UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Duquesne Light Holdings, Inc. Docket No. EC06-160-000
Duquesne Light Company
Duquesne Power, LLC
Duquesne Keystone, LLC
Duquesne Conemaugh, LLC
Monmouth Energy, Inc
DQE Holdings, LLC
DQE Merger Sub, Inc
DUET Investment Holdings Limited
GIF2-MFIT United Pty Limited
Industry Funds Management (Nominees)
Limited, as trustee of the IFM (International
Infrastructure) Wholesale Trust
CLH Holdings, GP

ORDER AUTHORIZING MERGER

(Issued December 22, 2006)

1. On September 6, 2006, the Duquesne Companies,[1] along with DQE Merger Sub, Inc. (Merger Sub), [2] Merger Sub's owner DQE Holdings LLC (Holdings),[3] and some of Holdings' investor-owners[4] (together with the Duquesne Companies, the Applicants)

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[1] Duquesne Light Holdings, Inc. (DL Holdings), its subsidiaries Duquesne Light Company (DLC), Duquesne Power, LLC (Duquesne Power), Duquesne Keystone, LLC (Duquesne Keystone), Duquesne Conemaugh, LLC (Duquesne Conemaugh), and Monmouth Energy, Inc. (Monmouth).

[2] Formerly known as Castor Merger Sub, Inc.

[3] Formerly known as Castor Holdings, LLC.

[4] DUET Investment Holdings Limited (DUET), GIF2-MFIT United Pty Limited (GIF2-MFIT United), IFM (International Infrastructure) Wholesale Trust (IFM Trust), acting through its trustee Industry Funds Management (Nominees) Limited (IFM Nominees), and CLH Holdings, GP (MIP).

filed an application under section 203 of the Federal Power Act (FPA)[5] requesting Commission approval of their proposed merger. The transaction involves the merger of Merger Sub with and into DL Holdings, with DL Holdings surviving and becoming a wholly owned subsidiary of Holdings. The Commission has reviewed the merger under the Commission's Merger Policy Statement[6] and will authorize it with minor conditions as consistent with the public interest, as discussed below.

I. Background

A. Description of the Applicants

1. Duquesne Companies

2. DL Holdings is a public utility holding company that owns various regulated and "unregulated" subsidiaries,[7] including DLC, Duquesne Power, DGC,[8] Monmouth, and Duquesne Light Energy, LLC (DLE).

3. DL Holdings' indirect subsidiaries DLC, DGC, Duquesne Power, and Monmouth have Commission authorized market-based rates (MBR). DLC, which purchases, transmits,[9] and distributes electric energy to customers in Pennsylvania, has no wholesale

[5] 16 U.S.C. § 824b (2000) (*amended by* Energy Policy Act of 2005 § 1289, Pub. L. No. 109-58, 119 Stat. 594, 982-83 (2005) (EPAct 2005)).

[6] *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (1996); FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); *see also, Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,983 (2000), FERC Stats. & Regs., Regulations Preambles July 1996-Dec. 2000 ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001) (*Merger Filing Requirements*); *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, 71 Fed. Reg. 28,422 (May 16, 2006); *order on reh'g*, Order No. 669-B, 71 Fed. Reg. 42,579 (July 27, 2006).

[7] The term "unregulated" is sometimes used to refer to a company with market-based rates.

[8] Duquesne Generation Company (DGC) holds two limited liability corporations, Duquesne Keystone and Duquesne Conemaugh.

[9] On January 1, 2005, DLC's transmission facilities were integrated into PJM.

customers. The Applicants state that DLC's retail customers have retail choice. Duquesne Power provides power to DLC to enable DLC to fulfill its state-imposed "provider-of-last-resort" obligation to retail customers. Duquesne Power does not own or control any electric generation, transmission, or distribution facilities in the Pennsylvania, New Jersey, and Maryland (PJM) market. Duquesne Keystone and Duquesne Conemaugh, which are held by DGC, were created to acquire minority undivided interests in two electric generation facilities in Pennsylvania. Monmouth is a wholly-owned indirect subsidiary of DL Holdings and owns a 10 MW generating facility fueled by landfill gas located in New Jersey, of which 7.5 MWs are committed for sale to Jersey Central Power and Light Co. (JCP&L) under a long-term agreement. Monmouth's MBR tariff contains an affiliate sales prohibition.

