136 FERC ¶ 61,016
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.

NSTAR Docket No. EC11-35-000
Northeast Utilities

ORDER AUTHORIZING MERGER AND DISPOSITION OF JURISDICTIONAL FACILTIES

(Issued July 6, 2011)

1. On January 7, 2011, NSTAR and Northeast Utilities (collectively, Applicants) filed pursuant to sections 203(a)(1) and 203(a)(2) of the Federal Power Act (FPA)[1] and Part 33 of the Commission's regulations a joint application for authorization of a proposed transaction by which NSTAR will become a wholly-owned subsidiary of Northeast Utilities (Proposed Transaction). The Commission has reviewed the application under the Commission's Merger Policy Statement.[2] As discussed below, we will authorize the Proposed Transaction as consistent with the public interest.

[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 FPA Section 203 Supplemental Policy Statement*, 72 Fed. Reg. 42,277 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement). *See also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). *See also Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

I. Background

A. Description of the Parties

1. NSTAR

2. NSTAR is a public utility holding company under the Public Utility Holding Company Act of 2005 (PUHCA 2005).[3] It is primarily engaged in the energy delivery business through two wholly-owned regulated subsidiaries, NSTAR Electric Company (NSTAR Electric) and NSTAR Gas Company (NSTAR Gas). NSTAR also owns NSTAR Electric & Gas Corporation, which provides centralized services to NSTAR Electric and NSTAR Gas. NSTAR's subsidiaries transmit and deliver electricity to 1.1 million electric distribution customers and deliver natural gas to nearly 300,000 customers in eastern Massachusetts. NSTAR and its subsidiaries have no retail customers outside of Massachusetts. The Applicants indicate that NSTAR is also the partial owner of additional public utilities described below under the heading "NSTAR and Northeast Utilities Joint Ventures," and certain other non-regulated subsidiaries.[4]

a. NSTAR Electric

3. NSTAR Electric is an electric distribution and transmission company and is the product of an internal corporate reorganization of NSTAR subsidiaries in which the former Cambridge Electric Light Company, Commonwealth Electric Company and Canal Electric Company were merged with and into the former Boston Edison Company, and Boston Edison Company's name was changed to NSTAR Electric.[5] NSTAR Electric owns transmission and distribution facilities located in eastern and southeastern Massachusetts, including metropolitan Boston, Cape Cod, Martha's Vineyard, and parts of Plymouth and Bristol Counties.

4. Applicants state that since final divestiture in 2010, NSTAR no longer owns generation assets directly or indirectly. However, NSTAR Electric has several remaining contractual entitlements to generation capacity that were entered into by Boston Edison Company, Cambridge Electric Light Company and Commonwealth Electric Company in the past. NSTAR Electric sells these contractual entitlements into the ISO New England

[3] 42 U.S.C. § 16451 *et seq*. (2006).

[4] *See* Application at Exhibits A and B-1.

[5] Application at 4 (citing *Boston Edison Co.*, 117 FERC ¶ 61,083 (authorizing internal corporate reorganization of these NSTAR subsidiaries), *order on reh'g*, 117 FERC ¶ 61,240 (2006)).

Inc. (ISO-NE) market. Applicants state that all revenues from such sales are credited back to NSTAR Electric's distribution customers. Applicants state that aside from these sales into the ISO-NE market, NSTAR Electric does not engage in wholesale sales and has no wholesale power customers.

5. Applicants state that the Commonwealth of Massachusetts is a retail choice state and that all of the consumers within the NSTAR electric service area have the right to purchase power from other suppliers. NSTAR Electric has provider of last resort (POLR) service responsibility, which it fulfills to the extent that consumers in its service area do not take advantage of the opportunity to purchase from other suppliers. However, NSTAR Electric does not directly serve POLR customers. Rather, it negotiates with suppliers and assigns the right to serve POLR customers to those suppliers. NSTAR Electric's sole responsibility then is to deliver power of third-party suppliers on NSTAR Electric's transmission and distribution facilities.

b. NSTAR Gas

6. NSTAR Gas is a natural gas local distribution company which purchases, distributes, and sells natural gas in central and eastern Massachusetts including Cambridge, Framingham, Plymouth, New Bedford, Worchester, Dedham, Somerville, and an area within the City of Boston. The Applicants state that NSTAR Gas' subsidiary, Hopkinton LNG Corp., owns a liquefied natural gas (LNG) facility in Hopkinton, Massachusetts and an LNG storage facility in Acushnet, Massachusetts. Applicants state that Hopkinton LNG Corp. principally provides its LNG services to NSTAR Gas.

2. Northeast Utilities

7. Northeast Utilities is public utility holding company under PUHCA 2005 that provides retail electric service to approximately 1.9 million customers in Connecticut, western Massachusetts and New Hampshire through its three wholly-owned regulated public utility subsidiaries: Connecticut Light and Power Company (CL&P), Western Massachusetts Electric Company (WMECo), and Public Service Company of New Hampshire (New Hampshire PSCo). Northeast Utilities also provides retail natural gas service to approximately 200,000 residential, commercial and industrial customers in the state of Connecticut through its natural gas subsidiary, Yankee Gas Services Company (Yankee Gas). Applicants state that in 2009 CL&P, WMECo, New Hampshire PSCo, and Yankee Gas accounted for approximately 98 percent of Northeast Utilities' earnings, and that the remaining 2 percent of earnings were derived from Northeast Utilities' competitive businesses, which are held by Northeast Utilities Enterprises, Inc. Applicants note that most of these competitive businesses, including Select Energy, Inc.

(Select Energy), are in the process of being wound down.[6] Northeast Utilities also owns Northeast Utilities Service Company, which provides centralized services to its public utility and natural gas affiliates.

a. CL&P

8. CL&P is an electric distribution company that provides transmission and distribution services and engages in the purchase and supply of electricity to its residential, commercial and industrial customers. As of year-end 2009, CL&P provided retail electric service to approximately 1.2 million customers in Connecticut. CL&P does not own any electric generation facilities, but has limited contracts for power, including 48 megawatts (MW) of output of the Vermont Yankee nuclear generating station (Vermont Yankee). However, Applicants state that none of these contracts, for power or otherwise, give CL&P operational control of generation. In addition, Applicants state that as Connecticut is a retail choice state, CL&P purchases power, without profit, to serve customers who do not choose a competitive energy supplier. These customers are charged through CL&P's "Standard Service" rates or supplier of last resort rates.

b. New Hampshire PSCo

9. New Hampshire PSCo provides retail electric service to about 500,000 retail customers throughout New Hampshire. New Hampshire PSCo is a provider of transmission and distribution services and also provides default POLR energy service under its "Energy Service" rates for customers who do not elect to use a third-party supplier, as New Hampshire is a retail choice state. It owns approximately 1,138 MW of generating capacity, all of which is dedicated to serving its retail load. In addition, New Hampshire PSCo has purchase obligations totaling 46 MW with independent generators and a contract to purchase 20 MW of the output from Vermont Yankee that expires in 2012. The Applicants note that none of these purchase obligations give New Hampshire PSCo operational control over generation. Although New Hampshire PSCo has other power purchase contracts, they are not tied to specific generating facilities and are used solely to meet its POLR load obligations. Lastly, Applicants state that New Hampshire PSCo's economic capacity from retained generation and long-term contracts is approximately equal to its load responsibilities, given the current level of load choosing to remain under POLR service.

[6] Application at 6 (citing Exhibits A and B-2).

c. WMECo

10. WMECo provides electric distribution service and POLR services to approximately 210,000 retail customers in western Massachusetts. It owns 1.8 MW in solar electric generating facilities.[7] WMECo also has an entitlement to 13 MW of the output of Vermont Yankee that expires in 2012, but Applicants state that the entitlement does not give WMECo operational control of generation. WMECo provides POLR services and therefore purchases electric power for those customers who do not choose an electric supplier. WMECo passes through the resulting costs to those customers under basic service rates.

d. Yankee Gas

11. Yankee Gas operates a gas distribution system serving approximately 200,000 customers in Connecticut with a total throughput for both sales and transportation in 2009 of 52.5 billion cubic feet (Bcf). Yankee Gas provides firm gas sales service to residential, commercial and industrial customers who require a continuous gas supply throughout the year, and to commercial and industrial customers that have the ability to burn an alternate fuel, but choose to purchase gas from Yankee Gas. Yankee Gas provides firm transportation service to its residential, multi-family, commercial and industrial customers who purchase gas from other sources, as well as interruptible transportation and interruptible gas sales service to commercial and industrial customers that have the capability to switch from natural gas to an alternative fuel on short notice; that is, Yankee Gas can interrupt service to these customers during peak demand periods or at any other time to maintain distribution system integrity.

