of its generation units, and filed applications under section 203 with the Commission in Docket Nos. EC01-66-000 and EC01-73-000, as well as with the Nevada Commission. In April 2001, however, in

[33] *Id.* at 18.

[34] 18 C.F.R § 33.3(a)(1) (2013).

response to the Western energy crisis, the Nevada legislature passed a law that prohibited generation divestiture before 2003 and halted industry restructuring in Nevada. Nevada Power and the Nevada Commission independently informed the Commission of these developments in letters filed in June 2001 in the merger docket (Docket No. EC99-1-000) as well as in the two related section 203 dockets involving the proposed sales of certain of Nevada Power's generating plants.[35] The Nevada Commission explained in its notice that, under the new law, the Nevada Commission was required to change or vacate any Nevada Commission orders authorizing or requiring generation divestiture and to take all appropriate action with FERC and other federal agencies consistent with the prohibition on divestiture.

29. In light of these developments, in September 2003, Nevada Power asked the Commission to terminate the proceedings in Docket Nos. EC01-66-000 and EC01-73-000 because the sales agreements that were part of the divestiture process had been terminated. While the Commission did not take any subsequent action in response to these developments in the merger docket (Docket No. EC99-1-000), in a delegated letter order issued on March 1, 2005, the Commission accepted Nevada Power's request to withdraw the divestiture applications (in Docket Nos. EC01-66-000 and EC01-73-000).[36] Under these circumstances, we see no reason to consider the competitive impacts of the Proposed Transaction as if Nevada Power and Sierra Pacific were not already affiliated. Nevertheless, in the absence of any evidence suggesting that the corporate merger of Nevada Power and Sierra Pacific would, in and of itself, raise competitive concerns, there is no reason to deny the Proposed Transaction. In this regard, we note that both the Applicants' approach to analyzing the positive competitive impacts of the Proposed Transaction and Ormat's speculations on potential adverse competitive effects rely, at least to some extent, upon matters that are not even before us in this proceeding, namely, completion of the ON Line and combination of Nevada Power's and Sierra Pacific's operations in one BAA.

b. Effect on Vertical Competition

i. Applicants' Analysis

30. Applicants state that the Proposed Transaction will have no adverse effect on vertical competition. Applicants state the Proposed Transaction will not result in the

[35] *See* Nevada Commission Letter to Secretary Boergers, Docket Nos. EC99-1-000, *et al*. (June 6, 2001); Nevada Power Letter to Secretary Boergers, Docket No. EC99-1-000 (June 11, 2001).

[36] *Nevada Power Co.*, Docket Nos. EC01-66-000 and EC01-73-000 (Mar. 1, 2005) (delegated letter order re withdrawal of section 203 application).

Applicants owning or controlling any new entities that provide inputs to electricity products and/or new entities that provide generation products.[37]

ii. Protests

31. Ormat argues that Applicants neglected to mention that they intended to keep all of their post-Phase 2 On Line capacity for themselves, while offering competitors only transitory conditional firm service, which they intend to take away as soon as Phase 2 of the ON Line is completed.[38] Ormat states that there are several reasons to doubt Applicants' claim that there is no ON Line capacity available for competitors. First, Ormat argues that NV Energy has provided no support in the Application and insufficient evidence in its other recent filings for its claim to ON Line capacity to serve its native load.[39] According to Ormat, NV Energy has assured the Commission that it requires the ON Line capacity to meet its existing native load needs, yet it assumes for purposes of analyzing third-party requests that it will need the capacity "to meet undefined system and future native load needs."[40] Further, Ormat argues that NV Energy is attempting "to skirt the vertical market power issue" and the "closely related horizontal market power concerns it raises" by arguing that transmission access issues are beyond the scope of this proceeding.[41] Finally, noting NV Energy's contentions in other proceedings that it needs the ON Line capacity for economic dispatch of designated network resources of the combined system, Ormat claims that there is nothing to prevent NV Energy from "undesignating" any of this generation at any time to suit its "shifting commercial interests."[42] Ormat suggests that, given Applicants' "vague plans" about using ON Line while denying others firm access to it, it is not hard to imagine NV Energy engaging in a strategy to make ON Line capacity available to its merchant function to sell power into California while foreclosing competitors from similar opportunity. Ormat argues that NV Energy could change its fleet at any time after approval, and import energy for its native load, while freeing its merchant function to use ON Line capacity for off-system sales.[43]

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[37] Application at 16.

