

133 FERC ¶ 61,231
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

BHE Holdings Inc.
Maine & Maritimes Corporation

Docket No. EC10-67-000

ORDER AUTHORIZING ACQUISITION OF SECURITIES AND
DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued December 16, 2010)

1. On May 11, 2010, as amended on September 15, 2010, BHE Holdings Inc. (BHE Holdings) and Maine & Maritimes Corporation (Maine & Maritimes) (collectively, Applicants), on behalf of themselves and their public utility affiliates, filed a joint application under sections 203(a)(1) and 203(a)(2) of the Federal Power Act (FPA).¹ Applicants request Commission authorization for Maine & Maritimes to dispose of its jurisdictional facilities under FPA section 203(a)(1), and for BHE Holdings to acquire all of the outstanding securities of Maine & Maritimes under FPA section 203(a)(2). The jurisdictional facilities of Maine & Maritimes include its transmission facilities, interconnection facilities, market-based rate tariffs, contracts, and related books and records.

2. The Commission has reviewed the proposed transaction under the Commission's Merger Policy Statement.² As discussed below, we will authorize the proposed

¹ 16 U.S.C. § 824b (2006).

² See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). See also *Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008). See also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). See also *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

transaction under sections 203(a)(1) and 203(a)(2), as we find that it is consistent with the public interest.

I. Background

A. Description of Parties

1. BHE Holdings

3. BHE Holdings, a Maine corporation, is an indirect and wholly-owned subsidiary of Emera Inc. (Emera) a publicly-traded utility holding company headquartered in Halifax, Nova Scotia, Canada. BHE Holdings owns all of the outstanding interests in Bangor Hydro, but no other material assets.

4. Bangor Hydro, a Maine corporation, is an electric utility engaged in the transmission and distribution of electric energy and related services to retail customers in eastern and coastal Maine. It owns approximately 825 miles of transmission lines and approximately 4,850 miles of distribution lines. Bangor Hydro's transmission facilities include the Northeastern Reliability Interconnect, the U.S. portion of a 345 kV transmission line that runs from Wiscasset, Maine, to New Brunswick, Canada. Bangor Hydro's transmission lines are governed by the ISO New England Inc. (ISO-NE) Transmission, Markets and Services Tariff (ISO-NE Tariff). Bangor Hydro does not have a franchised service area for the sale of electricity,³ but owns diesel-fired internal combustion units that produce 20 MW of power, all of which is under contract with Constellation Energy Commodities Group, Inc. Bangor Hydro is authorized by the Commission to make wholesale sales at market-based rates.

2. Maine & Maritimes

5. Maine & Maritimes is the parent holding company of Maine & Maritimes Utility Services Group and Maine Public Service Company (MPS).⁴ Maine & Maritimes Utility Services Group is an unregulated subsidiary that provides electrical engineering and construction services, including transmission line, substation design, and building services for generator projects outside the MPS service territory, as well as some contract work within MPS's territory.

³ Bangor Hydro divested itself of virtually all of its generation assets as part of Maine's restructuring of its electric industry. *See Bangor Hydro-Elec. Co.*, 86 FERC ¶ 61,281, *clarified*, 87 FERC ¶ 61,057 (1999).

⁴ Applicants state that Maine & Maritimes is the parent of Energy Atlantic, LLC, which is currently inactive, and Maine & New Brunswick Electrical Power Company, Ltd., an inactive Canadian subsidiary of MPS.

6. MPS is an electric utility that provides transmission and distribution service to retail customers and transmission service to three wholesale customers who are located in Aroostook County, Maine and a small portion of Penobscot County, Maine. MPS provides transmission service pursuant to its Open Access Transmission Tariff (MPS OATT). MPS, along with Eastern Maine Electric Cooperative, Inc. (EMEC), is a transmission-owning member of the Northern Maine Independent System Administrator, Inc. (Northern Maine ISA). MPS's only access to the United States transmission grid is indirectly over transmission facilities in Canada. The MPS transmission system is not interconnected with, and MPS is not a member of, the New England Power Pool or ISO-NE, and MPS is not a participating transmission owner in ISO-NE.

3. Joint Investments

7. Bangor Hydro and MPS have several investments in common. Bangor Hydro holds a 14.2 percent voting interest and MPS holds a 7.5 percent voting interest in Maine Electric Power Company (MEPCO), a Commission-regulated transmission company that owns a 345 kV interconnection between New Brunswick, Canada and Wiscasset, Maine. MEPCO is controlled by Central Maine Power Company (Central Maine), which holds a 78.3 percent voting interest in MEPCO. MEPCO provides open access transmission service pursuant to the ISO-NE Tariff.

8. In addition, Bangor Hydro holds 7 percent and MPS holds 5 percent of the outstanding shares of Maine Yankee Atomic Power Company, the owner and licensee of the Maine Yankee Nuclear Facility. The facility was taken out of service in 1997 and currently is in the process of being decommissioned and dismantled, but still has a rate schedule on file with the Commission.

B. Proposed Transaction

9. Pursuant to the Agreement and Plan of Merger, BHE Holdings intends to acquire all the outstanding securities of Maine & Maritimes through a merger of Maine & Maritimes into a new subsidiary of BHE Holdings. Maine & Maritimes will be the surviving entity.

