UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

MidAmerican Energy Holdings Company
Scottish Power plc
PacifiCorp Holdings, Inc.
PacifiCorp

Docket No. EC05-110-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued December 20, 2005)

1. On July 22, 2005, as amended on July 29, 2005, MidAmerican Energy Holdings Company (MidAmerican Holdings), Scottish Power plc (Scottish Power), PacifiCorp Holdings, Inc. (PacifiCorp Holdings), and PacifiCorp (collectively, Applicants), filed a joint application under section 203 of the Federal Power Act (FPA)[1] requesting Commission authorization for a disposition of jurisdictional facilities resulting from the sale of PacifiCorp from PacifiCorp Holdings to a wholly-owned subsidiary of MidAmerican Holdings (Proposed Transaction). The Commission has reviewed the Proposed Transaction under the Merger Policy Statement[2] and will authorize it as consistent with the public interest.

[1] 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)).

[2] *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*); *Transactions Subject to FPA Section 203*, Notice of Proposed Rulemaking, 70 Fed. Reg. 58,636 (2005), FERC Stats. & Regs. ¶ 32,589 (2005) (Section 203 NOPR).

I. Background

A. Description of Applicants

1. PacifiCorp, Scottish Power, and PacifiCorp Holdings

2. PacifiCorp is primarily engaged in the business of providing retail electric service to approximately 1.6 million customers in six western states: Utah, Oregon, Wyoming, Washington, Idaho and California. PacifiCorp owns approximately 9,000 megawatts (MW) of generation capacity. It provides transmission service under its open access transmission tariff (OATT) on file with the Commission. PacifiCorp operates in two control areas, PacifiCorp East and PacifiCorp West, which it operates as a single integrated system, and it is part of the Western Electricity Coordinating Council (WECC) reliability region.

3. Scottish Power is a Scottish public limited company. Through its operating subsidiaries, Scottish Power provides electricity and natural gas service to approximately six million homes and businesses in the western United States and across the United Kingdom.

4. PacifiCorp Holdings is a wholly-owned subsidiary of Scottish Power NA 1 Limited and Scottish Power NA 2 Limited, each of which is wholly owned by Scottish Power. PacifiCorp Holdings is the direct parent company of PacifiCorp and PPM Energy.

5. PPM Energy develops and markets electric generating capacity and energy, and it owns or controls, directly or indirectly through special purpose subsidiaries, approximately 900 MW of generating capacity in the form of thermal and wind projects. Other than the limited transmission assets needed to connect these generating facilities to the transmission grid, PPM Energy has no transmission or distribution assets. It also has subsidiaries engaged in the natural gas storage business. The Proposed Transaction does not involve the sale of PPM Energy, which will remain a subsidiary of PacifiCorp Holdings, and thus an indirect subsidiary of Scottish Power.

2. MidAmerican Holdings and Affiliates

6. MidAmerican Holdings is currently an exempt public utility holding company under section 3(a)(1) of the Public Utility Holding Company Act of 1935 (PUHCA 1935).[3] Through its subsidiaries, MidAmerican Holdings generates, transmits, stores,

[3] 15 U.S.C. §§ 79a *et seq.* (2000). The Energy Policy Act of 2005 (EPAct 2005) repeals PUHCA 1935, effective February 8, 2006, and enacts the Public Utility Holding (continued)

distributes, and supplies energy. It has interests in 6,777 MW of generation capacity in operation and under construction, including approximately 6,000 MW in the United States.

7. MidAmerican is a combination gas and electric utility company and a public utility under the FPA. MidAmerican is primarily engaged in the business of generating, transmitting, distributing, and selling electric energy and distributing, selling, and transporting natural gas. It is a wholly-owned, indirect subsidiary of MidAmerican Holdings. MidAmerican's service territory includes Iowa, Illinois, South Dakota, and Nebraska, where it has approximately 700,000 regulated retail electric customers and 675,000 retail and natural gas transportation customers. MidAmerican provides transmission service pursuant to a Commission-approved OATT. It owns or controls approximately 5,100 MW of generation capacity.

8. Cordova Energy Company LLC (Cordova) is an indirect, wholly-owned subsidiary of MidAmerican Holdings. Cordova owns the Cordova Energy Center, a gas-fired generating facility in Rock Island County, Illinois with a nominal net generating capability of 537 MW. Cordova has a long-term tolling agreement under which the entire output of the facility is controlled by El Paso Corporation.

9. CE Generation, LLC (CE Generation) indirectly owns interests in 10 geothermal generation facilities in California, as well as natural gas-fueled generating plants in Texas, Arizona, and New York. MidAmerican Holdings owns a 50 percent interest in CE Generation. Combined, the natural gas plants indirectly owned by CE Generation in the United States have a nominal net generating capability of 502 MW, while the geothermal facilities in California have a nominal net generating capacity of 327 MW.

10. Kern River Gas Transmission Company (Kern River) is an interstate natural gas transportation pipeline system extending from supply areas in the Rocky Mountains to markets in Utah, Nevada, and California.

11. Northern Natural Gas Company (Northern Natural) is an interstate natural gas pipeline system extending from the Permian Basin in Texas to the upper Midwest. Northern Natural provides transportation and storage service to utilities and end-users in the upper Midwest.