[38] Ormat at 13.

[39] *Id*. at 14-15. As previously noted, *supra* n.31, Ormat quotes statements made by Applicants in Docket No. ER13-1724-000.

[40] *Id.* at 15.

[41] *Id*. at 16.

[42] *Id.* at 17.

[43] *Id.* at 17-18.

32. Ormat states that the Commission should require Applicants to do one of two things. First, NV Energy should submit a new Delivered Price Test for each destination market assuming NV Energy's exclusive use of ON Line. Or, second, NV Energy should make ON Line capacity available to third parties for long-term firm transmission service. Ormat argues that if a new Delivered Price Test shows screen violations, the Commission should condition acceptance upon making sufficient ON Line capacity available to the market to mitigate the violations.[44]

33. River Commission and Water Authority argue that NV Energy has not recognized the need to provide capacity over the ON Line to its OATT network customers. They argue that this could affect competition in the region. Additionally, River Commission and Water Authority state that the Commission should consider proposed changes to retail access terms and conditions of NV Energy's OATT, or a lack of necessary changes to executed service agreements, and whether these could create barriers to participation in Nevada markets. River Commission and Water Authority state that the Commission should require Applicants to specifically commit as part of their reorganization to not discriminate against the ability of existing or prospective transmission customers or their agents to secure third party open access service over the combined system.[45]

iii. Applicants' Response

34. Applicants note that ON Line issues are outside the scope of this proceeding. Applicants state that they have no ability to exercise vertical market power. They state that upon consummation of the Proposed Transaction, they will provide open-access transmission service subject to Commission-approved rates and terms. Applicants argue that Ormat's arguments about potential future uses of the ON Line are speculative and provide no bases for a finding that the Proposed Transaction raises vertical market power issues.[46]

iv. Commission Determination

35. In transactions combining electric generation assets with inputs to generating power (such as natural gas, transmission, or fuel), competition can be harmed if the transaction increases a firm's ability or incentive to exercise vertical market power in wholesale electricity markets (vertical concerns). Here, Applicants have shown that the Proposed Transaction does not raise any of these concerns, as the Proposed Transaction

[44] *Id.* at 18-19.

[45] River Commission and Water Authority at 10.

[46] Applicants Answer at 19-20.

does not involve any new combination of any new entities that provide inputs to electricity products and/or new entities that provide generation products.[47]

36. We find that the competitive concerns Ormat and River Commission and Water Authority raise regarding access to the ON Line are beyond the scope of this proceeding. As we discuss further below, the ON Line will be constructed and put into service regardless of whether or not the Proposed Transaction is consummated. Thus, regardless whether the Proposed Transaction is consummated, the rates, terms, and conditions of transmission service on the ON Line will be governed by NV Energy's OATT. Consequently, these competitive concerns involving the ON Line would be more appropriately addressed in proceedings focusing on NV Energy's OATT.

2. Effect on Rates

a. Applicants' Analysis

37. Applicants state that the Proposed Transaction will have no adverse effect on wholesale power sales rates as neither Sierra Pacific nor Nevada Power has in place any wholesale contracts with formula rates that would automatically adjust as a result of the Proposed Transaction. Applicants state that should Sierra Pacific or Nevada Power seek changes to the rates or terms under any existing wholesale power sales contracts, they will be required to seek approval of those changes through an FPA section 205 proceeding.[48]