12. Yankee Gas also owns a 1.2 Bcf LNG facility in Waterbury, Connecticut that enables the company to buy natural gas in periods of low demand, store and use it during peak demand periods. Yankee Gas obtains its interstate capacity from three separate pipeline systems that directly serve Connecticut. Applicants state that to address growing firm demand and to replace offsets to the supply portfolio, including the retirement of Yankee Gas's four propane plants, Yankee Gas is in the process of constructing a 16-mile main gas pipeline within its service area and plans to expand its LNG facility's vaporization capability to meet its firm delivery obligations to customers. Applicants expect this project to be in-service for the winter of 2011/2012. Applicants further note that Yankee Gas provides limited intrastate transportation for Narragansett Electric

[7] WMECo has authorization from the Massachusetts Department of Public Utilities to develop an additional 4.2 MW of solar electric generating facilities. However, construction has not yet begun on these facilities.

Company for delivery at the Rhode Island border under a special contract approved by the Connecticut Department of Public Utility Control.[8]

e. Select Energy

13. Select Energy is an indirect, wholly-owned subsidiary of Northeast Utilities that is managed by Northeast Utilities Enterprises, Inc. Applicants state that Select Energy is a power marketer that, in the past, participated actively in both wholesale and retail power and natural gas markets, predominantly in the ISO-NE and PJM Interconnection, L.L.C. markets. Applicants state that Select Energy does not have a franchise service territory and does not own physical facilities for the generation, transmission or distribution of either electricity or gas. Applicants state that Select Energy exited the retail energy supply business in 2006, and that Northeast Utilities has been winding down its remaining wholesale power business with the intent to exit the competitive power business entirely. However, Applicants state that Select Energy still provides wholesale power to a single remaining customer, the New York Municipal Power Agency, and also has a power sales agreement with the owner of a 148 MW peaking plant in Connecticut that expires in 2012. Under the sales agreement, Select Energy purchases all the power products, excluding black start capability, and acts as lead participant to bid and schedule the units. In addition to this contract, Applicants state that another Northeast Utilities affiliate, Northeast Generation Services Company, operates the facility but does not itself control when the plant runs or where output is sold.

3. NSTAR and Northeast Utilities Joint Ventures

a. New England Hydro-Transmission Electric Company, Inc. and New England Hydro-Transmission Corporation

14. NSTAR Electric owns a 14.5 percent equity interest and a 7.9 percent voting share interest in each of New England Hydro-Transmission Electric Company, Inc. and New England Hydro-Transmission Corporation. Northeast Utilities owns a 22.66 percent equity interest and a 22.66 percent voting share interest in each of these companies. Applicants state that these two companies are public utilities under the FPA because they own transmission facilities (H.Q. Phase I/II HVDC Transmission Facilities) that are chiefly used to import power from the Hydro-Quebec system into New England. However, transmission service over this transmission facility is provided by ISO-NE on

[8] According to Applicants, under this special contract, Yankee Gas transports gas for Narragansett Electric Company pursuant to a limited jurisdiction blanket certificate issued by the Commission under 18 C.F.R. § 284.224 (2011) of the Commission's regulations.

behalf of certain utilities (including NSTAR Electric, CL&P, WMECo, and New Hampshire PSCo)[9] that acquired rights to use the facilities under Commission-approved agreements.[10]

b. Northern Pass Transmission LLC

15. Northeast Utilities indirectly owns 75 percent of Northern Pass Transmission LLC (Northern Pass) through its wholly-owned subsidiary, Northeast Utilities Transmission Ventures, Inc., and NSTAR indirectly owns 25 percent of Northern Pass through its wholly-owned subsidiary, NSTAR Transmission Ventures. Applicants state that Northern Pass was formed to construct and own a 1,200 MW bi-directional high voltage direct current transmission line and associated transmission facilities connecting the ISO-NE administered transmission system to the Hydro-Quebec transmission system (the NPT Line). As currently proposed, the NPT Line would be participant-funded and the associated firm transmission capacity sold entirely to a subsidiary of Hydro-Quebec, H.Q. Hydro Renewable Energy, Inc. The subsidiary will market the power it transmits on the NPT Line to customers in New England, which Applicants state may include utilities such as New Hampshire PSCo that have retained load responsibilities. The NPT Line also gives the Hydro-Quebec subsidiary the ability and right to sell power from the U.S. into Quebec. The NPT Line is expected to enter service in late 2015.[11]

---

[9] Application at 12-13. Applicants state that, through NSTAR Electric's corporate predecessors and CL&P, New Hampshire PSCo and WMECo, NSTAR Electric participated in the creation of ISO-NE, a regional transmission organization (RTO), and transferred operational control of their transmission facilities to ISO-NE on February 1, 2005. While ISO-NE provides transmission service over the transmission facilities owned by the four companies' regional pool transmission facilities, service over the four companies' local transmission facilities is provided through NSTAR Electric's and Northeast Utilities' respective Schedules 21 to section II of the ISO-NE Tariff. Service over the HQ Phase I/II HVDC Transmission Facilities is provided through NSTAR Electric's and Northeast Utilities' respective Schedules 20A to section II of the ISO-NE Tariff.

[10] Application at 11 (citing *ISO New England Inc.*, 111 FERC ¶ 61,244 (2005)).

[11] On December 15, 2010, Northern Pass filed a Transmission Service Agreement (TSA) with the Commission in Docket No. ER11-2377-000. The TSA sets forth the rate and non-rate terms and conditions under which Northern Pass would serve its sole customer. The Commission accepted the TSA for filing. *See Northern Pass Transmission LLC*, 134 FERC ¶ 61,095 (2011) (rehearing pending). In addition, Northern Pass filed an application with the U.S. Department of Energy for a Presidential

(continued…)

c. The Yankee Companies

16. NSTAR and Northeast Utilities each holds interests in the Connecticut Yankee Atomic Power Company, Yankee Atomic Electric Company, and Maine Yankee Atomic Power Company (collectively, the Yankee Companies). Each of the Yankee Companies owns a retired nuclear-powered electric generating facility.[12] The nuclear facilities owned by each of the Yankee Companies have been decommissioned in accordance with Nuclear Regulatory Commission requirements, and amended licenses, held in the name of the Yankee Companies, continue to apply to the independent spent fuel storage installations at each of the plant sites.

B. Description of the Transaction

17. Applicants state that the Proposed Transaction is a two-step process[13] under which NSTAR will merge with and into a new, wholly-owned subsidiary of Northeast Utilities called Northeast Utilities Holding Energy 1 LLC. The new subsidiary, Northeast Utilities Holding Energy 1 LLC, will cease to exist and NSTAR will become the surviving entity and a wholly-owned subsidiary of Northeast Utilities. Immediately thereafter, NSTAR will merge with and into a second new, wholly-owned subsidiary of Northeast Utilities called Northeast Utilities Holding Energy 2 LLC, which will be the surviving entity. After the consummation of the second merger, Northeast Utilities Holding Energy 2 LLC will be renamed NSTAR LLC. Applicants note that, post-merger, the public utilities of the Applicants will remain distinct and independent entities within the Northeast Utilities holding company structure.[14]

18. In accordance with the Merger Agreement, each holder of an NSTAR common share will be entitled to receive 1.312 common shares of Northeast Utilities (exchange

---

permit for permission to construct and operate a facility on or near the United States border.

[12] Connecticut Yankee Atomic Power Company owns the Haddam Neck Plant; Yankee Atomic Electric Company owns the Yankee-Rowe Plant; and Maine Yankee Atomic Power Company owns the Maine Yankee Plant.