Company Act of 2005 (PUHCA 2005). EPAct 2005, §§ 1261 *et seq.*, Pub. L. No. 109-58, 119 Stat. 594 (2005).

B. Description of the Transaction

12. Scottish Power, PacifiCorp Holdings, and MidAmerican Holdings have entered into a Stock Purchase Agreement, under which PacifiCorp will become a direct wholly-owned subsidiary of Holdings, a direct, wholly-owned subsidiary of MidAmerican Holdings that was formed to effectuate the Proposed Transaction. MidAmerican Holdings will purchase all of the outstanding common stock of PacifiCorp for approximately $5.1 billion in cash. Approximately $4.3 billion in net debt and preferred stock will remain outstanding at PacifiCorp. The ownership of PPM Energy will not be affected by the Proposed Transaction, and it will remain a wholly-owned, indirect subsidiary of Scottish Power.

II. Notice and Responsive Pleadings

13. Notices of Applicants' filings were published in the *Federal Register*, 70 Fed. Reg. 44,349 and 46,160 (2005), with interventions and protests due on or before September 26, 2005. Motions to intervene were filed by Arizona Public Service Company, Basin Electric Power Cooperative (Basin Electric), Black Hill Power, Inc. (Black Hills), Dairyland Power Cooperative, Idaho Power Company, Industrial Customers of Northwest Utilities, Midwest Municipal Transmission Group, National Grid USA, Nebraska Public Power District, Public Citizen's Energy Program, Public Utility District No. 1 of Snohomish County, and Wyoming Infrastructure Authority. Wisconsin Electric Power Company filed a motion to intervene out-of-time.

14. American Public Power Association and National Rural Electric Cooperative Association (APPA/NRECA) filed a motion to intervene and comments. Municipal Energy Agency of Nebraska (MEAN) and Utah Associated Municipal Power Systems (Utah Municipals) filed protests. Applicants filed a motion for leave to answer and an answer to the protests submitted by MEAN and Utah Municipals.

III. Discussion

A. Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to a protest 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

17. Section 203(a) of the FPA provides that the Commission must approve a merger if it finds that it "will be consistent with the public interest."[4] The Commission's analysis under the Merger Policy Statement of whether a consolidation is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation. As discussed below, we will approve the proposed merger as consistent with the public interest because we find that it will not adversely affect competition, rates, or regulation.

1. Effect on Competition

a. Horizontal Market Power Issues

i. Applicants' Analysis

18. MidAmerican Holdings retained Ms. Julie Solomon, a consultant with CRA International, Inc., to analyze the effect of the Proposed Transaction on competition. Ms. Solomon identifies three relevant products across the geographic markets affected by the merger: non-firm energy, capacity, and ancillary services. She concludes that the horizontal effect of the merger (*i.e.*, the combination of Applicants' generation) will not harm competition.

19. Ms. Solomon identifies three relevant geographic markets using the approach described by Appendix A of the Merger Policy Statement: the MidAmerican control area, the PacifiCorp-East control area, and the PacifiCorp-West control area. As required by Commission regulations, she also analyzes the first-tier control area markets (*i.e.*, directly interconnected control area markets) the MidAmerican, PacifiCorp-East, and PacifiCorp-West control areas and considers parties that have historically been customers of MidAmerican and PacifiCorp.[5] In her analysis of non-firm energy markets, Ms. Solomon uses Economic Capacity and Available Economic Capacity, as defined in the Merger Policy Statement, to represent a supplier's ability to participate in the market.[6]

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[4] 16 U.S.C. § 824(b) (2000) (*amended by* EPAct 2005 § 1289).

[5] 18 C.F.R. § 33.3(c)(2) (2005).

[6] "Economic Capacity" is the amount of capacity that could compete in the relevant market given market prices, running costs, and transmission availability. "Available Economic Capacity" is based on the same factors but subtracts the supplier's native load obligation from its capacity and adjusts transmission availability accordingly.

She uses the Delivered Price Test to evaluate the effect on competition in the relevant markets over 10 time periods: Super Peak, Peak, and Off-Peak periods for Summer, Winter, and Shoulder seasons, along with an extreme Summer Super Peak. Ms. Solomon uses prices ranging from $25 per megawatt-hour (MWh) in the Shoulder Off-Peak periods to $250 per MWh in the extreme Summer Super Peak.[7] She considers actual prices in the relevant markets during 2004, fuel prices in 2004, and forecast fuel prices for 2006, the test year for the analysis.[8]

20. Ms. Solomon states that her analysis placed limits on the amount of capacity that could be transferred over the transmission network by both non-simultaneous control area to control area limits and simultaneous interface limits. For her analysis of the MidAmerican market, she relies on a transmission study provided by MidAmerican that determined the simultaneous import limits for 2006. For the PacifiCorp-East and PacifiCorp-West markets, she relies on simultaneous import limit studies conducted by PacifiCorp in connection with its market-based rate compliance filing. For the PacifiCorp-East first-tier control area, she relies on simultaneous import limit studies conducted by PacifiCorp. Ms. Solomon states that she allocates transmission capacity using a pro rata or "squeeze-down" method.[9]

21. Ms. Solomon reports no failures of the Competitive Analysis Screen[10] for Economic Capacity in the relevant markets, with one exception. In the PacifiCorp-East control area, Ms. Solomon's results show post-merger concentrations ranging from 2,395 to 3,286 on the Herfindahl-Hirschman Index (HHI),[11] indicating a highly concentrated

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[7] For the PacifiCorp-East control area, the lower end of the price range is $35 per MWh for the Shoulder Off-Peak periods.