38. Applicants state that the Proposed Transaction will not have an adverse impact on transmission rates under the Sierra Pacific's or Nevada Power's OATTs, which currently specify separate zonal rates for each of Sierra Pacific and Nevada Power transmission systems.[49] Additionally, Applicants state that access to Sierra Pacific's and Nevada Power's respective transmission facilities are and will continue to be governed under an OATT on file with the Commission. The two zones, as defined in the OATT, are each of the two distinct BAAs in which transmission facilities are booked, respectively, to the accounts of Sierra Pacific (Zone A) and Nevada Power (Zone B).[50]

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[47] Ormat's reliance on *Westar Energy, Inc.*, 115 FERC ¶ 61,228, at P 71, *order on reh'g*, 117 FERC ¶ 61,011 (2006); and *Ohio Edison Co.*, 81 FERC ¶ 61,110, at 61,406-07 (1997), *reh'g denied*, 85 FERC ¶ 61,203 (1998) is misplaced because each of those transactions involved new combinations of generating and transmission assets.

[48] Application at 17.

[49] *Id.*

[50] *Id.*

39. Applicants state that concurrently with the Application, the companies will be filing a single system transmission rate for service beginning January 1, 2014, or on such later date that the ON Line is placed into service.[51] Applicants state that the single-system transmission rate will account for the costs of constructing the ON Line as well as the lease payment obligations. Applicants state that the new OATT rates are necessitated by the installation of the ON Line, which will occur irrespective of the Proposed Transaction.[52]

40. Applicants commit to hold customers harmless from transaction-related costs for a period of five years.[53] Applicants state that if they seek to recover "transactional costs" in future Commission-jurisdictional rates, they will present the Commission with information showing the operation of this hold harmless commitment.[54]

b. Protest

41. River Commission and Water Authority state that the Commission should consider broader rate impacts associated with the inclusion of the ON Line in the analysis under section 203.[55] River Commission and Water Authority state that rates for transmission and ancillary services will go up significantly and the service provided and the opportunities afforded to transmission customers to use the new transfer capacity made available through ON Line is not commensurate with the proposed higher tariff rates that will be levied.[56] River Commission and Water Authority contend that the ON Line will be for the benefit of NV Energy's native load and not for the benefit of OATT customers.

42. Deseret states that it intervened in the rate filings for ON Line, arguing that they would produce an unjust and unreasonable increase in rates. Deseret argues that the Commission should address these rates in a manner coordinated with this section 203 proceeding. Deseret states that the benefits from the ON Line that will accrue to other than retail load will be minimal. Deseret argues that if this is the case, the Commission should affirm that if another network customer requests new high voltage transmission

[51] Applicants filed the request in Docket Nos. ER13-1605-000 and ER13-1607-000.

[52] Application at 18.

[53] *Id.*

[54] *Id.* at 19.

[55] River Commission and Water Authority at 8.

[56] *Id.* at 8 (citing *NV Energy, Inc.*, 144 FERC ¶ 61,105 (2013)).

facilities for its own benefit, NV Energy should be required to build those facilities. Deseret argues that this would demonstrate true parity and comparable service among retail native load and non-native network customer load.[57]

43. Las Vegas Power argues that Applicants' rate commitments are ineffective because they make no commitment with respect to the ON Line costs, which is the project that the reorganization is built around. Las Vegas Power states that the Commission should reject Applicants' suggestion that ON Line costs should not be deemed to be transaction-related because Applicants committed to construct and pay for it prior to the Proposed Transaction. Las Vegas Power points to the *UtiliCorp* decision, where it states the Commission specifically conditioned its approval under section 203 of the FPA on the applicants committing to cover the costs of transmission facilities required to interconnect their systems.[58]

44. Las Vegas Power argues that acceptance of Applicants' argument would encourage applicants to front-load costs to avoid their inclusion in a merger application, especially those applicants who are already affiliated. Las Vegas Power notes that the proposed reorganization could not be feasible without the ON Line, as Applicants themselves make clear in their filing.[59]