[13] Applicants state that the Proposed Transaction's two-step process will be executed as set forth in the Agreement and Plan of Merger dated October 16, 2010, as amended on November 1, 2010 and December 16, 2010 (Merger Agreement). Application at Exhibit I.

[14] *See* Application at Exhibit C-3 for a schematic post-merger organizational chart.

ratio). Applicants state that the exchange ratio is based on the average closing share prices of NSTAR and Northeast Utilities over the 20 trading days immediately preceding the signing of the Merger Agreement and reflects no merger premium for either party's shareholders. They further explain that, based on the number of common shares of the two Applicants that will be outstanding immediately prior to the closing, they estimate that existing NSTAR shareholders will own approximately 43.7 percent of the equity in the post-Proposed Transaction Northeast Utilities, while existing Northeast Utilities shareholders will own the remaining 56.3 percent.

II. Notice of Filing and Responsive Pleadings

19. Notice of the application was published in the *Federal Register*, 76 Fed. Reg. 3619 (2011), with interventions and protests due on or before February 7, 2011. Notices of intervention were filed by Connecticut Department of Public Utility Control, Department of Public Utilities of the Commonwealth of Massachusetts, Maine Public Utilities Commission, and New Hampshire Public Utilities Commission. Timely motions to intervene were filed by Electric Power Supply Association (EPSA); George Jepsen, Attorney General for the State of Connecticut; Massachusetts Municipal Wholesale Electric Company and New Hampshire Electric Cooperative, Inc. (jointly and individually); New England Conference of Public Utilities Commissioners; New England Power Generators Association, Inc. (NE Power Generators); Shell Energy North America (US), L.P.; and Vermont Department of Public Service. On February 8, 2011, PSEG Power LLC and PSEG Energy Resources & Trade LLC (collectively, PSEG Companies) filed a motion to intervene out-of-time.

20. Timely motions to intervene and comments were filed by Cape Light Compact (Cape Light);[15] National Grid USA (National Grid) and its affiliates;[16] and the Attorney General of the Commonwealth of Massachusetts and the Massachusetts Department of Energy Resources (collectively, Massachusetts Parties). A timely motion to intervene

[15] Cape Light is a government aggregator under Massachusetts law that is comprised of the Massachusetts towns of Aquinnah, Barnstable, Bourne, Brewster, Chatham, Chilmark, Dennis, Edgartown, Eastham, Falmouth, Harwich, Mashpee, Oak Bluffs, Orleans, Provincetown, Sandwich, Tisbury, Truro, West Tisbury, Wellfleet, and Yarmouth, as well as Barnstable and Dukes counties.

[16] National Grid's affiliates are: New England Power Company, New England Hydro-Transmission Corporation, New England Hydro-Transmission Electric Company, Inc., New England Electric Transmission Corporation, Massachusetts Electric Company, Nantucket Electric Company, the Narragansett Electric Company and Granite State Electric Company.

and protest was filed by NRG Companies.[17] Jointly, EPSA and NE Power Generators (together, EPSA/NE Power Generators) also filed a protest.

21. On February 22, 2011, Applicants filed an answer to the protests. NRG Companies responded to Applicants' answer on March 9, 2011. Applicants responded to NRG Companies' answer on March 14, 2011.

III. Discussion

A. Procedural Matters

22. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[18] the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,[19] we will grant PSEG Companies' late-filed motion to intervene given its interest in the proceeding, the early stages of the proceeding, and the absence of undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[20] prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Applicants' answers and NRG Companies' answer because they have provided information that assisted us in our decision-making process.

B. Standard of Review Under Section 203

23. Section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest.[21] The Commission's analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.[22] Section 203(a)(4) also requires the

---

[17] The NRG Companies are, collectively: NRG Power Marketing LLC, Connecticut Jet Power LLC, Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC and Somerset Power LLC.

[18] 18 C.F.R. § 385.214 (2011).

[19] 18 C.F.R. § 385.214(d).

[20] 18 C.F.R. § 385.213(a)(2).

[21] 16 U.S.C. § 824b(a)(4) (2006).

[22] *See* Merger Policy Statement, FERC Stats. & Regs. at 30,111.

Commission to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest." The Commission's regulations establish verification and information requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or a pledge or encumbrance of utility assets.[23]

C. Analysis Under Section 203

1. Effect on Competition – Horizontal Market Power

a. Applicants' Analysis

24. Applicants assert that the Proposed Transaction will have no adverse effect on competition. They identify three relevant products across the relevant geographic market: non-firm energy, capacity, and ancillary services. In their analysis of non-firm energy markets, Applicants state that since neither Applicant owns or controls generation assets outside of ISO-NE, ISO-NE is the only potentially relevant geographic market. Applicants state that Northeast Utilities owns or controls approximately 1,300 MW, which amounts to less than four percent of the total generation in ISO-NE, which is about 32,000 MW. Applicants state that NSTAR has divested all of its generation. Applicants add that, although NSTAR has rights to the output of a small amount of generation by virtue of purchase contracts, none of the contracts give NSTAR the right to control the operation of that generation. Applicants conclude that there is no overlap of supply of wholesale electricity in any market and, hence, they are not required to submit a horizontal competitive analysis screen under Commission regulations.[24]

25. Notwithstanding their claim of no horizontal overlap, Applicants performed a sensitivity analysis of the impact of the Proposed Transaction on horizontal competition assuming that NSTAR controls all of its contract capacity, and that Northeast Utilities has operational control over all of the generation for which it has output contracts.[25]

---

[23] 18 C.F.R. § 33.2(j) (2011).

[24] Application at 16-17 (citing 18 C.F.R. § 33.3(a)(2)).

[25] Northeast Utilities has purchase contracts for approximately 432 MW of generation. NSTAR has a total of approximately 444 MW of contracts for power. Applicants performed an Appendix A analysis to determine the pre- and post-transaction market shares from which the market concentration or Herfindahl-Hirschman Index (HHI) change can be derived. The HHI is a widely accepted measure of market

(continued…)

Applicants analyzed the ISO-NE market as a whole, performing the Delivered Price Test analysis of Economic Capacity.[26] Applicants contend that the analysis of Economic Capacity is more relevant than the Available Economic Capacity analysis because all of the New England states except Vermont have restructured their markets such that most of the formerly vertically-integrated utilities no longer serve their historical load with dedicated resources that they control.[27] Applicants' sensitivity analysis found increases in the HHI ranging from 7 to 13 points in an unconcentrated market (HHI less than 1,000). Applicants conclude that because the post-transaction HHIs are well below the 1,000 level for every load condition that they analyzed, their sensitivity analysis supports

---

concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are considered to be unconcentrated; markets in which the HHI is greater than or equal to 1,000 but less than 1,800 points are considered to be moderately concentrated; and markets in which the HHI is greater than or equal to 1,800 points are considered to be highly concentrated. In the Merger Policy Statement, the Commission adopted the 1992 Federal Trade Commission (FTC)/Department of Justice (DOJ) Horizontal Merger Guidelines, which state that in a horizontal merger, an increase of more than 50 HHI points in a highly concentrated market or an increase of 100 HHI points in a moderately concentrated market fails its screen and warrants further review. U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, 57 Fed. Reg. 41,552 (1992), *revised*, 4 Trade Reg. Rep (CCH) ¶ 13,104 (April 8, 1997). On August 19, 2010, the FTC and DOJ issued revised horizontal merger guidelines, which, among other things, raise the thresholds for the measures of market concentration. Our analysis here is based on the thresholds adopted in the 1992 FTC/DOJ guidelines as in effect prior to August 19, 2010. We note that, on March 17, 2011, the Commission issued a Notice of Inquiry seeking comment on the potential impact of the revised guidelines on the Commission's analysis of horizontal market power. *Analysis of Horizontal Market Power Under the Federal Power* Act, 134 FERC ¶ 61,191 (2011).

[26] Each supplier's "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.