[8] Solomon Affidavit, Exhibit MidAmerican Holdings-1 at 23.

[9] Under the "squeeze down" allocation method, shares of available transmission are allocated at each interface, diluting as they get closer to the destination market. When economic supply competes to get through a constrained transmission interface into a control area, the transmission capability is allocated to the suppliers in proportion to the amount of economic capacity each supplier has outside of the interface. Application, Exhibit MidAmerican Holdings-1 at 27.

[10] Merger Policy Statement, Appendix A at 30,128 (Competitive Analysis Screen).

[11] The Herfindahl- Hirschman Index (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

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market, and a post-merger increase in the HHI of as much as 57 in off-peak periods, which exceed the 50 HHI screening threshold for highly-concentrated markets. She explains that these results are solely attributable to the originally planned 50 MW firm east-to-west transmission path, which is no longer part of the Proposed Transaction.[12] Ms. Solomon also analyzes the PacifiCorp-East control area without consideration of the 50 MW contract path. Her results show that there are no screen failures in any time period and no merger-related changes in HHI greater than one point, which she argues is actually deconcentrating. Thus, Ms. Solomon concludes that the effect of the merger on this market is *de minimis*.[13]

22. Ms. Solomon also performs an analysis of the Economic Capacity for the MidAmerican, PacifiCorp-West, and PacifiCorp-East first-tier control areas and reports no screen failures. The HHI results indicate that market concentration exists, but that merger-related changes in HHI are less than 50 points in all time periods. For the MidAmerican control area, she reports post-merger concentrations ranging from 2,251 to 3,323 HHI and no HHI changes. For the PacifiCorp-West control area, she reports post-merger concentrations ranging from 1,968 to 3,646 HHI and no changes in HHI exceeding 2 points. For the PacifiCorp-East first-tier control areas, she reports post-merger concentrations ranging from 1,046 to 4,188 HHI and no changes in HHI exceeding 42 points. Ms. Solomon conducts sensitivity analyses for these markets that assume that no firm 50 MW transmission path is available and that transmission capacity

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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 unconcentrated; markets which the HHI is greater than or equal to 1,000 but less than 1,800 points are considered moderately concentrated; and markets where the HHI is greater than or equal to 1,800 points are considered highly concentrated. The Commission has adopted the FTC/DOJ Horizontal Merger Guidelines, which state that in, a horizontal merger, an increase of more than 50 HHI in a highly concentrated market or an increase of 100 HHI in a moderately concentrated market fails its screen and warrants further review.

[12] On July 29, 2005, Applicants filed an amendment to the application stating that MidAmerican Holdings will no longer be pursuing the 50 MW contract transmission path as part of the merger, because it would no longer be legally required if PUHCA 1935 were repealed. We note that, as discussed above, EPAct 2005 repeals PUHCA 1935, effective February 8, 2006.

[13] Solomon Affidavit, Exhibit MidAmerican Holdings-1, at 31.

on the DC ties is either available or unavailable. The results of the sensitivity analyses show no screen failures.[14] Thus, Ms. Solomon concludes that the effect of the merger on these markets is *de minimis.*

23. Ms. Solomon performs a Competitive Analysis Screen for Available Economic Capacity in the relevant markets. Her results show that the market is unconcentrated in the PacifiCorp-East control area and moderately concentrated in the MidAmerican, PacifiCorp-West, and first-tier PacifiCorp-East control areas. Ms. Solomon reports that all merger-related changes in HHI are well below 50 points for each market and that there are no screen failures. She also conducts sensitivity analyses that assume that there is no firm 50 MW transmission path and that transmission capacity on the DC ties is either available or unavailable.[15] These sensitivity analyses show no screen failures. Thus, Applicants argue that the Proposed Transaction raises no competitive concerns related to Available Economic Capacity.

24. Ms. Solomon states that there are no other relevant geographic markets or products to consider.[16] She notes that, other than the markets analyzed, MidAmerican, MidAmerican Holdings, and PacifiCorp do not operate in the same markets, or that where they do, the business transactions are *de minimis*. Therefore, as provided in the Commission's regulations, further analysis is not required.[17] With respect to other product markets, Ms. Solomon notes that neither the MidAmerican nor the PacifiCorp control areas are part of centralized ancillary services or resource adequacy (*i.e.* capacity)

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[14] A sensitivity analysis is a standard statistical procedure designed to test whether the results of the model change significantly due to small changes in key parameters of the model. Results that are not sensitive to changes in key parameters of the model are considered "robust." For example, in the Delivered Price Test, the results can be affected by changes in the assumed market price or input prices such as fuel costs. In Order No. 642, the Commission recognized the importance of sensitivity analyses: "[g]iven the importance of prices to the outcome of market definition, we will require applicants to perform sensitivity analyses of alternative prices on the predicted competitive effects. This provides us with an additional measure of confidence and assurance that results are reliable." Order No. 642 at 31,891.

