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DEPARTMENT OF ENERGY  
Federal Energy Regulatory Commission

[Docket No. PL15-3-000]

Policy Statement

AGENCY: Federal Energy Regulatory Commission.

ACTION: Policy Statement

SUMMARY: The Commission adopts the following policies regarding future implementation of hold harmless commitments offered by applicants as ratepayer protection mechanisms to mitigate adverse effects on rates that may result from transactions subject to section 203 of the Federal Power Act (FPA). First, the Commission clarifies the scope and definition of the costs that should be subject to hold harmless commitments. Second, the Commission adopts the proposal that applicants offering hold harmless commitments should implement controls and procedures to track the costs from which customers will be held harmless. The Commission identifies the types of controls and procedures that applicants offering hold harmless commitments should implement. Third, the Commission declines to adopt its proposal to no longer accept hold harmless commitments that are limited in duration. Fourth, the Commission clarifies that, in connection with certain types of FPA section 203 transactions, an applicant may be able to demonstrate that the transaction will not have an adverse effect on rates without the need to make any hold harmless commitment.

DATES: This policy statement will become effective **[Insert Date 90 days after**

**publication in the FEDERAL REGISTER]**

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**SUPPLEMENTARY INFORMATION**

## POLICY STATEMENT

1. The Commission issues this Policy Statement to provide guidance regarding future implementation of hold harmless commitments offered by applicants as ratepayer protection mechanisms to mitigate adverse effects on rates that may result from transactions that are subject to section 203 of the Federal Power Act (FPA).<sup>1</sup>

2. On January 22, 2015, the Commission proposed guidance in four areas pertaining to hold harmless commitments: (1) the scope and definition of the costs that should be subject to hold harmless commitments; (2) controls and procedures to track the costs from which customers will be held harmless; (3) whether to no longer accept hold harmless commitments that are limited in duration; and (4) clarification that, in certain cases, an applicant may be able to demonstrate that a proposed transaction will not have an adverse effect on rates without the need to make any hold harmless commitment or offer any other form of ratepayer protection mechanism.<sup>2</sup> We adopt, clarify, and withdraw, in part, the proposals in the Proposed Policy Statement as explained in further detail below.

3. First, we adopt, as general guidance, the lists of transaction-related costs and transition costs that should be subject to any hold harmless commitment, as proposed in

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<sup>1</sup> 16 U.S.C. 824b (2012).

<sup>2</sup> *Policy Statement on Hold Harmless Commitments*, Proposed Policy Statement, 80 FR 4231 (Jan. 27 2015), 150 FERC ¶ 61,031 (2015) (Proposed Policy Statement).

the Proposed Policy Statement, and provide additional clarifications regarding transition costs, capital costs, labor costs, and the costs of transactions that are not consummated. Second, we adopt, in part, the proposal regarding establishing controls and procedures for transaction-related costs subject to any hold harmless commitment. Third, we withdraw our proposal to no longer accept hold harmless commitments that are limited in duration and clarify that we will continue to accept hold harmless commitments that are time limited to support a Commission finding that a proposed transaction will have no adverse effect on rates. Fourth, we clarify that consistent with the Merger Policy Statement, a hold harmless commitment is one of several forms of ratepayer protection that an applicant can offer to address any potential adverse effect on rates, and that hold harmless commitments may be unnecessary for some categories of transactions if an applicant can otherwise demonstrate that a proposed transaction will have no adverse effect on rates.

**I. Background**

**A. The Commission's Analysis of Proposed Transactions Under FPA Section 203**

4. FPA section 203(a)(4) requires the Commission to approve proposed dispositions, consolidations, acquisitions, or changes in control if it determines that the proposed transaction will be consistent with the public interest.<sup>3</sup> 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

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<sup>3</sup> 16 U.S.C. 824b(a)(4) (2012).

(3) the effect on regulation.<sup>4</sup> Before granting authorization, FPA section 203(a)(4) also requires the Commission to find that the transaction “will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.”<sup>5</sup>

5. The Proposed Policy Statement focused on the second prong of the Commission’s FPA section 203 analysis, specifically, the effect of a proposed transaction on rates. As explained in the Proposed Policy Statement, the Commission has stated that, when considering a proposed transaction’s effect on rates, the Commission’s focus “is on the effect that a proposed transaction itself will have on rates, whether that effect is adverse,

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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, 61 FR 68595 (Dec. 30, 1996), FERC Stats. & Regs. ¶ 31,044, at 30,111 (1996) (Merger Policy Statement), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997). See also *FPA Section 203 Supplemental Policy Statement*, 72 FR 42277 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007). See also *Revised Filing Requirements Under Part 33 of the Commission’s Regulations*, Order No. 642, 65 FR 70983 (Nov. 28, 2000), 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, 71 FR 1348 (Jan. 6, 2006), FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh’g*, Order No. 669-A, 71 FR 28422 (May 16, 2006), FERC Stats. & Regs. ¶ 31,214, *order on reh’g*, Order No. 669-B, 71 FR 42579 (July 27, 2006), FERC Stats. & Regs. ¶ 31,225 (2006).

<sup>5</sup> 16 U.S.C. 824b(a)(4). The Commission’s regulations establish verification and information requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or a pledge or encumbrance of utility assets. See 18 CFR 33.2(j).

and whether any adverse effect will be offset or mitigated by benefits that are likely to result from the proposed transaction.”<sup>6</sup> As relevant here, the Commission considers whether the transaction could result in an adverse effect on rates to wholesale requirements or transmission customers.

6. Generally, the Commission may find that a transaction will have no adverse effect on rates if an applicant demonstrates that there is no mechanism that would enable the applicant to recover costs related to the transaction in wholesale power or transmission rates, either because existing contracts would not allow such costs to be passed through to customers or, in the case of market-based rates, the transaction can have no adverse impact on wholesale rates.<sup>7</sup> In addition, in cases in which the proposed transaction may have an effect on rates, the Commission may nevertheless be able to find that the transaction will not have an adverse effect on rates if the applicant has demonstrated that there are offsetting benefits. Finally, the Commission may base its finding that a transaction will not have an adverse effect on rates in whole or in part on an applicant’s offer of specific ratepayer protections, such as a hold harmless commitment.

7. If an applicant’s only customers are wholesale power sales customers served under market-based rates, then the transaction will have no adverse effect on rates for such

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<sup>6</sup> Proposed Policy Statement, 150 FERC ¶ 61,031 at P 3 (quoting *ITC Midwest LLC*, 140 FERC ¶ 61,125, at P 19 (2012)).

<sup>7</sup> See *Exelon Corp.*, 149 FERC ¶ 61,148, at P 105 (2014).

customers.<sup>8</sup> Similarly, if an applicant is unable to pass through transaction-related costs because its existing contracts do not allow for such pass through, then the transaction will have no adverse effect on rates for such customers.<sup>9</sup> If, however, the transaction could result in an increase in rates and the wholesale power sales customers of the applicants are not served exclusively under market-based rates, or if the applicants have wholesale requirements or transmission customers, the Commission evaluates whether there are sufficient benefits to ratepayers that would offset any potential rate impact. If such benefits exist, the analysis of the effect on rates ends with a finding that there is no adverse effect on rates because of those offsetting economic benefits.<sup>10</sup>

If a proposed transaction has the potential to increase wholesale rates, but there is no showing of quantifiable offsetting economic benefits, the Commission must determine whether ratepayers are sufficiently protected from the potential rate increase, or whether

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<sup>8</sup> *Cinergy Corp.*, 140 FERC ¶ 61,180, at P 41 (2012) (citing *Duquesne Light Holdings, Inc.*, 117 FERC ¶ 61,326, at P 25 (2006)) (“The Commission has previously stated that, when there are market-based rates, the effect on rates is not of concern. The effect on rates is not of concern in these circumstances because market-based rates will not be affected by the seller’s cost of service and, thus, will not be adversely affected by the Proposed Transaction.”).

<sup>9</sup> See, e.g., *Public Service Co. of New Mexico*, 153 FERC ¶ 61,377, at P 39 (2015); *NRG Energy Holdings, Inc.*, 146 FERC ¶ 61,196, at P 87 (2014).

<sup>10</sup> The Commission has found that there is no adverse effect on rates where, although costs may increase in one area of the utility’s operations, lower costs are expected elsewhere. See, e.g., *Bluegrass Generation Co., L.L.C.*, 139 FERC ¶ 61,094, at P 41 (2012) (finding no adverse effect on rates because increases in capacity charges would be offset by a savings in energy rates).

there are other non-quantifiable, offsetting benefits that would, nevertheless, support a finding that the proposed transaction is consistent with the public interest, regardless of the potential for a rate increase.<sup>11</sup> When the Commission has considered such non-quantifiable offsetting benefits, it has often been in the context of transactions that increase competition or enable more competitive markets, such as transactions resulting in the expansion of regional transmission organizations or the increase in transmission ownership by independent transmission companies.<sup>12</sup>

8. Prior to the issuance of the Merger Policy Statement, the Commission had required applicants and intervenors to estimate the future costs and benefits of a transaction and then litigate the validity of those estimates. The Commission, however, eliminated those requirements in the Merger Policy Statement and, instead, established

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<sup>11</sup> An increase in rates “can still be consistent with the public interest if there are countervailing benefits that derive from the merger.” Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,114; *see also ALLETE, Inc.*, 129 FERC ¶ 61,174, at P 19 (2009) (“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 likely to result from the Proposed Transaction.”).