4. DLE, an electric generation supplier licensed by the Pennsylvania Public Utility Commission (PaPUC) to serve retail customers in Pennsylvania, owns no generation facilities and is not subject to the Commission's jurisdiction.

2. Investor Companies

5. Merger Sub is a wholly owned subsidiary of Holdings, and both were formed solely to enter into the Merger Agreement[10] and consummate the transactions contemplated by the Merger Agreement. Holdings, in turn, is owned by a consortium of investors (Consortium) that includes DUET, IFM,[11] MIP, GIF2-MFIT United, MTAA Super, and State Super. Neither Merger Sub nor Holdings owns or controls any energy or gas-related assets and they have conducted only activities incidental to their formation and in furtherance of the merger.

6. DUET owns and manages infrastructure businesses worldwide. MIP, owned by Macquarie Infrastructure Partners Canada, LP and Macquarie Infrastructure Partners A, LP, was formed to hold the investment in DL Holdings. GIF2-MFIT United is an investment vehicle. Applicants state that an affiliate, Macquarie Bank Limited (MBL),[12] of certain members of the Consortium – DUET, MIP, and GIF2-MFIT United – has only

[10] The Merger Agreement is in Exhibits I.1, Merger Agreement, and I.2, Amendment No. 1 of Applicants' filing.

[11] IFM Trust and IFM Nominees, together are IFM.

[12] MBL provides investment banking, financial markets, and retail financial services through affiliates and subsidiaries worldwide.

an indirect interest in energy-related assets through the management of investment vehicles.[13]

7. IFM Trust is a fund holding investments in international infrastructure assets. Along with its trustee IFM Nominees, IFM Trust is a subsidiary of Industry Fund Services Pty Ltd, a financial services provider. A sister fund of IFM Trust has an indirect interest through an investment vehicle in a wind power development company, with projects in Canada, California, and Arizona. However, Applicants claim that IFM does not exercise control over any of those projects or the wind power development company.

8. Applicants state that one member of the Consortium, MTAA Super,[14] has indirect, passive interests (through a limited partnership interest in an investment fund) in certain

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[13] These include: 1) transmission facilities in Michigan that are under the operational control of the Midwest Independent Transmission System Operator, Inc. (Midwest ISO), which, at the time of the Application's filing, were anticipated to be sold, and 2) a Hawaiian gas distribution company.

MBL owns Macquarie Canadian Infrastructure Management Ltd., which is the general partner of Macquarie Essential Assets Partnership (MEAP). MEAP holds an indirect limited partnership interest in Michigan Transco Holdings, LP (MTH, LP), which owns Michigan Electric Transmission Co., LLC (METC), which owns and operates approximately 5,400 miles of high-voltage transmission lines in Michigan. MEAP's interest in MTH, LP is held directly by Macquarie Transmission Michigan, Inc. (MTM) and NA Capital Holdings, Inc. (NA Capital), which each hold an 18 percent limited partnership interest in MTH, LP. The remaining interest in MTH, LP is owned by investors unaffiliated with MBL. Under a management services agreement, METC is managed by Trans-Elect, Inc., which is unaffiliated with MBL. METC's transmission assets are under the operational control of the Midwest ISO, while Trans-Elect Michigan LLC (TEM), which is also unaffiliated with MBL, is responsible for managing and operating MTH, LP's business. ITC Holdings Corp., in Docket No. EC06-123, proposed to acquire all of the outstanding equity interest in METC, including the interest held indirectly by MEAP. The Commission conditionally accepted that transaction. *See ITC Holdings Corp.*, 116 FERC ¶ 61,271 (2006); *order revising ordering paragraph*, 116 FERC ¶ 61,278 (2006). An affiliate of MBL, Macquarie Infrastructure Management (USA) Inc. manages Macquarie Infrastructure Company Trust, which owns its businesses and investments through Macquarie Infrastructure Co., LLC (collectively, MIC). MIC owns the Gas Company, LLC, a regulated retail gas distribution company serving Hawaii.

[14] MTAA Super is an Australian superannuation fund established in 1989 for members in the motor trades and allied industries, as well as the general public.