[27] Application at 18-19. Applicants further submit that an Available Economic Capacity analysis is not relevant in this case because NSTAR has no Available Economic Capacity.

their conclusion that the Proposed Transaction raises no horizontal market power concerns.[28]

26. Applicants further argue that the Proposed Transaction cannot cause a significant increase in concentration in other electricity product markets, namely, capacity and ancillary services. In particular, since NSTAR controls no electric generating capacity, it has no ability to exercise market power in capacity or ancillary services markets.[29]

b. Comments and Protests

27. In their protests, EPSA/NE Power Generators and the NRG Companies argue that the Commission should find the application deficient for failure to provide any analysis of buyer-side market power issues. EPSA/NE Power Generators request that the Commission direct Applicants to supplement the application to provide an analysis of the increase in buyer market power and market concentration that will result from the Proposed Transaction. More specifically, EPSA/NE Power Generators maintain that the Commission should require Applicants to supplement their application by filing detailed data regarding Applicants' purchases and contracts, along with a detailed analysis of Applicants' buyer market power, both pre- and post-merger.[30] Similarly, NRG Companies ask the Commission to direct the Applicants to amend the application to provide an analysis of market shares and concentration as a buyer of capacity and energy in New England. NRG Companies argue that the analysis should follow the same analytical framework as the Competitive Analysis Screen required to assess seller market power, i.e., assessing market shares and the post-merger increases in market concentration. NRG Companies state that although buyer market power may superficially be viewed as benefitting electric ratepayers because of the buyers' ability to pressure sellers and reduce prices, the consequences are much more complex in the long run and may ultimately increase costs to ratepayers. In particular, NRG Companies assert that suppliers that would be economic, absent the exercise of buyer market power, may retire and resources that would not be built, absent buyer market power, may be built instead. NRG Companies add that, to the extent that the analysis indicates increases in market concentration in excess of the thresholds used to screen seller market power, Applicants should provide further evidence demonstrating that the merger will not

[28] Application at 17-18. As shown in Application Exhibit J-1 at 42, Table 1, the post-merger HHIs ranged between 487 and 619.

[29] *Id.* at 19.

[30] EPSA/NE Power Generators' Protest at 7.

adversely affect wholesale competition or they should offer conditions that will provide assurances that such market power is adequately mitigated. [31]

28. NRG Companies add that the analysis should take into account the possibility that the merged company's operations in the future may differ from the Applicants' current operations. As an example, they suggest that if a buyer also competes as a seller in the wholesale market, any analysis of buyer market power should also consider the likelihood that the merged company may increase its ownership or control of generation. They state that the analysis should also consider whether the merged company's status as a provider of last resort would allow it to obtain regulatory treatments for such generation acquisitions (e.g., long-term rate base recovery of costs) that are not available in the wholesale market. They add that these concerns are not speculative because Applicants have indicated that building power plants is an option that they are considering.[32]

29. EPSA/NE Power Generators argue that, absent mitigation, the Proposed Transaction is inconsistent with the public interest because it would substantially increase Applicants' existing buyer market power and market concentration in ISO-NE. EPSA/NE Power Generators claim that Applicants have stated that NSTAR and Northeast Utilities together serve 50 percent of the region's load.[33] EPSA/NE Power Generators state that the post-merger HHI for the New England region would be roughly 2,500, ignoring all other participants' HHI contribution, well in excess of the Merger Policy Statement's threshold of 1,800 for a highly concentrated market. They add that it appears that the Proposed Transaction would result in an increase in the buyer-side HHI well in excess of 100 points, giving rise to the presumption that the Proposed Transaction is likely to create or enhance buyer market power.[34]

30. EPSA/NE Power Generators cite the ISO-NE's annual Forward Capacity Market (FCM) auction clearing prices as evidence of the exercise of buyer market power in ISO-NE. EPSA/NE Power Generators assert that all four of ISO-NE's annual FCM

---

[31] NRG Companies' Protest at 5-6.

[32] *Id.* at 7.

[33] EPSA/NE Power Generators' Protest at 8 (citing a statement in a Northeast Utilities—NSTAR presentation to an Edison Electric Institute financial conference on November 1, 2010). NRG Companies similarly allege that the merged company will account for 50 percent or more of the market of capacity and energy procured to meet POLR service requirements. NRG Companies' Protest at 1-2 and Attachment A.

[34] EPSA/NE Power Generators' Protest at 8.

auctions have cleared at the floor price due, in large part, to the abuse of buyer market power by load interests (in particular, through sponsorship of massive amounts of uneconomic, or "out of market," new entry) without triggering the ISO-NE's Alternative Price Rule, which is intended to deter such uneconomic entry.[35] As a result, EPSA/NE Power Generators argue, the FCM is verging on collapse. EPSA/NE Power Generators conclude that permitting the combination of two of the largest buyers in New England will further undermine the viability of that and other New England markets.[36]

31. EPSA/NE Power Generators argue that buyer market power concerns are exacerbated by Applicants' statements that the rationale for the Proposed Transaction is, among other things, to increase its ownership of power-producing assets in coming years and to enable future larger scale projects for new generation and transmission. EPSA/NE Power Generators conclude that, absent mitigation, this additional generation could be a tool for the exercise of buyer market power in the form of more uneconomic entry that has already seriously harmed the FCM.[37]

32. EPSA/NE Power Generators argue that the Commission should condition its approval of the Proposed Transaction on the imposition of additional buyer market power monitoring and mitigation measures that would eliminate the merged entity's incentive and ability to exercise buyer market power. They argue that a revitalized Alternative Price Rule, incorporating the modifications proposed by ISO-NE, New England PGA, and other generators in the FCM proceeding in Docket No. ER10-787-000, *et al*., would go a long way towards mitigating the anticompetitive effects of the Proposed Transaction on capacity markets, provided all offers by Applicants' new or newly acquired generation or other capacity resources into FCM are clearly subject to mitigation under that rule.[38] They continue that while an improved Alternative Price Rule mechanism would help mitigate the effects of the Proposed Transaction, the Commission will need to consider imposing additional, tailored mitigation measures on Applicants as a condition to approving the Proposed Transaction. They add that it may be appropriate to consider not

---

[35] *Id.* at 2-3 (citing *ISO New England Inc. & New England Power Pool Participants Comm.*, 131 FERC ¶ 61,065, at P 69-76 (2010)).

[36] EPSA/NE Power Generators' Protest at 2-3.

[37] *Id*. at 9-10.

[38] As discussed below, the Commission issued an order in these proceedings on April 13, 2011. *ISO New England, Inc., et al.*, 135 FERC ¶ 61,029 (2011) (rehearing pending).

only mitigation measures relating to capacity markets but also measures to account for Applicants' buyer market power in energy markets.[39]

33. EPSA/NE Power Generators suggest that the Commission consider instituting hearing and settlement judge procedures to develop a more complete record on the merits of the various additional mitigation measures the Commission may identify or Applicants propose.[40]

c. Applicants' Answer

34. Applicants take issue with the NRG Companies' and EPSA/NE Power Generators' assertion that the post-merger company will serve 50 percent of the load in the ISO-NE region. Applicants state that NRG Companies use data showing purchases by utilities in New England, aggregated by holding company. This data shows that Northeast Utilities and NSTAR purchased 35 percent and 15 percent, respectively, of the total amount of such utility purchases in ISO-NE in 2009.[41] Applicants argue, however, that NRG Companies' calculation ignores more than half of the 2009 purchases to serve load in ISO-NE, specifically, (1) purchases by competitive suppliers that serve competitive retail load in the ISO-NE market; (2) purchases by municipal and cooperative systems that are not subject to the Commission's jurisdiction; and (3) purchases to serve load in Vermont. Applicants maintain that an accurate calculation of their market share of purchases in the ISO-NE market should include all purchases made in ISO-NE, and not just the subset of purchases made by regulated utilities. Applicants conclude that because NRG Companies have left out over half of the load in ISO-NE from their calculation, NRG Companies have derived a market share for the Applicants that is over twice as high as the Applicants' actual share.[42]

35. Applicants maintain that EPSA/NE Power Generators' claim of a 50 percent post-transaction market share is based entirely on a slide prepared by Northeast Utilities that provided a general description of the Proposed Transaction. Applicants note, however, that the slide in question addresses the Applicants' distribution load (i.e., the load taking distribution service over the Applicants' distribution facilities, and did not purport to reflect the Applicants' share of power sales to retail customers in ISO-NE). Applicants

---

[39] EPSA/NE Power Generators' Protest at 13.

[40] *Id.* at 13-14.

