

145 FERC ¶ 61,261  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Silver Merger Sub, Inc.  
NV Energy, Inc.  
Nevada Power Company  
Sierra Pacific Power Company  
MidAmerican Energy Holding Company

Docket No. EC13-128-000

ORDER AUTHORIZING DISPOSITION OF FACILITIES  
AND ACQUISITION OF SECURITIES

(Issued December 19, 2013)

1. On July 12, 2013, as amended on July 17, 2013, pursuant to sections 203(a)(1) and 203(a)(2) of the Federal Power Act<sup>1</sup> (FPA) and Part 33 of the Commission's regulations,<sup>2</sup> Silver Merger Sub, Inc. (Merger Sub), MidAmerican Energy Holding Company (MidAmerican), NV Energy, Inc. (NV Energy), Nevada Power Company (Nevada Power) and Sierra Pacific Power Company (Sierra Pacific) (collectively, Applicants) filed a joint application for the approval of a transaction in which Merger Sub will merge with and into NV Energy, resulting in NV Energy becoming a wholly-owned subsidiary of MidAmerican (Proposed Transaction).<sup>3</sup> The Commission has reviewed the Merger

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<sup>1</sup> 16 U.S.C. § 824b(a)(1) and (a)(2) (2012).

<sup>2</sup> 18 C.F.R. pt. 33 (2013).

<sup>3</sup> Joint Application for Authorization of Disposition of Jurisdictional Assets and Merger Under Sections 203(a)(1) and 203(a)(2) of the FPA, Docket No. EC13-128-000 (July 10, 2013) (Application). Applicants amended the Application on July 17, 2013 to add MidAmerican as an applicant.

Application under the Commission's Merger Policy Statement.<sup>4</sup> As discussed below, we will authorize the Proposed Transaction as consistent with the public interest.

## I. Background

### A. Description of the Parties

#### 1. NV Energy

2. Applicants state that NV Energy is a Nevada corporation and an investor-owned public utility holding company. In 1999, Sierra Pacific and Nevada Power received authorization for the merger of Nevada Power into Sierra Pacific Resources, as the result of which Nevada Power became a wholly-owned subsidiary of Sierra Pacific Resources. Sierra Pacific Resources later changed its corporate name to NV Energy, the publicly-traded public utility holding company that now owns Sierra Pacific and Nevada Power (together, Sierra Pacific and Nevada Power are referred to as the "NV Energy Utilities," and NV Energy and the NV Energy Utilities are referred to as the "NV Energy Applicants").<sup>5</sup>

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<sup>4</sup> 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*, 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).

<sup>5</sup> We note that, on November 26, 2013, the Commission authorized the merger of Sierra Pacific with and into Nevada Power. *NV Energy, Inc.*, 145 FERC ¶ 61,170, at P 1 (2013) (*NV Energy*). That transaction has not yet closed and is currently pending before the Public Utilities Commission of Nevada (Nevada Commission).

## 2. Nevada Power

3. Applicants state that Nevada Power is a vertically-integrated public utility that generates, transmits and distributes electric energy in Las Vegas and surrounding areas in southern Nevada, and is regulated by the Nevada Commission. Nevada Power operates a transmission system in southern Nevada and owns and operates approximately 4,500 megawatts (MW) of generation. Nevada Power provides transmission service pursuant to an Open Access Transmission Tariff (OATT) and provides wholesale power services to customers within its service territory.

## 3. Sierra Pacific

4. According to Applicants, Sierra Pacific is a vertically-integrated public utility that generates, transmits and distributes electric energy throughout northern Nevada, including the cities of Reno, Sparks, Carson City and Elko, and is also regulated by the Nevada Commission. Sierra Pacific operates a transmission system in northern Nevada and owns and operates approximately 1,600 MW of generation. Sierra Pacific provides transmission service pursuant to an OATT and provides wholesale power services to customers within its service territory. Sierra Pacific also operates a local distribution company that provides natural gas service to customers in Reno and Sparks, Nevada.

## 4. MidAmerican/Merger Sub

5. Applicants state that MidAmerican, an Iowa corporation, is a holding company that owns subsidiaries principally engaged in energy businesses and is itself a consolidated subsidiary of Berkshire Hathaway, Inc. (Berkshire Hathaway). MidAmerican's domestic electric power generating, transmission and natural gas transmission assets are owned directly or indirectly by the following entities: MidAmerican Energy Company (MidAmerican Energy), PacifiCorp, MidAmerican Renewables, LLC (MidAmerican Renewables), Kern River Gas Transmission Company (Kern River), Northern Natural Gas Company (Northern Natural Gas), and MidAmerican Transmission, LLC (MidAmerican Transmission).<sup>6</sup>

6. Applicants state that MidAmerican is an integrated company that owns and operates electric utilities in the Midwest and in the Western Electric Coordinating Council (WECC) region of the western United States.<sup>7</sup> In the WECC region, PacifiCorp

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<sup>6</sup> For information about these entities, *see* Application at 8-18.

<sup>7</sup> Application, Dr. Morris Aff. at 4.

is a vertically-integrated utility that provides retail electric service to customers in parts of California, Idaho, Oregon, Utah, and Wyoming and provides transmission service in nine Western states. PacifiCorp provides open access transmission service pursuant to its OATT. It operates in two balancing area authorities (BAAs), which are referred to as PacifiCorp East and PacifiCorp West, and also owns generation located in other BAAs. MidAmerican Energy is a combination gas and electric company that is engaged in the generation, transmission distribution and sale of electricity and distribution, transportation, and sale of natural gas to customers in parts of Iowa, Illinois, Nebraska and South Dakota. It is a transmission-owning member of Midcontinent Independent System Operator, Inc. (MISO).

7. Applicants add that, through MidAmerican Renewables, MidAmerican owns, operates and invests in various renewable energy facilities. Its wholly-owned subsidiaries include Bishop Hill II, LLC; Cordova Energy Company; Pinyon Pines Wind I, LLC; Pinyon Pines Winds II, LLC; Solar Star California XIX, LLC; Solar Star California XX, LLC; and Topaz Solar Farms LLC. In addition, MidAmerican Renewables owns a 49 percent interest in Agua Caliente Solar, LLC and a 50 percent interest in CE Generation, LLC (CE Generation). CE Generation, in turn, indirectly owns interests in 10 geothermal units in the Imperial Irrigation District BAA, and natural gas-fired generating facilities owned by its subsidiaries, Power Resources, Ltd., Saranac Power Partners, L.P., and Yuma Cogeneration Associates.<sup>8</sup> Kern River operates an interstate pipeline that extends from Opal, Wyoming to Kern County in California. Berkshire Hathaway, which, as noted above, owns MidAmerican, also indirectly owns the BNSF Railway Company (BNSF), which delivers coal for electricity generation in most states west of the Mississippi river and as far east as Alabama. BNSF, however, does not currently deliver any coal to Nevada, where the Nevada Energy Utilities operate.<sup>9</sup>

8. Applicants state that Merger Sub is a Nevada corporation and a direct, wholly-owned subsidiary of NVE Holdings, LLC (NVE Holdings), a Delaware limited liability company, which is, in turn, a direct, wholly-owned subsidiary of MidAmerican. Merger Sub is a special purpose entity formed for the purpose of effectuating the Proposed Transaction.

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<sup>8</sup> For information about these entities, *see* Application at 8-18.

<sup>9</sup> Application, Morris Aff. at 9.

## **B. Description of Proposed Transaction**

9. The terms of the Proposed Transaction are set forth in the Agreement and Plan of Merger, dated May 29, 2013, by and among MidAmerican, Merger Sub, and NV Energy (Merger Agreement), which was filed as Exhibit I to the Application. Applicants state that, pursuant to the Merger Agreement, MidAmerican will purchase all of the outstanding shares of NV Energy's common stock for \$23.75 per share in cash. Following consummation of the Proposed Transaction, NV Energy will be a direct, wholly-owned subsidiary of NVE Holdings, and an indirect, wholly-owned subsidiary of MidAmerican.<sup>10</sup>

## **II. Notice of Filing**

10. Notice of the Application was published in the *Federal Register*, 78 Fed. Reg. 43,190 (2013), with interventions and protests due on or before September 10, 2013. Notice of the July 17, 2013 amendment was published in the *Federal Register*, 78 Fed. Reg. 44,555 (2013), with interventions and protests due on or before September 10, 2013.

11. On August 14, 2013, the Director of the Division of Electric Power Regulation - West issued a request for additional information from Applicants.<sup>11</sup> Applicants filed a response to the request on August 27, 2013.<sup>12</sup> Notice of Applicants Response to Deficiency Letter was published in the *Federal Register*, 78 Fed. Reg. 54,882 (2013), with interventions and comments due on or before September 10, 2013.

12. The Nevada Commission filed a notice of intervention. Timely motions to intervene were filed by Barrick Goldstrike Mines Inc., Barrick Turquoise Ridge Inc. as Operator of Turquoise Ridge Joint Venture, and Barrick Cortez Inc. as Operator of Cortez Mines (together, Barrick Mines); Calpine Corporation; Cities of Santa Clara, California and Redding, California; Cargill Power Markets, LLC; Electric Power Supply Association; Iberdrola Renewables LLC; Idaho Power Company; Las Vegas Power Company, LLC; Modesto Irrigation District; Northwest and Intermountain Power Producers Coalition; Paiute Pipeline Company; Plumas Sierra Rural Electric

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<sup>10</sup> Application at 18; Exhibit I.

<sup>11</sup> Letter order directing Applicants to provide additional information, Docket No. EC13-128-000 (Aug. 14, 2013) (Deficiency Letter).

<sup>12</sup> Response to Deficiency Letter, Docket No. EC13-128-000 (filed Aug. 27, 2013) (Applicants Response to Deficiency Letter).