U.S.-based energy-related assets, but that the member does not exercise any control over the investment fund, its manager, or any of the assets. With the exception of certain hydroelectric facilities that sell all of their output (totaling approximately 32 MWs) under long-term contracts, the fund does not have interests in assets in the PJM control area. State Super is a collection of several superannuation funds established by the government of Australia for the benefit of public sector employees. State Super neither owns interests in electric generation or transmission assets located in the United States nor gas transmission or distribution assets located in the United States.

9. IFM Trust, GIF-2 MFIT United, DUET, and MIP own no energy-related assets in North America.

B. Description of the Merger

10. Merger Sub will merge with and into DL Holdings, with DL Holdings surviving and becoming a wholly owned subsidiary of Holdings. Holdings' and Merger Sub's obligations under the Merger Agreement are not conditioned upon their ability to obtain financing for the transaction. Financing for the merger consideration will come from equity funds provided by the Consortium, including $141 million in newly issued shares of DL Holdings contributed by DUET and IFM, and the issuance of debt securities. Neither DLC nor any other public utility subsidiary of DL Holdings will provide financing for the merger or pledge or encumber its assets in connection therewith. The companies anticipate completing the merger in the first quarter of 2007.

II. Notice and Responsive Pleadings

11. Notice of Applicants' filing was published in the *Federal Register*, 71 Fed. Reg. 54,984 (2006), with interventions and protests due on or before October 10, 2006.

12. Motions to intervene were filed by Public Citizen, Inc. and Citizen Power, Inc. (collectively, Public Citizen), Strategic Energy, LLC, and the Pennsylvania Office of Consumer Advocate. Public Citizen also filed a protest. On October 24, 2006, Applicants filed an answer.

III. Discussion

A. Procedural Matters

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest or answer unless otherwise

ordered by the decisional authority. We will accept the answer submitted by Applicants because it provides information that has assisted us in our decision-making process.

B. Standard of Review under Section 203

15. Section 203(a) of the FPA requires the Commission to approve a merger if the Commission makes two determinations. First, the Commission must determine that the merger or disposition will be consistent with the public interest.[15] This generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.[16] Second, the Commission must determine 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."[17] The Commission's regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in cross-subsidization or pledge or encumbrance of utility assets.[18]

C. Analysis under Section 203

1. Effect on Competition - Horizontal and Vertical Market Power

a. Applicants' Analysis

16. The Applicants claim that the merger does not create or enhance the ability or incentive of the Applicants, or any affiliate, to exercise market power and does not raise horizontal or vertical market power issues. They argue that the merger will not create any opportunity for any entity to exercise market power in generation, restrict potential downstream competitors' access to upstream supply markets, or increase potential competitors' costs. The merger is merely the transfer of control of DL Holdings and its public utility subsidiaries to Holdings and will not result in any increase in concentration

[15] 16 U.S.C. § 824b(a)(4), as amended by EPAct 2005.

[16] *See* Merger Policy Statement, 61 Fed. Reg. 68,595; Order No. 669, FERC Stats. & Regs. ¶ 31,200.

[17] 16 U.S.C. § 824b(a)(4), as amended by EPAct 2005.

[18] 18 C.F.R. § 33.2 (2006), as revised by Order No. 669-B at P 49.

in any relevant geographic market. The Applicants state that the Consortium members' principal energy and utility assets are outside the United States and that no member controls public utility assets in PJM, the relevant geographic market. Further, Applicants contend that Holdings and the Consortium's members do not own or control inputs into the production of electricity in the relevant market.

17. Applicants assert that MTAA Super's indirect passive interest in certain hydroelectric facilities in the PJM control area has no bearing on the competition analysis for several reasons. First, all of the output of these facilities is committed under long-term agreements.[19] Second, the total output of all of these units is only 32 MWs, which, in the PJM market, is *de minimis*. Third, MTAA Super cannot influence or control the output of the hydroelectric facilities, since it is only a passive investor in the fund that owns these units.