II. Notice of Filing and Responsive Pleadings

10. Notice of the Application was published in the *Federal Register*, 75 Fed. Reg. 28,599 (2010), with interventions and protests due on or before June 1, 2010. EMEC filed a timely motion to intervene. Customer Group⁵ and Northern Maine ISA

⁵ Customer Group consists of: (1) Houlton Water Company; (2) Van Buren Light and Power District; (3) EMEC; and (4) Office of the Maine Public Advocate.

filed timely motions to intervene and protests. The Maine Public Utilities Commission (Maine Commission) filed a motion for leave to intervene out-of-time. On June 16, 2010, Applicants filed an answer. On June 21, 2010, Northern Maine ISA filed an answer; on June 25, 2010, Applicants filed a limited answer to Northern Maine ISA. On June 28, 2010, Customer Group filed a response to Applicants' June 16 answer.

11. On August 25, 2010, Customer Group submitted a motion to lodge additional evidence, and a request that the Commission require Applicants to submit confidential information to supplement the record. Applicants filed an answer.

12. On September 15, 2010, Applicants, in conjunction with Customer Group, filed a Settlement Agreement and a separate explanatory statement under Rule 602 of the Commission's Rules of Practice and Procedure.⁶ Notice of the filing as an amendment to the application⁷ was published in the *Federal Register*, 75 Fed. Reg. 60,443 (2010), with interventions and protests due on or before October 5, 2010. Northern Maine ISA filed timely comments in opposition. Applicants filed a reply, and Northern Maine ISA filed a subsequent reply.

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 (2010), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2010), the Commission will grant Maine Commission's late-filed motion to intervene, given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

⁶ 18 C.F.R. § 385.602 (2010).

⁷ The Commission considers a settlement agreement filed prior to a dispositive order as an amendment to the application. See *Wisconsin Electric Power Co.*, 125 FERC ¶ 61,158, at P 10 n.2 (2008) (treating filed "settlement agreements" that resolved intervenors' disputes regarding a tariff filing as amendments to the tariff filing; citing *Stowers Oil and Gas Co. and Northern Natural Gas Co.*, 27 FERC ¶ 61,001, at 61,002 n.3 (1984) (the style in which a petitioner frames a document does not dictate how the Commission must treat it)); *Long Island Lighting Co.*, 82 FERC ¶ 61,124, at 61,447 (1998); *Cajun Elec. Power Coop. v. Louisiana Power & Light Co.*, 55 FERC ¶ 61,272, at 61,868-89 (1991).

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept the answers because they have provided information that assisted us in our decision-making process.

15. Motions to lodge pleadings from other forums may be appropriate in some instances to supplement the Commission's record.⁸ However, in this instance, we find that the Customer Group's motion to lodge does not assist us in our decision-making, and thus we deny the motion to lodge.

16. Further, under the terms of the Settlement Agreement, Customer Group agrees that it will not object to the Commission's approval of the proposed transaction as it is described in the application and will deem its protest to have been satisfied unless the application is amended materially. On this basis, the Commission deems Customer Group's protest to be withdrawn.

B. Section 203 Application

1. Standard of Review

17. Section 203(a)(4) of the FPA requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest. The Commission's analysis of whether a transaction 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.⁹ Section 203(a)(4) also requires the Commission to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."¹⁰ The Commission's regulations establish verification and informational requirements for Applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.¹¹

⁸ *El Paso Electric Co. v. Tucson Electric Power Co.*, 132 FERC ¶ 61,017, at P 45 (2010).

⁹ *Merger Policy Statement*, FERC Stats. & Regs. at 30,111.

¹⁰ 16 U.S.C. § 824b(a)(4) (2006).

¹¹ 18 C.F.R. § 33.2(j) (2010).

2. Effect on Competition

a. Applicants' Analysis

18. Applicants state that the transaction will have no adverse effect on horizontal competition in generation because MPS and MEPCO are “wires-only” electric utilities, and, although Bangor Hydro owns limited generating assets, it is primarily a “wires-only” company as well. No other affiliate of Maine & Maritimes owns any generation. Applicants state that the transaction will have no adverse effect on horizontal competition in transmission, because after consummation of the transaction, Bangor Hydro, MEPCO, and MPS will continue to provide open-access service over their respective transmission lines. As to MEPCO, Applicants state that, although the proposed transaction will result in an aggregate of direct and indirect holdings by BHE Holdings in MEPCO of 21.7 percent, MEPCO provides open access transmission service pursuant to the ISO-NE OATT and MEPCO is controlled by Central Maine. Thus, according to Applicants, the proposed transaction does not raise any market power concerns.