Cooperative; Southwest Gas Corporation; Transmission Agency of Northern California; Truckee Donner Public Utility District and Utah Associated Municipal Power Systems.

13. Comments were submitted by United States Senator Harry Reid, United States Senator Dean Heller, and Governor of Nevada Brian Sandoval.

14. Timely motions to intervene and protest were filed by Deseret Generation and Transmission Co-Operative, Inc. (Deseret); and the Colorado River Commission of Nevada and Southern Nevada Water Authority (River Commission and Water Authority).

15. Motions to intervene out-of-time were filed by Bonneville Power Administration (Bonneville); Bureau of Consumer Protection; Liberty Utilities (CalPeco Electric) LLC; Office of the Nevada Attorney General; Sierra Club; and Valley Electric Association, Inc.

16. On September 19, 2013, Applicants filed an answer to the protests.<sup>13</sup> On September 30, 2013, Barrick Mines submitted a request to reply and reply to Applicants' Answer.<sup>14</sup> On October 4, 2013, River Commission and Water Authority filed an answer to Applicants' Answer.<sup>15</sup> On October 8, 2013, Applicants filed an answer in opposition to the River Commission and Water Authority Answer and Barrick Mines Reply.<sup>16</sup>

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<sup>13</sup> Request for Leave to Answer and Answer of Applicants, Docket No. EC13-128-000 (filed Sept. 19, 2013) (Applicants Answer).

<sup>14</sup> Motion for Leave to Reply and Reply of Barrick Mines, Docket No. EC13-128-000 (filed Sept. 29, 2013) (Barrick Mines Reply).

<sup>15</sup> Motion for Leave to File Limited Answer and Answer of Colorado River Commission and Southern Nevada Water Authority, Docket No. EC13-128-000 (filed Sept. 30, 2013) (River Commission and Water Authority Answer).

<sup>16</sup> Applicants Answer in Opposition to Limited Answer of Colorado Commission and Water Authority and Limited Reply of Barrick Mines, Docket No. EC13-128-000 (filed Oct. 8, 2013) (Applicants Answer to River Commission and Water Authority Answer and Barrick Mines Reply).

### **III. Discussion**

#### **A. Procedural Issues**

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the notice of intervention and timely unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,<sup>17</sup> the Commission will grant late-filed motions to intervene, given the entities' interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

18. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure<sup>18</sup> prohibits an answer to a protest or 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.

#### **B. Standard of Review under Section 203**

19. Section 203(a)(4) of the FPA requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest. The Commission's analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.<sup>19</sup> Section 203(a)(4) also requires the Commission, before granting authorization, 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."<sup>20</sup> The Commission's regulations establish verification and informational

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<sup>17</sup> 18 C.F.R. § 385.214(d).

<sup>18</sup> 18 C.F.R. § 385.213(a)(2).

<sup>19</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

<sup>20</sup> 16 U.S.C. § 824b(a)(4).

requirements for applicants that seek a determination that a transaction will not result in an inappropriate cross-subsidization or pledge or encumbrance of utility assets.<sup>21</sup>

**C. Analysis under Section 203**

**1. Effect on Horizontal Competition**

**a. Applicants Analysis**

20. Applicants assert that the Proposed Transaction presents no horizontal market power concerns.<sup>22</sup> Applicants first identify five relevant geographic markets in which the NV Energy Utilities and PacifiCorp own generation.<sup>23</sup> Applicants state that there are no direct generation overlaps between Merger Sub and its affiliates and the NV Energy Applicants and their affiliates.<sup>24</sup> Applicants performed a Competitive Analysis Screen for each of the relevant geographic markets. The NV Energy BAA consists of the combined Sierra Pacific and Nevada Power BAAs, which Applicants state that they intend to consolidate after completion of the One Nevada Transmission Line (ON Line).<sup>25</sup> Applicants state that the focus of their analysis is on available economic capacity (AEC) (essentially, economic supply in excess of load-serving obligations) rather than economic capacity (EC) (which ignores load obligations).<sup>26</sup> According to

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<sup>21</sup> 18 C.F.R. § 33.2(j).

<sup>22</sup> Application at 20.

<sup>23</sup> The identified relevant geographic markets include the BAAs of: Sierra Pacific, Nevada Power, PacifiCorp East, PacifiCorp West and NV Energy.

<sup>24</sup> Application at 22.

<sup>25</sup> *Id.* at 21. The ON Line is a 230-mile 500 kV transmission line that will interconnect Sierra Pacific with Nevada Power. It is being jointly developed by Sierra Pacific, Nevada Power and Great Basin Transmission South, LLC, an affiliate of LS Power Development, LLC. *Id.*, Exhibit D; *id.*, Solomon Aff. at 12 & n.10. Applicants state that the anticipated in-service date of the ON Line is December 31, 2013. Solomon Aff. at 12. They explain that with the completion of the ON Line, Nevada Power's and Sierra Pacific's BAAs can be combined into a single BAA. *Id.* For additional information about the ON Line, *see NV Energy*, 145 FERC ¶ 61,170 at PP 6-7, 51.

<sup>26</sup> Application at 23.



Applicants' expert witness, the proper focus in this case should be on AEC, which is consistent with the Commission's policy in states where there is limited or no retail access and where it is unlikely that retail access will be adopted in the foreseeable future.<sup>27</sup>

21. Applicants state that they performed studies of simultaneous transmission import limits (SIL) based on projected 2014 conditions in order to consider generation outside of the NV Energy BAAs that can be imported.<sup>28</sup> Applicants state that for purposes of the instant analysis, NV Energy used an approach that "more realistically" maintained the dispatch of certain internal generation for reliability purposes, and selected first-tier generation to increase, while overall still respecting SILs.<sup>29</sup> Applicants state that they allocated the transmission on a *pro rata* basis, such that imports are based on the *pro rata* shares of capacity that are economically and physically deliverable to the destination market.<sup>30</sup>

22. Applicants state that price levels in the analysis were based on two years of historical price data in each market reported in Electric Quarterly Reports and adjusted to reflect forecasted fuel prices for 2014.<sup>31</sup>

23. Applicants performed a Delivered Price Test for each of the relevant geographic markets identified above and their first-tier markets. Applicants state that they calculated the market shares of generation capacity that could be delivered at 105 percent of the market price for each of ten different load conditions, and then used these market shares

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<sup>27</sup> *Id.* at 23-24. *See also id.*, Solomon Aff. at 17 & n.18.

<sup>28</sup> Application at 25. Applicants note that the SILs calculated by both PacifiCorp and by the NV Energy Utilities are different than the SILs included in their 2012 triennial filings, which are based on a historical 2010-2011 test year, because the SILs that must be used for the purposes of the section 203 analysis are based on a forward-looking 2014 study year. *Id.* at 26 & n.38.

<sup>29</sup> *Id.* at 26; *id.*, Solomon Aff. at 27 & n.41 (noting that additional details on SIL calculations are provided in workpapers).

<sup>30</sup> Application at 27; *id.*, Solomon Aff. at 27.

<sup>31</sup> Application at 27.

to calculate market concentration values using the Herfindahl-Hirschman Index (HHI).<sup>32</sup> Applicants present the following results of changes in the HHI:<sup>33</sup>

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<sup>32</sup> *Id.* at 25. For information about the HHI, *see* footnote 33, below.

<sup>33</sup> Applicants performed an Appendix A analysis, also referred to as a Delivered Price Test or Competitive Analysis Screen, to determine the pre- and post-transaction market shares from which the market concentration or HHI change can be derived. The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are considered to be unconcentrated; markets in which the HHI is greater than or equal to 1,000 but less than 1,800 points are considered to be moderately concentrated; and markets in which the HHI is greater than or equal to 1,800 points are considered to be highly concentrated. In a horizontal merger, an increase of more than 50 HHI points in a highly concentrated market or an increase of 100 HHI points in a moderately concentrated market fails its screen and warrants further review. Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,129; *see also Analysis of Horizontal Market Power under the Federal Power Act*, 138 FERC ¶ 61,109 (2012) (affirming the Commission's use of the thresholds adopted in the Merger Policy Statement).

<b>Post Transaction AEC Results in NV Energy Balancing Authority Area</b>						
<b>Period</b>	<b>Price</b>	<b>Market Size (MW)</b>	<b>MidAmerican AEC (MW)</b>	<b>MidAmerican Market Share</b>	<b>HHI</b>	<b>HHI Change</b>
Summer Super-Peak 1	\$ 100	5,966	88	1.5%	536	0
Summer Super-Peak 2	\$ 60	6,687	846	12.6%	585	14
Summer Peak	\$ 43	6,921	1,365	19.7%	822	73
Summer Off-Peak	\$ 26	5,550	276	5.0%	812	0
Winter Super-Peak	\$ 47	6,253	1,680	26.9%	1,034	42
Winter Peak	\$ 43	6,754	2,214	32.8%	1,300	78
Winter Off-Peak	\$ 27	3,877	24	0.6%	551	0
Shoulder Super-Peak	\$ 51	6,479	218	3.4%	605	5
Shoulder Peak	\$ 38	7,466	1,306	17.5%	646	71
Shoulder Off-Peak	\$ 23	3,815	0	0%	629	0

Source: Application at 29.

24. Applicants state that in the NV Energy BAA, the amount of AEC that PacifiCorp is allocated is relatively small, and the change in HHI ranges from 0 to 78 points in an unconcentrated or moderately concentrated market. Applicants state that there is no indication that the Proposed Transaction creates horizontal market power concerns.<sup>34</sup>

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<sup>34</sup> Application at 28.