<sup>12</sup> *See, e.g., ITC Midwest LLC*, 133 FERC ¶ 61,169, at P 23 (2010) (finding offsetting benefits because of the transfer of transmission assets to a standalone transmission company); *ALLETE*, 129 FERC ¶ 61,174 at P 20 (finding that the advantages created in joining a regional transmission organization outweighed potential rate increase created by the different tax treatment of the assets after transfer); *Ameren Servs. Co.*, 103 FERC ¶ 61,121, at P 23 (2003) (finding that increasing a regional transmission organization’s footprint would offset a rate increase); *Rockland Elec. Co.*, 97 FERC ¶ 61,357, at 62,651 (2001) (finding that attracting more bidders and encouraging more competition offset a potential rate increase for locational marginal prices along a seam at times of peak demand).

various ratepayer protection mechanisms that an applicant could offer to insulate customers from any possible rate effects attributable to a proposed transaction.<sup>13</sup>

9. The Commission then explained that it had previously accepted “a variety of hold harmless provisions,” and that parties could consider those as well as “other mechanisms if they appropriately address ratepayer concerns.”<sup>14</sup> Among the types of protection the Commission stated applicants could propose were the following:

- Open season for wholesale customers—applicants agree to allow existing wholesale customers a reasonable opportunity to terminate their contracts (after notice) and switch suppliers. This allows customers to protect themselves from merger-related harm.
- General hold harmless provision—a commitment from the applicant that it will protect wholesale customers from any adverse rate effects resulting from the merger for a significant period of time following the merger. Such a provision must be enforceable and administratively manageable.
- Moratorium on increases in base rates (rate freeze)—applicants commit to freezing their rates for wholesale customers under certain tariffs for a significant period of time.
- Rate reduction—applicants make a commitment to file a rate decrease for their wholesale customers to cover a significant period of time.<sup>15</sup>

10. The Commission concluded that, although each mechanism would provide some benefit to ratepayers, in the majority of circumstances the most meaningful (and the most

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<sup>13</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111 (“[I]n assessing the effect of a proposed merger on rates, we will no longer require applicants and intervenors to estimate the future costs and benefits of a merger and then litigate the validity of those estimates. Instead, we will require applicants to propose appropriate rate protection for customers.”).

<sup>14</sup> *Id.* at 30,124.

<sup>15</sup> *Id.* (footnotes omitted).

likely to give wholesale customers the earliest opportunity to take advantage of emerging competitive wholesale markets) was an open season provision.<sup>16</sup>

11. Subsequently, in Order No. 642, the Commission promulgated regulations governing FPA section 203 applications and described the information applicants must submit regarding the effect of a proposed transaction on rates. In relevant part, the Commission stated:

In the [Merger] Policy Statement, we determined that ratepayer protection mechanisms (e.g., open seasons to allow early termination of existing service contracts or rate freezes) may be necessary to protect the wholesale customers of merger applicants. ...

Thus, in the [Notice of Proposed Rulemaking] we proposed that all merger applicants demonstrate how wholesale ratepayers will be protected and that applicants will have the burden of proving that their proposed ratepayer protections are adequate. Specifically, we proposed that applicants must clearly identify what customer groups are covered (e.g., requirements customers, transmission customers, formula rate customers, etc.), what types of costs are covered, and the time period for which the protection will apply.<sup>17</sup>

12. The Commission adopted the proposals set forth in the Notice of Proposed Rulemaking and emphasized that if applicants did not offer any ratepayer protection mechanisms, they must explain how the proposed merger would provide adequate ratepayer protection.<sup>18</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,914.

<sup>18</sup> *Id.*

**B. Current Commission Practice Regarding Hold Harmless Commitments**

13. Over the last decade hold harmless commitments have become a common feature of FPA section 203 applications involving mergers of traditional franchised utilities or their upstream holding companies.<sup>19</sup> More recently, hold harmless commitments have been made in connection with transactions by traditional franchised utilities to acquire jurisdictional facilities in order to satisfy resource adequacy requirements at the state level, to improve system reliability and/or meet other regulatory requirements.<sup>20</sup>

14. The Commission has consistently accepted hold harmless commitments in which FPA section 203 applicants commit not to seek recovery of transaction-related costs in jurisdictional rates except to the extent that such costs are offset by transaction-related savings.<sup>21</sup> Thus, hold harmless commitments typically focus on preventing recovery in

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<sup>19</sup> The Commission has also accepted other forms of ratepayer protection in lieu of or in addition to hold harmless commitments. *See, e.g., Cinergy Services, Inc.*, 102 FERC ¶ 61,128, at P 33 (2003) (accepting rate freeze as rate mitigation); *Vermont Yankee Nuclear Power Corp.*, 91 FERC ¶ 61,325, at 62,125 (2000) (accepting rate cap and an open season provision as mitigation); *Cajun Elec. Power Coop., Inc.*, 90 FERC ¶ 61,309, at 62,005-06 (2000) (approving a transaction where current customers were allowed to keep their current contracts or choose from three different power purchasing agreements).

<sup>20</sup> *See, e.g., FirstEnergy Generation Corp.*, 141 FERC ¶ 61,239, at PP 1, 16, 27-30 (2012) (*FirstEnergy*) (accepting a hold harmless commitment in an asset transaction where generation assets would be turned into assets to support transmission system upgrades in order to meet needs identified in a study by PJM Interconnection, L.L.C. following the retirement of other generating facilities); *ITC Midwest*, 140 FERC ¶ 61,125 at P 15; *Int'l Transmission Co.*, 139 FERC ¶ 61,003, at P 16 (2012).

<sup>21</sup> *NSTAR Advanced Energy Sys., Inc.*, 131 FERC ¶ 61,098, at P 24 (2010) (“The Commission looks for assurances from public utilities that they hold customers harmless (*continued ...*)

rates of the costs incurred that are “related” to the transaction.<sup>22</sup> Although the Commission has relied on commitments to hold customers harmless from transaction-related costs to support findings of no adverse effects on rates, these commitments generally have not included detailed definitions of the transaction-related costs that are covered by the applicant’s hold harmless commitment or identified the categories of savings that the transaction is expected to produce.<sup>23</sup>

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from these transaction-related costs, to the extent they are not exceeded by cost savings arising from the transaction, for a significant period of time following the merger, not an indefinite period of time.”) (internal citation omitted); *see also Cinergy*, 140 FERC ¶ 61,180 at P 42; *ITC Midwest*, 140 FERC ¶ 61,125 at PP 21-22; *Int’l Transmission*, 139 FERC ¶ 61,003 at P 17; *BHE Holdings Inc.*, 133 FERC ¶ 61,231, at P 37 (2010); *cf. Sierra Pacific Power Co.*, 133 FERC ¶ 61,017, at P 14 (2010) (accepting a commitment not to include any transaction-related costs in its Commission-accepted open access transmission tariff).

<sup>22</sup> An applicant may seek to recover transaction-related costs incurred prior to consummating a proposed transaction or those transaction-related costs incurred within the time period during which the hold harmless commitment applies by making certain filings. Specifically, an applicant must submit a new filing under FPA section 205 and a concurrent informational filing in the relevant FPA section 203 docket. In the FPA section 205 filing, an applicant 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. *Exelon Corp.*, 149 FERC ¶ 61,148 at PP 105-107.

<sup>23</sup> *See, e.g., Puget Energy*, 123 FERC ¶ 61,050 at P 27 (“We accept Applicants’ hold harmless commitment, which we interpret to include all merger-related costs, not only costs related to consummating the transaction. If Applicants seek to recover any merger-related costs in a subsequent section 205 filing, they must show quantifiable offsetting benefits.”) (citations and footnotes omitted); *National Grid plc*, 117 FERC ¶ 61,080, at P 54 (2006) (“Applicants have committed to hold ratepayers harmless from transaction-related costs in excess of transaction savings for a period of five years.”).

**C. Proposed Policy Statement**

15. On January 22, 2015, the Commission issued a Proposed Policy Statement on Hold Harmless Commitments to attempt to address: (1) concerns of parties that may believe hold harmless commitments offer insufficient protection; (2) instances in which hold harmless commitments may not be necessary; and (3) confusion over the scope and coverage of hold harmless commitments.

16. The Proposed Policy Statement focused on the matter of what should constitute an acceptable hold harmless commitment to demonstrate that ratepayers will be adequately protected from any rate effects of a transaction. The Commission identified several general areas to address including: (1) the scope and definition of the costs that should be subject to hold harmless commitments; (2) controls and procedures to track the costs from which customers will be held harmless; (3) the acceptance of hold harmless commitments that are limited in duration; and (4) clarification that, if applicants are otherwise able to demonstrate that a proposed transaction will not have an adverse effect on rates, then there is no need for applicants to make hold harmless commitments or offer other ratepayer protection mechanisms. The Proposed Policy Statement did not propose to provide guidance on what categories of savings related to a proposed transaction may be used in a subsequent section 205 filing to justify recovery of transaction-related costs. These issues will be considered on a case-by-case basis.

## **D. Comments**

17. Comments were filed by American Electric Power Company, Inc. (AEP); American Public Power Association and the National Rural Electric Cooperative Association (collectively, APPA and NRECA); Edison Electric Institute (EEI); Electric Power Supply Association (EPSA); Louisville Gas and Electric Company and Kentucky Utilities Company (collectively, Kentucky Utilities); South Central MCN, LLC and Midcontinent MCN, LLC (collectively, Transmission-Only Companies); Southern Company Services, Inc. as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company (collectively, Southern Company); Transmission Access Policy Study Group; and Transmission Dependent Utility Systems (Transmission Dependent Utilities).