19. With regard to vertical market power, Applicants reiterate that Bangor Hydro, MEPCO, and MPS own or control jurisdictional transmission assets and provide transmission service pursuant to open access transmission tariffs. Other than their common investment in MEPCO, which is controlled by Central Maine, the electric assets that Bangor Hydro and its affiliates own are not directly connected with the electric assets that MPS and its affiliates own. In addition, Applicants state that BHE Holdings’ parent company, Emera, holds a 12.92 percent minority interest in Maritimes and Northeast Pipeline, which operates a natural gas pipeline between Goldboro, Nova Scotia, and Dracut, Massachusetts. Applicants state that Emera does not control access to the pipeline such that it could restrict natural gas deliveries to electric generators. The application states that, other than Emera’s minority interest in the pipeline, neither Applicants nor their affiliates own or control any resources or infrastructure used to deliver inputs to competing generating facilities in the United States.

b. Commission Determination

20. In analyzing whether a transaction will adversely affect competition, the Commission first examines its effects on concentration in generation markets or whether the transaction otherwise creates an incentive to engage in behavior harmful to competition, such as the physical or economic withholding of generation. The proposed transaction will not have an adverse effect on horizontal competition because it involves

companies that are primarily “wires-only” electric utilities.¹² Therefore, we find that the proposed transaction will not have an adverse effect on horizontal competition.

21. Second, the Commission considers the vertical combination of upstream inputs, such as transmission or natural gas, with downstream generating capacity. We accept Applicants’ representation that Emera’s minority interest in Maritimes and Northeast Pipeline does not confer the ability to restrict natural gas deliveries to electric generators to support our finding that the proposed transaction does not raise any vertical market power concerns, and we note that the combined entity owns a *de minimis* amount of generation. For these reasons, we find that the proposed transaction will have no adverse effect on competition.

3. Effect on Rates

a. Applicants’ Analysis

22. Applicants state that all contracts under which BHE Holdings’ public utility affiliates provide wholesale power service are entered into pursuant to market-based rate authority, thus, the transaction will not have an adverse effect on wholesale power rates.

23. Further, Applicants state that the transaction will have no adverse effect on the transmission service rates of Bangor Hydro, MPS, or MEPCO. BHE Holdings is acquiring Maine & Maritimes, so Applicants argue no costs related to the transaction will be incurred by either Bangor Hydro or MEPCO; therefore, no such costs will be passed on to transmission customers.¹³

24. According to Applicants, transmission rates for MPS are established pursuant to a formula set forth in the MPS OATT. In order for MPS not to pass through the costs related to the transmission to its transmission customers, Applicants state that MPS would need to modify its OATT formula rate to exclude merger-related costs, specifically excluding merger-related costs in Account No. 923 (Outside Services) from amounts recovered under the formula. MPS pledges to hold harmless all transmission customers from any costs associated with the transaction (e.g., transaction costs) for a period of five years to the extent that such costs exceed savings related to the transaction.

¹² *PNM Resources*, 124 FERC ¶ 61,019, at P 18 n.9 (2008) (“The Commission has recognized that wires-only transactions should not raise competitive concerns.”) (citations omitted).

¹³ BHE Holdings Inc. May 11, 2010 Application at 13-14 (Application).

25. Applicants also pledge to hold harmless all transmission and current wholesale customers from any costs associated with the transaction for a period of five years to the extent that such costs exceed savings related to the transaction.¹⁴

b. Protests and Answers

i. Customer Group

26. In its protest, Customer Group expressed concern as to the sufficiency of Applicants' generic "hold harmless" commitment. As discussed in greater detail below, Customer Group subsequently reached an agreement with Applicants under which Customer Group agreed that it will not object to the Commission's approval of the proposed transaction as it is described in the application and will deem its protest have been satisfied unless the application is amended materially.

ii. Northern Maine ISA

27. Northern Maine ISA requests that the Commission condition its approval of the application on the requirement that, before any MPS transmission facilities are integrated with the transmission system operated by ISO-NE, Applicants be required to file, for Commission approval, a proposal to hold customers harmless from any adverse economic consequences of the integration. Consumer interests would be able to challenge the filing, and Applicants would bear the burden of proof to demonstrate that their proposal would hold Northern Maine customers harmless. Northern Maine ISA contends that Applicants have structured their filing to avoid discussion of plans to integrate the MPS transmission facilities with ISO-NE after the proposed transaction is completed, but that that is the likely outcome of the proposed transaction. Northern Maine ISA notes that Applicants have stated that the proposed transaction would allow the companies to provide service under a uniform rate schedule across both of their service territories. Northern Maine ISA asserts that "uniform rate schedule" will be the ISO-NE OATT, and that this establishes a clear nexus between the proposed transaction and eventual integration with ISO-NE.¹⁵ Northern Maine ISA states that the integration of the MPS system into ISO-NE could result in increased annual costs of more than \$60 million to

¹⁴ *Id.* at 14-15.

¹⁵ Northern Maine ISA June 1, 2010 Protest at 10.