[15] Solomon Affidavit, Exhibit MidAmerican Holdings-1, at 9-10.

[16] *Id.* at 35.

[17] 18 C.F.R. § 33.3(a)(2) (2005).

markets.[18] Nonetheless, she examines the potential to import services to the California ISO ancillary services market and the potential to export capacity to the PJM capacity credit market. Under these scenarios, she concludes that MidAmerican, MidAmerican Holdings, and PacifiCorp cannot participate in these markets.

ii. Comments and Protests

25. MEAN argues that Applicants have not properly defined the relevant geographic markets. MEAN states that Applicants' analysis does not examine all of MidAmerican Holdings' first-tier markets or other markets in which both MidAmerican Holdings and PacifiCorp compete and serve common customers, including MEAN.[19] MEAN further argues that because a number of load-serving entities, including Black Hills, Basin Electric, Cargill, Public Service of Colorado, and MEAN, purchase power and serve loads in both the Eastern and Western Interconnections, Applicants should have analyzed the effect on competition in markets that straddle the divide between the two interconnections. MEAN states that pre-merger, it benefits from price competition between MidAmerican Holdings to the east and PacifiCorp to the west in serving its load and argues that the merger will eliminate that competition.[20]

26. APPA/NRECA note that the Commission's current method for evaluating the effect of a merger on competition (the "Appendix A analysis" set out in Order Nos. 642 and 642-A) was developed at a time when "cross-country" electric utility mergers were not common, due to statutory bars in PUHCA 1935. The Appendix A "impact on competition" horizontal screen analysis looks primarily at whether competition will be lessened in the "common" markets in which merging firms compete. They argue that the Commission should consider the effect of eliminating a competitor in the broader market, which may leave the remaining firms with greater economic and political market power.[21] They state that the repeal of PUHCA 1935 means that this Commission will likely see many applications under FPA section 203 seeking approval of "cross-country" mergers—transactions that seek to unite geographically remote electric utility merger partners. They urge the Commission to evaluate the instant merger not only in itself, but

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[18] Solomon Affidavit, Exhibit MECH-1 at 35-36.

[19] MEAN Protest at 5.

[20] *Id.* at 8-9.

[21] APPA/NRECA Protest at 5.

also as a harbinger of change. They ask us to evaluate how well our current electric utility merger standards will function in the post-PUHCA 1935 repeal environment, and whether they will adequately protect electric consumers.

iii. Applicants' Response to Protests

27. In response to MEAN's argument regarding the relevant geographic markets that would be affected by the merger, Applicants state that Ms. Solomon analyzed the effect of the merger on competition in markets on both sides of the DC interties, as MEAN argues they should. Specifically, they state that Ms. Solomon's analysis of the Western Area Power Administration - Colorado-Missouri (WAPA - Colorado-Missouri) market covers the western side of the DC interties, and her analysis of the Western Area Power Administration – Upper Great Plains (WAPA - Upper Great Plains) market covers the eastern side of the DC interties. There were no screen failures for either Economic Capacity or Available Economic Capacity for any season/load levels in those markets.

28. Applicants also address MEAN's argument that they should have considered the area overlapping the Eastern and Western Interconnections as a relevant geographic market. They argue that such a market would be quite large and that the merged firm would be competing with a large number of other suppliers. They analyze the overlapping market by combining the WAPA - Colorado-Missouri and WAPA - Upper Great Plains markets. They state that in such a market, MidAmerican Energy and PacifiCorp would have market shares of no more than four percent and five percent, respectively, and that the change in concentration would be no more than 20 HHI for Economic Capacity or Available Economic Capacity for any season/load level, clearly passing the Commission's screen.[22] They further argue that the Commission has previously addressed the issue of competition between the Eastern and Western Interconnections and concluded that electrical disparities prevent material competition between suppliers in the east and west.[23]

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[22] Applicants use the "2ab" method to calculate the change in HHI, which is derived from the difference between adding the squares of the pre-merger market shares of the two ($a^2 + b^2$), and squaring the combined firm's post-merger market share ($(a+b)^2 = (a^2 + b^2 + 2ab)$). The method is commonly used in analyses of changes in market structure.

[23] Applicants' Answer at 6 (*citing Northern States Power Co. & New Centuries, Inc.*, 90 FERC ¶ 61,020 at 61,132 (2000)).

29. In response to APPA/NRECA's request that the Commission evaluate how well its current merger standards will function in the post-PUHCA 1935 environment, Applicants argue that the Commission's standard of review is well established and works well in considering the effect of proposed transactions on competition, whether long-distance or otherwise. In response to APPA/NRECA's assertion that the repeal of PUHCA 1935 requires the Commission to change its standard of review, Applicants contend that this is unnecessary because the Securities and Exchange Commission does not perform a market power analysis as part of its review under PUHCA 1935. Rather, the Commission analyzed the effect of a transaction on wholesale competition and continues to do so.

iv. Commission Determination

30. Applicants have shown that the combination of their generation assets will not adversely affect competition in any relevant market. We discuss the specific issues below.