<b>Post Transaction AEC Results in PacifiCorp East Balancing Authority Area</b>						
<b>Period</b>	<b>Price</b>	<b>Market Size (MW)</b>	<b>MidAmerican AEC (MW)</b>	<b>MidAmerican Market Share</b>	<b>HHI</b>	<b>HHI Change</b>
Summer Super-Peak 1	\$ 100	5,865	20	0.3%	472	0
Summer Super-Peak 2	\$ 59	5,797	134	2.3%	444	1
Summer Peak	\$ 42	6,237	806	12.9%	582	48
Summer Off-Peak	\$ 28	5,606	45	0.8%	882	0
Winter Super-Peak	\$ 46	6,004	886	14.8%	596	77
Winter Peak	\$ 39	6,304	1,175	18.6%	709	91
Winter Off-Peak	\$ 25	5,686	66	1.2%	495	0
Shoulder Super-Peak	\$ 46	5,994	523	8.7%	526	0
Shoulder Peak	\$ 36	6,296	1,019	16.2%	646	0
Shoulder Off-Peak	\$ 21	3,526	0	0%	697	0

Source: Application at 29.

25. Applicants state that in the PacifiCorp East BAA, the amount of AEC that PacifiCorp is allocated is relatively small, and the change in HHI ranges from 0 to 91 points, all below 100 points in an unconcentrated to moderately concentrated market.<sup>35</sup>

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<sup>35</sup> *Id.* at 29.

<b>Post Transaction AEC Results in PacifiCorp West Balancing Authority Area</b>						
<b>Period</b>	<b>Price</b>	<b>Market Size (MW)</b>	<b>MidAmerican AEC (MW)</b>	<b>MidAmerican Market Share</b>	<b>HHI</b>	<b>HHI Change</b>
Summer Super-Peak 1	\$ 100	2,282	6	0.3%	858	0
Summer Super-Peak 2	\$ 59	2,282	43	1.9%	829	0
Summer Peak	\$ 42	2,496	290	11.6%	892	42
Summer Off-Peak	\$ 28	2,556	0	0%	1,013	0
Winter Super-Peak	\$ 46	2,867	152	5.3%	733	13
Winter Peak	\$ 39	2,880	238	8.3%	684	33
Winter Off-Peak	\$ 25	3,182	0	0%	621	0
Shoulder Super-Peak	\$ 46	2,309	18	0.8%	922	0
Shoulder Peak	\$ 36	2,308	77	3.3%	770	0
Shoulder Off-Peak	\$ 21	3,294	0	0%	749	0

Source: Application at 30.

26. Applicants state that in the PacifiCorp West BAA, the amount of AEC that PacifiCorp is allocated is relatively small, and the change in HHI ranges from 0 to 42 points, all below 50 points in an unconcentrated or moderately concentrated market. Applicants conclude that there is no indication that that Proposed Transaction creates horizontal market power concerns.<sup>36</sup>

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<sup>36</sup> *Id.* at 28.

<b>Post Transaction AEC Results in Nevada Power Balancing Authority Area</b>						
<b>Period</b>	<b>Price</b>	<b>Market Size (MW)</b>	<b>MidAmerican AEC (MW)</b>	<b>MidAmerican Market Share</b>	<b>HHI</b>	<b>HHI Change</b>
Summer Super-Peak 1	\$ 100	4,892	29	0.6%	585	0
Summer Super-Peak 2	\$ 60	5,415	597	11.0%	602	11
Summer Peak	\$ 43	5,863	1,123	19.2%	824	50
Summer Off-Peak	\$ 26	4,754	96	2.0%	1,890	0
Winter Super-Peak	\$ 47	4,649	1,205	25.9%	1,034	48
Winter Peak	\$ 43	5,038	1,629	32.3%	1,351	79
Winter Off-Peak	\$ 27	2,813	29	1.0%	850	1
Shoulder Super-Peak	\$ 51	5,518	136	2.5%	619	3
Shoulder Peak	\$ 38	6,249	1,005	16.1%	623	62
Shoulder Off-Peak	\$ 23	3,503	0	0%	1,176	0

Source: Application at 30.

<b>Post Transaction AEC Results in Sierra Pacific Balancing Authority Area</b>						
<b>Period</b>	<b>Price</b>	<b>Market Size (MW)</b>	<b>MidAmerican AEC (MW)</b>	<b>MidAmerican Market Share</b>	<b>HHI</b>	<b>HHI Change</b>
Summer Super-Peak 1	\$ 100	1,815	60	3.3%	1,325	0
Summer Super-Peak 2	\$ 60	2,291	262	11.4%	1,229	6
Summer Peak	\$ 43	2,223	266	12.0%	1,269	22
Summer Off-Peak	\$ 26	955	45	4.8%	875	0
Winter Super-Peak	\$ 47	3,294	526	16.0%	1,414	8
Winter Peak	\$ 43	2,641	670	25.4%	1,599	27
Winter Off-Peak	\$ 27	893	20	2.2%	765	0
Shoulder Super-Peak	\$ 51	2,279	159	7.0%	1,174	5
Shoulder Peak	\$ 38	2,256	427	18.9%	1,467	33
Shoulder Off-	\$ 23	662	0	0%		0

Peak					1,196	
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Source: Application at 31.

27. Applicants explain that, should there be a delay in the completion of the ON Line, there would be an interim period during which Sierra Pacific and Nevada Power continue to operate as separate BAAs.<sup>37</sup> Applicants state that there are no screen failures in the Nevada Power and the Sierra Pacific BAAs.<sup>38</sup>

28. Additionally, Applicants explain that there are several other factors that demonstrate a lack of market power concerns associated with the Proposed Transaction. Applicants state that neither Nevada Power nor Sierra Pacific is authorized to sell energy, capacity or ancillary services at market-based rates in their current BAAs or in the combined NV Energy BAA, and following the Proposed Transaction, MidAmerican affiliates will make wholesale sales at cost-based rates in the NV Energy market or markets.<sup>39</sup> Second, Applicants state that shareholders do not “profit” from NV Energy Utilities’ wholesale sales because revenues from such sales are fully credited to the retail and wholesale cost-based customers through a fuel adjustment clause.<sup>40</sup> Third, Applicants note that the NV Energy Utilities lack the incentive to charge higher market prices because they are significant net buyers of energy.<sup>41</sup> Finally, Applicants explain that there is little competitive overlap between NV Energy and PacifiCorp because Mead<sup>42</sup> is the only common point of delivery with more than a *de minimis* overlap in short-term energy sales and there is only one customer, a marketer (Citigroup), for which both PacifiCorp and NV Energy each had more than a *de minimis* level of short-term sales.<sup>43</sup>

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<sup>37</sup> *Id.* at 21.

<sup>38</sup> *Id.* at 30-31.

<sup>39</sup> *Id.* at 31-32.

<sup>40</sup> *Id.* at 32.

<sup>41</sup> *Id.*

<sup>42</sup> Applicants explain that Mead is a liquid trading point for the Southwest area of WECC and Applicants’ share of sales at Mead is small relative to total sales. *Id.* at 33.

<sup>43</sup> *Id.*

**b. Deficiency Letter and Response**

29. Commission staff requested Applicants to provide additional support and explain certain assumptions made when conducting the SIL study in connection with the Delivered Price Test.<sup>44</sup> Commission staff also requested Applicants to explain certain assumptions that were made in calculating the destination market price.<sup>45</sup> Applicants responded with supporting documentation for the SIL calculations and provided an additional sensitivity for the Delivered Price Test, using a weather-normalized load.<sup>46</sup>

**c. Comments, Protests and Response**

30. Deseret claims that the Proposed Transaction will exacerbate the market power (and lack of competitive alternatives) already existing in the Nevada wholesale market.<sup>47</sup>

31. Barrick Mines, in its Reply, argues that Applicants' analysis does not adequately address the effects of the potential merger on competitive markets. Barrick Mines asserts that Applicants' expert witness conducted her competitive analysis based on the assumption that Nevada lacks or has limited retail open access.<sup>48</sup> According to Barrick Mines, Nevada has retail open access and there are customers in Nevada that take transmission service from NV Energy Applicants for delivery of their unbundled energy, ancillary services and renewable energy credits for renewable portfolio standard compliance. Thus, Barrick Mines argues that Applicants' analysis is inadequate and ignores the negative effects of the merger on these customers. Barrick Mines argues that all competitive analyses and evaluations based on the assumption that there is no open access in Nevada are wrong and should be rejected.

32. In response, Applicants point out that Barrick Mines' "reply" appears to be a very late-filed comment challenging the Application and competitive analysis contained therein, based on the "false premise" that Applicants' expert witness assumed that

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<sup>44</sup> Deficiency Letter at 2-5.

<sup>45</sup> *Id.* at 5.

<sup>46</sup> *See* Applicants Response to Deficiency Letter.

<sup>47</sup> Deseret Protest at 6.

<sup>48</sup> Barrick Mines Reply at 2 (citing Solomon Aff. at nn.17-18).



Nevada lacks retail access.<sup>49</sup> Applicants emphasize that their competitive analysis was based on the assumption that “*Nevada has limited retail access . . . [and] this limited retail access does not alter the determination that Nevada is essentially . . . a non-restructured/non-retail access market.*”<sup>50</sup> Applicants explain that Nevada law permits certain government entities and large commercial and industrial customers (that is, those with an annual average consumption greater than 1 MW) to procure energy from entities other than Nevada utilities as long as they also have a new generating resource. Applicants state that “only a small handful of customers” have obtained retail access in the 12 years that it has been available in Nevada.<sup>51</sup> Indeed, they point out that Barrick Mines is the only industrial or commercial customer to avail itself of retail access in these 12 years, and only five governmental entities are served by the Colorado River Commission.<sup>52</sup> Applicants thus argue that their analysis correctly accounts for the competitive impact of Nevada’s limited retail access regime and the competition analysis supporting the Application properly modeled Nevada as a non-restructured/non-retail access market. Applicants add that, because retail access in Nevada is limited, in accordance with Commission precedent,<sup>53</sup> the competitive analysis should focus on AEC.

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<sup>49</sup> Applicants Answer to River Commission and Water Authority Answer and Barrick Mines Reply at 7.