Northern Maine customers from transmission service and wholesale power purchases.¹⁶ Northern Maine ISA states that northern Maine consumers should be protected from the adverse consequences of such an action.¹⁷ Northern Maine ISA reiterates its arguments in its subsequent answer.¹⁸

iii. Applicants' Answer

28. Applicants respond to Northern Maine ISA's arguments stating that the Commission should not, in this proceeding, consider the possible effects of integration with ISO-NE, arguing that whether integration occurs is speculative and outside the scope of the proposed transaction. Applicants note that if MPS is integrated with ISO-NE, MPS will first be required to make a section 205 filing to amend the ISO-NE tariff.¹⁹ In response to Northern Maine ISA's argument that the proposed transaction will result in the "inevitable integration" of MPS into ISO-NE via a new transmission line, Applicants argue the Northern Maine ISA's tariff bars any new facility from being connected to the Northern Maine Transmission System if the Northern Maine ISA disapproves of the connection.²⁰

c. Amendment to the Application

29. The amendment to the application consists of an agreement between Customer Group and Applicants resolving issues between them related to the proposed transaction. The transmittal letter to the agreement states that the Commission should approve the proposed transaction, "subject to the requirement that the Merger Applicants fulfill the commitments" in the agreement.²¹ The agreement acknowledges that Applicants contemplate building a transmission line interconnecting ISO-NE and MPS. The agreement further provides that, before seeking rate authorization for such a transmission

¹⁶ Northern Maine ISA argues that, over a 20-year period, integration into ISO-NE could shift an average of up to \$46.6 million per year in increased transmission costs and \$21.6 million per year in increased wholesale energy costs to Northern Maine. *Id.* at 9 (citing *Power Market Cost/Benefit Assessment of Maine Power Connection* at 3 (Nov. 12, 2008), available at <http://www.nmisa.com/documents.htm>).

¹⁷ Northern Maine ISA June 1, 2010 Protest at 5-7.

¹⁸ Northern Maine ISA June 21, 2010 Answer.

¹⁹ *Id.* at 6.

²⁰ BHE Holdings June 25, 2010 Answer (quoting section 4.21 of the Northern Maine ISA tariff).

²¹ BHE Holdings September 15, 2010 Transmittal Letter.

line from the Commission, Applicants must first obtain an order from the Commission regarding cost recovery from Northern Maine ISA customers, under one of two scenarios.

30. In the first scenario, under condition 3.1, if Applicants *do not* seek cost recovery from Northern Maine ISA customers, then they must provide sufficient evidence for the Commission to find that there will be no cost recovery by Applicants, or on their behalf by another entity, from Northern Maine ISA customers. In the second scenario, under condition 3.2, if Applicants *do* seek cost recovery from Northern Maine ISA customers, then Applicants must provide sufficient evidence for the Commission to find that they made an effort to negotiate with the participating transmission owners in ISO-NE to phase-in the cost effects to Northern Maine ISA (and EMEC) customers and that Customer Group and EMEC were given an opportunity to participate in all of these negotiations.

31. Both conditions also provide that Applicants must provide evidence sufficient for the Commission to find that ISO-NE and Northern Maine ISA, or their successors, either have determined through a System Impact Study, or are likely to determine based on engineering analyses, that the new transmission line will not cause problems for system reliability on the networks that they administer, or that any such problems will be resolved by measures whose costs are included in the cost of a transmission line or borne by parties other than Northern Maine ISA customers. The amendment states that the Commission must specifically mandate compliance with the amendment as an express condition on its authorization of the proposed transaction.

i. Northern Maine ISA's Protest

32. Northern Maine ISA opposes the amendment to the application because, Northern Maine ISA asserts, it does not protect customers from costs related to the integration of MPS into ISO-NE.²² Northern Maine ISA urges the Commission to condition its authorization of the proposed transaction on the Applicants' commitment to hold customers harmless from the rate effects from the integration of MPS into ISO-NE. Northern Maine ISA argues that transmission costs are lower for its customers under the current arrangement than if its customers are allocated a share of the ISO-NE transmission costs, which would increase costs by an average of between \$11.9 million and \$30.4 million per year. In addition, Northern Maine ISA asserts that wholesale energy costs will increase because the average energy clearing price for Northern Maine was about 16.3 percent lower than that of ISO-NE between 2003 and 2010. According to Northern Maine ISA, shifting such costs to customers in northern Maine would increase wholesale power costs by an average of \$7.4 million per year. Northern Maine ISA

²² Northern Maine ISA also complains that the amendment does not address the reliability concerns related to the proposed transaction, discussed below.

contends that the amendment to the application will not hold customers harmless from these costs. Moreover, Northern Maine ISA argues that condition 3.1 is unnecessary and that condition 3.2 allows Applicants too much discretion to pass costs on to northern Maine customers.

33. In addition, Northern Maine ISA takes issue with the part of the condition that requires the Commission to make a finding that ISO-NE and Northern Maine ISA, or their successors, have either determined through a System Impact Study or are likely to determine based on engineering analyses, that the proposed transmission line will not cause any problems for system reliability for either network and that the costs of resolving any such problems will not be passed on to Northern Maine ISA customers. Northern Maine ISA contends that this provision requires the Commission to prejudge the outcome of a proceeding to be conducted by the Northern Maine ISA in compliance with its tariff, and that the Commission's action of prejudging the outcome would be in conflict with Commission precedent.

ii. Applicants' Answer

34. Applicants contend that Northern Maine ISA did not raise any new arguments in its opposition to the amendment. Applicants state that concerns over the costs of integration with ISO-NE are speculative and irrelevant to the proposed transaction, and that the hold harmless commitment made in the application is sufficient.