[41] This data is tabulated in Attachment A to NRG Companies' Protest.

[42] Applicants' Answer at 5.

thus claim that the slide in question does not address the post-merger company's monopsony power in ISO-NE capacity or energy markets.[43]

36. Applicants, in turn, offer their own calculation of their 2010 buyer market share. Citing publicly available data,[44] Applicants assert that their buyer market share in ISO-NE was roughly 21.2 percent in 2010, not 50 percent, as EPSA/NE Power Generators claim. Applicants argue that this share is similar to post-merger market shares in other mergers where the Commission found no market power concerns.[45] Applicants further assert that the FTC/DOJ 1992 Horizontal Merger Guidelines, cited by EPSA/NE Power Generators, established a 35 percent market share threshold for a presumption that a merged company would be able to unilaterally and profitably exercise market power. Applicants note that their post-merger market share is well below this threshold.[46]

37. Applicants add that calculation of their market share based on their own share of total load obligations overstates their market share as buyers in ISO-NE. Applicants argue that this is because New Hampshire PSCo owns over 1,000 MW of generation that it uses to serve its own load. Therefore, according to Applicants, not all of the 5,828 gigawatt hours (GWh) of New Hampshire PSCo's load was purchased by New Hampshire PSCo in 2010, and New Hampshire PSCo's market share of purchases in ISO-NE (as opposed to its share of load in ISO-NE) is considerably lower than its 21 percent share (5,828 GWh) of ISO-NE load.[47]

38. Applicants add that their ISO-NE purchases consist entirely of purchases to serve POLR loads that are subject to strict state-imposed requirements. Applicants argue that analysis of these state-established requirements governing procurement and sale of power for POLR service demonstrates that the combination of the Applicants' purchase obligations could not increase any ability or incentive they might have to exercise monopsony power. Accordingly, Applicants conclude that the Proposed Transaction will

---

[43] *Id*. at 5-6.

[44] Hourly demand for all of ISO-NE available at http://www.iso-ne.com/markets/hstdata/znl_info/hourly/2010_smd_hourly.xls, not http://www.iso-ne.com/markets/hstdata/znl_info/hourly/smd_hourly_2010.xls.

[45] Applicants' Answer at 7 (citing *Nevada Power Co.*, 113 FERC ¶ 61,265, at P 15 (2005)).

[46] Applicants' Answer at 7-8.

[47] *Id.* at 8.

not have an impact on their ability and incentive to exercise market power in the portions of ISO-NE that they serve.

39. With regard to Connecticut and Massachusetts, Applicants state that the essential requirements are the same in the two states for acquiring power to serve POLR load and making that power available to those ultimate customers who choose POLR status. As an initial matter, Applicants assert that they have no ability to control the amount of their POLR load in Connecticut and Massachusetts, which is dependent on the number of retail customers that have not chosen to be supplied by a competitive retail supplier. Applicants state that both Connecticut and Massachusetts require the Applicants to acquire power through a competitive solicitation, which is reviewed and approved by the public utility commission. In each state, each winning bidder is obligated to provide a load following service that consists of the energy, capacity and ancillary services necessary to serve a fixed percentage of the Applicants' POLR load. Applicants state that as a result they contract for 100 percent of their POLR load obligations in Connecticut and Massachusetts and, in each of these states, the Applicants procure 100 percent of the total POLR hour-to-hour load requirement through competitive solicitations that are closely monitored and approved by the respective public utility commissions. Therefore, Applicants argue that they cannot influence prices by manipulating the competitive solicitation process or withholding any of that load from the market in order to reduce prices. Applicants conclude that the combining of their POLR loads in Connecticut and Massachusetts pursuant to the Proposed Transaction will not increase the ability of the Applicants to withhold load from the market and thereby artificially reduce market prices.[48]

40. Applicants add that the Connecticut and Massachusetts POLR service programs eliminate any incentive to reduce market prices in serving POLR load. Applicants state that the costs they incur to procure the power and provide the POLR service are a complete pass-through, and thus there is no opportunity to profit by reducing market prices in ISO-NE.[49]

41. Similarly, Applicants state that New Hampshire PSCo has no control over the amount of its POLR load in New Hampshire. Applicants state that, as in Massachusetts and Connecticut, the amount of POLR load New Hampshire PSCo serves in New Hampshire is dependent on the number of retail customers that have chosen not to be supplied by a competitive retail supplier. Applicants add that New Hampshire PSCo is strictly obligated to serve 100 percent of its POLR load. Applicants explain that New

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

[49] *Id.* at 11.

Hampshire PSCo does not engage in formal POLR-related competitive solicitations and instead serves its POLR load through a managed portfolio consisting primarily of owned generation, supplemented by bilateral purchases of power and purchases from the ISO-NE market. Applicants maintain that New Hampshire PSCo is not allowed a profit on the resale of its power purchases to serve POLR load and therefore could not earn greater profits on its purchases through a demand-reduction strategy. Applicants add that the profit on New Hampshire PSCo's owned generation is determined by New Hampshire state regulators, who perform semi-annual true-ups designed to ensure that New Hampshire PSCo is limited to its allowed return on its own generation and that New Hampshire PSCo passes all cost increases and reductions to its POLR customers. Applicants conclude that New Hampshire PSCo lacks the ability to withhold its POLR demand, has no ability to profit on its purchases to serve POLR load, and is restricted to a regulated return on its owned generation used for that purpose.[50]

42. Applicants conclude that, given the requirements applicable to the acquisition of power to serve their POLR loads, it is clear that the combination of the Applicants will not increase either their ability or their incentive to exercise monopsony power. Applicants state that in each of the three states, the Applicants lack the ability to withdraw demand from the market and that any reduction in the costs of energy, capacity, or ancillary services is automatically passed-through to the Applicants' customers in the three states.[51]

43. Applicants note that the EPSA/NE Power Generators' allegation of monopsony power relating to the effect of out of market capacity purchases on the FCM auctions conducted by the ISO-NE is the focus of the paper hearing the Commission is conducting in Docket No. ER10-787-000. Applicants argue that the purpose of this paper hearing is to address the claims of EPSA/NE Power Generators in the immediate case (as well as in the aforementioned docket) that current buyer-side mitigation measures are inadequate to allow the FCM auctions to establish the correct market signals for entry by new generation capacity into the ISO-NE market. Applicants argue that the EPSA/NE Power Generators have not provided any reason for the Commission to conclude that its pending ruling in the aforementioned docket will not adequately address all concerns regarding out of market purchases. Applicants maintain that the EPSA/NE Power Generators have failed to identify a single aspect of the Proposed Transaction that would allow the

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

[51] *Id.* at 12.

Applicants to circumvent any measures that the Commission might adopt in the aforementioned docket to address out of market purchases.[52]

44. Applicants continue that EPSA/NE Power Generators have not identified any reason why the Proposed Transaction would increase the ability of, or incentives for, the Applicants to enter into out of market transactions that would reduce prices in the FCM auctions. Applicants reiterate that under the provisions governing procurement of power to serve POLR load, any decrease in the cost of capacity under the FCM auctions is passed through to the Applicants' POLR customers and does not increase the Applicants' profits. Applicants also note that the out of market purchases mentioned by EPSA/NE Power Generators in this docket and by parties to Docket No. ER10-787-000 are largely dictated by state policies, and those policies are completely unrelated to, and unaffected by, the Proposed Transaction. Applicants add that the speculative strategy EPSA/NE Power Generators posit, that is, of Applicants exercising monopsony power to artificially suppress FCM market prices, could be successful only if the FCM auctions fail to send the correct market signals to new entrants. Applicants submit that the arguments EPSA/NE Power Generators raise presume, without any basis, that the Commission's decisions in Docket No. ER10-787-000 will fail to achieve the Commission's goal of preventing such an outcome.[53]

d. Answer to Answer

45. In their response to Applicants' answer, NRG Companies assert that they did not make an error in limiting their analysis to purchases by Applicants and other companies that provide POLR service. NRG Companies note that the first step in evaluating market power is product definition, and argue that NRG Companies' data correctly focused on POLR service as the distinct product in which Applicants may exercise buyer market power. With respect to that product, NRG Companies assert that their protest demonstrated that Applicants' post-merger market shares in the POLR market are in excess of 50 percent—much higher than Applicants' claimed 21 percent. Thus, according to NRG Companies, Applicants' argument that the merged company would have no market power significantly mis-defines the relevant market.[54]

46. NRG Companies maintain that Applicants' argument that it may be appropriate to consider how these data would differ if New Hampshire PSCo were removed from the

[52] *Id.* at 13-14.