45. Las Vegas Power also disputes Applicants' claim that there has been significant entry of merchant generators in the Southwest and Northwest regions. Las Vegas Power notes that there has been little, if any, recent new generation development in the Nevada Power balancing authority area, and that most of the new generation is owned by Nevada Power. As such, Las Vegas Power requests that the Commission condition any approval of the transaction on Applicants holding customers harmless from all transaction-related costs, including, but not limited to, all costs associated with the ON Line.[60]

c. Applicants' Response

46. Applicants argue that rate issues relating to ON Line are beyond the scope of this proceeding, and that the Commission has traditionally rejected attempts to raise issues

[57] Deseret at 7.

[58] Las Vegas Power at 8 (quoting *UtiliCorp United Inc.*, 92 FERC ¶ 61,067, at 61,236, *on reh'g*, 93 FERC ¶ 61,303 (2000) (*UtiliCorp*)).

[59] *Id.* at 9.

[60] *Id.* at 10.

that could be addressed in another forum.[61] Applicants note that there are four open dockets addressing the issues raised by protestors, and the Commission should therefore reject the attempt to interject those issues here.

47. With respect to Las Vegas Power's arguments, Applicants state that Las Vegas Power wants to be excused from cost responsibility for ON Line while its affiliate, Great Basin, will benefit from payments for ON Line usage from NV Energy. Applicants note that the Commission "looks at the effect of the transaction on rates, not the rate changes that may occur regardless of the transaction."[62] Applicants point to the Commission's decision in *BHE Holdings, Inc.*, in which the Commission rejected an attempt to include the costs of a new transmission line and RTO integration as related to the transaction for the purposes of section 203 analysis. Applicants argue that the costs of the ON Line are not an effect of the Proposed Transaction, and will be incurred whether or not Nevada Power and Sierra Pacific are merged.

48. Applicants distinguish the *UtiliCorp* case by noting that in that case, the applicants were three unaffiliated utilities who planned to integrate their systems through the construction of new transmission facilities. In that case, the new facilities would not occur but for the planned merger. Applicants reiterate that the ON Line will be completed regardless of the merger, and that construction began nearly three years before the Application in this proceeding was filed.[63]

49. Applicants argue that Las Vegas Power's arguments on incentives are backwards, as it is not credible to suggest that Applicants would choose to build a huge facility merely to allow it to merge its already wholly-owned subsidiaries. Applicants note that the decision to build ON Line was based on multiple factors, including the desirability of integrating Nevada's northern and southern grids, improving reliability, and increasing access to renewable resources. These advantages will occur regardless of the merger of Nevada Power and Sierra Pacific, which is intended to produce a more streamlined, less complex corporate structure, and reduced regulatory burden. Applicants also note that the Commission will still have the ability to examine the effect of the ON Line on transmission rates through the ongoing rate proceeding in Docket No. ER13-1605-000.[64]

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[61] Applicants Answer at 6 (citing *FirstEnergy Generation Corp.*, 141 FERC ¶ 61,239 (2012); *BHE Holdings, Inc.*, 133 FERC ¶ 61,231 (2010); *ALLETE, Inc.*, 129 FERC ¶ 61,174 (2009)).

[62] *Id.* at 8 (quoting *Appalachian Power Co.*, 143 FERC ¶ 61,074, at P 35 (2013)).

[63] *Id.* at 10.

[64] *Id.* at 11-12.

d. Commission Determination

50. We find that the Proposed Transaction will not have an adverse effect on rates. As Applicants note, neither Sierra Pacific nor Nevada Power have formula rates or wholesale contracts that will be altered by consummation of the Proposed Transaction.