iii. Northern Maine ISA's Answer

35. In its final answer, Northern Maine ISA contends that the construction of the transmission line and subsequent integration with ISO-NE is central to the value of the proposed transaction and that costs associated with the transmission line and integration with ISO-NE are therefore costs related to the transaction.

d. Commission Determination

36. The Merger Policy Statement states that, in analyzing the effect of a proposed transaction on rates, the Commission will focus on ratepayer protection.²³ The

²³ Merger Policy Statement, FERC Stats. & Regs. at 30,122. *See also PNM Resources*, 124 FERC ¶ 61,019, at P 43 (2008) (Applicants are not required to quantify the benefits of the transaction; the Commission focuses on ratepayer protection); *ITC Holdings Corp.*, 121 FERC ¶ 61,229, at P 121 (2007) (Commission does not examine costs and benefits but focuses on ratepayer protection).

Commission, in the Merger Policy Statement, “urge[d] merger applicants to negotiate with customers before filing and to offer an . . . appropriate ratepayer protection mechanism in their merger applications.”²⁴ The Commission provided examples of the types of ratepayer protection mechanisms that the applicants could propose, including a “general hold harmless provision—a commitment from the applicant that it will protect wholesale customers from any adverse rate effects resulting from the merger for a significant period of time following the merger.”²⁵ The Commission has been clear that hold harmless provisions should address costs related to the transaction and do not necessarily insulate customers from all rate increases.²⁶

37. We accept Applicants’ commitment to hold harmless all transmission and current wholesale customers from any costs associated with the transaction for a period of five years to the extent that such costs exceed savings related to the transaction. Regarding formula rates, the Commission has found that a hold harmless commitment is enforceable and administratively manageable if customers have an opportunity to scrutinize costs before they are included in the formula rate, and therefore are able to alert the Commission to costs that might be transaction-related. If Applicants seek to recover transaction-related costs through their wholesale power or transmission rates, they must submit a compliance filing that details how they are satisfying the hold harmless requirement. If Applicants seek to recover transaction-related costs in an existing formula rate that allows for such recovery, then that compliance filing must be filed in the FPA section 205 docket in which the formula rate was approved by the Commission, as well as the instant section 203 docket.²⁷ We also note that, if Applicants seek to recover transaction-related costs in a filing whereby they are proposing a *new* rate (either a new formula rate or a new stated rate), then that filing must be made in a *new* section 205

²⁴ Merger Policy Statement, FERC Stats. & Regs. at 30,124.

²⁵ *Id.*

²⁶ *PNM Resources*, 124 FERC ¶ 61,019 at P 43 (“Applicants are not required to apply a rate freeze and may propose rate increases under section 205 filings.”); *ITC Holdings Corp.*, 121 FERC ¶ 61,229 at P 124 (“the Commission finds that any increased costs of ITC Midwest attributable to prudent transmission investment do not make the Transaction contrary to the public interest”); *Boston Generating*, 113 FERC ¶ 61,016, at P 26 (2005) (“In reviewing an application under section 203, the Commission looks at the effects of the transaction on rates, not at rate changes that may occur regardless of the transaction.”).

²⁷ In this case the filing would be a compliance filing in both the section 203 and 205 dockets.

docket as well as in the instant section 203 docket.²⁸ The Commission will notice such filings for public comment. In such a filing, Applicants must: (1) specifically identify the transaction-related costs they are seeking to recover, and (2) demonstrate that those costs are exceeded by the savings produced by the transaction, in addition to any requirements associated with filings made under section 205. Such a hold harmless commitment will protect customers' wholesale power and transmission rates from being adversely affected by the proposed transaction.

38. In addition, the Commission will be able to monitor the Applicants' hold harmless provision under the books and records provision of section 301(c) of the FPA.²⁹ Therefore, we find that the proposed transaction will not have an adverse effect on rates.

39. As the Commission stated in the Merger Policy Statement, it encourages parties to settle any disputes related to rates in a proposed transaction prior to filing the application; even after filing of the application and protests, the Commission continues to promote negotiation among the parties.³⁰ Regarding the agreement between Applicants and Customer Group, the Commission construes it as an amendment to the application and, in approving the proposed transaction, requires Applicants to abide by the commitments contained therein.³¹ On the same basis, we deem Customer Group's protest withdrawn, as noted above. While the Commission notes that the commitments made in the agreement are binding on the Applicants and Customer Group, the Commission does not accept the implication in the agreement that the Commission will be bound to make certain findings or to undertake a certain course of action in a future proceeding. We also note that any subsequent filing made by the parties pursuant to the agreement will be subject to public notice and comment, so Northern Maine ISA may raise its concerns at that time.

40. Northern Maine ISA argues that Applicants want to integrate the Northern Maine transmission system into the transmission system operated by ISO-NE at some future time, and that the Commission should condition its approval of the transaction at issue here on Applicants holding transmission customers in Northern Maine harmless from any adverse economic consequences of such an integration. We find that Northern Maine

²⁸ In this case the filing would be a compliance filing in the section 203 docket, but a rate application in the section 205 docket.