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

[54] NRG Companies' Answer at 4.

analysis, as New Hampshire PSCo does not procure POLR services, are equally unavailing. NRG Companies state that, contrary to Applicants' claim, a New Hampshire PSCo adjustment does not reveal market shares below 21 percent. NRG Companies argue that revising their analysis to remove New Hampshire PSCo load from the calculation results in post-transaction market shares of POLR purchases of 44 percent.

e. Commission Determination

47. We find that the Proposed Transaction will have no adverse effect on competition as a result of horizontal market power.

48. With respect to seller market power, we agree with Applicants that the Proposed Transaction will have a *de minimis* impact on market concentration in ISO-NE. First, we note that since neither Applicant owns or controls generation assets outside of ISO-NE, ISO-NE is the only potentially relevant geographic market. The record indicates that Northeast Utilities owns or controls approximately 1,300 MW, which amounts to less than four percent of the total generation in ISO-NE, and that NSTAR has divested all of its generation. Although NSTAR has rights to the output of a small amount of generation by virtue of purchase contracts, none of the contracts give NSTAR the right to control the operation of that generation. Thus, there is no overlap of supply of wholesale electricity in any market. Based on this record evidence, we find that there is no horizontal seller market overlap, resulting in an HHI change of zero. Moreover, since NSTAR controls no electric generating capacity, it has no ability to exercise market power in capacity or ancillary services markets. Therefore, the Proposed Transaction does not raise any seller market power concerns. We note that no intervenor argues otherwise.

49. In the Merger Policy Statement, the Commission acknowledged that while the horizontal market power analytic screen described therein focuses only on monopoly (seller) power, this is not intended to exclude an analysis of monopsony (buyer) power as a relevant consideration.[55] In that regard, the Merger Policy Statement states that "[a]n analysis of monopsony power should be developed if appropriate."[56]

---

[55] Merger Policy Statement, FERC Stats. & Regs. at 30,135. As the Commission stated in *Oklahoma Gas and Elec. Co.*, 111 FERC ¶ 61,075, at P 12 (2005):

> "[t]raditionally, the concern with buyer market power, also known as monopsony power, is that a dominant buyer can purchase a good for less than the price that would prevail in a competitive market. Additionally, a firm that has some degree of both buyer market power and seller market power could withhold purchasing from competitors, thus driving those competitors out of business, and in turn, ultimately increase its seller

(continued…)

50. Based on the limited guidance provided in the Commission's Merger Policy Statement, the starting point in the analysis of buyer market power is the definition of the relevant product market(s). In this case, there are two relevant product markets: the wholesale energy market and the FCM in ISO-NE, because those are the markets in which Northeast Utilities and NSTAR participate as buyers. As noted, the parties have calculated substantially different post-merger buyer market shares based on different views of the relevant product market. We agree with Applicants that the relevant wholesale energy product market definition in this case is power purchased to serve *all* load in ISO-NE, and not just the POLR load served by regulated utilities. To conclude otherwise would be to assume that competitive retail suppliers do not compete with Applicants in making wholesale purchases to supply retail electricity to customers, and that power purchases for non-POLR purposes (i.e., purchases by competitive suppliers) are not interchangeable with, or a substitute for, power that is purchased to meet POLR obligations. Protestors provide no basis for such an assumption. To agree with protestors one would also have to assume that the *only* retail competition in ISO-NE is between regulated utilities competing to supply POLR load. This is not the case. Nevertheless, although we agree with Applicants that power purchased to serve *all* load in ISO-NE is the relevant product definition, our conclusion that the merger raises no monopsony power concerns rests on other considerations, as explained below.

51. We conclude that the proposed merger does not increase Applicants' ability to exercise buyer market power in the ISO-NE wholesale energy market. Except for allegations concerning the Applicants' ability to exercise market power in the FCM, which we address below, the intervenors have not provided any facts that would lead us to conclude that the Proposed Transaction will increase the Applicants' ability to exercise monopsony power by artificially withholding demand. Further, the intervenors have not suggested that the proposed merger will have any effect on the performance of the duties that Applicants presently have to purchase sufficient electricity in the wholesale energy market to meet their respective POLR load obligations, which will not change as a result of the merger. Applicants will not be able to artificially decrease demand in the wholesale energy market because Applicants must purchase sufficient electricity in the wholesale energy market to meet their POLR load obligations, and thus cannot lower the amount of electricity they purchase *below* this amount. Therefore, the proposed merger

---

market power. Such predatory behavior would harm competition by eliminating competitors and increasing market concentration."

[56] *Id.* The Commission noted that "long-term purchases and sales data for interconnected entities are already collected and could be used to assess buyer concentration in the same way that seller concentration is calculated."

will not increase Applicants' ability to exercise buyer market power in the ISO-NE electricity market by artificially withholding demand. Similarly, we conclude that, the proposed merger will not enhance any ability that Applicants may have to exercise monopsony power in the wholesale energy market by artificially increasing wholesale energy market supply in order to lower prices. Accordingly, we will not require Applicants to provide additional analysis of the effect of the merger on buyer market power in the wholesale energy markets.

52. As noted above, the specific buyer market power concern raised by EPSA/NE Power Generators relates to the FCM auctions in ISO-NE. They argue that the merger of the Applicants would further undermine the viability of the FCM auctions, and that buyer market power concerns would be "exacerbated" by Applicants' plans to substantially increase the amount of generation that they own or control which, according to EPSA/NE Power Generators, could lead to more uneconomic entry of the kind that is alleged to have already harmed the FCM. In that connection, however, we agree with Applicants that the paper hearing that the Commission conducted in Docket No. ER10-787-000, *et al*. on the effect of out of market capacity purchases on the FCM auctions conducted by ISO-NE was a more appropriate forum for discussion of the issue than is the instant proceeding.[57] Addressing the buyer market power issue in that proceeding, the Commission determined that ISO-NE should work with its stakeholders to develop offer-floor mitigation, which, it noted, "would provide effective buyer-side mitigation."[58] As that decision addresses the buyer market power concerns raised by EPSA/NE Power Generators in the instant proceeding, we will not impose any additional requirements on the Applicants here.

2. Effect on Competition – Vertical Market Power

a. Applicants' Analysis

53. Applicants contend that the Proposed Transaction does not raise any vertical market power issues. Applicants explain that Northeast Utilities and NSTAR have turned over control of their transmission facilities to ISO-NE and hence cannot exercise vertical market power by controlling transmission.[59] Applicants did conduct a vertical market power analysis because Northeast Utilities and NSTAR both own natural gas distribution

[57] *See ISO New England, Inc.*, 135 FERC ¶ 61,029 (rehearing pending).

[58] *Id*. P 165.

[59] Application Exhibit J-1 at 6. ISO-NE outlined the timing for a stakeholder process addressing offer-floor mitigation in a May 13, 2011 compliance filing.

assets. Applicants state that the test the Commission established in Order No. 642[60] for determining whether there is potential vertical market power arising from control over gas transportation does not relate directly to whether a merger makes either the upstream gas transportation markets or the downstream wholesale electric market more concentrated, and hence, less competitive. Rather, the test is whether the upstream and downstream markets are both highly concentrated, i.e., have HHIs of 1,800 or more. The screen is passed if either of the markets is not highly concentrated.

54. In light of their description of the Commission's test, Applicants chose to focus solely on the downstream electric market. Applicants state that the downstream market analysis is identical to the Economic Capacity Delivered Price Test, with the notable difference that control over gas-fired generation is deemed to lie with the pipeline or gas distribution company serving it, not the owner of the generating facility.[61] Applicants state that when control over gas-fired generation is attributed to the pipeline or gas distribution company serving it,[62] the HHI for the ISO-NE market is in the range of approximately 840 to 1,140, depending on the time period. Applicants conclude that since the downstream branch of the test is passed, the Proposed Transaction passes the test for lack of vertical market power arising from the Proposed Transaction with respect to control over gas transportation facilities.[63]

b. Commission Determination

55. Transactions that combine electric generation assets with inputs to generating power (such as natural gas, transmission, or fuel) can harm competition if the transaction increases a 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, a firm created by the transaction could impede entry of new competitors or inhibit existing competitors' ability to undercut an attempted price increase in the downstream wholesale electricity market. Applicants have shown that the Proposed Transaction does not raise any of these concerns.