51. Protestors argue that the Commission should consider the costs of the ON Line when considering the effect on rates of the Proposed Transaction. We disagree. The ON Line will be constructed and put into service regardless of whether or not the Proposed Transaction is consummated. Generally, the Commission does not address the rate treatment of assets in section 203 proceedings, but instead reserves such discussion for a section 205 proceeding.[65] We note that our analysis of rate effects under section 203 of the FPA differs from the analysis of whether rates are just and reasonable under section 205 of the FPA. Our focus here is on the effect that the Proposed Transaction will have on rates, whether that effect is adverse, and whether any adverse effect will be offset or mitigated by benefits that are likely to result from the transaction.[66] The Commission has addressed rate issues related to new transmission facilities in cases involving the combination of unaffiliated entities, where new transmission was necessary to integrate the two entities.[67] That circumstance is not the case here, where the entities are already affiliated and the transmission line has already been approved.

52. We accept Applicants' commitment to hold customers harmless for five years from costs related to the Proposed Transaction. We interpret Applicants' hold harmless commitment to apply to all transaction-related costs, including costs related to consummating the Proposed Transaction and transition costs (both capital and operating) incurred to achieve merger synergies.

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[65] *See FirstEnergy Generation Corp.*, 141 FERC ¶ 61,239 at P 32 ("Any issues related to the rate treatment of the assets at issue will be addressed in a future rate proceeding"); *BHE Holdings, Inc.*, 133 FERC ¶ 61,231 at P 40 (arguments concerning integration of systems are not appropriate in a section 203 proceeding and must be analyzed in a section 205 proceeding); *ALLETE, Inc.*, 129 FERC ¶ 61,174 at P 19 (analysis of rate effects under section 203 is distinct from whether rates are just and reasonable under section 205).

[66] *See, e.g.*, Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,123 (noting that an increase in rates "can be consistent with the public interest if there are counterveiling benefits that derive from the transaction"); *see also ITC Midwest LLC*, 133 FERC ¶ 61,169, at P 24 (2010); *ALLETE, Inc.*, 129 FERC ¶ 61,174 at P 19; *Startrans IO, L.L.C.*, 122 FERC ¶ 61,307, at PP 25-28 (2008); *ITC Holdings Corp.*, 121 FERC ¶ 61,229, at PP 120-128 (2007).

[67] *See UtiliCorp*, 92 FERC ¶ 61,067 at 61,236.

53. If Applicants seek to recover transaction-related costs through their wholesale power or transmission rates within five years after the Proposed Transaction is consummated, they must submit a compliance filing that details how they are satisfying the hold harmless requirement. If Applicants seek to recover transaction-related costs in an existing formula rate that allows for such recovery within such five-year period, then that compliance filing must be filed in the section 205 docket in which the formula rate was approved by the Commission, as well as in the instant section 203 docket.[68] We also note that, if Applicants seek to recover transaction-related costs in a filing within such five-year period, whereby Applicants are proposing a *new* rate (either a new formula rate or a new stated rate), then that filing must be made in a *new* section 205 docket as well as in the instant section 203 docket.[69] The Commission will notice such filings for public comment. In such filings, 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 transaction, in addition to any requirements associated with filings made under section 205. Such a hold harmless commitment will protect customers' wholesale and transmission rates from being adversely affected by the Proposed Transaction.[70]

54. Accordingly, in light of these considerations and requirements, we find that the Proposed Transaction will not adversely affect rates.

3. Effect on Regulation

a. Applicants' Analysis

55. Applicants state that the Proposed Transaction will have no adverse effect on regulation. Applicants state that the renamed surviving company, NV Energy Operating Company, will continue to be a public utility as defined in section 201(e) of the FPA,[71] and will remain subject to the Commission's jurisdiction.[72] Applicants state that

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[68] In this case, the filing would be a compliance filing in both the section 203 and 205 dockets.

[69] In this case, the filing would be a compliance filing in the section 203 docket, but a rate application in the section 205 docket.

[70] *See ITC Midwest LLC, et al.*, 133 FERC ¶ 61,169 at PP 24-25; *FirstEnergy Corp., et al.*, 133 FERC ¶ 61,222 at P 63; and *PPL Corp., et al.*, 133 FERC ¶ 61,083, at PP 26-27 (2010).

[71] 16 U.S.C. 824(e).