18. Applicants state that Holdings and the Consortium's members do not own or control any electric transmission facilities in the PJM market, nor do they own any interest in fuel delivery or supply facilities in the United States. While affiliates of MBL have a limited partnership interest in the partnership that owns METC, and METC owns electric transmission facilities located in Michigan, those facilities are under the operational control of the Midwest ISO, and in any event the interest is expected to be sold.[20] None of the other Consortium members own or control any electric transmission assets in the United States.

b. Commission Determination

19. Applicants have shown that the combination of their generation capacity will not harm horizontal competition in any relevant market. Holdings and the Consortium members' affiliated energy assets are limited to hydroelectric facilities that are a *de minimis* share of the generating capacity in PJM or any smaller relevant market within PJM. Therefore, the merger will not eliminate a competitor or materially increase market concentration in the relevant market.

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[19] Applicants cite to, *e.g., Morgan Stanley Capital Group, Inc.*, 69 FERC ¶ 61,175 (1994) ("ownership of . . . generating units raises no generation dominance concerns since the output from the units is unavailable by virtue of commitment under long-term contracts"), *order on reh'g*, 72 FERC ¶ 61,082 (1995); *Enron Power Marketing, Inc.*, 65 FERC ¶ 61,305 (1993), *order on clarification and reh'g*, 66 FERC ¶ 61,244 (1994).

[20] The interest has since been sold. *See supra* n. 13.

20. Additionally, we find that the proposed merger will not create or enhance vertical market power through the combination of electric generation and transmission assets. The merger does not create or enhance the incentive or ability of Applicants to adversely affect prices or output in a downstream electricity market or discourage entry by new generators. Holdings and the Consortium's members do not own or control any electric transmission facilities in the relevant geographic market, nor do they own any interest in fuel delivery or supply facilities in the United States.

21. We note that no party raised any issues regarding the merger's effect on competition.

2. Effect on Rates

a. Applicants' Analysis

22. Applicants contend that the merger will not have any effect on rates for wholesale power sales or transmission service.

23. Applicants state that neither Duquesne Keystone, Duquesne Conemaugh, DLC, Monmouth, nor Duquesne Power makes any cost-based wholesale requirements sales. Thus, due to the extremely small amount of uncommitted generation owned by the Duquesne Companies and the fact that all wholesale power sales (with the exception of a small amount of power sold under Monmouth's long-term fixed-rate agreement with JCP&L) are made at market-based rates, the merger will not adversely affect wholesale power sales rates.

24. Applicants contend that no transaction costs or acquisition-related debt will be incurred by either DLC or MBL's affiliated entities as a result of the merger. Holdings, nevertheless, commits to hold DLC's transmission customers harmless from any transmission rate increases that are the result of costs related to the merger for five years, to the extent that any such costs exceed merger-related savings, per standard Commission policy. Applicants assert that no other entities affiliated with them own jurisdictional transmission assets. For all these reasons, the merger will have no adverse effect (or no effect at all) on any Commission-jurisdictional transmission service rates.

b. Commission Determination

25. In the Merger Policy Statement, we explained the need for ratepayer protection. The Commission explained that to ensure that a merger is consistent with the public interest, it must "protect the merging utilities' wholesale ratepayers and transmission customers from the possible adverse effects of the merger."[21] To that end, the Merger

[21] Merger Policy Statement at 30,123.

Policy Statement described various mechanisms that may be acceptable means of protecting ratepayers in particular cases, such as a hold harmless commitment for a significant period of time. The Commission has also previously stated that when there are MBRs, the effect on rates is not of concern.[22] Thus, we find that Applicants have shown that the proposed merger will not adversely affect wholesale rates. We rely on the fact that Applicants commit to hold DLC's transmission customers harmless from rate increases that are the result of costs related to the merger for five years.[23]

3. Effect on Regulation

a. Applicants' Analysis

26. The Applicants argue that the merger will not adversely affect federal regulation. There will be no effect on the Commission's jurisdiction, as no Applicant will change its jurisdictional status as a result of the merger. All subsidiaries or affiliates of any of the Applicants that are jurisdictional public utilities before the merger will remain jurisdictional public utilities subject to regulation by the Commission after the merger.