---

[60] *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).

[61] Application at 21.

[62] Application Exhibit J-1 at 53.

[63] *Id.* at 8.

56. We further find that Applicants' ownership of electric transmission facilities does not raise any vertical market power concerns because Applicants have turned over control of their facilities to ISO-NE, eliminating their ability to use its transmission system to harm competition.

3. Effect on Rates

a. Applicants' Analysis

57. Applicants argue that the Proposed Transaction will have no adverse effect on transmission rates or on rates for wholesale requirements customers. Applicants commit for a period of five years to hold harmless wholesale requirements and transmission customers from the effects of the Proposed Transaction. Specifically, for that five-year period, Applicants will not seek to include merger-related costs in their transmission revenue requirements or in their wholesale requirements rates, except to the extent that they can demonstrate merger-related savings equal to or in excess of all of the transaction-related costs so included.[64] Further, if Applicants seek to recover transaction-related costs, they will submit a compliance filing that details how they are satisfying the hold harmless commitment. Applicants further commit to comply with the Commission's directives in other proceedings involving a similar hold-harmless provision.

b. Comments and Protests

58. The Massachusetts Parties submitted limited comments on the process that the Applicants must employ in the event that they seek to recover merger-related costs in the future. Specifically, the Massachusetts Parties urge the Commission to bind Applicants to their commitment to comply with the Commission's directives in other proceedings involving similar hold harmless provisions.

59. The Massachusetts Parties also contend that NSTAR's existing formula rate does not allow for the recovery of merger-related costs. Thus, the Massachusetts Parties argue, pursuant to Commission precedent, if NSTAR seeks to recover merger-related costs after the proposed hold harmless provision lapses, NSTAR must file a petition to modify its tariff to recover such costs in a new section 205 docket as well as in a compliance filing in the instant section 203 docket giving notice to all parties to the instant docket of the proposed tariff. The Massachusetts Parties request that the

[64] Application at 25-26.

Commission clearly delineate these procedural requirements associated with the recovery of merger-related costs in its order.[65]

60. Cape Light seeks assurance that Applicants will not pass on any merger-related costs to NSTAR Electric's distribution customers (which include Cape Light's ratepayers) as a result of this proceeding. Cape Light states that it is concerned that some merger-related benefits may accrue to NSTAR Electric's basic service customers, but not to NSTAR Electric's distribution customers. Cape Light speculates that such one-sided benefits may adversely impact competition with Cape Light.[66]

c. Applicants' Answer

61. Applicants do not object to the Commission ordering that they be bound to the rate commitments included in their application. However, Applicants do oppose any suggestion that the Commission impose more detailed procedural requirements for the recovery of merger-related costs as part of its approval of the Proposed Transaction. Applicants argue that their rate commitment in the immediate docket is sufficient because the latter already includes the detailed procedural requirements outlined by the Commission in certain recent proceedings.[67] Applicants further argue that Cape Light presents no reason for the Commission to find that the rate commitments included in the application are inadequate to ensure that Applicants will not pass on any merger-related costs to wholesale customers unless offset by merger-related benefits, which is the standard that the Commission has applied in other cases.[68]

d. Commission Determination

62. We accept Applicants' commitment to hold transmission and wholesale requirements customers harmless for five years from costs related to the Proposed Transaction.[69] We accept Applicants' hold harmless commitment, which we interpret to

---

[65] Massachusetts Parties' Comments at 5-6.

[66] Cape Light's Comments at 7.

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

[68] Applicants' Answer at 16-17.

[69] We note that retail rates are not typically addressed by this Commission and are usually addressed by the relevant state commission. *See e.g.*, *NSTAR*, 131 FERC ¶ 61,098, at P 18 (2010) (citing *National Grid plc*, 117 FERC ¶ 61,080, at P 54 (2006)).

include all transaction-related costs, not only costs related to consummating the transaction. We note that nothing in the application indicates that rates to customers will increase as a result of transaction-related costs created by the Proposed Transaction. The Commission will be able to monitor the Applicants' hold harmless commitment under the books and records provision of PUHCA 2005 and its authority under section 301(c) of the FPA, and the commitment is fully enforceable based on the Commission's authority under section 203 of the FPA.

63. If Applicants seek to recover transaction-related costs through their wholesale power or transmission rates within the next five years they must submit a compliance filing that details how they are satisfying the hold harmless requirement. If Applicants seek to recover transaction-related costs in an existing formula rate that allows for such recovery within the next five years, then that compliance filing must be filed in the section 205 docket in which the formula rate was approved by the Commission, as well as in the instant section 203 docket.[70] We also note that, if the Applicants seek to recover transaction-related costs in a filing within the next five years whereby it is proposing a *new* rate (either a new formula rate or a new stated rate), then that filing must be made in a *new* section 205 docket as well as in the instant section 203 docket.[71] The Commission will notice such filings for public comment. In such filings, Applicants must: (1) specifically identify the transaction-related costs they are seeking to recover, and (2) demonstrate that those costs are exceeded by the savings produced by the transaction, in addition to any requirements associated with filings made under section 205. Such a hold harmless commitment will protect customers' wholesale and transmission rates from being adversely affected by the Proposed Transaction.[72]

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

---

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

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

[72] *See ITC Midwest LLC*, 133 FERC ¶ 61,169 at P 24-25; *FirstEnergy Corp*., 133 FERC ¶ 61,222 at P 63; and *PPL Corp.*, 133 FERC ¶ 61,083 at P 26-27.

4. Effect on Regulation

a. Applicants' Analysis

65. Applicants assert that the Proposed Transaction will have no effect on the Commission's ability to regulate wholesale sales or on any state commission's jurisdiction or regulatory authority.

b. Commission Determination

66. We find no evidence that either state or federal regulation will be impaired by the proposed transaction. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap at the federal or state level.[73] 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. The Commission stated in the Merger Policy Statement that it ordinarily will not set the issue of the effect of a transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the transaction. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission stated that it may set the issue for hearing, and that it will address such circumstances on a case-by-case basis.[74] We note that no party alleges that regulation would be impaired by the Proposed Transaction, and no state commission has requested that the Commission address the issue of the effect on state regulation.

5. Cross-Subsidization

a. Applicants' Analysis

67. Applicants contend that the Proposed Transaction will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of assets of a traditional public utility that has captive customers or that owns or provides transmission service over jurisdictional facilities for the benefit of an associate company. Specifically, Applicants verify that, based on the facts and circumstances known to them or that are reasonably foreseeable, the Proposed Transaction will not result in, at the time of the transaction or in the future: (1) any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) any new issuance of securities by a traditional public utility associate company that

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

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

has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) any new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA.[75] Further, Applicants and their affiliates disclose their existing pledges and encumbrances of utility assets, as required under Order No. 669-A and 18 C.F.R. § 33.2(j)(l).

b. Commission Determination

68. Based on the representations as presented in the application, we find that the Proposed Transaction will not result in cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company.[76]

69. When a controlling interest in a public utility is acquired by another company, whether a domestic company or a foreign company, the Commission's ability to protect public utility customers adequately 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. In addition, the merged company will be subject to record-keeping and books and records requirements of PUHCA 2005. The approval of this transaction is based on such ability to examine books and records.

D. Accounting Analysis

70. The Proposed Transaction will be a merger of equals in a stock-for-stock transfer. Applicants state that of the public utility applicants, only NSTAR Electric's books would be affected by the Proposed Transaction. Therefore, Applicants provide proposed

[75] Application at Exhibit M.