18. We discuss specific concerns raised by commenters below.

## **II. Discussion**

### **A. Scope and Definition of Transaction-Related Costs**

#### **1. Proposal**

19. The Commission's experience has been that applicants generally do not attempt to define what costs are subsumed in the term "transaction-related costs," and that this may lead to later disagreement over which costs are or are not covered by the applicant's hold harmless commitment. In the Proposed Policy Statement, therefore, the Commission set forth guidelines for costs subject to hold harmless commitments offered by FPA section

203 applicants.<sup>24</sup> Specifically, the Commission proposed that the costs set out below are those transaction-related costs from which customers must be held harmless and that may not be recovered from customers except to the extent exceeded by demonstrated transaction-related savings.<sup>25</sup> The Commission proposed to provide guidance in the Proposed Policy Statement regarding how to identify transaction-related costs, and acknowledged that attempts to precisely articulate all such costs are not feasible.

20. First, the Commission proposed that transaction-related costs include, but are not limited to, the following costs incurred to explore, agree to, and consummate a transaction:

- the costs of securing an appraisal, formal written evaluation, or fairness opinions related to the transaction;
- the costs of structuring the transaction, negotiating the structure of the transaction, and obtaining tax advice on the structure of the transaction;
- the costs of preparing and reviewing the documents effectuating the transaction (e.g., the costs to transfer legal title of an asset, building permits, valuation fees, the merger agreement or purchase agreement and any related financing documents);

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<sup>24</sup> See Proposed Policy Statement, 150 FERC ¶ 61,031 at PP 21-28.

<sup>25</sup> We expect that applicants proposing to recover these costs would track and record them pursuant to the procedures established below. See *infra* PP 66-69.

- the internal labor costs of employees<sup>26</sup> and the costs of external, third-party, consultants and advisors to evaluate potential merger transactions, and once a merger candidate has been identified, to negotiate merger terms, to execute financing and legal contracts, and to secure regulatory approvals;<sup>27</sup>
- the costs of obtaining shareholder approval (e.g., the costs of proxy solicitation and special meetings of shareholders);
- professional service fees incurred in the transaction (e.g., fees for accountants, surveyors, engineers, and legal consultants); and
- installation, integration, testing, and set up costs related to ensuring the operability of facilities subject to the transaction.

21. Moreover, the Commission stated that, for transactions that are pursued but never completed (transactions that ultimately fail), transaction-related costs should not be recovered from ratepayers. The Commission also recognized that not every cost listed above will be found in every transaction,<sup>28</sup> and that the final determination of what

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<sup>26</sup> If the duties of employees are not solely dedicated to activities related to a transaction, internal labor costs deemed merger-related should be determined in a manner that is proportionally equal to the amount of time spent on the merger compared to other activities of the utility and tracked accordingly.

<sup>27</sup> Some of these costs are typically incurred prior to the announcement of a merger.

<sup>28</sup> Proposed Policy Statement, 150 FERC ¶ 61,031 at P 23.

transaction-related costs may be recovered by applicants will remain subject to case-by-case analysis.

22. The Commission stated that there is a second category of transaction-related costs related to mergers, where, in addition to the costs to consummate the transaction described above, parties typically also incur costs to integrate the operations and assets of the merging companies in order to achieve merger synergies.<sup>29</sup> These costs, which are sometimes referred to collectively as “transition” costs, are incurred after the transaction is consummated, often over a period of several years. These costs include both the internal costs of employees spending time working on transition issues, and external costs paid to consultants and advisers to reorganize and consolidate functions of the merging entities to achieve merger synergies. These costs may also include both capital items (e.g., a new computer system or software, or costs incurred to carry out mitigation commitments accepted by the Commission in approving the transaction to address competition issues, such as the cost of constructing new transmission lines) and expense items (e.g., costs to eliminate redundancies, combine departments, or maximize contracting efficiencies). The Commission proposed that such transition costs incurred to integrate the operations of merging companies include, but are not limited to, the following:

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<sup>29</sup> Entities engaging in certain internal corporate restructuring and reorganizations, unrelated to complying with state law restructuring requirements, may seek to achieve similar cost savings or increased efficiencies as merging entities.

- engineering studies needed both prior to and after closing the merger;
- severance payments;
- operational integration costs;
- accounting and operating systems integration costs;
- costs to terminate any duplicative leases, contracts, and operations; and
- financing costs to refinance existing obligations in order to achieve operational and financial synergies.<sup>30</sup>

23. The Commission stated that this list of transition costs is not exhaustive, and may include other categories of costs incurred or paid in connection with the integration of two utilities after a merger. Thus, the Commission proposed to consider transition costs as transaction-related costs that should be subject to hold harmless commitments on a case-by-case basis and that such transaction-related costs should be covered under hold harmless protection, although noting that applicants will have an opportunity to show why certain of those costs should not be considered transaction-related costs under their hold harmless commitment based on their particular circumstances. Also, the Commission proposed to consider, on a case-by-case basis, whether other costs not discussed herein should be subject to hold harmless commitments.

24. Additionally, the Commission noted that accounting journal entries related to a merger transaction may affect expense, asset, liability, or proprietary capital accounts

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<sup>30</sup> Proposed Policy Statement, 150 FERC ¶ 61,031 at P 24.

used in the development of a public utility's rates.<sup>31</sup> These accounting journal entries may originate from transaction-related costs recorded as an expense or capitalized as an asset. Additional accounting journal entries may originate from goodwill and fair value adjustments related to the purchase price paid for the acquired company. Merger transactions are accounted for by applying purchase accounting, which adjusts the assets and liabilities of the acquired entity to fair value and recognizes goodwill for the amount paid in excess of fair value.<sup>32</sup> If the acquired company is a holding company, purchase accounting also provides for the fair value adjustments and goodwill to be recorded on the books of some, or all, of the acquired holding company's subsidiaries, which is commonly referred to as "push-down" accounting. Under appropriate circumstances, the Commission has allowed the fair value accounting adjustments and goodwill to be recorded on a public utility's books and reported in the FERC Form No. 1. Additionally, the Commission has required public utilities to maintain detailed accounting records and disclosures associated with such amounts so as to facilitate the evaluation of the effects of the transaction on common equity and other accounts in future periods if needed for

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<sup>31</sup> *Id.* P 26.

<sup>32</sup> Purchase accounting is also commonly referred to as acquisition accounting under generally accepted accounting principles in the United States. Purchase accounting is a formal accounting method for merger transactions which measures the assets and liabilities of the acquired entity at fair value and establishes goodwill for amounts paid in excess of fair value. *See* Accounting Standard Codification Section 805-10 (Fin. Accounting Standards Bd. 2014), <http://asc.fasb.org>.

ratemaking purposes.<sup>33</sup> The Commission stated that it believed that ratepayers should continue to be protected from adverse effects on rates stemming from accounting entries recording goodwill and fair value adjustments on a public utility's books and reported in FERC Form Nos. 1 or 1-F. This is consistent with our long-standing policy that acquisition premiums, including goodwill, must be excluded from jurisdictional rates absent a filing under FPA section 205 and Commission authorization granting recovery of specific costs.

25. Finally, the Commission stated, in the context of FPA section 203 transactions involving the acquisition of discrete assets (e.g., an existing power plant) by a utility, under the Commission's accounting regulations and rate precedent the excess purchase cost of utility plant over its depreciated original cost is an acquisition premium and is excluded from recovery through rates unless a showing of offsetting benefits is demonstrated in an FPA section 205 filing.<sup>34</sup> The Commission stated that it has not, and does not, consider acquisition premiums to be part of transaction-related costs and, as such, it did not believe that the proposed treatment of transaction-related costs required a change in the Commission's current practice with respect to acquisition premiums. Therefore, the Commission stated it will continue to preclude recovery of acquisition

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<sup>33</sup> *PPL Corp.*, 133 FERC ¶ 61,083, at P 39 (2010); *Michigan Electric Transmission Co., LLC*, 116 FERC ¶ 61,164, at PP 29-30 (2006); *Niagara Mohawk Holdings Inc.*, 95 FERC ¶ 61,381, at 62,415, *reh'g denied*, 96 FERC ¶ 61,144 (2001).

<sup>34</sup> Proposed Policy Statement, 150 FERC ¶ 61, 031 at P 27.

premiums as part of transaction-related costs, and reminded applicants that a showing of “specific, measurable, and substantial benefits to ratepayers” must be made in a subsequent FPA section 205 proceeding in order to recover an acquisition premium, whether or not a hold harmless commitment has been made.<sup>35</sup>

## 2. Comments

### a. General Comments

26. As a general matter, many commenters support the Commission’s intent to provide additional guidance and clarity to the costs covered by hold harmless commitments.<sup>36</sup> For example, EEI generally supports the list of costs that the Commission proposes to consider as transaction-related costs covered by a hold harmless commitment as long as individual applicants continue to have the flexibility to tailor what is covered by the hold harmless commitment to their individual circumstances.<sup>37</sup> EEI

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<sup>35</sup> *Id.* (citing *Duke Energy Progress, Inc.*, 149 FERC ¶ 61,220, at PP 67-68 (2014) (reviewing Commission precedent requiring that acquisition adjustments may be recovered if the acquisition provides “measurable benefits” that are “tangible and nonspeculative,” and allowing recovery of an acquisition adjustment where “the acquisition provides specific, measurable, and substantial benefits to ratepayers”) (internal citations omitted)).

<sup>36</sup> *See* AEP Comments at 2; APPA and NRECA Comments at 8; EEI Comments at 2; Kentucky Utilities Comments at 2; Southern Company Comments at 5; Transmission Access Policy Study Group Comments at 1; Transmission Dependent Utilities Comments at 3.