27. Under the Commission's regulations, "[w]here the affected state commissions have authority to act on the transaction, the Commission will not set for hearing whether the transaction would impair effective regulation by the state commissions."[24] Applicants assert that, the PaPUC has such authority and that they will request authorization of the merger from the PaPUC.

b. Commission Determination

28. Applicants have shown that the proposed merger will not adversely affect federal regulation. All subsidiaries or affiliates of any of the Applicants that are jurisdictional public utilities before the merger will remain jurisdictional public utilities subject to regulation by the Commission after the merger is consummated. With respect to the merger's effect on state regulation, we note that the merger will not change any state commission's jurisdiction over any utility and, further, that no state commission has alleged that the merger will adversely affect state regulation.

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[22] *Exelon Corp.*, 112 FERC ¶ 61,011, at P 210 (2005).

[23] We note that Applicants also commit that no transaction costs or acquisition-related debt will be incurred by either DLC or MBL's affiliated entities as a result of the merger.

[24] 18 C.F.R. § 2.26(e)(1) (2006).

29. When a controlling interest in a public utility is acquired by another company, whether a domestic company or a foreign company, the Commission's ability to protect public utility customers against inappropriate cross-subsidization may be impaired unless it has access to the parent company's books and records. 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.[25] Further, under sections 1264 and 1265 of EPAct 2005, the Commission and state commissions have the authority to gain access to books and records of companies within a holding company and holding companies.[26] However, these provisions do not apply to foreign entities. Accordingly, as a condition of approval, the Applicants are required to make available books and records for examination, if necessary, to the Commission and the respective state commissions.[27]

4. Cross-subsidization

a. Applicants' Analysis

30. Applicants contend that the merger 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. In accordance with Order No. 669-A,[28] Applicants verify that authorizing the merger will not result, either now or in the future, in: (1) any transfer of facilities between DLC or Monmouth and an associate company; (2) DLC or Monmouth issuing any securities in connection with the merger; (3) any new or additional pledge or encumbrance of DLC's or Monmouth's assets; or (4) any new affiliate contracts.

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[25] 16 U.S.C. § 825(c) (2000), as amended by EPAct 2005. *See PacifiCorp,* 87 FERC ¶ 61,288, at 62,152 (1999).

[26] *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, Order No. 667, 70 Fed. Reg. 75,592 (Dec. 20, 2005), FERC Stats. & Regs. ¶ 31,197, at 31,109 (2005), *order on reh'g,* Order No. 667-A, 71 Fed. Reg. 28,446 (May 16, 2006), FERC Stats. & Regs. ¶ 31,213, *order on reh'g*, Order No. 667-B, 71 Fed. Reg. 42,750 (July 28, 2006), FERC Stats. & Regs. ¶ 31,224 (2006).

[27] *PacifiCorp*, 87 FERC ¶ 61,288, at 62,152 (1999); *Northwestern Corp.*, 117 FERC ¶ 61,100, at P 51 (2006).

[28] Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, at P 144-46, amended by Order No. 669-B, FERC Stats. & Regs. ¶ 31,225, at P 49 (to be codified at 18 C.F.R § 33.2(j)).

Applicants note that certain non-regulated affiliates of MBL may provide non-power services to DL Holdings and its subsidiaries, including DLC. However, under the Commission's policies, those services will be provided at the lower of market price or cost. In addition, the agreements will be subject to the approval of the PaPUC under state laws governing affiliate agreements. Applicants further provide statements of existing pledges and/or encumbrances of utility assets in Exhibit M, as required by Order No. 669-B.

b. Protest

31. Public Citizen argues that DLC's customers are effectively captive, and therefore must be viewed as being at high risk for cross-subsidization abuses.[29] It argues that DLC's customers must be viewed as captive because 82 percent of DLC's household consumers do not "choose" an alternative electric supplier. Public Citizen claims that, in every quarter, from January 2001 through July 2006, more customers returned to DLC as their provider of last resort. The need for this Commission to protect these households from the effects of cross-subsidization is even more crucial given the application's statement that "[i]t is anticipated that certain affiliates of MBL [Macquarie Bank Limited] may provide non-power services to DL Holdings and its subsidiaries, including DLC" and a number of acquiring entities.

c. Applicants' Response

32. Applicants argue that Public Citizen's assertion that DLC's power customers are "effectively captive" mischaracterizes Pennsylvania's deregulation of retail energy markets. DLC submitted evidence in a proceeding before the PaPUC to show that, among competitive retail markets across the U.S., DLC has one of the highest levels of shopping among large customer load (greater than 300 kW) and ranks ninth for switching by residential load. Additionally, Applicants argue, even if DLC's customers were captive, that would not dictate that the Commission hold a hearing to inquire into the potential for cross-subsidization abuses. Applicants claim that they addressed cross-subsidization in accordance with the Commission's regulations and precedent.