²⁹ 16 U.S.C. § 825(c) (2006).

³⁰ Merger Policy Statement, FERC Stats. & Regs. at 30,124.

³¹ Section 1.3 of the Settlement Agreement states that the Commission "must specifically mandate compliance with this Settlement Agreement as an express condition of its approval of the merger."

ISA has not shown that any increase in transmission rates related to integration with ISO-NE (should that occur at some point in the future) are costs related to the instant transaction for purposes of the Commission's section 203 analysis. Furthermore, the issue of integrating MPS into ISO-NE is not before the Commission in the instant proceeding. If MPS wishes to integrate with ISO-NE in the future, it will be required to first propose this to the Commission in an FPA section 205 tariff filing, which will be subject to public notice and comment, as well as review by the Commission.³² On this basis, we find that Northern Maine ISA's concerns regarding potential rate increases related to integrating MPS with ISO-NE are beyond the scope of this proceeding.

4. Effect on Regulation

a. Applicants' Analysis

41. The application states that the transaction will not diminish federal regulatory authority over Applicants and/or their affiliates. Following the transaction, Bangor Hydro, MPS, and their public utility affiliates will remain subject to the Commission's jurisdiction. In addition, Applicants state that the transaction will not adversely affect state regulation. They note that consummation of the transaction is expressly conditioned on approval by the Maine Commission.

b. Commission Determination

42. We find that neither state nor federal regulation will be impaired by the proposed transaction. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap at the federal or state level.³³ We find that the merger will not create a regulatory gap at the federal level, because the Commission will retain its regulatory authority over the companies after the transaction. In the Merger Policy Statement, the Commission stated that it ordinarily will not set the

³² *Guidance on Regional Transmission Organization and Independent System Operator Filing Requirements under the Federal Power Act*, 104 FERC ¶ 61,248 (2003) (describing Commission's analysis of section 205 filings by utilities seeking to join an RTO or ISO); *see, e.g., Midwest Independent Transmission System Operator, Inc. and Big Rivers Electric Corporation*, 133 FERC ¶ 61,175 (2010) (conditionally accepting tariff revisions related to Big Rivers Energy joining Midwest ISO); *Midwest Independent Transmission System Operator, Inc., MidAmerican Energy Company*, 128 FERC ¶ 61,047 (2009) (accepting tariff revisions reflecting MidAmerican Energy joining Midwest ISO).

³³ Merger Policy Statement, FERC Stats. & Regs. at 30,124.

issue of the effect of a transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the transaction. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission stated that it may set the issue for hearing, and that it will address such circumstances on a case-by-case basis.³⁴ We note that no party alleges that regulation would be impaired by the proposed transaction, and that no state commission has requested that the Commission address the issue of the effect on state regulation.

5. Cross-Subsidization

a. Applicants' Analysis

43. Applicants state that the only affiliated entities that have captive customers or that own or provide transmission service over jurisdictional transmission facilities are Bangor Hydro, MPS, and MEPCO. Applicants assert that the proposed transaction will not result in any proscribed cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company because, among other things: (1) the proposed transaction will not result in any transfer of jurisdictional assets between affiliated entities; (2) neither Bangor Hydro, MPS, nor MEPCO will be issuing any securities as a result of the transaction; (3) no assets of Bangor Hydro, MPS, or MEPCO will be pledged or encumbered as a result of the proposed transaction except insofar as existing MPS debt may be refinanced (in which case, there will not be an additional pledge or encumbrance of MPS assets and, therefore, any such refinancing is consistent with the public interest); and (4) the proposed transaction will not result in any new affiliate contract between Bangor Hydro, MPS, or MEPCO and any associate company except insofar as a support services agreement may be executed by Bangor Hydro, MPS, and/or certain affiliates (in which case any such agreement will comply fully with the Commission's Affiliate Restrictions regulations and its Cross-Subsidization Restrictions and, therefore, will be consistent with the public interest).

b. Commission Determination

44. Applicants state that the proposed transaction will not result in any new affiliate contract, "except insofar as a support services agreement may be executed by Bangor Hydro, MPS, and/or certain affiliates (in which case any such agreement will comply fully with the Commission's Affiliate Restrictions regulations and its Cross-Subsidization

³⁴ *Id.* at 30,125.

Restrictions and, therefore, will be consistent with the public interest).”³⁵ Applicants provide no further detail regarding the agreement.³⁶

45. The Commission’s regulations require a detailed showing that a proposed transaction will not result in any new affiliate contract, “other than non-power goods and services agreements subject to review under section 205 and 206 of the Federal Power Act.”³⁷ Because Applicants state that their support services agreement “may be executed,” we infer that it does not now exist, and so Applicants cannot yet make the detailed showing required in our regulations.³⁸ Applicants do however, as noted above, represent that, if a support services agreement is executed, it will comply with the Commission’s Affiliate and Cross-Subsidization requirements.

46. We remind Applicants that our regulations prohibit “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 services 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.*”³⁹ While we interpret Applicants’ reference to a “support services agreement” to refer to a “non-power goods and services agreement,” we will require Applicants to file a copy of the agreement in this docket, for informational purposes, within 30 days of the date of execution.⁴⁰

³⁵ Application, Exhibit M.