<sup>37</sup> EEI Comments at 13.

also states that the Commission should explicitly confirm that hold harmless commitments only apply to transaction-related costs.<sup>38</sup>

27. Several commenters support the full list of transaction-related costs the Commission enumerated.<sup>39</sup> For example, APPA and NRECA support the scope of the costs outlined in the Proposed Policy Statement. APPA and NRECA list the following benefits likely to emerge from the Commission's clarifications including: (1) fewer protests of FPA section 203 applications; (2) more streamlined FPA section 203 proceedings; (3) improved ratepayer protections; (4) more consistent Commission orders; (5) easier enforcement and administration in Commission orders; (6) fewer compliance issues and complaints regarding cost recovery; (7) greater assurance of recovery of costs; and (8) lower financing costs due to more regulatory certainty.<sup>40</sup>

28. At the same time, APPA and NRECA agree that the proposed list of costs is not definitive or determinative and that "because each transaction is unique, the final determination of what transaction-related costs may be recovered by applicants will remain subject to a case-by-case analysis."<sup>41</sup> APPA and NRECA and the Transmission

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<sup>38</sup> *Id.*

<sup>39</sup> APPA and NRECA Comments at 9; Transmission Access Policy Study Group Comments at 3; Transmission Dependent Utilities Comments at 3-4.

<sup>40</sup> APPA and NRECA Comments at 7-8.

<sup>41</sup> *Id.* at 8 (citing Proposed Policy Statement, 150 FERC ¶ 61,031 at P 21). *See also* Transmission Dependent Utilities Comments at 4.

Dependent Utilities suggest that applicants should bear the ultimate burden to show the adequacy of their hold harmless commitment.<sup>42</sup> The Transmission Dependent Utilities request that the Commission confirm that, in making its case-by-case determinations as to additional costs that will be subject to particular hold harmless commitments, the Commission will not limit its consideration only to consummation and transition costs but it will consider “any rate increase that results from a transaction.”<sup>43</sup>

29. APPA and NRECA also state that they remain skeptical that utility mergers benefit customers in the form of lower wholesale energy prices or lower transmission rates and assert that empirical evidence supports their view.<sup>44</sup> They state that the evidence for the electric industry mergers is mixed at best and shows that merger benefits do not pan out and are not passed on to consumers.<sup>45</sup> Therefore, APPA and NRECA state that the Commission should be vigilant in enforcing hold harmless commitments.<sup>46</sup>

30. Other commenters suggest the Commission take a different approach than an enumerated list of transaction-related and transition costs. For example, the Kentucky

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<sup>42</sup> APPA and NRECA Comments at 9; Transmission Dependent Utilities Comments at 4.

<sup>43</sup> Transmission Dependent Utilities Comments at 4.

<sup>44</sup> APPA and NRECA Comments at 6-7 (citing JOHN KWOKA, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 104, 126, 148, 155-56, 231 (2015)).

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

<sup>46</sup> *Id.* at 7.

Utilities state that the Proposed Policy Statement should utilize “a more neutral” approach in its guidance as to whether transaction-related costs should be subject to a hold harmless commitment and that, if the transaction meets direct operating or regulatory compliance needs, any offered hold harmless commitment should not be assumed to cover “nearly all” transaction/transition costs.<sup>47</sup> Instead, the Kentucky Utilities suggest that the Commission should recognize that covered costs should be based on a fair and reasonable analysis of the specific facts or circumstances of the transaction.<sup>48</sup>

31. Several commenters support the Commission’s current policy regarding treatment of acquisition premiums.<sup>49</sup> Finally, Transmission Access Policy Study Group states that the Commission should not be dissuaded from adopting its proposal based on speculative contentions that these measures will chill investment.<sup>50</sup>

**b. Transition Costs**

32. EEI and AEP request that the Commission provide greater clarity as to the scope and definition of transition costs. Both caution that the Proposed Policy Statement does not distinguish transition costs from other ongoing business activities that merging

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<sup>47</sup> Kentucky Utilities Comments at 6.

<sup>48</sup> *Id.*

<sup>49</sup> APPA and NRECA Comments at 9; Transmission Access Policy Study Group Comments at 3-4; Transmission Dependent Utilities Comments at n.8.

<sup>50</sup> Transmission Access Policy Study Group Comments at 4.

entities may undergo that are unrelated to the merger but are also seeking to increase efficiency.<sup>51</sup> EEI notes that the lack of distinction could lead companies to postpone otherwise beneficial investments to avoid those investments being viewed as transaction-related costs.<sup>52</sup>

33. Furthermore, AEP states that over time the costs of ongoing business as a public utility and transition costs will become harder to differentiate,<sup>53</sup> and EEI cautions that a broad definition risks creating uncertainty about recovery of prudently-incurred costs.<sup>54</sup> Both are specifically concerned that post-integration engineering studies will be included as transition costs and they assert that doing so will discourage utilities from undertaking studies that are prudent or beneficial to ratepayers.<sup>55</sup> Finally, AEP questions the

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<sup>51</sup> AEP Comments at 5-6 (giving the examples of “engineering studies,” “operating systems integration costs,” and “operational integration costs”); EEI Comments at 13-14 (giving the example of investments in new information technology systems, which could be timed coincidentally with a merger and not incurred primarily for the purpose of integration, and, therefore, should not be considered subject to a hold harmless commitment). *See also* Kentucky Utilities Comments at 7 (cautioning that entities may also engage in non-transaction related refinancing and renegotiation of vendor contracts that could be considered transition costs under a broad definition and that only an incremental or non-utility component of those costs should be considered a transaction-related cost).

<sup>52</sup> EEI Comments at 14.

<sup>53</sup> *See* AEP Comments at 5 (stating that over time these costs “will have an increasingly diminished nexus to the merger itself”).

<sup>54</sup> *See* EEI Comments at 14.

<sup>55</sup> *See* AEP Comments at 6; EEI Comments at 18.

Commission's basis for generally including transition costs as transaction-related costs because: (1) applicants generally commit to hold customers harmless from costs directly incurred to effectuate the transaction and (2) the Proposed Policy Statement does not cite a case in which the Commission has formally adopted a rule requiring the inclusion of transition costs as transaction-related costs.<sup>56</sup>

**c. Capital Costs**

34. AEP and EEI assert that the costs of any assets used to provide utility service on an ongoing basis belong in rate base and should not be excluded from the rate base because they may be a transaction cost.<sup>57</sup> Both assert that capital assets could be built to increase efficiencies, they will benefit customers, and the costs should be fully recoverable.<sup>58</sup> AEP asserts that the test for whether these capital costs should be included should be the same as it has always been: "are the facilities used and useful by the utility's customers and were the costs of the facilities prudently incurred in connection

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<sup>56</sup> See AEP Comments at 4-5.

<sup>57</sup> See *id.* at 7; EEI Comments at 16.

<sup>58</sup> See AEP Comments at 7 (giving the example of new more efficient facilities enabled by the combined entities' larger size); EEI Comments at 16-17 (giving the example of a new operations center).

with the provision of utility service.”<sup>59</sup> AEP states that this is consistent with the general principle that ratepayers should bear the cost of utility service.<sup>60</sup>

35. AEP states that making capital costs subject to a hold harmless commitment raises further issues of how the policy will be implemented, including tracking and recovery of costs and future interconnection of generating facilities.<sup>61</sup> AEP states that the Commission has approved settlements in the past that did not include new transmission as a transition cost; instead, the Commission waited to address it in a future proceeding, which AEP asserts is the appropriate course for capital costs.<sup>62</sup>

36. Furthermore, EEI and AEP state that hold harmless commitments should not apply to costs related to new facilities that are constructed at the Commission’s direction or approval to mitigate market power concerns raised by a merger transaction.<sup>63</sup> Both assert that these assets provide utility service, and therefore benefits, to customers and should not be excluded from recovery as transaction costs just because the assets were included in mitigation strategies.<sup>64</sup> EEI suggests that new facilities that raise competition or rate concerns may be addressed through protection mechanisms other than a hold harmless

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<sup>59</sup> AEP Comments at 7.

<sup>60</sup> *Id.* (citing Proposed Policy Statement, 150 FERC ¶ 61,031 at P 39).

<sup>61</sup> *Id.* at 8, n.1.

<sup>62</sup> *Id.* at 8 (citing *Pub. Serv. Co. of Colo.*, 78 FERC ¶ 61,267, at 62,139 (1997)).

<sup>63</sup> *See id.*; EEI Comments at 11, 17.

<sup>64</sup> *See* AEP Comments at 8; EEI Comments at 16.

commitment and that doing so would reduce implementation problems regarding the tracking of costs and recovery of related costs.<sup>65</sup>

37. EEI asserts that the Commission should recognize that costs related to transactions undertaken as part of normal operations, such as to align ownership of an asset with a maintenance or reliability compliance obligation, or a transaction involving acquisition of a small, discrete transmission asset from a distribution-only entity, should not be subject to exclusion from rates under a hold harmless commitment.<sup>66</sup>

**d. Internal Labor Costs**

38. AEP, EEI, and Southern Company all suggest that the Commission should clarify that internal labor costs that are subject to a hold harmless commitment should include only incremental costs caused by the merger that would not otherwise be incurred.<sup>67</sup>

They contend that, if an employee was already employed by the merging or acquiring entities at the time the transaction was announced, the employee's salary should not be

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<sup>65</sup> EEI Comments at 17-18 (suggesting providing customers with a first call right on the increased available transmission capacity).

<sup>66</sup> *Id.* at 17.

<sup>67</sup> *See* AEP Comments at 11; EEI Comments at 15-16; Southern Company Comments at 6-8. *See also* Kentucky Utilities Comments at 7 (cautioning that hold harmless commitments should only apply to incremental costs in general).

treated as a transaction-related cost because any assignments related to the transaction would be performed in addition to other duties, with no additional compensation.<sup>68</sup>

Furthermore, EEI contends that the full cost of an employee's salary should continue be fully recoverable because the salary is prudently incurred to serve existing customers.<sup>69</sup>

AEP and Southern Company assert that excluding non-incremental employee costs would result in unmerited rate reductions for customers of merging entities<sup>70</sup> and state that tracking labor costs will be burdensome and subject employees to endless tracking requirements.<sup>71</sup> Finally, AEP and Southern Company both state that the Proposed Policy Statement cites no precedent to support including non-incremental internal labor costs as transaction-related costs subject to a hold harmless commitment.<sup>72</sup> AEP asserts that Commission precedent can reasonably be read to mean that hold harmless commitments only apply to incremental internal costs.<sup>73</sup>

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<sup>68</sup> See AEP Comments at 11-12; EEI Comments at 16; Southern Company Comments at 7. Southern Company recognizes that some employees may receive additional compensation due to a merger and does not object to incremental compensation or the costs of new staff brought on to effectuate the transaction being treated as incremental transaction costs. Southern Company Comments at 7-8.