33. Applicants acknowledge that DLC's customers are captive with respect to transmission service, but point out that the application addresses concerns regarding cross-subsidization with a hold harmless commitment and affiliate transaction pricing standards. The Applicants again state that affiliate transactions in non-power goods and services will be provided at the lower of market price or cost and subject to the approval of the PaPUC under state laws governing affiliate agreements. They claim that Public

[29] Public Citizen Protest at 3.

Citizen has raised no issue of fact or law to suggest that these safeguards, which the Commission has approved in the past, will not be sufficient to protect DLC's customers.

d. Commission Determination

34. Under section 203(a)(4) of the FPA,[30] the Commission must find that the transaction will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company, unless that cross-subsidization, pledge, or encumbrance will be consistent with the public interest. Section 33.2(j) of the Commission's regulations requires that an applicant intending to show that such cross-subsidization will not occur, must file an explanation, with appropriate evidentiary support (Exhibit M to the application), assuring that no cross-subsidization or pledge or encumbrance of utility assets for the benefit of an associate company will result at the time of the transaction or in the future. This explanation must include a disclosure of existing pledges and/or encumbrances of utility assets and a detailed showing that the transaction will not result in: (A) Any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (B) Any new issuance of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (C) Any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (D) Any new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the Federal Power Act.[31]

35. In Order No. 669, the Commission explained its concern regarding cross-subsidization as being "principally a concern over the effect of a transaction on rates."[32] Therefore, the Commission stated that applicants should proffer ratepayer protection mechanisms to assure that captive customers are protected from the effects of cross-

[30] 16 U.S.C. § 824b(a)(4), as amended by EPAct 2005.

[31] 18 C.F.R. § 33.2(j) (2006), as revised by Order No. 669-B at P 45.

[32] Order No. 669 at P 167.

subsidization.[33] Among the types of protection mechanisms that can be proposed by merger authorization applicants are: a general hold harmless provision, which must be enforceable and administratively manageable, where the applicant commits that it will protect wholesale customers from any adverse rate effects resulting from the transaction for a significant period of time following the transaction; and a moratorium on increases in base rates (rate freeze), where the applicant commits to freezing its rates for wholesale customers under a certain tariff for a significant period of time. The Commission stated that it would address the adequacy of the proposed mechanisms on a case-by-case basis. The applicant bears the burden of proof to demonstrate that customers will be protected.

36. In this case, Applicants have provided sufficient assurance that their merger will not result in cross-subsidization of a non-utility associate company or in the pledge or encumbrance of utility assets for the benefit of an associate company. Applicants have provided the verifications and information as required by our regulations. Applicants verify that authorizing the merger will not result, either now or in the future, in: 1) any transfer of facilities between DLC or Monmouth and an associate company; 2) DLC or Monmouth issuing any securities in connection with the merger; 3) any new or additional pledges or encumbrances of DLC's or Monmouth's assets; and 4) any new affiliate contracts except for contracts involving non-power goods and services subject to review under sections 205 and 206 of the FPA.[34] Additionally, Applicants state that: 1) the merger's hold harmless commitment will protect DLC's transmission customers from merger-related rate increases for a period of five years following the merger;[35] and 2) non-power services provided by affiliates of MBL to DL Holdings and its subsidiaries, including DLC, will be provided at the lower of market price or cost.[36] Public Citizen

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[33] Order No. 669-A at P 135.

[34] *See* 18 C.F.R. § 33.2(j) (2006), as revised by Order No. 669-B at P 45.

[35] The commitment states that DLC's transmission customers will be held "harmless from any transmission rate increases which are the result of costs related to the Transaction [merger] for five years, to the extent that any such costs exceed merger-related savings, per standard Commission policy." Application at 25. Although DLC currently has a stated rate, it has recently made a filing to change to a formula rate. *See* Docket No. ER06-1549-000. Should the formula rate be approved and DLC seek to recover merger-related costs through their transmission rates, DLC will be required to submit an informational filing to the Commission that details how they are satisfying the hold harmless requirement as outlined in our decision in *ITC Holdings Corp.*, 116 FERC ¶ 61,271 at P 48 (2006).