[72] Application at 19.

following the Proposed Transaction, NV Energy's retail electric and gas operations will be subject to regulation by the Nevada Commission.

b. Comments

56. The Nevada BCP notes that the Nevada Commission's review of the proposed consolidation of Sierra Pacific and Nevada Power will likely not be complete before the Commission acts on this Application. As such, the Nevada BCP asks the Commission to affirm that any approval of this Application does not preempt the Nevada Commission's authority to review the proposed consolidation.[73]

57. The Nevada Commission states that it takes no position in this proceeding on whether the Commission should grant approval, but that it believes the Commission should coordinate with the Nevada Commission's proceedings on the merger. The Nevada Commission initially noted that it will not make a determination on Sierra Pacific and Nevada Power's joint application until the end of March 2014. The Nevada Commission states that given this timing, the Commission should consider postponing action on the instant application. If the Commission does not delay action, the Nevada Commission requests that it issue a narrow order authorizing but not requiring implementation of any relief to be granted.[74]

58. River Commission and Water Authority states that the Commission should consider (and accommodate) the positions expressed by the Nevada Commission. They state that Nevada Commission's requests are reasonable, given the Applicants' decision to delay submitting applications to the Nevada Commission until late May and July of this year. River Commission and Water Authority also argue that the Commission should consider the instant application together with the merger filing in Docket No. EC13-128-000 involving MidAmerican Energy Holding Companies, as that proposal is another important part of the transition of the Nevada Power transmission system into a consolidated, physically connected family of utilities.[75]

c. Applicants' Response

59. In response to the Nevada Commission, Applicants state that they have not requested expedited treatment from the Commission, and that sufficient time thus exists for the Commission to consider any information it deems necessary for its decision-making. Applicants also note that state and federal merger proceedings typically run in

[73] Nevada BCP at 4.

[74] Nevada Commission at 9.

[75] River Commission and Water Authority at 12.

parallel with one another, and it is the Commission's policy generally not to delay its rulings to wait on other jurisdictions to act.[76] However, Applicants state that they have no objections should the Commission defer its consideration of the Proposed Transaction.[77]

d. Commission Determination

60. We find no evidence that either state or federal regulation will be impaired by the Proposed Transaction. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap at the federal or state level.[78] We find that the Proposed Transaction will not create a regulatory gap at the federal level because the Commission will retain its regulatory authority over the companies after the Proposed Transaction is consummated. As to the state level, the Commission explained in the Merger Policy Statement that it ordinarily will not set the issue of the effect of a transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the 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.[79] The Nevada Commission has stated that it has authority to act on the Proposed Transaction, alleviating the need for a hearing here. With respect to the concerns raised by commenters, we note that our order granting approval for the Proposed Transaction does not preempt any state proceedings and that the timing of our determination does not have any impact on state jurisdiction.

4. Cross-subsidization

a. Applicants' Analysis

61. Applicants state that the Proposed Transaction does not create any new marketing affiliates with non-captive customers, transfer utility assets to or from such marketing affiliates, or require Sierra Pacific or Nevada Power to issue debt on behalf of or encumber utility assets on behalf of such marketing affiliates. Applicants state that upon

[76] Applicants Answer at 3-4.

[77] Applicants supplemental information at 1.

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

[79] *Id*. at 30,125.

consummation of the Proposed Transaction, all debt of Sierra Pacific will be assumed by Nevada Power and consolidated into Nevada Power debt.[80]

62. Applicants note that except for the transfer of debt as described above, the Proposed Transaction will not result in, at the time of the Proposed Transaction or in the future: (1) any transfers 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 issuances 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 facilities, for the benefit of an associate company; or (4) any new affiliate contracts 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 services agreements subject to review under sections 205 and 206 of the FPA.[81]

b. Commission Determination

63. Based on the representations as presented in the Application, we find that the Proposed Transaction will not result in an inappropriate cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company.