31. Regarding MEAN's arguments about the relevant geographic markets, we find that Applicants have analyzed all of the relevant geographic markets that could be affected by the Proposed Transaction. In particular, Applicants have performed an Appendix A analysis on the effect of the Proposed Transaction on those markets that could be affected by the merger: Mid American, PacifiCorp West, PacifiCorp East, and the first-tier control areas of PacifiCorp East. For the first-tier markets of MidAmerican and PacifiCorp West, Applicants have argued that because the effect of the transaction on PacifiCorp West and MidAmerican is de minimis, the effect on their first tier markets is necessarily de minimis, because MidAmerican and PacifiCorp control very little capacity outside of their respective control areas. We agree with that argument because there are no remote markets where both MidAmerican and PacifiCorp own significant generation capacity. In addition, Applicants have analyzed the effect of the merger on competition in markets on both sides of the DC interties as well as the area overlapping the Eastern and Western Interconnections as relevant geographic markets as MEAN argues they should have. They analyzed the WAPA - Colorado-Missouri market on the west side of the interties, the WAPA - Upper Great Plains market on the east side, and the combined WAPA - Colorado-Missouri and WAPA - Upper Great Plains markets. This analysis shows no screen violation in any season/load condition for Economic Capacity or Available Economic Capacity.

32. We reject APPA/NRECA's argument that the Commission look at more than the effects of this merger on competition. We will not use this case to consider changing our merger policy due to issues that may be raised by future mergers. Under our standard, we examine the effect of a transaction on competition in the relevant geographic and product markets, which is a well-established framework for analyzing market competition. The geographic markets are those that would be affected by the Proposed Transaction by

eliminating a competitor or a potential competitor in the market. The relevant product markets are capacity, ancillary services, and energy, across a range of season and load conditions.[24] APPA/NRECA refer to the "broader" markets that could be affected by the merger, thus increasing the economic and political market power of the remaining firms, but do not define those markets. We are aware that as markets evolve, product market and geographic market definitions can change. For example, the existence of organized markets for ancillary services has made it possible to analyze ancillary services, such as regulation services, as a distinct relevant product market. Further, as transmission systems are extended and rate pancaking is eliminated, the relevant geographic markets may expand. Our standard of review is flexible enough to consider any changes in market structure that ultimately result from EPAct 2005 and the repeal of PUHCA 1935, but we will not speculate on what general trends might emerge; rather, we will evaluate the effect of this merger on competition based on the record in this case, as the FPA requires.

b. Vertical Market Power Issues

i. Applicants' Analysis of Vertical Market Power Issues

33. Applicants state that the Proposed Transaction raises none of the vertical market power issues with which the Commission has expressed concern in merger proceedings: (1) denying rival firms access to inputs or raising their input costs; (2) increasing anticompetitive coordination; or (3) regulatory evasion. Applicants' witness, Ms. Julie Solomon, states that there are no issues related to either the combination of control over electric generation and transmission assets, or the combination of electric generation assets and fuel supplier or fuel delivery systems.

34. Regarding the effect of combining their transmission and generation assets, Ms. Solomon states that the Proposed Transaction does not increase Applicants' ability or incentive to use control over their transmission facilities to gain a competitive advantage in wholesale electricity markets because none of MidAmerican's generation assets are on PacifiCorp's transmission system and none of PacifiCorp's generation assets are on MidAmerican's transmission system.[25] Ms. Solomon further argues that MidAmerican's

[24] In this case for example, Applicants have examined the effect on competition in energy markets for 10 season/levels: Off-Peak, Peak, and Super Peak for the Winter, Shoulder, and Summer seasons; and an additional Extreme Peak for the Summer season.

[25] Exhibit MidAmerican Holdings-1 at 36.

proposed independent Transmission System Coordinator and Applicants' proposed Market Monitoring Plans eliminate any concerns about pre-existing vertical market power unrelated to the acquisition.

35. Applicants also address the effect of combining their natural gas transportation and electric generation assets. They state that the Commission has concluded that both the upstream and downstream markets need to be highly concentrated in order for there to be a vertical market power issue.[26] Ms. Solomon's analysis shows that the relevant upstream market is not highly concentrated. Thus, Applicants conclude that the Proposed Transaction will not harm competition in wholesale electricity markets by creating or enhancing the ability or incentive for Applicants to exercise vertical market power by creating entry barriers, foreclosing rival competitors, or raising rivals' costs.

36. Ms. Solomon analyzes the upstream market and defines the relevant product as delivered natural gas and the relevant geographic market as the portion of Utah that includes the PacifiCorp service territory. She states that market definition is intended to encompass an area in which PacifiCorp's generation competes with other generation and there is a potential overlap with Kern River.[27] She reports a concentration of 1,547 HHI, indicating that the relevant upstream market is not highly concentrated, and concludes that the merged firm would not have the ability to use control of upstream natural gas resources to harm competition in any relevant wholesale electricity markets. Finally, Ms. Solomon states that the Proposed Transaction will not enable Applicants to erect other barriers to entry by competitors because they do not control potential electric generating sites.

ii. Commission Determination

37. In mergers combining electric generation assets with inputs to generating power (*e.g.*, natural gas transmission or fuel supply assets) competition can be harmed if a merger increases the merged firm's ability or incentive to exercise vertical market power in wholesale electricity markets. For example, by denying rival firms access to inputs or by raising their input costs, the merged firm could impede entry of new competitors or inhibit existing competitors' ability to discipline or undercut an attempted price increase in the downstream wholesale electricity market. Here, as discussed below, Applicants have shown that the Proposed Transaction does not raise any of these concerns. We note that no protester raised vertical market power issues in this proceeding.