<sup>69</sup> EEI Comments at 16.

<sup>70</sup> See AEP Comments at 11-12; Southern Company Comments at 7.

<sup>71</sup> See AEP Comments at 13; Southern Company Comments at 9.

<sup>72</sup> AEP Comments at 12; Southern Company Comments at 8.

<sup>73</sup> AEP Comments at 12 (citing *Ameren Energy Generating Co.*, 145 FERC ¶ 61,034, at P 97 n.99 (2013) (*Ameren*)).

e. **Costs of Transactions That Are Not Completed and Costs Incurred Prior to Announcement**

39. AEP and EEI do not agree with the Commission's statement that costs related to transactions that are never completed should not be recovered from ratepayers.<sup>74</sup> Both assert that there are sound business reasons that a firm may choose not to pursue a transaction and that excluding recovery of such costs may improperly punish a firm for abandoning a transaction that was not ultimately in the best interest of its customers or discourage a firm from exploring transactions.<sup>75</sup> EEI asserts that past Commission policy did not exclude recovery of such costs and that it is difficult to ascertain when "normal business decisions" become transactions that are being "pursued."<sup>76</sup> Furthermore, EEI asserts that the proposal will require tracking of costs with more specificity than is required by the Commission's current accounting rules.<sup>77</sup>

40. Southern Company asks for a clarification of the treatment of costs related to failed acquisitions. It states that a clarification that this statement is applicable only to the

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<sup>74</sup> *Id.* at 14 (citing Proposed Policy Statement, 150 FERC ¶ 61,031 at P 23); EEI Comments at 15.

<sup>75</sup> *See* AEP Comments at 14-15 (stating that a utility may not have completed a transaction for which it incurred preliminary costs: (1) because the current owner decides to abandon the transaction; (2) based on the results of due diligence review; (3) because it determined a self-built project could be built at lower cost; or (4) because a lower-cost option becomes available from another seller); EEI Comments at 15.

<sup>76</sup> EEI Comments at 15.

<sup>77</sup> *Id.*

merger context would be useful because transaction-related costs relating to failed attempts to acquire specific generation and transmission facilities to fulfill a need, such as a need to serve load reliably, should be recoverable in a utility's cost-of-service.<sup>78</sup> Southern Company provides an example of a Request For Proposals (RFP) for long-term capacity that results in ten bidders and negotiations are pursued with two of the bidders, one offering a 20-year power purchase agreement and another offering to sell an existing generating unit. If negotiations fail with the bidder that happens to be an existing generator, Southern states that transaction-related costs associated with the potential purchase should not be deemed "unrecoverable," as the threat of such an action could skew the RFP results.<sup>79</sup> Southern states that such costs are merely the routine costs of capacity procurement efforts. Therefore, Southern Company states that "[t]he Commission should clarify that such costs, to the extent prudently-incurred, are permitted to be recovered in wholesale power rates."<sup>80</sup>

41. EEI and EPSA contend that the Commission should not require inclusion of costs incurred prior to the announcement of a transaction because doing so would be premature, burdensome, and costly.<sup>81</sup> EEI states that long-term strategic planning,

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<sup>78</sup> Southern Company Comments at 4-5.

<sup>79</sup> *Id.* at 5.

<sup>80</sup> *Id.*

<sup>81</sup> *See* EEI Comments at 14; EPSA Comments at 4-6 ("Such a requirement is tantamount to asking a couple who are only on a second date to pick out their wedding (*continued ...*)

including investigating potential transactions, is part of the routine daily operations of any company and should not be singled out for separate tracking, which it asserts would be unwieldy and misleading because staff would conceivably have to bill their time separately for every potential project or transaction they analyze, just in case that project or transaction came to fruition.<sup>82</sup> EEI states that the burden of this proposal exceeds the benefits due to the number of transactions that may be explored and could provide a disincentive for companies to investigate transactions that could ultimately benefit customers.<sup>83</sup>

**f. Request for Guidance on Savings**

42. EEI suggests that the Commission should provide useful guidance by adding some discussion to the Policy Statement regarding the scope and definition of transaction-related savings or benefits.<sup>84</sup> EEI states that, as part of this guidance, the Commission should specify “that hold harmless costs from a purchase can be netted against benefits from a future sale, so that if the future sale produces net benefits those can be used to offset the prior purchase’s costs, thereby reducing or eliminating costs to be tracked

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china pattern.”).

<sup>82</sup> EEI Comments at 14.

<sup>83</sup> *Id.* at 14-15.

<sup>84</sup> *Id.* at 18.

under a hold harmless commitment for the prior sale.”<sup>85</sup> EEI states that “[t]his would allow companies that engage in multiple transactions over time to ensure that customers are not charged the costs net of the benefits of [multiple] transactions taken together.”<sup>86</sup>

### 3. Commission Determination

43. We adopt in part the policy set forth in the Proposed Policy Statement regarding what kinds of costs are typically transaction-related costs covered by a hold harmless commitment. As described above, comments received in response to the Proposed Policy Statement were generally supportive of the Commission’s proposals. Accordingly, we adopt, and will consider, as general guidance, the proposed list of transaction-related costs including:

- the costs of securing an appraisal, formal written evaluation, or fairness opinions related to the transaction;
- the costs of structuring the transaction, negotiating the structure of the transaction, and obtaining tax advice on the structure of the transaction;
- the costs of preparing and reviewing the documents effectuating the transaction (e.g., the costs to transfer legal title of an asset, building permits, valuation fees, the merger agreement or purchase agreement and any related financing documents);

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

- the internal labor costs of employees<sup>87</sup> and the costs of external, third-party, consultants and advisors to evaluate potential merger transactions, and once a merger candidate has been identified, to negotiate merger terms, to execute financing and legal contracts, and to secure regulatory approvals;<sup>88</sup>
- the costs of obtaining shareholder approval (e.g., the costs of proxy solicitation and special meetings of shareholders);
- professional service fees incurred in the transaction (e.g., fees for accountants, surveyors, engineers, and legal consultants); and
- installation, integration, testing, and set up costs related to ensuring the operability of facilities subject to the transaction.

44. Further, we will adopt, and will consider, as general guidance, the proposed subset of transaction-related costs – transition costs – to include the following when incurred to integrate operations:

- engineering studies needed both prior to and after closing the merger;

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<sup>87</sup> If the duties of employees are not solely dedicated to activities related to a transaction, internal labor costs deemed merger-related should be determined in a manner that is proportionally equal to the amount of time spent on the merger compared to other activities of the utility and tracked accordingly.

<sup>88</sup> Some of these costs are typically incurred prior to the announcement of a merger.

- severance payments;
- operational integration costs;
- accounting and operating systems integration costs;
- costs to terminate any duplicative leases, contracts, and operations; and
- financing costs to refinance existing obligations in order to achieve operational and financial synergies.

45. We will continue to consider hold harmless commitments on a case-by-case basis and, as such, applicants may propose that their hold harmless commitment cover specific transaction-related costs in addition to those listed above, if they can demonstrate that those certain cost categories may be properly included or excluded from their hold harmless commitment without an adverse effect on rates. The burden remains on applicants to show that any offered hold harmless commitment will meet the Commission's standard that the proposed transaction does not have an adverse effect on rates.

46. We decline to adopt the Transmission Dependent Utilities' request that we consider any rate increase that results from a transaction to be a transaction-related cost subject to an applicant's hold harmless commitment. This goes beyond our standard on adverse effects on rates as an increase in rates "can still be consistent with the public interest if there are countervailing benefits that derive from the merger."<sup>89</sup> The adoption

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<sup>89</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,114; *see, e.g.*, (continued ...)

of the Transmission Dependent Utilities request would curtail an applicant's ability to craft suitable ratepayer protection mechanisms and limit the Commission's ability to authorize transactions where rate increases are offset by the benefits of the transaction. We continue to believe that the guidance related to transaction-related costs set out in this Policy Statement does not require a change in the Commission's current practice with respect to acquisition premiums. Therefore, we will continue to preclude recovery of acquisition premiums as part of transaction-related costs, and remind applicants that a showing of "specific, measurable, and substantial benefits to ratepayers" must be made in a subsequent FPA section 205 proceeding in order to recover an acquisition premium, whether or not a hold harmless commitment has been made.

47. To provide further clarity, we discuss below, in detail, the following topics: (a) transition costs; (b) capital costs; (c) internal labor costs; (d) costs of transactions that are not completed and costs incurred prior to announcement; and (e) requests for guidance on savings.