[36] Application at 28.

has not explained why this is not sufficient to protect DLC's customers. We find that DLC's customers are protected against inappropriate cross-subsidization, and we rely on Applicants' commitments in making our finding.[37]

37. Moreover, in the Merger Policy Statement, the Commission recognized that "where the state commissions have authority to act on the merger, we intend to rely on the state commissions to exercise their authority to protect state interests."[38] In Order No. 669, the Commission further stated that any additional protection mechanisms it imposes to assure that customers are protected from the effects of cross-subsidization would complement, and not nullify, those imposed by state commissions.[39] In this regard, we note that the PaPUC has jurisdiction over DLC, and that the PaPUC has merger authorization authority and authority to protect against cross-subsidization.[40] We also note that the Pennsylvania Office of Consumer Advocate intervened in this proceeding and did not raise concerns about potential cross-subsidization. Therefore, the Commission does not find that the record supports additional conditions beyond those discussed above.[41]

38. Finally, we reject Public Citizen's argument that "DLC's customers are effectively captive and therefore must be viewed as being at high risk for cross-subsidization abuses."[42] DLC's customers have retail choice, and it is not the role of this Commission to evaluate the success or failure of a state's retail choice program. The Commission's regulations state that captive customers are "wholesale or retail electric energy customers served under cost-based regulation."[43] Retail customers in retail choice states who

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[37] *See Duke Energy Corp.*, 113 FERC ¶ 61,297 (2005); *National Grid*, 117 FERC ¶ 61,080 (2006).

[38] Order No. 592 at 30,112.

[39] Order No. 669 at P 167.

[40] *See, e.g.*, 66 PA. CONS. STAT. § 2811(e)(1) (2006); 52 PA. CODE § 54.121 (2006). The PaPUC is currently reviewing the proposed merger of Applicants under Docket No. A110-150F0035.

[41] The Commission will monitor and periodically audit, where appropriate, to ensure that Applicants abide by their commitments in Exhibit M and any requirements contained in Commission orders. Order No. 669 at P 170.

[42] Public Citizen Protest at 3.

[43] 18 C.F.R. § 33.1(b)(5) (2006), as revised by Order No. 669-A at P 147.

choose to buy power from their local utility at cost-based rates as part of that utility's provider-of-last-resort obligation, which is the case here, are not considered captive customers – that is, they are not served under cost-based regulation, since that term indicates the absence of retail choice.

D. Accounting

1. Applicants' Analysis

39. The application includes proposed accounting entries to record the merger. The first entry represents the pro forma adjustment to eliminate the historical proprietary capital of DL Holdings, including a debit to Common Stock for approximately $1.2 billion, a debit to Retained Earnings for $587 million, a credit to Treasury Stock for $1.1 billion, a credit to Accumulated Other Comprehensive Loss for $17 million, and a credit to Acquisition Adjustment of $645 million.[44]

40. The second entry represents the pro forma adjustment to record the purchase price of DL Holdings by Holdings. The entry debits Acquisition Adjustment and credits Acquisition Adjustment for approximately $1.6 billion. The application states that the pro forma adjustment was calculated by multiplying DL Holdings' outstanding common stock as of June 30, 2006, adjusted for Treasury Stock net of DLC's investment in DL Holdings' stock, by the purchase price of $20 per share.[45]

41. The final entry represents the pro forma adjustment to record the unrecognized costs associated with DL Holdings' pension and other postretirement benefit plans and debits Regulatory Asset and credits Accumulated Provision for Pensions and Benefits for $85 million.[46]

2. Commission Determination

42. We are unable to determine whether the Applicants' accounting for the merger is consistent with the Commission's accounting requirements. Applicants did not provide account numbers demonstrating the specific accounts that are being debited and credited. For instance, in the second accounting entry, Applicants debit Retained Earnings. We are not certain if the entry refers to Account 215, Appropriated Retained Earnings, or Account 216, Unappropriated Retained Earnings. Also, Applicants have not stated

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[44] Application, Exhibit N, Accounting Treatment.

[45] *Id*.