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[26] Order No. 642 at 31,911.

[27] Exhibit MidAmerican Holdings-1 at 40.

38. We find that the Proposed Transaction does not increase Applicants' ability or incentive to use control over their transmission facilities to gain a competitive advantage in wholesale electricity markets because, as we stated in Order No. 642, a merger cannot impair competition in downstream electricity markets if it involves an input supplier that sells no product into the downstream electricity geographic market.[28] Here, Applicants have shown that they do not compete in the downstream markets that could be affected by their upstream transmission assets, because the merging companies are in different interconnections altogether, so neither could use its transmission system to keep competitors out of a market where the other competes.

39. Applicants have shown that the combination of their generation and natural gas transportation assets will not harm competition. In Order No. 642, we stated that in order for a merger to create or enhance vertical market power, both the upstream and downstream markets must be highly concentrated.[29] Applicants' analyzed the relevant upstream market, delivered natural gas in the portion of Utah that includes the PacifiCorp service territory, and have shown that the market is not highly concentrated. Moreover, Applicants have shown that the merger does not create or enhance the merged firm's ability to impede entry of gas-fired generators because potential entrants have alternatives to the Kern River pipeline that are unaffected by the merger.

2. Effect on Rates

a. Applicants' Analysis

40. Applicants state that the Proposed Transaction will not adversely affect either wholesale power or transmission rates. To achieve ratepayer protection consistent with the Merger Policy Statement,[30] Applicants commit to hold transmission customers harmless from any increase in transmission rates to the extent that transaction-related costs exceed demonstrated transaction-related savings. Applicants state that the rates of MidAmerican's and PacifiCorp's wholesale power requirements customers will not be adversely affected by the Proposed Transaction because the same hold harmless commitment will also apply to wholesale power sales customers purchasing under cost-based rates contracts. Applicants further state that their customers under fixed-rate wholesale power and transmission contracts will not be adversely affected by the

[28] Order No. 642 at 31,903.

[29] *Id.* at 31,911.

[30] Merger Policy Statement at 30,124.

Proposed Transaction. They note that these rates may be changed only under a section 205 filing with the Commission. Applicants state that this filing requirement offers an additional level of ratepayer protection because they cannot simply modify these rates to increase revenues to recover transaction-related costs.

b. Comments

41. Utah Municipals question whether Applicants' hold harmless commitments are enough to ensure that the merger will not adversely affect wholesale transmission or power rates. They argue that, even if it can be shown that the nominal transmission rate itself will not change by virtue of the merger, no third party should be confronted with additional costs due to the merger. Utah Municipals ask whether the merged companies' operations will result in new flows and constraints creating a new need for generation re-dispatch, resulting in a cost increase to wholesale customers, and whether new upgrades will be necessary, thus resulting in additional costs.

42. Utah Municipals also question the lack of clarity of Applicants' operational plans and their effects on transmission-related matters. In their July 29 amendment, Applicants stated that they will not pursue a 50 MW east-west reservation to allow MidAmerican to deliver energy into the western markets, which was contemplated in their original application. Utah Municipals assert that MidAmerican Holdings stated that it will continue to explore transmission opportunities and may later seek to obtain a contract path between PacifiCorp and MidAmerican. Utah Municipals argue that the Commission should consider requiring Applicants to submit more detailed information regarding Applicants' short- and long-term operational plans to identify benefits of the merger.[31]

43. Utah Municipals note that Applicants have stated that each company has long-term plans to expand regional transmission coordination, and they argue that the Commission should require Applicants to coordinate their transmission planning with affected utilities, including transmission-dependent utilities such as Utah Municipals. Finally, given Applicants' stated objective of expanding their respective transmission systems, Utah Municipals request that the Commission make it clear that other utilities should be able to participate in transmission planning, expansion, and ownership.[32]

[31] Utah Municipals at 4.

[32] *Id.* at 6.

c. Applicants' Response

44. Applicants state that Utah Municipals' concern regarding the merged companies' operations seems to be based upon a misunderstanding of the Proposed Transaction. According to Applicants, MidAmerican Energy and PacifiCorp will not be merged as a result of the proposed acquisition. Therefore, they argue, the questions raised by Utah Municipals regarding the merged companies' operations are inapposite.[33] They further argue that Utah Municipals' concern about the lack of clarity regarding the companies' operational plans and transmission-related matters are unfounded because they have no plans to file a joint operating agreement at this time. If they do enter into such an agreement in the future, Utah Municipals will have the opportunity to identify any concerns by participating in any relevant Commission hearings.[34] Finally, they state that Utah Municipals' request that they be able to participate in any transmission planning, expansion, and ownership are vague and unrelated to this proceeding.