**a. Transition Costs**

48. We will continue to consider transition costs as a subset of transaction-related costs. We are unconvinced by commenters' assertions that the line distinguishing costs incurred in connection with the normal business activities of a public utility and costs

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*Bluegrass Generation Co., L.L.C.*, 139 FERC ¶ 61,094 at P 41 (finding no adverse effect on rates because increases in capacity charges would be offset by a savings in energy rates).

incurred to integrate operations and assets of two previously unaffiliated companies is difficult to discern or too burdensome to track. We acknowledge that the classification of a specific cost is fact specific and requires judgment in some cases. Nevertheless, to the extent there are categories of transition costs listed herein that applicants do not consider transaction-related based on transaction specific circumstances, applicants are free to demonstrate in the FPA section 203 proceeding that these costs should not be considered transaction-related. We acknowledge AEP's concern that the Commission has not adopted a formal rule regarding the treatment and definition of transition costs for purposes of a hold harmless commitment. However, the Commission has stated that transaction-related costs, in the context of a hold harmless commitment, include transition costs.<sup>90</sup> In this Policy Statement, we provide additional guidance as to what those costs are. Further, if an applicant categorizes costs as transaction-related out of an abundance of caution because there is uncertainty regarding the nexus between the cost and the transaction, the Commission's policy provides for the recovery of such costs with a demonstration of offsetting benefits should the transaction produce savings or other

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<sup>90</sup> See, e.g., *Union Power Partners, L.P.*, 154 FERC ¶ 61,149, at P 63 (2016) (“We interpret Purchaser’s hold harmless commitment to apply to *all transaction-related costs, including* costs related to consummating the Proposed Transaction and *transition costs*, incurred prior to the consummation of the Proposed Transaction, or in the five years after the Proposed Transaction’s consummation.”) (emphasis added); *Exelon Corp.*, 138 FERC ¶ 61,167, at P 118 (2012) (“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 related synergies.”) (emphasis added).

synergies.<sup>91</sup> This policy should not discourage beneficial investment by applicants following completion of a Commission-authorized transaction, but rather should encourage documentation and tracking of those costs and related savings.

**b. Capital Costs**

49. We also clarify that whether or not capital costs, including capital costs related to mitigation, should be considered transaction-related costs that should be subject to an applicant's hold harmless commitment can be considered on a case-by-case basis either upfront in the FPA section 203 proceeding, or when an applicant seeks to recover such costs in an FPA section 205 proceeding.<sup>92</sup> In this regard, we recognize that it would be inappropriate to adopt a general policy that all capital costs, including capital costs related to mitigation, are subject to an applicant's hold harmless commitment. Applicants may incur capital costs for facilities that are used and useful and provide service to customers. Conversely, applicants may also incur capital costs as a direct requirement of the transaction, which are not used and useful until a later point in time. An inquiry into whether these costs are used and useful or otherwise prudently incurred would require a

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<sup>91</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,123 (noting that an increase in rates “can be consistent with the public interest if there are countervailing benefits that derive from the transaction”); *Pennsylvania Electric Co.*, 154 FERC ¶ 61,109 at P 48 (“The Commission has established that, where applicants make hold harmless commitments in the context of FPA section 203 transactions, in order to recover transaction-related costs, applicants must demonstrate offsetting benefits at the time they apply to recover those costs.”).

<sup>92</sup> Proposed Policy Statement, 150 FERC ¶ 61,031 at PP 21-25.

fact specific inquiry, which is more appropriately handled on a case-by-case basis rather than under a generally applicable policy.

50. In general, capital costs unrelated to the transaction are not subject to an applicant's hold harmless commitment. For example, applicants may be able to demonstrate that certain capital projects were already in the preliminary stages of construction or development prior to the merger announcement and would be completed whether or not the transaction is ever consummated. If adequately documented, we agree that such capital costs should not be subject to an applicant's hold harmless commitment.

51. As guidance, we are principally concerned about three categories of capital costs directly tied to the transaction that may negatively impact customer rates: (1) the capital costs of facilities that are constructed as part of an applicant's commitment to mitigate competition concerns that have been identified in the Commission's authorization; (2) the costs of replacing any equipment or facility of merging companies, prior to the end of its useful life, if such action was the direct consequence of a transaction; and (3) the transition costs of integrating the previously separate systems. Generally, these costs will be considered transaction-related costs subject to an applicant's hold harmless commitment unless applicants demonstrate offsetting benefits, or offer ratepayer protections other than a hold harmless commitment, in their FPA section 203 application.

52. While applicants may present their case-by-case analysis when they seek to recover capital costs in an FPA section 205 proceeding, we advise applicants to present a clear case in their FPA section 203 application to avoid uncertainty when possible.

Therefore, we advise applicants to clearly state which known capital costs related to the transaction will be included or excluded from a hold harmless commitment at the time of their FPA section 203 application. Further, we advise applicants to clearly explain a process for determining which capital costs—that may be unknown at the time of the application but are related to the transaction and determined at a future date—will be included or excluded from a hold harmless commitment at the time of their FPA section 203 application. Similarly, we advise applicants to explain the treatment of operation and maintenance costs incurred in relation to transaction-related capital costs if the related plant asset meets the used and useful criterion in providing utility service, the Commission may consider exclusion of such costs from the hold harmless commitment. A clear explanation in the FPA section 203 application of the treatment of capital costs will aid the Commission and third parties in understanding how a transaction will not have an adverse effect on rates both in considering the application and in future related proceedings, including any future FPA section 205 filing to show transaction-related savings.

53. Finally, we note that capital costs incurred for documented utility need, including those for reliability, such as transmission upgrades, that are related to a transaction may offer similar benefits to the transactions discussed below where a hold harmless commitment may not be necessary for a showing of no adverse effect on rates.<sup>93</sup> In such

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<sup>93</sup> See *infra* PP 92-95.

cases, applicants may demonstrate that such capital costs are not transaction-related costs subject to their hold harmless commitment by showing such costs have offsetting benefits or otherwise showing that these capital costs have no adverse effect on rates.

**c. Internal Labor Costs**

54. We will adopt the proposal to include both internal and external labor costs related to a transaction as transaction-related costs. The Commission's concern is that an applicant will use its existing employees to both perform normal utility activities as well as transaction-related activities and not make a distinction between the two activities. As a result, the applicant would recover transaction-related labor costs without demonstrating that they are offset by benefits. Thus, an appropriate labor cost allocation is needed to ensure the applicant's ratepayers are not paying for transaction-related activities without a showing of offsetting benefits.

55. The Commission declines to adopt AEP's reading of Commission precedent in *Ameren* as limiting transaction-related internal labor costs to incremental internal labor costs.<sup>94</sup> In *Ameren* the Commission stated that the applicant must file its accounting for any costs incurred to effectuate the transaction which "may include, but are not limited to, internal labor costs, legal, consulting, and professional services incurred to effectuate the transaction."<sup>95</sup> This statement directing accounting entries to be filed does not impact

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<sup>94</sup> *Ameren*, 145 FERC ¶ 61,034 at P 97, n.99.

<sup>95</sup> *Id.*

the scope of transaction-related costs subject to the applicant's hold harmless commitment, and thus, cannot be construed to mean that hold harmless commitments only apply to incremental labor costs.

56. Commenters' arguments that labor costs for existing employees that perform additional transaction-related tasks but receive no additional incremental salary should not be subject to hold harmless commitment are misplaced. Imposing additional transaction-related tasks on existing employees without additional compensation does not relieve applicants from general ratemaking principles, which require that employee costs follow the employees' assigned tasks.<sup>96</sup> Employees' time should be allocated in proportion to the tasks performed. Otherwise, ratepayers will bear transaction-related costs without offsetting benefits. Therefore, it is the Commission's policy that applicants support the allocation of the labor costs for salaried employees who work on both normal business activities in providing utility service and on transaction-related activities with appropriate supporting documentation (e.g., approved time sheets detailing the allocation of actual time worked on utility, transaction, and other non-utility activities). To the extent applicants are unable or unwilling to track internal employees time related to a

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<sup>96</sup> *See, e.g.*, Final Audit Report: Audit of Formula Rates, Transmission Incentives, and Demand Response at Baltimore Gas and Electric Company, Docket No. FA13-13-000 at 17-18 (2015) (noting inappropriate recovery of internal labor costs in transmission rates).

transaction, applicants should consider and propose other ratepayer protection mechanisms.

d. **Costs of Transactions That Are Not Completed and Costs Incurred Prior to Announcement**

57. As for costs related to transactions that are pursued but never completed, we clarify our statement that such “costs should not be recovered from ratepayers.”<sup>97</sup> Instead those costs are subject to the Commission’s general rate-making principles under FPA

sections 205 and 206 and the Commission’s accounting precedent.<sup>98</sup> With respect to EEI’s comment regarding activities in the early stages of a transaction that are undertaken in the course of normal business, we note that only those activities related to the transaction for which the hold harmless commitment was made necessitate separate tracking. In terms of tracking expenses prior to the announcement of a transaction, we note that a hold harmless commitment only applies where the Commission issues an order accepting such a commitment. Expenses for transactions that do not reach that point are subject to the Commission’s ordinary ratemaking principles. Moreover, if a

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<sup>97</sup> Proposed Policy Statement, 150 FERC ¶ 61,031 at P 23.

<sup>98</sup> The costs incurred to consummate a merger transaction are considered to be nonoperational in nature and, to the extent recorded on a jurisdictional entity’s books, should be included in a non-operating expense account - Account 426.5, Other Deductions. 18 CFR pt. 101 (2015).

transaction that is the subject of a hold harmless commitment is not consummated, there would presumably never be any transaction-related savings that could offset transaction-related costs.