[76] Although Cape Light asserts that the Proposed Transaction may "cause cross-subsidization issues" (*see* Cape Light's Comments at 6-7), it does not explain what those issues are or otherwise raise any issues of fact that would lead us to conclude that the Proposed Transaction is likely to result in cross-subsidization of any non-utility associate company or pledge or encumbrance of utility assets.

accounting entries recording the effects of the Proposed Transaction on the books of NSTAR Electric.[77]

71. Applicants' proposed accounting eliminates the equity balances of NSTAR Electric.[78] Thus, the net credit shown on NSTAR Electric's Pro Forma Balance Sheet to Common Stock Issued and Other Paid-in Capital of $2,092,293,592 consists of the proprietary capital accounts, which were eliminated to reflect the extinguishment of NSTAR Electric's equity balances. The stock-for-stock merger constitutes a business combination, as Northeast Utilities will acquire NSTAR pursuant to the Merger Agreement.[79] Since the proposed merger would occur at the utility holding company level, it would not involve the consolidation of regulated utility subsidiaries. Therefore, Applicants do not provide journal entries reflecting the merger transaction, other than the elimination of equity balances on the NSTAR Electric's books.

72. To the extent that the Proposed Transaction affects the books and records of the Applicants' public utility operating subsidiaries, we will direct the Applicants to submit their proposed final merger accounting to the Commission within six months after the transaction is consummated.[80] The accounting submission must provide all merger or conversion-related accounting entries made to the books and records of the Applicants' public utility operating subsidiaries, along with appropriate narrative explanations describing the basis for the entries.

E. Other Considerations

1. Effect of the Proposed Transaction on Retail Competition

73. Applicants state that not all of the state commissions that regulate the Northeast Utilities and NSTAR public utility subsidiaries are required to approve the Proposed

---

[77] Application at Appendix 1, *Pro Forma* Accounting Entries.

[78] NSTAR Electric proposes to eliminate equity balances based on consolidated balances from FERC filings.

[79] Financial Accounting Standards Board's Accounting Standard Codification Topic 805, Business Combinations, states that a business combination is a transaction or other event in which an acquirer obtains control of one or more businesses. Transactions sometimes referred to as true mergers or mergers of equals also are business combinations.

[80] Electric Plant Instruction No. 5, Electric Plant Purchased or Sold, and Account 102, Electric Plant Purchased or Sold, 18 C.F.R. Part 101 (2011).

Transaction and some do not have jurisdiction to consider the effect of the Proposed Transaction on retail competition in their states. For that reason, Applicants included an analysis of the Proposed Transaction showing no adverse effect on retail competition.[81] In its comments, however, Cape Light asserts that the Proposed Transaction will harm the public interest, noting, in particular, that the Proposed Transaction could adversely affect retail competition in Massachusetts.[82]

74. In the Merger Policy Statement, the Commission stated that "in cases where a state commission asks us to address the merger's effect on retail markets because it lacks adequate authority under state law, we will do so."[83] However, we have received no request by a state commission for the Commission to address the effect of the Proposed Transaction on retail markets. Furthermore, the Applicants are seeking authorization for the Proposed Transaction from the Massachusetts Commission, which is able to address any adverse effects that this merger may have on retail customers in that state, which is the subject of Cape Light's protest. Accordingly, we find it unnecessary to consider the effect of the Proposed Transaction on retail competition.

2. Reliability and Cyber Security Standards

75. 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, and the like, must comply with all applicable reliability and cyber security standards. The Commission, North American Electric Reliability Corporation, or the relevant regional entity may audit compliance with reliability and cyber security standards.

[81] Application at 24-25; Application Exhibit J-1 at 46-47.

[82] Cape Light's Comments at 5-7.

[83] Merger Policy Statement, FERC Stats. & Regs. at 30,128.

3. Effect of Proposed Transaction on Certain Voting Requirements

76. National Grid states that it does not oppose the application in this proceeding but it notes that the Proposed Transaction has the potential to affect voting dynamics under various contracts among New England utilities. For example, under section 1.02(a) of the Rate Design and Funds Disbursement Agreement, an agreement among Participating Transmission Owners (PTO) in ISO-NE, joint PTO filings under section 205 of the FPA (such as proposed changes to regional transmission rates under the ISO-NE tariff) must be authorized by multiple PTOs with "Individual Votes" of 65 percent of the total of all Individual Votes based on the book value of transmission assets owned by all of the PTOs. This contract provision also prevents the "veto" of a proposed section 205 filing by a single PTO that has up to 50 percent of the aggregate Individual Votes of the PTOs. According to National Grid, no single PTO currently has more than 50 percent of the Individual Votes. National Grid understands, however, that, after Northeast Utilities acquires NSTAR, the resulting company will have more than 50 percent of the aggregate Individual Votes of the PTOs and therefore will have the ability to block unilaterally proposed joint section 205 filings even if supported by all of the other PTOs. Similar anti-veto provisions are included in the contract provisions governing general amendments to the Transmission Operating Agreement among the PTOs in ISO-NE and the Phase I/II Transmission Service Administration Agreement among ISO-NE and various interconnection rights holders.[84] These contract provisions establish that a single utility that has up to 50 percent of the votes under the applicable voting metric in these contracts cannot block a proposed contract amendment supported by the other parties. National Grid states that after the Proposed Transaction, the combined Northeast Utilities/NSTAR may have the ability to block unilaterally proposed amendments to these agreements.[85]

77. In light of the change in circumstances contemplated by the Proposed Transaction, National Grid believes the parties to these contracts should discuss whether modifications to these voting provisions and to any other similar voting arrangements among New England utilities are appropriate after the Proposed Transaction is finalized. National Grid requests that the Commission encourage Northeast Utilities and NSTAR to enter

[84] National Grid's Comments at 5-6. They state that the Phase I/II TSAA is available on the ISO-NE website at: http://www.iso-ne.com/regulatory/toa/phase_I-II_hvdc-tf-_tsaa.pdf.

[85] National Grid's Comments at 5-6.

into good faith discussions with National Grid and other affected parties to discuss these issues once the Proposed Transaction is completed.[86]

78. Applicants respond that they are willing to engage in good faith negotiations with National Grid and other parties regarding the voting arrangements under various contracts among New England utilities. Applicants do not believe, however, that the Commission should condition the Proposed Transaction upon such negotiations, which Applicants argue do not relate to any of the factors the Commission identifies in its Merger Policy Statement or in its regulations under section 203 as being relevant to the Commission's review of proposed mergers. Applicants add that the voting provisions under the various contracts to which National Grid refers are complex, and were the product of several years of negotiation, not only among the parties thereto, but also with other stakeholders. Applicants maintain that these contracts give rise to a number of issues other than voting rights, and that all of these issues are unrelated to the Proposed Transaction. Applicants conclude that it would be inappropriate for the Commission to order, as part of its approval of the Proposed Transaction, that the Applicants negotiate with multiple stakeholders region-wide to address the concerns National Grid raises over one aspect of these agreements.[87]

79. We agree with Applicants that the concerns raised by National Grid concerning the possible impact of the Proposed Transaction on voting dynamics under existing agreements with ISO-NE PTOs are not relevant to the Commission's review of proposed mergers. Nonetheless, consistent with Applicant's answer, we encourage good faith negotiations on this issue among relevant stakeholders. We note that parties retain any rights under section 206 of the FPA to raise these issues with the Commission at a later date.

4. Applicants' Plans to Maintain Dual Corporate Headquarters

80. Cape Light expresses concern with Applicants' plans to maintain dual headquarters in Boston, Massachusetts and Hartford, Connecticut, which Cape Light asserts may be inconsistent with the public interest.[88] In response, Applicants state that Cape Light identifies no issue considered by the Commission in connection with its

[86] *Id*. at 7.

[87] Applicants' Answer at 17-18.

[88] Cape Light's Comments at 7.

review of mergers that is affected by the question of the location of corporate headquarters.[89]

81. We agree with Applicants that Cape Light has not identified any issue relevant to our review of mergers that is affected by Applicants' plans to maintain dual corporate headquarters.

The Commission orders:

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

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

(C) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

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

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

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

(G) Applicants shall adhere to the accounting requirements discussed in the body of the order.

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

---

[89] Applicants' Answer at 17.

(I) If Applicants seek to recover transaction-related costs through their wholesale power or transmission rates, they must first submit a compliance filing in this docket 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 transaction.

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

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.