d. Commission Determination

45. The Commission finds that Applicants have shown that the Proposed Transaction will not adversely affect transmission rates or wholesale power rates. We rely on Applicants' hold harmless commitment in making our finding. Utah Municipals raise one specific issue regarding the Proposed Transaction's effect on wholesale rates – whether PacifiCorp's and MidAmerican's post-transaction operations will result in new flows and constraints requiring new generation re-dispatch and thus increasing costs to wholesale customers. Applicants have addressed that concern by explaining that the companies will remain separate and that there are no plans for a joint operating agreement at this time. If MidAmerican and PacifiCorp file a joint operating agreement at a later date, Utah Municipals will be able to raise any concerns then. Utah Municipals other concerns are not relevant to the Proposed Transaction's effect on wholesale transmission or power rates. We also note that we have accepted, in a separate section

[33] Applicants' Answer at 15-16.

[34] Applicants cite their July 29, 2005, filing of an amendment to the application stating that they would no longer be pursuing the 50 MW contract transmission path as part of the merger, because it would no longer be legally required if the Public Utility Holding Company Act of 1935 were repealed, which it was on August 8, 2005.

205 proceeding, MidAmerican's and PacifiCorp's proposed revisions to their OATTs to eliminate rate pancaking for transactions using transmission services across both MidAmerican's and PacifiCorp's transmission facilities.[35]

3. Effect on Regulation

a. Applicants' Analysis

46. Applicants state that the Proposed Transaction will not adversely affect federal regulation. They state that as a result of the Proposed Transaction, MidAmerican Holdings will become a registered public utility holding company subject to the regulation by the Securities and Exchange Commission under PUHCA 1935. MidAmerican Holdings, on behalf of MidAmerican and PacifiCorp commit that, for wholesale ratemaking purposes, upon consummation of the Proposed Transaction, MidAmerican and PacifiCorp will follow the Commission's policy regarding the pricing of affiliate transactions for non-power goods and services. Applicants state that this commitment ensures that MidAmerican, PacifiCorp, and their affiliates will remain subject to the Commission's regulations regarding wholesale ratemaking effects of affiliate non-power transactions and that this commitment also eliminates any potential concern of the Commission regarding wholesale ratemaking impacts of affiliate non-power transactions regarding the preemptive effect of SEC jurisdiction under the holding in *Ohio Power Co. v. FERC*.[36]

47. Applicants state that the Proposed Transaction will not adversely affect state regulation. Applicants contend that, because PacifiCorp and MidAmerican will retain their independent corporate existences, the Proposed Transaction will not result in the loss of jurisdiction over such matters by any state regulatory authority. Applicants conclude that the Proposed Transaction will not affect the ability of any of the relevant state commissions to regulate the retail rates of MidAmerican and PacifiCorp.

b. Commission Determination

48. We note that the Proposed Transaction is expected to occur after February 8, 2006, the date on which PUHCA 2005 will replace PUHCA 1935. However, Applicants filed their application for the Proposed Transaction before the date on which PUHCA 2005

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[35] *MidAmerican Energy Company and PacifiCorp* (Docket Nos. ER05-1233-000 and ER05-1234-000 Sept. 16, 2005) (unpublished letter order).

[36] 954 F.2d 779 (D.C. Cir. 1992).

was enacted, August 8, 2005, and thus the current section 203 standards apply to the Proposed Transaction.[37] We find that the transfer will not adversely affect federal regulation because Applicants have committed that, for wholesale ratemaking, they will follow the Commission's policy regarding the pricing of affiliate transactions for non-power goods and services. Furthermore, the Proposed Transaction will not impair the ability of any state commission to regulate any of Applicants. We note that no state commission protested the Proposed Transaction.

C. Other Issues

1. Protests

49. Public Citizen states that representatives of the Applicants held multiple private meetings with some or all of the Commissioners before the companies' July 22 filing at the Commission and after the companies filed details of the merger with the Securities and Exchange Commission. Public Citizen requests that all participants in any and all of these meetings with the Commissioners—including the Commissioners themselves—testify under oath what was discussed at the meetings, and that this testimony shall be provided as part of the public record of this proceeding.

50. Public Citizen states that it is making this request because Commissioners are required by the Administrative Procedure Act (APA),[38] to record meetings if they have knowledge that the matter will be "noticed for hearing." According to Public Citizen, the Commission should have known that the MidAmerican-PacifiCorp merger would be "noticed for hearing" because on May 27, 2005, the companies filed a "Stock Purchase Agreement" with the Securities and Exchange Commission, which provided the public and the Commission notice that the merger was going forward and would have to be filed for approval at the Commission.

51. Public Citizen further contends that Commission rules prohibiting off-the-record communications with "decisional" employees during any "contested on-the-record proceeding," as applied in this case, conflicts with federal law. According to Public Citizen, the APA limits the ability of federal agencies to conduct "off-the-record" private meetings: "the prohibitions of this subsection shall apply beginning at such time as the

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[37] Section 1289 of EPAct 2005 states that "[t]he amendments made by this section shall not apply to any application under section 203 of the [FPA] that was filed on or before the date of enactment of [PUHCA 2005]." EPAct § 1289(c).