58. In addition, we clarify that while all costs related to the acquisition of an existing facility required to serve load or transmission customers, including costs associated with bids for other facilities that were incurred as a part of routine capacity procurement efforts, will be considered transaction-related costs if an applicant makes a hold harmless commitment, as we have noted in the preceding paragraphs, capital costs of facilities that are used and useful and provide service to customers would normally be recoverable in rates under general ratemaking principles, unless the capital costs fall within one of the categories discussed above (e.g., capital costs related to mitigation measures), in which case they would be subject to the applicant's hold harmless commitment. Moreover, under our accounting rules, when electric plant constituting an operating system is purchased, the costs of acquisition, including expenses incidental thereto, are properly includible in electric plant and charged to Account 102, Electric Plant Purchased or Sold.<sup>99</sup> Thus, in the situation Southern Company posits, the real question is what portion of the costs associated with an RFP process, including costs incurred pursuing bids that are ultimately unsuccessful, would be properly includible in the costs of the facility that is acquired. To the extent all

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<sup>99</sup> 18 CFR pt. 101 (2015).

or some portion of those costs are included in the cost of the facility that is acquired, and assuming that the facility is used and useful and provides service to customers, they would normally be recoverable as capital costs associated with that facility and, therefore, not be subject to any hold harmless commitment that is made.

e. **Request for Guidance on Savings**

59. Regarding transaction-related savings, we decline to allow the netting of benefits from future transactions against the transaction-related costs of past transactions, as EEI suggests. The Commission has previously confined its analysis regarding the effect on rates to the transaction that is the subject of the application.<sup>100</sup> Applicants are not required to create separate records to measure savings if they do not intend to recover transaction-related costs from ratepayers. Furthermore, we decline to speculate on the scope and definition of transaction-related savings that applicants may offer in a subsequent FPA section 205 filing in order to recover transaction-related costs covered by a hold harmless commitment given that we have received a limited number of FPA section 205 filings seeking to recover transaction-related costs by showing offsetting savings. Applicants may choose the most appropriate method to calculate savings so long as the savings can be shown to result from the transaction. We will review these filings on a case-by-case basis.

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<sup>100</sup> See *BHE Holdings, Inc.*, 133 FERC ¶ 61,231 at P 40 (focusing on “costs related to the instant transaction for purposes of the Commission’s section 203 analysis”).

**B. Controls and Procedures to Track and Record Costs Related to Hold Harmless Commitments**

**1. Proposal**

60. In the Proposed Policy Statement the Commission proposed to clarify that all applicants offering hold harmless commitments should implement appropriate internal controls and procedures to ensure the proper identification, accounting, and rate treatment of all transaction-related costs incurred prior to and subsequent to the announcement of a proposed transaction, including all transition costs.<sup>101</sup>

61. Specifically, the Commission noted that applicants are required to describe in their FPA section 203 applications how they intend to protect ratepayers from transaction-related costs, consistent with their obligation to show that their transaction is consistent with the public interest.<sup>102</sup> As contemplated in the Merger Policy Statement, a hold harmless commitment offered by applicants must be “enforceable and administratively manageable.”<sup>103</sup> Therefore the Commission proposed that in creating an enforceable and administratively manageable commitment, applicants should provide assurances that transaction-related costs will be quantified, documented, and verified, and may not be recovered from ratepayers until applicants can demonstrate that savings, if any, offset the transaction-related costs they seek to recover. To this end, the Commission has required

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<sup>101</sup> Proposed Policy Statement, 150 FERC ¶ 61,031 at P 29.

<sup>102</sup> See Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,914.

<sup>103</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

that applicants offering hold harmless commitments establish internal controls and/or tracking mechanisms.<sup>104</sup> In the Proposed Policy Statement, the Commission proposed the following additional guidance regarding these requirements.

62. First, the Commission proposed to clarify that all applicants offering hold harmless commitments should implement appropriate internal controls and procedures to ensure the proper identification, accounting, and rate treatment of all transaction-related costs incurred prior to and subsequent to the announcement of a proposed transaction, including all transition costs.<sup>105</sup>

63. Second, the Commission proposed that applicants offering hold harmless commitments should include, as part of their FPA section 203 applications and any separate FPA section 205 filings seeking to recover transaction-related costs, a detailed description of how they define, designate, accrue, and allocate transaction-related costs, and explain the criteria used to determine which costs are transaction-related. Applicants should specifically identify and describe their direct and indirect cost classifications, and the processes they use to functionalize, classify and allocate transaction-related costs. In addition, applicants should explain the types of transaction-related costs that will be recorded on their public utilities' books; how they determined the portion of these costs assigned to their public utilities; and how they classify these costs as non-operating,

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<sup>104</sup> See *Silver Merger Sub, Inc.*, 145 FERC ¶ 61,261, at P 78 (2013); *ITC Holdings Corp.*, 143 FERC ¶ 61,256, at P 168 (2013).

<sup>105</sup> Proposed Policy Statement, 150 FERC ¶ 61,031 at P 30.

transmission, distribution, production, and other. Applicants should also describe their accounting procedures and practices, and how they maintain the underlying accounting data so that the allocation of transaction-related costs to the operating and non-operating accounts of their public utilities is readily available and easily verifiable.<sup>106</sup>

64. The Commission noted that it had, in the past, required applicants to submit their final accounting entries associated with transactions within six months of the date that the transaction is consummated.<sup>107</sup> The Commission proposed to require applicants subject to the Commission’s accounting regulations to provide, as a part of this accounting filing, the accounting entries and amounts related to all transaction-related costs incurred as of the date of the accounting filing, along with narrative explanations describing the entries.<sup>108</sup>

## 2. Comments

65. EEI requests clarifications and changes related to the Commission’s proposed accounting treatment. EEI encourages the Commission to have applicants “simply identify succinctly how they plan to categorize and handle the costs, in conformance with the Uniform System of Accounts . . . .”<sup>109</sup> EEI asserts that applicants should be able to

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<sup>106</sup> *Id.* P 31.

<sup>107</sup> *See, e.g., Central Vermont Public Service Corp.*, 138 FERC ¶ 61,161, at P 55 (2012).

<sup>108</sup> Proposed Policy Statement, 150 FERC ¶ 61,031 at P 32.

<sup>109</sup> EEI Comments at 19.

rely on the accounting systems they already have in place without having to explain the design and use of those systems, as their accounting practices are already overseen by the Commission.<sup>110</sup> EEI asserts the Commission should specify that if transaction costs are reasonably projected to be minor or below a certain threshold, the costs need not be tracked, as the cost of tracking them would exceed the benefit.<sup>111</sup> EEI also encourages the Commission to extend the deadline for submitting accounting to one year rather than six months as the information may take more than six months to be verified and the extra time would lead to a more complete filing.<sup>112</sup>

66. Noting that the Commission seeks to require applicants to track and record costs that may be incurred even prior to a public announcement of any proposed transaction, EPSA states it does not understand how the Commission can recognize that it can be challenging to accurately track, record and categorize all transaction-related costs but also require applicants to keep accurate accounting of such information, particularly in the early stages of a negotiation.<sup>113</sup> EPSA states the proposed requirement is not only premature, but extremely difficult to implement, administratively burdensome, and

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> EPSA Comments at 6.

costly.<sup>114</sup> EPSA states that this requirement is more appropriate after a public announcement of a transaction. Therefore, EPSA requests that the Commission not require tracking of transaction-related costs incurred prior to the announcement of a transaction.<sup>115</sup>

67. APPA and NRECA, Transmission Access Policy Study Group, and Transmission Dependent Utilities support the Commission's proposed tracking requirements.<sup>116</sup>

Specifically, APPA and NRECA support the Commission's proposal that the internal controls and procedures should be detailed in the FPA section 203 applications and any related FPA section 205 rate filing.<sup>117</sup> Transmission Access Policy Study Group states that internal controls are both feasible and essential and are good housekeeping, consistent with the practice of regulated utilities to operate pursuant to systems of accounts and fundamental to honoring hold harmless commitments.<sup>118</sup> Transmission Dependent Utilities support the tracking requirements because the clarifications will help ensure that transaction-related costs will be quantified, documented, and verified and ensure that transaction-related costs will not be recovered from ratepayers until applicants

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> APPA and NRECA Comments at 10-11; Transmission Access Policy Study Group Comments at 1, 4; Transmission Dependent Utilities Comments at 7.

<sup>117</sup> APPA and NRECA Comments at 10.

<sup>118</sup> Transmission Access Policy Study Group Comments at 4.

demonstrate offsetting savings.<sup>119</sup> Transmission Dependent Utilities assert that these requirements will result in fewer compliance difficulties, will reduce disputes about cost recovery, and will simplify the Commission's administration of hold harmless conditions by providing a clearer picture of each public utility's compliance efforts.<sup>120</sup>

### 3. Commission Determination

68. We will withdraw the Commission's proposal requiring applicants to describe their accounting procedures and practices, and how they maintain the underlying accounting data for the transaction. As EEI suggested, applicants should be able to rely on their accounting systems without having to explain the design and use of those systems in the FPA section 203 filing. However, we will adopt the Commission's proposal regarding establishing controls and procedures for transaction-related costs subject to the hold harmless commitment, regardless of the projected amount of the costs of the transaction. We will also adopt the proposal that applicants offering hold harmless commitments should include in the FPA section 203 application a description of how they define, designate, accrue, and allocate transaction-related costs. Applicants should also explain the criteria used to determine which costs are transaction-related.

69. Applicants that make a hold harmless commitment must make clear, at minimum, what they are committing to and have the ability to record and track such costs. A well-

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<sup>119</sup> Transmission Dependent Utilities Comments at 7.

<sup>120</sup> *Id.*

documented methodology and system to account for such costs also facilitates uniformity in practice and reduces confusion in how the hold harmless commitments are applied. Additionally, if applicants choose to seek recovery of those costs in a separate FPA section 205 filing, proper documentation is necessary for determining the appropriateness of the recovery. Moreover, proper documentation of these costs will provide for the avoidance of ongoing litigation which has been voiced as a concern by commenters.<sup>121</sup>

70. We will continue to require that applicants submit their final accounting entries associated with transactions within six months of the date that the transaction is consummated. We will also adopt the Commission's proposal to require applicants subject to the Commission's accounting regulations to provide, as a part of this accounting filing, the amounts related to all transaction-related costs incurred as of the date of the accounting filing. The final accounting entries and amounts related to transaction-related costs allow the Commission to scrutinize how applicants record the transaction at the time of consummation and apply the criteria to identify transaction-related costs as of the accounting filing date. The filing does not necessarily reflect all transaction-related costs as they typically continue to be incurred well after the merger. Given that applicants should have controls and procedures in place to track these costs in a timely manner, six months should be adequate for filing the accounting entries. If

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<sup>121</sup> See, e.g., AEP Comments at 10; EEI Comments at 7, 10; Southern Company Comments at 9, 12.

additional time is needed, applicants may file a request for extension including the reasons for the requested additional time.