³⁶ Also, we note that Applicants did not disclose any existing pledges and/or encumbrances of utility assets for the benefit of an associate company, 18 C.F.R. § 33.2(j)(1)(i) (2010). We interpret this to mean that there are none.

³⁷ 18 C.F.R. § 33.2(j)(1)(ii)(D) (2010).

³⁸ Commission regulations also require that an application under section 203 include, “[a]ll contracts related to the proposed transaction together with copies of all other written instruments entered into or proposed to be entered into by the parties to the transaction (to be identified as Exhibit I to the application).” 18 C.F.R. § 33.2(f) (2010). Where an agreement has not yet been finalized, the Commission will accept a draft. *See EIF Berkshire Holdings, LLC*, 116 FERC ¶ 61,273, at P 17 (2006).

³⁹ 18 C.F.R. § 33.2(j)(1)(ii)(D) (2010) (emphasis added).

⁴⁰ The Commission will not notice the filing, and the filing will not require Commission action.

47. Based on the facts as presented in the application, as discussed above, we find that the proposed transaction will not result in inappropriate cross-subsidization, or the pledge or encumbrance of utility assets for the benefit of an associate company.

48. 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 adequately protect public utility customers against inappropriate cross-subsidization may be impaired unless it has access to the acquirer'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. However, the Commission's jurisdiction does not extend to foreign companies operating outside of United States borders. The Commission has acted previously to protect customers by requiring access to a foreign acquirer's books and records,⁴¹ and our approval of the transaction here is conditioned on Applicants' agreement to provide access to all books and records within the lawful scope of section 301(c) of the FPA.

C. Accounting Analysis

49. The filing raises issues concerning the Applicants' accounting for the merger and related transaction costs. The Applicants claim the transaction will not impact the jurisdictional accounts of any of their subsidiaries or affiliates. They state that if the transaction does impact any jurisdictional accounts they will submit the required accounting entries within six months of the consummation of the transaction.⁴² Accordingly, to the extent that Bangor Hydro, MPS, MEPCO or Maine Yankee records any costs related to the merger (e.g., merger premiums, acquisition adjustments, goodwill, and merger transaction costs) in their accounts, they are directed to submit their final accounting for the proposed transaction within six months after the transaction is consummated.⁴³ The accounting submission must provide all accounting entries necessary to effect the proposed transaction, including narrative explanations describing the basis for the entries.

⁴¹ See *New England Power Co.*, 87 FERC ¶ 61,287 (1999). See also *Consolidated Water Power Co.*, 91 FERC ¶ 61,275, at 61,931-32 (2000); *PacifiCorp*, 87 FERC ¶ 61,288, at 62,152-53 (1999).

⁴² Application at 23.

⁴³ 18 C.F.R. Part 101, Electric Plant Instruction No. 5, *Electric Plant Purchased or Sold*, Account No. 102, *Electric Plant Purchased or Sold*, and Account No. 114, *Electric Plant Acquisition Adjustments* (2009).

50. Although the application states the transaction will not impact jurisdictional accounts, the Applicants acknowledge they will incur merger-related transaction costs. The application states that merger-related transaction costs would be recorded in Account No. 923, Outside Services Employed, and that these costs would need to be excluded from MPS's transmission rates which are established pursuant to a formula set forth in its OATT using FERC Form 1 data.⁴⁴ The filing also states that in order for MPS not to pass through costs related to the transaction to transmission customers, MPS would need to modify its OATT formula rate to exclude merger-related costs.

51. Costs incurred to effectuate a merger are not considered an operating activity under the Commission's accounting regulations and therefore should not be recorded in Account No. 923 as proposed by the Applicants.⁴⁵ The Commission has required companies to record merger-related transaction costs in Account No. 426.5, Other Deductions.⁴⁶ Account No. 426.5 includes miscellaneous expense items which are non-operating in nature.⁴⁷ Accordingly, Bangor Hydro, MPS, MEPCO and Maine Yankee must record their share of any merger-related transaction costs in Account No. 426.5.

D. Other Considerations

1. Reliability

a. Northern Maine ISA's Arguments

52. Northern Maine ISA requests that the Commission impose a condition that relates to MPS in its role as the Northern Maine Area Operator (NMAO). Northern Maine ISA states that it relies on MPS and EMEC – acting collectively as the NMAO – to perform certain functions of Northern Maine ISA.⁴⁸ Northern Maine ISA requests that, prior to

⁴⁴ Application at 14.

⁴⁵ 18 C.F.R. Part 101 (2010).

⁴⁶ See e.g., *Midwest Power Systems, Inc. and Iowa-Illinois Gas and Electric Company*, 71 FERC ¶ 61,386 (1995); *NSTAR Electric and Gas Corporation*, Docket No. AC07-183-000 (Aug. 9, 2007) (unpublished letter order).

⁴⁷ The Commission's accounting regulations provide for the classification of non-operating expenses in Account Nos. 426.1 through 426.5. The Note to the Special Instructions of these accounts states, "The classification of expenses as non-operating and their inclusion in these accounts is for accounting purposes. It does not preclude Commission consideration of proof to the contrary for ratemaking or other purposes."