[46] *Id*.

whether they intend to push down the purchase premium to the public utility subsidiaries, and they have not shown the effect, if any, of the merger on the public utility subsidiaries.[47]

43. In the first accounting entry, Applicants have not explained why they are crediting Acquisition Adjustment for $645 million as part of the elimination of historical proprietary capital. In the second entry, Applicants have not explained why the total equity market value of the transaction is being recorded as an acquisition adjustment. In the final entry, Applicants have not explained why they are proposing fair value adjustments to pensions and other postretirement benefits separately from the merger accounting.

44. Therefore, as a condition of approval, Applicants must make the proper accounting for the merger as outlined in the ordering paragraphs below.

E. Other Issues - Ex Parte Meetings

1. Protest

45. Public Citizen asserts that illegal ex parte meetings may have been held. Having not yet received a reply to its Freedom of Information Act Request filed on September 22, 2006 at the time it filed its protest, Public Citizen states that it reserves the right to raise the issue in a future filing if such evidence is found.

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[47] For accounting purposes, the push down of goodwill and acquisition adjustments are allowed. *Commonwealth Edison Co.*, 91 FERC ¶ 61,036 at 61,137 (2000); *Entergy Services Inc.*, 65 FERC ¶ 61,332 at 62,537 (1993). Although the push down of goodwill and acquisition adjustments are allowed for accounting purposes, this does not guarantee rate recovery. Under Commission policy, rate recovery of an acquisition adjustment in traditional cost-based requirements rates is allowed only if the acquisition is prudent and provides measurable, demonstrable benefits to ratepayers. *See Minnesota Power & Light Co.*, 43 FERC ¶ 61,104, at 61,342, *reh'g denied*, 43 FERC ¶ 61,502 (1988); *Duke Energy Moss Landing, LLC*, 83 FERC ¶ 61,318, at 62,304 (1998); *PSEG Power Connecticut*, 110 FERC ¶ 61,020 at P 32 (2005).

2. Applicants' Response

46. Applicants assert that they did not engage in any meetings with the Commission regarding the proposed transaction or the application. Applicants further assert that Public Citizen's speculation is not a basis for holding a hearing on the application or concluding that the proposed transaction is not in the public interest.[48]

3. Commission Determination

47. To the best of the Commission's knowledge, neither Staff nor Commissioners held any meetings with Applicants regarding the proposed transaction or the application. Furthermore, even if any Commissioner held pre-filing meetings with any of the Applicants regarding the proposed transaction or the application, we have found that such pre-filing meetings are permissible under Commission precedent. *National Grid*, 117 FERC ¶ 61,080 at P 78 (2006); *Duke Energy Corp.*, 113 FERC ¶ 61,297 at P 136-140 (2005). Therefore, the Commission sees no need to address Public Citizen's argument.

The Commission orders:

(A) Applicants' proposed section 203 transaction is hereby authorized, subject to conditions, as discussed in the body of this order.

(B) 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 now pending or which may come before the Commission.

(C) 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.

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

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

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[48] Applicants cite to *Southern Natural Gas Co.*, 110 FERC 61,052 (2005) (where party seeking an evidentiary hearing submits "allegations or speculations without an adequate proffer to support them, the Commission may properly disregard them") (*citing General Motors Corp. v. FERC*, 656 F.2d 791 (D.C. Cir. 1981)).

(F) Applicants shall notify the Commission within 10 days of the date that the merger has been consummated.

(G) Applicants must inform the Commission of any change in circumstances that would reflect a departure from the facts the Commission relied upon in granting the petition.

(H) Applicants shall submit their final accounting entries to the Commission within six months after the date on which the merger is consummated. The accounting submission shall provide: (1) the computation of excess purchase price over fair value and (2) the computation and accounting for any goodwill and/or acquisition adjustments, as well as any final allocation of the purchase price to the public utility subsidiaries.

(I) Applicants shall provide proposed final accounting entries for the merger in accordance with Electric Plant Instruction No. 5 and Account 102, Electric Plant Purchased or Sold, of the Uniform System of Accounts. The accounting submission shall include narrative explanations describing the basis for the entries.

(J) Applicants shall explain why they are proposing fair value adjustments to pensions and other postretirement benefits separately from the merger accounting.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.