[38] 5 U.S.C. § 551 *et seq.* (2000).

agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge."[39]

2. Commission Determination

52. We reject Public Citizen's argument that the Commissioners' pre-filing meetings were in violation of either the Commission's regulations or the APA. First, the regulations prohibit off-the-record communications in any "contested on-the-record proceedings."[40] The regulations define a "contested on-the-record proceeding" as "any proceeding before the Commission to which there is a right to intervene and in which an intervenor disputes any material issue …"[41] The regulations prohibit such off-the-record communications in a contested on-the-record proceeding "from the time of filing of an intervention disputing any material fact that is the subject of a proceeding."[42]

53. At the time that employees of the Applicants met with the Commissioners, the Commission's prohibition against off-the-record communications did not apply because there was no proceeding whatsoever, much less a contested on-the-record proceeding, nor were there any parties. As the prohibition against off-the-record communications did not apply at this point, we find that the Commissioners acted according to the rules set forth in the Commission's regulations.

54. Second, we reject Public Citizen's argument that any pre-filing meetings between the Commissioners' and the Applicants violated the APA because, when the pre-filing

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[39] 5 U.S.C. § 557(d)(1)(E) (2000).

[40] 18 C.F.R. § 385.2201(a) (2005).

[41] 18 C.F.R. § 385.2201 (c)(1) (2005). In Order No. 607, the final rule implementing the Commission's *ex parte* rules, we noted that "[t]he explicit requirement that the proceeding be "contested" before *ex parte* rules attach reflects the notion that procedural requirements and constraints originally developed to preserve the rights of parties in an adjudication have no place in an administrative proceeding in which there is no "contest" comparable to the controversy in a judicial case." *Regulations Governing Off-the-Record Communications*, Order No. 607, FERC Stats. & Regs. ¶ 31,079 at 30,881, 64 Fed. Reg. 51,222 at 51,230 (1999).

[42] 18 C.F.R. § 385.2201(d)(1)(iv) (2005).

meetings occurred, there was no "proceeding", so the pre-filing meeting was not an *ex parte* communication. The APA defines an "*ex parte* communication" as "an oral or written communication not on the public record with respect to which reasonable prior notice to all *parties* is not given."[43] A "party" is "a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency *proceeding*."[44] Prior to filing, as there was no Commission proceeding, the APA's prohibition on *ex parte* communication could not apply. Public Citizen's protest would effectively read out of the statute the requirement that there be an agency proceeding to which parties are named, admitted, or are entitled as of right to seek admission, and we must therefore reject it as inconsistent with the APA's definition of *ex parte* communication. Furthermore, we note that Public Citizen makes no effort to explain when, in its view of the APA, a "proceeding" begins. Under Public Citizen's view, there is no limit to how early a "proceeding begins.

55. In Order No. 607, we similarly concluded that pre-filing meetings are not *ex parte* communications, as defined by the APA. In the Notice of Proposed Rulemaking underlying that order, the Commission proposed to explicitly provide an exemption for pre-filing meetings.[45] However, we determined in Order No. 607 that no pre-filing exemption was necessary and thus that pre-filing communications were not covered by the APA prohibition on *ex parte* communications "because they take place prior to the filing of an application, and therefore prior to any 'proceeding' at the Commission."[46]

56. Public Citizen cites *Electric Power Supply Association v. FERC*[47] to support its argument that the Commissioners' pre-filing meetings violated the APA. However, *EPSA* dealt with *ex parte* communications related to a specific "pending on-the-record proceeding" and post-filing meetings. The Court indicated in *EPSA v. FERC* that the

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[43] 5 U.S.C. § 551(14) (2000) (emphasis added).

[44] 5 U.S.C. § 551(3) (2000) (Emphasis added).

[45] *Regulations Governing Off-the-Record Communications*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,534 at 33,506-07 (1998) ("pre-filing communications are often useful in educating applicants as to the appropriate format, content, and form that an application or other filing should take. Such consultations can therefore improve the chances that filings, once made, will be ready for evaluation on the merits.").

[46] Order No. 607 at 30,879.

[47] *Electric Power Supply Association v. FERC*, 391 F.3d 1255 (2004) (*EPSA*).

overriding concern of section 557 is to ensure that an adequate record exists for purposes of judicial review and that the fairness of the proceedings is above reproach.[48] In the situation at hand, there was no "pending on-the-record proceeding" because no application had yet been filed. Therefore, the APA was not violated.

57. Finally, we note that the current proceeding is not the proper venue for Public Citizen to challenge the validity of the Commission's regulations; its arguments are, in fact, a collateral attack on those regulations. We will not ignore our regulations because a party to a specific case argues that the regulations are invalid. If Public Citizen believes that the Commission should amend its regulations, Public Citizen should submit a petition for rulemaking setting forth the changes it believes are necessary.[49]

The Commission orders:

(A) Applicants' Proposed Transaction is authorized, 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 Proposed Transaction.

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[48] *EPSA*, 391 F.3d at 1266 (2004).

[49] 18 C.F.R. § 385.207(a)(4) (2005).

(F) If the Proposed Transaction result in changes in the status or the upstream ownership of Applicants' affiliated qualifying facilities, if any, an appropriate filing for recertification pursuant to 18 C.F.R. § 292.207 shall be made.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.