⁴⁸ Northern Maine ISA June 1, 2010 Protest at 12 (citing Northern Maine ISA Tariff section 4.7(c)). The NMAO oversees the scheduling, dispatching and facilitating of all energy, capacity and ancillary services transactions in the Northern Maine Market.

(continued...)

any change in MPS's management, functions, or practices that would affect MPS in its role as the NMAO, MPS must provide reasonable notice to, and engage in any necessary coordination with, the Northern Maine ISA and affected market participants to ensure the continued reliable operation of the Northern Maine Transmission System and Northern Maine wholesale electric markets unless and until Northern Maine is integrated with ISO-NE. Northern Maine ISA contends that the Commission can impose a condition related to reliability under section 203, which states that the Commission may approve acquisitions "upon such terms and conditions necessary or appropriate to *secure the maintenance of adequate service . . .*"⁴⁹

b. Applicants' Answer

53. Applicants ask the Commission to reject Northern Maine ISA's request to condition the transaction on Applicants providing notice and coordinating with Northern Maine ISA and affected market participants "prior to any change in MPS's management, functions, or practices that would affect MPS in its role as the NMAO." Applicants state that this is a Northern Maine ISA tariff matter outside the scope of this proceeding. Applicants assert that Northern Maine ISA's concerns are speculative and that it has not shown how possible changes in management that affect MPS's ability to perform its functions and changes in practices related to acting as NMAO would be a result of the transaction or would create an adverse effect on competition, rates, or regulation.⁵⁰

c. Commission Determination

54. We find that changes in MPS's management, functions, or practices that would affect MPS in its role as the NMAO are not related to this particular transaction.⁵¹ When

When MPS and EMEC fulfill these duties, they and their employees are deemed to be agents of Northern Maine ISA.

⁴⁹ Northern Maine ISA June 21, 2010 Answer at 9 (quoting 16 U.S.C. § 824b(b) (2006) (emphasis supplied)). Northern Maine ISA reiterated its arguments in its reply to the amendment to the application. Northern Maine ISA October 5, 2010 Comments at 12-15; Northern Maine ISA October 19, 2010 Comments at 4.

⁵⁰ BHE Holdings Inc. June 16, 2010 Answer at 12.

⁵¹ *National Grid plc*, 117 FERC ¶ 61,080, at P 77 (2006), *reh'g denied*, 122 FERC ¶ 61,096 (2008) ("Insofar as intervenors are concerned that the merged company's future activities will adversely affect reliability, we note that we may address those concerns in the future as part of our authority to oversee reliability."). If Northern Maine ISA's concerns come to fruition, it may bring them to the Commission's attention by filing a complaint under section 206 of the FPA.

necessary, the Commission will condition its authorization to address specific, merger-related harm; no such harm has been identified here.⁵² Moreover, the Commission retains its jurisdiction over reliability issues regardless of which entity owns the transmission facilities. For these reasons, we decline to adopt Northern Maine ISA's proposed condition requiring Applicants to provide notice prior to any change in MPS's management, operations, functions, or practices that would affect MPS in its role as the NMAO.

2. Additional standards

55. Information and/or systems connected to the bulk power system involved in this transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to FPA section 215. Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information databases, and operating systems. If affiliates, personnel or investors are not authorized for access to such information and/or systems connected to the bulk power system, a public utility is obligated to take the appropriate measures to deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, etc., must comply with all applicable reliability and cyber security standards. The Commission, North American Electric Reliability Corporation or the relevant regional entity may audit compliance with reliability and cyber security standards.

The Commission orders:

(A) We hereby grant authorization under sections 203(a)(1) and 203(a)(2) for the proposed transaction, as discussed in the body of this order.

(B) We deny the motion to lodge additional evidence.

(C) We deem Customer Group's protest to be withdrawn.

(D) 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.

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

⁵² *Great Plains Energy*, 121 FERC ¶ 61,069 at P 49.

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

(G) Applicants shall make appropriate filings under section 205 of the FPA, as necessary, to implement the proposed transaction.

(H) Applicants must inform the Commission within 30 days of any material change in circumstances that would reflect a departure from the facts the Commission relied upon in authorizing the transaction.

(I) Applicants shall notify the Commission within 10 days of the date that the reorganization transaction has been consummated.

(J) Applicants shall file in this docket, for informational purposes, a copy of the support services agreement discussed above within 30 days of the execution date of the agreement.

(K) Applicants shall submit their proposed accounting entries to the Commission within six months after the date on which the merger is consummated. The accounting submission shall provide: (1) all accounting entries necessary to effect the transaction, along with narrative explanations describing the basis for the entries; and (2) an explanation of the accounting for the acquisition premium.

(L) If Applicants seek to recover transaction-related costs through any formula rate, they must first submit a compliance filing to the Commission that details how they are satisfying the hold harmless requirement. In particular, in such a filing, Applicants must: (1) specifically identify the transaction-related costs they are seeking to recover; and (2) demonstrate that those costs are exceeded by the savings produced by the merger.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.