<sup>50</sup> *Id.* at 7 & n.21 (citing Solomon Affidavit at 17 n.18 (emphasis in Applicants Answer to River Commission and Water Authority Answer and Barrick Mines Reply) and Application at 23-24 n.33).

<sup>51</sup> *Id.* at 7.

<sup>52</sup> *Id.* at 8-9.

<sup>53</sup> *Id.* at 8 & n.22 (citing, as examples, *Nevada Power Co. and Gen West LLC*, 113 FERC ¶ 61,265, at P 15 (2005) (agreeing with applicant Nevada Power that AEC “is the more relevant measure in the Nevada Power market” for a horizontal market power analysis performed after Nevada had enacted its existing limited retail access regime); *Nevada Power Co.*, 145 FERC ¶ 61,022, at P 13 & n.17 (2013) (stating that “the Commission places more reliance on the [AEC] measure of capacity in markets where, as is the case in Nevada, the section 203 applicant has a native load obligation.”); *PacifiCorp*, 124 FERC ¶ 61,046, at PP 16, 18 (2008) (finding that AEC provides “the more accurate measure of effect on competition” in the PacifiCorp service territory where there was limited retail access) and Application, Solomon Aff. at 17, 29, n.44 (citing *Duke*, 136 FERC ¶ 61,245; *Great Plains Energy, Inc.*, 121 FERC ¶ 61,069, at P 34 & n.44 (2007), *reh’g denied*, 122 FERC ¶ 61,177 (2008) (*Great Plains*); *Nat’l Grid, plc.*,

(continued...)

Consequently, in Applicants' view, the showing that there are no AEC screen failures supports the conclusion that the Proposed Transaction has no adverse effect on competition, rates or regulation.

33. Nevada Senators Reid and Heller and Nevada Governor Sandoval express support for the Proposed Transaction.<sup>54</sup>

**d. Commission Determination**

34. We find that the Proposed Transaction will not create horizontal market power concerns. In response to an inquiry from Commission staff,<sup>55</sup> Applicants adequately explained their assumptions underlying the Delivered Price Test. We find that the changes in HHI that will result from the Proposed Transaction show that the thresholds established in the Commission's competitive analysis screen under the AEC measures are not exceeded for any season/load period, even when tested using various price sensitivities in the NV Energy, PacifiCorp East, PacifiCorp West, Sierra Pacific and Nevada Power BAAs, as well as their respective first-tier markets. This finding is not dependent on the consummation of the merger of Sierra Pacific with and into Nevada Power. We note that Applicants appropriately focused their consideration on AEC because, despite some limited opportunities for retail choice in Nevada, as Barrick Mines points out, both Sierra Pacific and Nevada Power retain significant load obligations. The Commission has indicated that where applicants retain significant load obligations, it is appropriate to consider AEC as the relevant measure.<sup>56</sup> Therefore, contrary to Barrick

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117 FERC ¶ 61,080, at PP 27-28 (2006), *reh'g denied*, 122 FERC ¶ 61,096 (2008); *Westar Energy, Inc.*, 115 FERC ¶ 61,228, at P 72, *reh'g denied*, 117 FERC ¶ 61,011, at P 39 (2006) (*Westar*); and *Nevada Power Co.*, 113 FERC ¶ 61,265, at P 15 (2005) and Application at 23-24 n.32 (same)).

<sup>54</sup> See Reid Letter at 1 (asserting that the Proposed Transaction “will impact Nevada’s clean energy future and is important to investments in infrastructure necessary to integrate greater amounts of clean energy into our grid”); Heller Letter at 1 (noting that “Nevada’s energy future depends on having renewable energy development”); Sandoval Letter at 1 (stating that the Proposed Transaction would “promote future investment in new generation and transmission infrastructure in Nevada”).

<sup>55</sup> See Deficiency Letter.

<sup>56</sup> See *Great Plains*, 121 FERC ¶ 61,069 at P 34 & n.44; *Westar*, 115 FERC ¶ 61,228 at P 72, *reh'g denied*, 117 FERC ¶ 61,011 at P 39; *Nev. Power Co.*, 113 FERC ¶ 61,265 at P 15.

Mines' assertion, we find that Applicants' competitive analysis correctly analyzes NV Energy Utilities' load and takes into consideration the limited retail access in Nevada.

35. We find that Applicants have generally performed the Delivered Price Test in accordance with prior Commission guidance, with some variations in the SIL study in the NV Energy and Nevada Power markets during the summer and fall seasons. Applicants performed the SIL study by manually scaling generation.<sup>57</sup> During this process, Applicants scaled up a small number of generating units within Applicants' BAAs to relieve constraints and allow greater imports into the market. This method was not supported by an explanation or a documented operating procedure and thus does not conform to Commission guidance.<sup>58</sup> However, because there is no generation owned by affiliates of MidAmerican located in the NV Energy Utilities BAAs, or any generation owned by NV Energy in the PacifiCorp BAAs, and the BAAs are interconnected with a number of neighboring markets, the HHI results are not significantly impacted by a change in the import levels. Moreover, Commission staff performed an independent analysis that corrected for Applicants' error and that confirmed that Applicants pass the HHI screens.

36. While the Proposed Transaction does not trigger screen failures, the Commission has previously made clear that it will consider evidence of anticompetitive effects other than increases in HHI.<sup>59</sup> Here we find no evidence of anticompetitive effects that may be masked in the market concentration measures, and protestors have not provided alternative evidence for the Commission to consider. Also, as Applicants note, there are several factors that reduce incentives to exercise market power. These factors include the fuel adjustment clause that requires Nevada Power and Sierra Pacific to credit "profits" from wholesale off-system sales back to captive customers, and the need for Nevada Power and Sierra Pacific to be net purchasers of power to serve load obligations. The

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<sup>57</sup> "Scaling" refers to the generally accepted study practice of increasing the simulated output of generating units in one area, while simultaneously decreasing the simulated output of generating units in another area, in order to modify the power transferred between the areas.

<sup>58</sup> See *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018, at App. E (2004) (directing applicants when conducting SIL study to "...scale down the study area resources....").

<sup>59</sup> *Analysis of Horizontal Market Power under the Federal Power Act*, 138 FERC ¶ 61,109 at P 36.

Commission has previously held that these factors demonstrate a lack of market power.<sup>60</sup> Therefore, we find the Proposed Transaction does not raise horizontal market power concerns.

## 2. Effect on Vertical Competition

### a. Applicants Analysis

37. Applicants state that the Proposed Transaction raises no vertical market power concerns.<sup>61</sup> Applicants define the downstream product market as the market for electric generation and the geographic market as each of the Applicants' BAAs and the other BAAs in the WECC region.<sup>62</sup> In the upstream markets, Applicants define the relevant product market as the market for fossil fuel, including coal and natural gas.<sup>63</sup>

38. For natural gas, Applicants consider the upstream supplier to be the firm shippers on interstate pipelines with long-term contracts. For coal, Applicants consider the railroad rather than the supplier of the fossil fuel as the upstream supplier for coal delivered by rail, except that, in the case of coal-fired plants located near mines where coal is delivered via conveyor, truck, or proprietary short-line railroads, the mine owner or operator is considered the supplier.<sup>64</sup>

39. Applicants state that both the upstream and downstream markets must be highly concentrated to give rise to vertical market power concerns. Applicants state that in all markets studied for delivered fossil fuel, except for the Northwestern Energy BAA with

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<sup>60</sup> See *Arizona Pub. Serv. Co.*, 141 FERC ¶ 61,154, at P 33 (2012); see also *FirstEnergy Corp.*, 133 FERC ¶ 61,222, at P 50 (2010) (finding that withholding baseload generation capacity would not increase prices enough to offset lost revenue) (*FirstEnergy*).

<sup>61</sup> Application at 33.

<sup>62</sup> *Id.* at 35.

<sup>63</sup> *Id.* at 36.

<sup>64</sup> *Id.* at 38-39.

respect to coal,<sup>65</sup> the upstream markets are not highly concentrated, with an HHI below 1,800 points. Applicants conclude that the combined firm would not have the ability to exercise vertical market power.<sup>66</sup>

40. Applicants reiterate that, following the Proposed Transaction, Applicants would not have the incentive to exercise market power because Nevada state law provides that net benefits from off-system sales accrue to the NV Energy Utilities' retail and wholesale cost-based customers, and not to NV Energy shareholders; and the NV Energy Utilities are typically significant net buyers of electric energy.<sup>67</sup>

41. Applicants state that the merger parties' transmission assets and transmission service thereunder is pursuant to Commission-approved OATTs. All of MidAmerican Energy's transmission assets are under the operational control of MISO. Moreover, PacifiCorp and the NV Energy Utilities provide transmission service pursuant to the Commission-approved PacifiCorp and NV Energy OATTs, respectively. Applicants state that neither they nor their affiliates own any sites for generation development or any other inputs to electricity production that would allow them to erect barriers to entry to new generation.<sup>68</sup>

**b. Commission Determination**

42. In mergers combining electric generation assets with inputs to generating power (such as natural gas, transmission, or fuel), competition can be harmed if a merger increases the merged firm's ability or incentive to exercise vertical market power in wholesale electricity markets.<sup>69</sup> For example, by denying rival firms access to inputs or by raising their input costs, a merged firm could impede entry of new competitors or

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<sup>65</sup> *Id.* at 39-49 & n.76. Applicants note that the Proposed Transaction does not affect this upstream market in the NorthWestern Energy BAA, which is located in Montana and South Dakota.

<sup>66</sup> Application at 40.

<sup>67</sup> *Id.* at 41-42.

<sup>68</sup> *Id.* at 42.