5. Accounting Issues

64. As noted above, Applicants commit for a period of five years to hold transmission and wholesale customers harmless from transaction-related costs, which we have interpreted to include all merger-related costs, including costs related to consummating the proposed transaction and merger costs incurred to integrate and achieve synergies. Although Applicants have not explained the nature, amount, or accounting for the merger-related costs subject to its hold harmless commitment, the Commission has previously stated that costs incurred to consummate a merger transaction are non-operating in nature and must be recorded in Account 426.5, Other Deductions.[82]

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[80] Application at 20.

[81] *Id*. at 20-21, Exhibit M.

[82] These costs may include, but are not limited to, internal and external third party costs for legal, consulting, and professional services incurred to consummate the merger. *See, e.g., Exelon Corp.,* 138 FERC ¶ 61,167, at P 133 (2012).

Additionally, the Commission has stated that integration costs and other operational costs incurred to achieve merger synergies costs are generally considered to be operating in nature and may be recorded in an operating expense account or capitalized in an asset account, as appropriate.[83] Nevertheless, Applicants' accounting for all merger-related costs does not permit recovery through Applicants' wholesale power or transmission rates during the hold-harmless period without first making a section 205 filing and receiving authorization from the Commission, consistent with the hold harmless requirements discussed above. Applicants must implement appropriate internal controls and procedures to ensure the proper identification, accounting, and rate treatment for all merger-related costs incurred prior to and subsequent to the merger.

65. In Attachment A to the Application, Applicants provided *pro forma* accounting entries to record the transfer of electric and gas plant assets, other assets and liabilities, and capital stock at their book value from Sierra to Nevada Power, which resulted from the merger. However, Applicants did not use Account 102, Electric Plant Purchased and Sold, to record the transfer of the plant assets, as required by Electric Plant Instruction (EPI) No. 5, Electric Plant Purchased or Sold.[84]

66. Account 102 is used as an interim control account to record all aspects of a transaction involving the acquisition or transfer of operating units or systems. The use of this account is an important accounting control that helps ensure that acquisitions and transfers of operating units or systems are properly accounted for, whether or not the entities involved in the transaction are members of the same corporate family. Therefore, we will require Applicants to record the transfer of the plant assets through Account 102, consistent with the instructions of EPI No. 5 of the Commission's Uniform System of Accounts. Applicants shall submit their proposed final accounting for the merger within six months after the merger is consummated. The accounting submission shall provide all merger-related accounting entries made to the books and records of Applicants, including merger consummation and integration costs, along with appropriate narrative explanations describing the basis for the entries.

6. Additional Issues

67. 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

[83] *See, e.g., Exelon Corp.*, 138 FERC ¶ 61,167 at P 133 and *Bangor Hydro Electric Company and Maine Public Service Company*, 144 FERC ¶ 61,030, at P 33 (2013).

[84] 18 C.F.R. Pt. 101 (2013).

characteristics the Commission relied upon in granting market-based rate authority.[85] To the extent that the foregoing authorization results in a change in status, Applicants are advised that they must comply with the requirements of Order No. 652. In addition, Applicants shall make any appropriate filings under section 205 of the FPA to implement the Proposed Transaction.

68. Information and/or systems connected to the bulk power system involved in this Proposed Transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to FPA section 215. Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information databases, 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, and the like, must comply with all applicable reliability and cyber security standards. The Commission, North American Electric Reliability Corporation, or the relevant regional entity may audit compliance with reliability and cyber security standards.

The Commission orders:

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

(B) Applicants shall submit their proposed final accounting for the merger within six months after the merger is consummated. The accounting submission shall provide all merger-related accounting entries made to the books and records of Applicants, along with appropriate narrative explanations describing the basis for the entries.

(C) Applicants must inform the Commission within 30 days of any material change in circumstances that departs from the facts the Commission relied upon in granting the Application.

(D) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts,

[85] *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005). *See* 18 C.F.R. § 35.42 (2013).

valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

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

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

(G) Applicants, to the extent that they have not already done so, shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction.

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.