<sup>69</sup> See *Exelon Corp.*, 138 FERC ¶ 61,167, at P 112 (2012) (*Exelon*).

inhibit existing competitors' ability to undercut an attempted price increase in the downstream wholesale electricity market.<sup>70</sup>

43. In examining whether a merger causes an adverse effect on competition, the Commission examines the ability and incentive of the merger applicants to exercise market power.<sup>71</sup> The framework the Commission established in Order No. 642<sup>72</sup> for determining whether a merger warrants additional analysis for potential vertical market power arising from control over upstream inputs to generating power is whether the upstream and downstream markets are both highly concentrated, i.e., have HHIs of 1,800 or more.<sup>73</sup> The screen is passed if either of the markets is not highly concentrated.

44. Because Applicants' analysis demonstrates that the upstream gas market is not highly concentrated,<sup>74</sup> further analysis of the potential for the exercise of vertical market power related to Applicants' control over natural gas inputs is not necessary here.<sup>75</sup>

45. Although the NorthWestern Energy BAA is highly concentrated with respect to coal,<sup>76</sup> Applicants have shown that their market share in this BAA is small.<sup>77</sup> Applicants explain that the high concentration in this BAA is due to the presence of an unaffiliated

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<sup>70</sup> *Id.*

<sup>72</sup> Order No. 642, FERC Stats. & Regs. ¶ 31,111.

<sup>73</sup> *Id.* at 31,909.

<sup>74</sup> *See* Application, Dr. Morris Aff. at 23-32.

<sup>75</sup> In this case, Applicants argue that natural gas and coal may be competitive substitutes. *See id.* at 14-15. However, because the generating facilities using each of the fuels may be economic in different season/load periods, each of the "delivered fossil fuels" may not always be a reasonable substitute. In this instance, therefore, we considered coal and natural gas as separate upstream inputs. We would prefer future vertical competition analyses to consider coal and natural gas separately.

<sup>76</sup> *See id.* at 25 (stating that the NorthWestern Energy BAA is highly concentrated with an HHI of 5,537).

<sup>77</sup> *Id.* at 25-26 (stating that the "MidAmerican share of the upstream fuel supplies is only 6.4 percent, and the upstream market shares are the same both pre-merger and post-merger.").

coal mine and the Proposed Transaction will not increase this concentration.<sup>78</sup> Furthermore, BNSF does not currently deliver coal to Nevada, where the NV Energy Utilities operate.<sup>79</sup> Thus, we conclude that the Proposed Transaction does not combine the upstream coal inputs with downstream generation in the NV Energy Utilities' markets and, therefore, that Applicants will not be able to exercise vertical market power as a result of the Proposed Transaction.<sup>80</sup>

46. Additionally, we find that the combination of electric generation and transmission assets will not give Applicants an ability to exercise vertical market power because Applicants' transmission facilities will continue to be subject to Commission-approved OATTs. Furthermore, based on Applicants' representations, we find that there are no barriers to entry that would raise vertical market power concerns.

47. In addition to finding that Applicants lack the ability to exercise vertical market power, we also find that Applicants have demonstrated that certain other factors reduce their incentive to exercise vertical market power.<sup>81</sup> These include the requirement under the NV Energy Utilities' fuel adjustment clause<sup>82</sup> to credit captive customers with any profits from off-system sales and the fact that the NV Energy Utilities are typically net buyers of power to serve load obligations.<sup>83</sup> Similarly, PacifiCorp would also receive few benefits from attempting to increase the fuel supply costs of its competitors in order to gain their customers and increase PacifiCorp's profits because PacifiCorp, like the NV

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<sup>78</sup> *Id.* at 25 (stating that the Rosebud mine that supplies the Colstrip generation facility is owned by Westmoreland Coal Company, which has a 73.5 percent share in the area).

<sup>79</sup> *Id.* at 9.

<sup>80</sup> We further note the downstream electric energy markets in which Applicants compete will remain relatively unconcentrated, as shown in the horizontal market power discussion above.

<sup>81</sup> Application at 41 & n.80; *id.*, Dr. Morris Aff. at 6 & n.3 (citing Nevada Administrative Code § 704.032.1 ("For an electric utility, the rate [is] determined by dividing the cost of fuel for electric generation and purchased power, reduced by any revenue from off-system sales for the test period, by the total megawatt-hours that have been sold, exclusive of off-system sales, for the test period . . . ."))).

<sup>82</sup> *See supra* text at P 28.

<sup>83</sup> Application, Dr. Morris Aff. at 6-7 and 32-33.

Energy Utilities, is subject to state regulation of its retail sales, which will ensure that it credits captive customers with profits from off-system sales.<sup>84</sup> For these reasons, we find the Proposed Transaction does not raise vertical market power concerns.

### 3. Effect on Rates

#### a. Applicants Analysis

48. Applicants state that the Proposed Transaction will not have an adverse effect on rates. Applicants assert that the Commission's evaluation of a merger's impact on rates primarily focuses on the transaction's impacts on transmission rates and captive long-term wholesale requirements customers.<sup>85</sup> Applicants have listed California Pacific Electric Company, LLC and Southern Nevada Water Authority as wholesale customers. Applicants also have various transmission service customers throughout the west.<sup>86</sup> Applicants commit to hold wholesale requirements and transmission customers harmless from the effect of the Proposed Transaction for five years. Specifically, Applicants state that, for a five-year period, they will not seek to include transaction-related costs in their transmission revenue requirements or in their wholesale requirements rates, except to the extent they can demonstrate transaction-related savings are equal to or in excess of the transaction-related costs included in the rate filing.<sup>87</sup> Applicants point out that the Commission's Merger Policy Statement and numerous subsequent cases support this type of (five-year hold harmless) commitment.<sup>88</sup>

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<sup>84</sup> See *id.* at 6 & n.4.

<sup>85</sup> Application at 43.

<sup>86</sup> See *id.* at Exhibit F-1 (NV Energy Applicants' Wholesale Power Sales and Transmission Service Customers).

<sup>87</sup> Applicants clarify that their hold harmless commitment covers *all* merger-related costs, including any acquisition premium. Applicants Answer at 11 (emphasis in original).

<sup>88</sup> Application at 43 & n.86 (citing Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124; *Ameren Corp.*, 108 FERC ¶ 61,094, at PP 62-68 (2004); *Great Plains*, 121 FERC ¶ 61,069 at P 48 & n.63).



49. Applicants state that the Commission has authority to monitor Applicants' hold harmless commitment.<sup>89</sup> They add that if they seek to recover transaction-related costs through their wholesale power or transmission rates, they will submit a compliance filing that details how they are satisfying the hold harmless commitment. Applicants further note that they will comply with the Commission's directives in other proceedings that involve a similar hold harmless commitment.<sup>90</sup>

**b. Protests and Answers**

50. Deseret and River Commission and Water Authority make three arguments concerning the Proposed Transaction's effect on rates: (1) Applicants should fully eliminate pancaked transmission rates; (2) the hold harmless commitment Applicants propose is insufficient to prevent the future recovery in wholesale rates of the \$2 billion acquisition premium paid by MidAmerican; and (3) lower debt costs arising from the merger should be reflected in the NV Energy Utilities' rates predicated on a 2014 test period.

**i. Elimination of Rate Pancaking**

51. Deseret and River Commission and Water Authority state that Applicants' vertical market power analysis fails to include a commitment to de-pancake rates.<sup>91</sup> Thus, according to these protestors, transmission customers would be required to pay both PacifiCorp and NV Energy Utilities' rates for certain transactions that require use of both transmission systems. They argue that Commission precedent is clear that after a merger, entities that are affiliated under one corporate family must adopt a single system rate to eliminate rate pancaking.<sup>92</sup> Citing filings in other proceedings, they argue that NV Energy has committed to eliminate rate pancaking and charge a single system rate if and

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<sup>89</sup> *Id.* at 43 & n.87 (citing *ITC Midwest LLC*, 133 FERC ¶ 61,169, at P 24 (2010) (*ITC*)).

<sup>90</sup> *Id.* at 43-44 (quoting *ITC*, 133 FERC ¶ 61,169 at P 25).

<sup>91</sup> *See* Deseret Protest at 11; River Commission and Water Authority Protest at 11-13.

<sup>92</sup> *See* Deseret Protest at 8-9 & n.10 (citing *UtiliCorp United Inc. and St. Joseph Light & Power Co.*, 92 FERC ¶ 61,067, at 61,234-235 (2000); *Consolidated Edison Co. of New York, Inc. and Orange and Rockland Utilities, Inc.*, 86 FERC ¶ 61,063 at 61,242 (1999)).

when the Nevada Power and Sierra Pacific systems are interconnected.<sup>93</sup> They object that Applicants have made no such commitment in this proceeding and argue that the Commission should direct Applicants to submit a proposal to eliminate rate pancaking among the interconnected NV Energy and PacifiCorp systems.<sup>94</sup>

52. Applicants respond by emphasizing that the Commission's standard for evaluating the effect on rates under section 203 is whether the transaction before the Commission will itself have adverse rate impacts.<sup>95</sup> They add that this is a fact-specific inquiry and, under the facts in this case, the Proposed Transaction will have no effect on rates, including transmission rates between NV Energy and PacifiCorp. They point out that the Proposed Transaction does not include any proposed changes to transmission rates of any Applicant, nor have the Applicants made any section 205 filing in connection with the Proposed Transaction. They argue that because there is no effect on rates, there is no adverse effect on rates. They add that, while the Commission has considered rate de-

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<sup>93</sup> Deseret Protest at 10 and nn.13-14 (quoting NV Energy's Transmittal Letter for Transmission Rate Filing and Limited Request for Summary Disposition, Docket No. ER13-1605-000, at 4-5 (filed May 31, 2013) (Nevada Power and Sierra Pacific "proposed that . . . service across both systems would be priced at a single rate based on the location of the delivery point"); NV Energy's Transmittal Letter for Application for Approval of Corporate Reorganization Under Section 203 of the Federal Power Act, Docket No. EC13-113-000, at 17 (filed May 31, 2013) ("Commission practice and policy require that, upon the interconnection of the two systems through the operation of the ON Line, the Companies replace their current zonal rates with a single-system OATT rate.")); River Commission and Water Authority Protest at 5-6. River Commission and Water Authority add that the effect of this rate pancaking is further amplified by the fact that Nevada Power already limited River Commission's and Water Authority's use of network service under the OATT and declined to lift that restriction immediately in earlier cases. *See id.* at 6 & n.5 (citing Docket Nos. EC13-113-000 (internal reorganization proceeding) and ER13-1607 (proceeding concerning the non-rate terms and conditions of NV Energy's OATT)).

<sup>94</sup> Deseret Protest at 11; River Commission and Water Authority Protest at 6 (arguing that rate pancaking should be eliminated across the interconnected transmission systems of what will be affiliated companies, namely Nevada Power, Sierra Pacific and PacifiCorp).

<sup>95</sup> Applicants Answer at 2 & n. 5 (citing Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2000); Merger Policy Statement, 68 Fed. Reg. 68,595 at 68,596, FERC Stats. & Regs. ¶ 31,044).

pancaking as one of the many potential mitigation measures for transactions that may have an adverse effect on rates or competition, in this case, because there is no adverse effect on rates or competition, there is no need for mitigation.

53. Additionally, Applicants argue that these protestors' assertions lack any probative analytical support and therefore should not be given any weight. They assert that neither Deseret nor River Commission and Water Authority have shown or demonstrated in a quantifiably reliable manner that the Proposed Transaction has an adverse effect on rates. They state that the Commission has routinely rejected bare, unsupported assertions.<sup>96</sup>

54. Applicants add that, rather than make a specific showing of adverse effect on rates, Deseret seeks to gain a commercial benefit from the Proposed Transaction. Applicants contend that neither section 203 of the FPA nor the Merger Policy Statement require Applicants to convey any particular benefit to Deseret, but that the Proposed Transaction not adversely affect rates. They argue that, while protestors "in passing" assert that Applicants' vertical market power analysis is inadequate,<sup>97</sup> Applicants have provided extensive analyses satisfying the Commission's criteria for demonstrating lack of horizontal or vertical market power and these unsupported claims should be rejected.

55. Applicants also point out that they have proposed a hold harmless commitment. They state that in these circumstances, the Commission has generally not considered the need for additional mitigation measures, including rate de-pancaking between non-integrated systems.<sup>98</sup> In support of their position, Applicants highlight the Commission's recent decision in *Central Vermont Public Service Corporation (Central Vermont)*, in which a protestor asked the Commission to require the merging parties to adopt a single system rate before approving the merger. As noted by Applicants, in *Central Vermont*, the Commission held that "[t]he issue of approval of a single rate is not before the Commission in the instant proceeding. If and when Applicants wish to propose a single

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<sup>96</sup> Applicants Answer at 6 & n.17 (citing *Exelon*, 138 FERC ¶ 61,167 at P 113; *FirstEnergy*, 133 FERC ¶ 61,222 at P 63).

<sup>97</sup> *Id.* at 6 & n. 16 (citing River Commission and Water Authority Limited Protest at 12 ("Applicants' analysis of vertical market power does not even discuss the issue of rate pancaking and rests solely on the fact that the interconnected transmission systems of each utility in the Western Interconnection will be 'subject to a Commission-approved OATT, or grandfathered legacy transmission agreements.'"); Deseret Protest at 11 (same)).

<sup>98</sup> Applicants Answer at 6.

rate, it will be the subject of a separate FPA Section 205 tariff filing, which will be subject to public notice and comment, as well as review by the Commission.”<sup>99</sup>

Applicants argue that protestors in this proceeding are in the same position as the protester in *Central Vermont*. Applicants state that, if they seek to make future modifications to their respective transmission rates, they would be required to make a section 205 transmission rate filing.

56. River Commission and Water Authority disagree with Applicants’ assertion that they “are in the same position as the protester in *Central Vermont*.”<sup>100</sup> They assert that the protester in *Central Vermont* was entitled “to much more protection from adverse rate consequences resulting from the merger in that case” than are River Commission and Water Authority in this case.<sup>101</sup> They state that this is because the merging parties in *Central Vermont* “committed to file a single rate schedule for service over their combined transmission systems at non-pancaked rates to become effective concurrently with the closing of the merger.”<sup>102</sup> They argue that, therefore “the Commission did not need to condition its approval in Central Vermont on adoption of a non-pancaked rate; the merging parties already committed to do so.”<sup>103</sup> River Commission and Water Authority add that the merging parties in *Central Vermont* stated that the single rate would be submitted as both a compliance filing to the order approving the proposed transaction in the section 203 proceeding, as well as under section 205 of the FPA. They argue that submitting the rate as a compliance filing “preserv[ed] the Commission’s merger jurisdiction over the rate.”<sup>104</sup> They state that this is a further protection not offered to River Commission and Water Authority in this proceeding. They add that the *Central Vermont* merging parties also promised “a full cost justification,” enabling the assessment

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<sup>99</sup> *Id.* at 4 & n.10 (citing *Central Vermont*, 138 FERC ¶ 61,161, at P 47 (2011)).

<sup>100</sup> River Commission and Water Authority Answer at 3 & n.4 (citing Applicants Answer at 4).

<sup>101</sup> *Id.* at 3.

<sup>102</sup> *Id.* at 3-4.

<sup>103</sup> *Id.* at 4.

<sup>104</sup> *Id.* at 4 & n.6 (quoting Answer of Central Vermont Public Serv. Corp. and Gas Metro LP, et al., Docket No. EC11-117, at 3 (filed Nov. 23, 2011)).

of the justness and reasonableness of the single-system, non-pancaked rate.<sup>105</sup> They state that Applicants offer none of these protections to the parties in this proceeding.

57. River Commission and Water Authority also take exception to what they refer to as Applicants' "disingenuous references" to "non-integrated systems of NV Energy and PacifiCorp."<sup>106</sup> They point out that Applicants admit their systems are integrated.<sup>107</sup> River Commission and Water Authority add that an integrated system map of the Western Interconnection confirms this contention.<sup>108</sup>

58. River Commission and Water Authority also challenge Applicants' attempt to distinguish the cases River Commission and Water Authority cited to support their request for a single-system rate – *UtiliCorp* and *ConEdison* – on the basis that those cases involved independent system operators (ISOs) or regional transmission organizations (RTOs). River Commission and Water Authority argue that the absence of an ISO or RTO in the post-merger combined territory is an even stronger reason for requiring a non-pancaked rate to protect customers such as River Commission and Water Authority from potential rate abuses.<sup>109</sup>

59. In response, Applicants argue that River Commission and Water Authority's Limited Answer suffers from the same infirmity as their original protest, namely, that they assert, without any analysis or specific evidence, that there will be adverse rate consequences from the Proposed Transaction.<sup>110</sup> Applicants contend that River

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<sup>105</sup> *Id.* at 4.

<sup>106</sup> *Id.* at 5.

<sup>107</sup> *Id.* (citing Applicants Answer at 8).

<sup>108</sup> The NV Energy Utilities are interconnected to PacifiCorp through the Red Butte - Harry Allen 345 kV line and the Pavant - Gardner 230 kV line.

<sup>109</sup> River Commission and Water Authority Answer at 5-6 & n. 6 (quoting *Duke*, 136 FERC ¶ 61,245 at P 146 ("appropriate mitigation measures for an adverse effect on competition 'could include, but not be limited to, joining or forming an RTO, implementation of an [independent coordinator of transmission] arrangement, generation divestiture, virtual divestiture, and proposals to build new transmission to provide greater access to third party suppliers.'")).

<sup>110</sup> Applicants Answer to River Commission and Water Authority Answer and Barrick Mines Reply at 1.

Commission and Water Authority miss the point about the *Central Vermont* case because, while the applicants in that proceeding stated their intention to file a single-system rate in the future, the Commission declined to impose such a requirement in approving the merger. They state that the Commission left open the possibility that applicants might not file for a single-system rate in the future, finding that “[i]f and when Applicants *wish* to propose a single rate” that rate filing would be the subject of a separate section 205 Tariff filing.<sup>111</sup> Applicants argue that this holding, therefore, supports their position that the Commission may approve the Proposed Transaction without requiring imposition of a single-system rate as a condition of merger approval.

60. Applicants also argue that River Commission and Water Authority incorrectly assert that NV Energy and PacifiCorp are integrated systems.<sup>112</sup> According to Applicants, they are not integrated systems. Rather, they are interconnected. To draw the distinction between “interconnected” and “integrated,” Applicants explain that, for example PJM Interconnection, L.L.C. and the New York Independent System Operator, Inc. are interconnected far more extensively than NV Energy and PacifiCorp, but they are not operated as an integrated system.

## ii. Acquisition Premium

61. Next, Deseret and River Commission and Water Authority assert that Applicants’ proposed hold harmless commitment is insufficient to prevent the future recovery in wholesale rates of the \$2 billion acquisition premium paid by MidAmerican. They argue that, while Applicants have proposed a “standard” hold harmless provision to insulate customers against transaction-related costs, unlike other merger applicants, they have not foreclosed seeking to recover any or all of this acquisition premium in wholesale rates. They assert that Applicants have failed to address the issue at all, and ask the Commission to require Applicants to address the recovery of any acquisition premium in wholesale rates as part of its hold harmless commitment for the Proposed Transaction.<sup>113</sup>

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<sup>111</sup> *Id.* at 4 & n.12 (quoting *Central Vermont*, 138 FERC ¶ 61,161 at P 47) (emphasis added by Applicants).

<sup>112</sup> *Id.* at 6 & n.18 (arguing that River Commission and Water Authority’s “bald assertion” that Applicants admit their systems are integrated is “patently false”) (quoting River Commission and Water Authority Answer at 5).

<sup>113</sup> See Deseret Protest at 12-15; River Commission and Water Authority Protest at 14-17.

62. Applicants respond by clarifying that, contrary to these protestors' assertion, Applicants' hold harmless commitment covers all transaction-related costs, including any request to recover an acquisition premium in wholesale rates.<sup>114</sup> They state that their hold harmless commitment is identical to the long-standing form of hold harmless commitments that the Commission has found to satisfy the Commission's ratepayer protection requirements.<sup>115</sup> Applicants add that, if they were to seek recovery of any transaction-related costs in wholesale rates, they would first have to make a filing with the Commission seeking approval.<sup>116</sup>

### iii. Reflecting Lower Debt Costs in Rates

63. Finally, Deseret and River Commission and Water Authority argue that lower debt costs arising from the Proposed Transaction should be reflected in NV Energy Utilities' rates predicated on a 2014 test period. Specifically, they request reducing the 6.13 percent "long-term cost of debt" included in NV Energy Utilities' proposed transmission rates for the 2014 Test Period that is pending before the Commission in Docket No. ER13-1605-000.<sup>117</sup> River Commission and Water Authority assert that the Commission must ensure that customers receive the benefit of the reduced debt costs by either: (1) instituting *sua sponte* a proceeding under section 206 of the FPA, directing NV Energy Utilities to quantify the amount of any reduced debt costs and then lowering the rates that will be effective the later of January 1, 2014 or the in-service date of ON Line to reflect the lower costs; or (2) directing the NV Energy Utilities to reflect their expected debt cost in the pending rate proceeding in Docket No. ER13-1605-000 and provide refunds for any reduced debt costs consistent with the suspension order in Docket No. ER13-1605-000.

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<sup>114</sup> Applicants Answer at 11.

<sup>115</sup> *Id.* at 11 & n.32 (citing *Exelon*, 132 FERC ¶ 61,167 at P 120; *Duke*, 136 FERC ¶ 61,245 at PP 169-170; *ITC*, 133 FERC ¶ 61,169 at P 25; *FirstEnergy*, 133 FERC ¶ 61,222 at P 63).

<sup>116</sup> *Id.* at 11-12 & n.36 (citing *Central Vermont*, 138 FERC ¶ 61,161 at P 45 n.38).

<sup>117</sup> See Deseret Protest at 15-17; River Commission and Water Authority Protest at 17-19. On August 5, 2013, the Commission issued an order in Docket Nos. ER13-1605-000 and ER13-1607-000 accepting in part, rejecting in part, accepting and suspending filings in part, and establishing hearing and settlement judge procedures and consolidating proceedings. See *NV Energy, Inc.*, 144 FERC ¶ 61,105 at P 1, *order on reh'g*, 145 FERC ¶ 61,080 (2013) (*NV Energy*).

64. In their answer, Applicants argue that these protestors' concerns regarding the NV Energy Utilities' cost of debt are outside the scope of this proceeding.<sup>118</sup> Applicants state that the Proposed Transaction does not include any changes to wholesale rates; nor does it change any existing long-term debt of Nevada Power, Sierra Pacific, or any other party to the Proposed Transaction. Applicants explain that Docket No. ER13-1605-000 is a separate proceeding to set a transmission rate for Nevada Power and Sierra Pacific that will apply once the two systems are consolidated and operate as a single integrated BAA.<sup>119</sup> They point out that Deseret as well as River Commission and Water Authority are parties in that proceeding, and thus have the opportunity to raise any concerns regarding NV Energy's cost of debt for the 2014 test period in that proceeding. They note that the Commission has already established a hearing to address this and other issues related to NV Energy's transmission rates.

**c. Commission Determination**

65. We find that the Proposed Transaction will not have an adverse effect on rates. Deseret and River Commission and Water Authority argue that the Commission must require Applicants to eliminate pancaked rates as a condition for approving the Proposed Transaction. We disagree. Our analysis of rate effects under section 203 of the FPA differs from the analysis of whether rates are just and reasonable under section 205 of the FPA. Our focus here is on the effect that the Proposed Transaction itself will have on rates, whether that effect is adverse, and whether any adverse effect will be offset or mitigated by benefits that are likely to result from the transaction.<sup>120</sup> Applicants do not propose any rate changes in connection with the Proposed Transaction and we find no evidence that the Proposed Transaction itself will cause an increase in rates; nor do any of the protestors argue otherwise.<sup>121</sup> Therefore, based on the facts in this case, we will not require the elimination of pancaked rates among the affiliates (NV Energy Utilities and

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<sup>118</sup> Applicants Answer at 12-13.

<sup>119</sup> *Id.* at 12-13 & n.39 (citing *NV Energy*, 144 FERC ¶ 61,105).

<sup>120</sup> *See, e.g., NV Energy, Inc.*, 145 FERC ¶ 61,170, at P 52 & n.67 (2013); *UtiliCorp.*, 92 FERC ¶ 61,170, at 61,236, *order on reh'g*, 93 FERC ¶ 61,303 (2000).

<sup>121</sup> We address protestors' merger-related cost argument below.



PacifiCorp) in the Mid-American holding company system as a condition of approving the merger.<sup>122</sup>

66. Our section 203 precedent supports this conclusion. *Central Vermont*<sup>123</sup> involved a two-step merger of all of the assets of Central Vermont and Green Mountain Power into a direct, wholly-owned, subsidiary of Northern New England Energy. The transaction consolidated ownership and operation of Central Vermont and Green Mountain Power transmission facilities into a single corporate entity. As parties note above, in their merger application before the Commission, Central Vermont and Green Mountain Power stated their intention to propose a single rate schedule under the ISO-NE Tariff for service offered over their combined transmission systems at non-pancaked rates, to become effective concurrently with the closing of the second step of the transaction.<sup>124</sup> One customer protested, arguing that consolidated ownership of two separate sets of transmission facilities would increase transmission charges for some customers.<sup>125</sup> Seeking mitigation measures, the protestor asked the Commission to impose a hold harmless condition to ensure that the transaction would not “cause the rates charged to transmission customers served prior to the merger under a transmission tariff with a revenue requirement based solely on the costs of Green Mountain Power's transmission facilities to increase above the level at which such rates would have remained under a stand-alone [Green Mountain Power] transmission revenue requirement.”<sup>126</sup>

67. The Commission declined to condition its merger approval in *Central Vermont*. Instead, the Commission agreed with applicants that arguments concerning their future filing of a single transmission rate schedule were premature. The Commission held that

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<sup>122</sup> See, e.g., *WPS Resources Corp. and Upper Peninsula Energy Corp.*, 83 FERC ¶ 61,196, at 61,839 (1998) (allowing use of zonal rates for intra-zonal transactions in interim period prior to the establishment of an RTO or physical interconnection among holding company affiliates, where merger does not adversely affect the current transmission rate).

<sup>123</sup> 138 FERC ¶ 61,161 at PP 14-15.

<sup>124</sup> *Id.* P 40 & n.33 (citing Central Vermont Application at 33).

<sup>125</sup> *Id.* PP 40-41.

<sup>126</sup> *Id.* P 41.

“[t]he issue of a single rate is not before the Commission in the instant proceeding.”<sup>127</sup> The Commission explained that “[i]f and when Applicants wish to propose a single rate” that rate filing will be the subject of a separate section 205 tariff proceeding.<sup>128</sup> Here, we similarly find the protestors' request that the Commission condition its approval of the merger on the elimination of pancaked rates is outside the scope of this proceeding. Protestors have not rebutted Applicants' demonstration that the Proposed Transaction would not have an adverse effect on rates, and we conclude that this section 203 merger proceeding is not the appropriate forum for addressing the rates Applicants will charge for transmission service after the Proposed Transaction has been completed.<sup>129</sup>

68. We accept Applicants' commitment to hold customers harmless for five years from costs related to the Proposed Transaction. We interpret Applicants' hold harmless commitment to apply to all transaction-related costs, including costs related to consummating the Proposed Transaction and transition costs (both capital and operating) incurred to achieve merger synergies. We note Applicants' clarification that their hold harmless commitment covers all transaction-related costs, including any request to recover an acquisition premium in wholesale rates.<sup>130</sup> However, regardless of the terms of Applicants' hold harmless commitment, we remind Applicants that the Commission historically has not permitted rate recovery of acquisition premiums.<sup>131</sup> If Applicants seek recovery of any acquisition premium associated with the Proposed Transaction, they

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<sup>127</sup> *Id.* P 47.

<sup>128</sup> *Id.*

<sup>129</sup> We note, however, that while we decline to condition our approval of this Proposed Transaction on eliminating pancaked rates, this does not preclude the Commission from requiring elimination of pancaked rates in a future section 205 or 206 proceeding. *See Southern Co. Servs.*, 131 FERC ¶ 61,232, at P 18 & n.30 (2010) (“Order No. 888 requires holding company systems, such as Southern, to file a tariff that uses a single, system-wide price”); *New England Power Co.*, 88 FERC ¶ 61,292, at 61,890 (1999) (“The Commission generally requires that affiliated systems adopt a single system rate reflecting the combined costs of the affiliated system.”); *Consolidated Edison Co. and Orange & Rockland Utils., Inc.*, 86 FERC ¶ 61,063, at 61,242 (1999) (interconnected affiliates are typically required to file a single system rates).

<sup>130</sup> *See* Applicants Answer at 11.

<sup>131</sup> *Exelon*, 138 FERC ¶ 61,167 at P 118.

must be able to demonstrate in a subsequent proceeding under section 205 of the FPA that its acquisition was “prudent and provides measurable, demonstrable benefits to ratepayers.”<sup>132</sup>

69. The Commission will be able to monitor Applicants’ hold harmless commitment under its authority under section 301(c) of the FPA<sup>133</sup> and the books and records provision of the Public Utility Holding Company Act of 2005.<sup>134</sup> Moreover, the commitment is fully enforceable based on the Commission’s authority under section 203 of the FPA.

70. If Applicants seek to recover transaction-related costs through their wholesale power or transmission rates within five years after the Proposed Transaction is consummated, they must submit a compliance filing that details how they are satisfying the hold harmless requirement. If Applicants seek to recover transaction-related costs in an existing formula rate that allows for such recovery within such five-year period, then that compliance filing must be filed in the section 205 docket in which the formula rate was approved by the Commission, as well as in the instant section 203 docket.<sup>135</sup> We also note that, if Applicants seek to recover transaction-related costs in a filing within such five-year period, whereby Applicants are proposing a *new* rate (either a new formula rate or a new stated rate), then that filing must be made in a *new* section 205 docket as well as in the instant section 203 docket.<sup>136</sup> 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

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<sup>132</sup> *ITC Holdings Corp.*, 139 FERC ¶ 61,112 at P 50 & n.116 (citing *Minnesota Power & Light Co.*, 43 FERC ¶ 61,104, at 61,342, *reh’g denied*, 43 FERC ¶ 61,502 (1988); *Duke Energy Moss Landing, LLC*, 83 FERC ¶ 61,318, at 62,304 (1988); *PSEG Power Connecticut, LLC*, 110 FERC ¶ 61,020, at P 32 (2005)).

<sup>133</sup> 16 U.S.C. § 825(c) (2012).

<sup>134</sup> 42 U.S.C. § 16452 (2012).

<sup>135</sup> In this case, the filing would be a compliance filing in both the section 203 and 205 dockets.

<sup>136</sup> In this case, the filing would be a compliance filing in the section 203 docket, but a rate application in the section 205 docket.

protect customers' wholesale and transmission rates from being adversely affected by the Proposed Transaction.<sup>137</sup>

71. We find that protestors' concerns regarding the cost of long-term debt of NV Energy Utilities are beyond the scope of this section 203 proceeding. There is a separate NV Energy Utilities proceeding pending before the Commission in Docket Nos. ER13-1605-000 and ER13-1607-000 that focuses on the rates, terms and conditions for transmission service after Nevada Power and Sierra Pacific have been consolidated and commence operations as a single integrated BAA.<sup>138</sup> We note that Deseret and River Commission and Water Authority are parties in that consolidated FPA section 205 proceeding. This specific rate issue would be more appropriately considered in that rate proceeding and protestors are free to raise their concerns there.

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

#### 4. Effect on Regulation

##### a. Applicants Analysis

73. Applicants state that, while the Commission requires merger applicants to evaluate the effect of a proposed transaction on federal and state regulation, the Commission indicated in Order No. 642 that it would not ordinarily set a merger application for hearing with respect to the impact on regulation unless: (a) the proposed transaction involves public utility subsidiaries of a registered holding company under the Public Utility Holding Company Act of 1935 (PUHCA 1935) and the relevant applicants do not commit to abide by the Commission's policies on pricing of non-power goods and services between affiliates; or (b) the affected state commissions lack authority over the proposed transaction and raise concerns about the effect on state regulation.<sup>139</sup>

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<sup>137</sup> See *ITC*, 133 FERC ¶ 61,169 at PP 24-25; *FirstEnergy*, 133 FERC ¶ 61,222 at P 63; and *PPL Corp., et al.*, 133 FERC ¶ 61,083, at PP 26-27 (2010).

<sup>138</sup> We note that on the same day (May 31, 2013) that NV Energy and Sierra Pacific made the rate filing in Docket No. ER13-1605-000, NV Energy filed in Docket No. ER13-1607-000 revisions to the non-rate terms and conditions contained in the NV Energy OATT to reflect consolidation of the Sierra Pacific and Nevada Power utilities and their transmission systems. See *NV Energy* 144 FERC ¶ 61,105, at P 1.

<sup>139</sup> Application at 44 & n.89 (citing Order No. 642, FERC Stats. & Regs. ¶ 31,111, at 31,914-15).

Applicants state that the Proposed Transaction raises none of these concerns. Applicants assert that requirement (a) is no longer applicable since the repeal of PUHCA 1935. They add that each of the public utility subsidiaries of MidAmerican and NV Energy will remain Commission-jurisdictional public utilities, subject to the same degree of regulation after the Proposed Transaction as before it. Accordingly, Applicants state that the Proposed Transaction will have no impact on the Commission's jurisdiction. Applicants also assert that the Proposed Transaction does not have any effects on state regulation that need to be addressed by the Commission.<sup>140</sup> Applicants state that the Nevada Commission has the authority and will review the effect of the Proposed Transaction on its jurisdiction and, therefore, under the Merger Policy Statement, the Commission does not consider the effect of the Proposed Transaction on the Nevada Commission.<sup>141</sup>

**b. Commission Determination**

74. 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.<sup>142</sup> We find that the Proposed Transaction will not create a regulatory gap at the federal level because the Commission will retain its regulatory authority over the companies after the Proposed Transaction is consummated. As to the state level, the Commission explained in the Merger Policy Statement that it ordinarily will not set the issue of the effect of a transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the transaction. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission may set the issue for hearing and it will address such circumstances on a case-by-case basis.<sup>143</sup> The Nevada Commission has stated that it has authority to act on the Proposed Transaction, alleviating the need for a hearing here.<sup>144</sup>

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<sup>140</sup> *Id.* at 45.

<sup>141</sup> *Id.* at 45 & n.90 (citing Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,125).

<sup>142</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

<sup>143</sup> *Id.* at 30,125.

<sup>144</sup> We note that in an order issued on December 17, 2013, the Nevada Commission accepted a stipulation, as clarified, and granted, as modified, authorization

(continued...)

## 5. Cross-subsidization

### a. Applicants Analysis

75. Applicants state that the Proposed Transaction will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of a traditional public utility for the benefit of any 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 Proposed Transaction or in the future: (1) any transfers of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) any new issuances of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional facilities, for the benefit of an associate company; or (4) any new affiliate contracts between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA.<sup>145</sup>

### b. Commission Determination

76. Based on the representations in the Application, we find that the Proposed Transaction will not result in an inappropriate cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company. We note that no party has argued otherwise.

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for the merger of NV Energy with MidAmerican. Applicants' Supplemental Filing, Docket No. EC13-128-000 (filed Dec. 17, 2013) (citing *Joint Application of Nevada Power Company d/b/a/ NV Energy, Sierra Pacific Power Company d/b/a/ NV Energy (referenced together as "NV Energy, Inc.") and MidAmerican Energy Holdings Company ("MidAmerican") for approval of a merger of NV Energy, Inc. with MidAmerican*, Docket No. 13-07021 (Nevada Commission Dec. 17, 2013)).

<sup>145</sup> Application at 46. Applicants add that Exhibit M to the Application also includes a list of the existing pledges and encumbrances of Applicants' regulated utilities, as required by 18 C.F.R. § 33.2(j)(1)(i). *Id.*

## 6. Accounting Issues

77. As noted above, Applicants commit for a period of five years to hold transmission and wholesale customers harmless from transaction-related costs, which we have interpreted to include all transaction-related costs, including costs related to consummating the Proposed Transaction and costs incurred to achieve merger synergies. Applicants also state that they do not intend to reflect any aspect of the Proposed Transaction on the books of any Applicant that is required to keep its books in accordance with the Commission's Uniform System of Accounts (USofA). However, to the extent Applicants subject to the USofA record any aspect of the Proposed Transaction on its books, such Applicants must record those costs consistent with Commission precedent. The Commission has previously stated that costs incurred to consummate a merger transaction are non-operating in nature and must be recorded in Account 426.5, Other Deductions.<sup>146</sup>

78. Additionally, the Commission has stated that integration costs and other operational costs incurred to achieve merger synergies costs are generally considered to be operating in nature and may be recorded in an operating expense account or capitalized in an asset account, as appropriate.<sup>147</sup> Applicants' accounting for all transaction-related costs does not permit recovery through Applicants' wholesale power or transmission rates without first making a section 205 filing and receiving authorization from the Commission, consistent with the hold harmless requirements discussed above. Applicants must implement appropriate internal controls and procedures to ensure the proper identification, accounting, and rate treatment for all transaction-related costs incurred prior to and subsequent to the merger.

79. Finally, Applicants subject to the Commission's USofA shall submit their proposed final accounting for the merger within six months after the merger is consummated. The accounting submission shall provide all transaction-related accounting entries made to the books and records of Applicants, including costs to consummate the merger and achieve merger synergies, along with appropriate narrative explanations describing the basis for the entries.

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<sup>146</sup> These costs may include, but are not limited to, internal and external third party costs for legal, consulting, and professional services incurred to consummate the merger. *See, e.g., Exelon*, 138 FERC ¶ 61,167 at P 133.

<sup>147</sup> *See, e.g., Exelon*, 138 FERC ¶ 61,167 at P 133 and *Bangor Hydro Elec. Co. and Maine Pub. Serv. Co.*, 144 FERC ¶ 61,030, at P 33 (2013).

## 7. Additional Issues

80. Order No. 652 requires that sellers with market-based rate authority timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.<sup>148</sup> To the extent that the foregoing authorization results in a change in status, Nevada Power is advised that it must comply with the requirements of Order No. 652. In addition, Nevada Power shall make any appropriate filings under section 205 of the FPA to implement the Proposed Transaction.

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

### The Commission orders:

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

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

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

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<sup>148</sup> *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005). *See* 18 C.F.R. § 35.42 (2013).



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

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

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

(H) 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 addition to a section 205 filing. 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 Proposed Transaction.

(I) Applicants subject to the Commission's USofA shall submit their proposed final accounting for the merger within six months after the Proposed Transaction is consummated. The accounting submission shall provide all transaction-related accounting entries made to the books and records of Applicants, including costs to consummate the merger and achieve merger synergies, along with appropriate narrative explanations describing the basis for the entries.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

Document Content(s)

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