71. We clarify that irrespective of the date that a transaction is announced, companies required to follow the Commission's accounting regulations must have appropriate controls and procedures in place to track transaction-related costs to ensure compliance. Specifically, the Commission's long-standing policy is that costs incurred to effectuate a merger are non-operating in nature, and they should be recorded in Account 426.5, Other Deductions. Accordingly, absent a change in the Commission's accounting requirements, these costs should be tracked when they are incurred.

### **C. Time Limits on Hold Harmless Commitments**

#### **1. Proposed Policy Statement Recommendations**

72. The Commission proposed to reconsider whether a hold harmless commitment that is limited to five years or another specified time period adequately protects ratepayers from an adverse effect on rates.<sup>122</sup> Specifically, in light of the proposed treatment of certain categories of costs as transaction-related for purposes of any hold harmless commitment, the Commission's experience auditing utilities that have made hold harmless commitments, and concerns of protestors in previous FPA section 203 applications,<sup>123</sup> the Commission proposed to reconsider whether hold harmless

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<sup>122</sup> Proposed Policy Statement, 150 FERC ¶ 61,031 at P 34.

<sup>123</sup> See, e.g., *PNM Resources, Inc.*, 124 FERC ¶ 61,019, at P 36 (2008) (protestor alleging that the five-year limitation on recovery will simply result in the deferred (*continued ...*))

commitments that are limited to five years (or another specified period) adequately protect ratepayers from any adverse effect on rates. As part of this reconsideration, the Commission stated that it believed that time-limited hold harmless commitments may not adequately protect ratepayers from transaction-related costs. Therefore, the Commission proposed that there be no time limit on hold harmless commitments and that costs subject to hold harmless commitments cannot be recovered from ratepayers at any time (regardless of when such costs are incurred), absent a showing of offsetting savings in order to demonstrate no adverse effect on rates.<sup>124</sup> The Commission stated that this revised approach is consistent with the Merger Policy Statement, which emphasized that the burden of proof to demonstrate that customers will be protected should be on applicants, and that applicants should also bear the risk that benefits will not materialize.<sup>125</sup>

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recovery of transaction-related costs).

<sup>124</sup> Evidence of offsetting merger-related savings cannot be based on estimates or projections of future savings, but must be based on a demonstration of actual merger-related savings realized by jurisdictional customers. *Exelon Corp.*, 149 FERC ¶ 61,148 at P 107 (citing *Audit Report of National Grid, USA*, Docket No. FA09-10-000 (Feb. 11, 2011) at 55; *Ameren Corp.*, 140 FERC ¶ 61,034, at PP 36-37 (2012)).

<sup>125</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,123.

## 2. Comments

73. Many commenters suggest that the Commission should continue to accept time limited hold harmless commitments.<sup>126</sup> They contend that the Commission has not shown that there is any evidence that applicants have purposely deferred costs past the end of the five-year period or otherwise evaded review that requires a change in current policy.<sup>127</sup> Furthermore, they assert that, if the Commission is concerned that time-limited hold harmless commitments may lead an applicant to delay incurring or recovering a transaction's costs until after the hold harmless period expires, the Commission already has tools and protections to adequately protect customers.<sup>128</sup> Furthermore, AEP states that the change in policy would be a reversal of the Merger Policy Statement and put the Commission back in the position of weighing the costs and benefits of mergers.<sup>129</sup> Commenters contend that the Commission should not adopt this policy, which will

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<sup>126</sup> See EEI Comments at 6; EPSA Comments at 4; Kentucky Utilities Comments at 3-4; Southern Company Comments at 9.

<sup>127</sup> See generally AEP Comments at 8-9; EEI Comments at 6; Southern Company Comments at 9-10.

<sup>128</sup> See generally AEP Comments at 9 (asserting current accounting, auditing, and ratemaking practices are adequate); EEI Comments at 9-10 (stating that current accounting rules address the Commission's concerns regarding deferral of recovery); Southern Company Comments at 11 (suggesting that the Commission's policy related to the recovery of regulatory assets is sufficient).

<sup>129</sup> See AEP Comments at 11.

unnecessarily burden applicants at the expense of transactions that benefit customers.<sup>130</sup>

They generally assert that the change in policy will discourage mergers, which they believe will harm customers and deter infrastructure investment.<sup>131</sup>

74. Commenters explain that the Commission's concerns are unwarranted because it is in the applicant's financial interest to complete integration as soon as possible to ensure a quick transition and capture synergies.<sup>132</sup> Furthermore, they assert that the integration of the operations of merging utilities generally occurs in the first few years after a merger.<sup>133</sup> They also assert that the costs associated with tracking these costs indefinitely will be burdensome and significant.<sup>134</sup> Commenters caution that an indefinite hold harmless commitment could incentivize entities to not pursue elimination of duplicative services and costs, which would reduce benefits to ratepayers, because the costs of such activity may be considered transition costs in perpetuity and, therefore, be unrecoverable.<sup>135</sup>

75. Commenters also state that any change to the Commission's practice of accepting hold harmless commitments that are limited in duration will undermine regulatory

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<sup>130</sup> See EEI Comments at 6; EPSA Comments at 4.

<sup>131</sup> See EEI Comments at 10-11; EPSA Comments at 4.

<sup>132</sup> See generally AEP Comments at 9; EEI Comments at 8, 10.

<sup>133</sup> AEP Comments at 9; Southern Company at 10-11.

<sup>134</sup> EPSA Comments at 4; Southern Company Comments at 12 (stating that in addition to the cost of new systems, all current and future employees would have to be trained to recognize and track the costs).

<sup>135</sup> See EEI Comments at 8; EPSA Comments at 5.

certainty.<sup>136</sup> They state that without a time limit the Commission creates the unnecessary risk of future litigation in which there may be attempts by protesters or the Commission to link future costs back to a previous transaction, no matter how unrelated to a transaction, and that any entity that had a merger or transaction would then need to disprove that assertion.<sup>137</sup> Commenters assert that without regulatory certainty investors will be unwilling to commit funds or will increase the costs of the funds they do commit, which will have an adverse effect on the costs and on the viability of transactions and utility valuations.<sup>138</sup> As to transaction-related capital costs, Southern Company also asserts that one would expect that at some point in time, used and useful investments should and would be included in rates, and if the Commission wishes to exclude certain assets from recovery it should use a more targeted approach than extending the hold harmless period for all transaction-related costs.<sup>139</sup> Others state that a transaction must be considered closed at some point in order for there to be closure for both accounting and

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<sup>136</sup> EEI Comments at 6.

<sup>137</sup> *See* AEP Comments at 10 (worrying that an open-ended commitment will spawn multiple look back proceedings); EEI Comments at 7, 10 (asserting that this will create an inappropriate evidentiary burden on applicants that may also be impossible to overcome); Kentucky Utilities Comments at 3; Southern Company Comments at 10, 12-13.

<sup>138</sup> *See* AEP Comments at 10, n.3; EEI Comments at 7.

<sup>139</sup> *See* Southern Company Comments at 11-12.

ratemaking purposes<sup>140</sup> and requiring an open ended hold harmless commitment could deter “beneficial consolidation.”<sup>141</sup> EEI states that the Commission’s current standard provides ample protection for customers while also providing regulatory certainty, which is essential in a constantly changing industry.<sup>142</sup>

76. Commenters further explain that it will be difficult to determine if costs are transaction-related the further in time entities get from the transaction because of intervening events<sup>143</sup> and a changing regulatory and technological environment,<sup>144</sup> and that it will be difficult to untangle these costs in rates from the entity’s general ongoing operations.<sup>145</sup> They caution that the further in time one gets from a transaction the more difficult it will become to determine what is and is not a transition cost.<sup>146</sup> AEP suggests that the Commission could remedy this problem either by accepting time-limited hold harmless provisions or limiting the scope of transition costs to the activities required to integrate the companies once their merger is consummated.<sup>147</sup>

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<sup>140</sup> See AEP Comments at 10; Southern Company Comments at 12.

<sup>141</sup> Southern Company Comments at 12.

<sup>142</sup> EEI Comments at 7.

<sup>143</sup> See *id.* at 6.

<sup>144</sup> See Kentucky Utilities Comments at 3.

<sup>145</sup> See AEP Comments at 10; EEI Comments at 7.

<sup>146</sup> See Kentucky Utilities Comments at 3; Southern Company Comments at 13.

<sup>147</sup> AEP Comments at 10.

77. AEP also notes that a hold harmless commitment with no limit on duration raises questions like: (1) how do you measure how much of a cost incurred 15 years after a merger was attributable to merger “integration” as opposed to normal utility operations; (2) if merger “integration” costs can still be incurred decades after the transaction closed, can merger “savings” still be accruing over that same period; (3) how do you measure those savings; and (4) would companies need to maintain shadow books for the unmerged companies for the rest of time to prove the savings that resulted from the merger?<sup>148</sup>

78. EEI asserts that a time-limited commitment is consistent with U.S. generally accepted accounting principles, which recognize that transactions end when all costs, assets, and liabilities have been recorded.<sup>149</sup> EEI states that the Commission should recognize that there is a finite transition period following a transaction and five years is a reasonable time frame in which one could expect that a company would complete its transition and integration.<sup>150</sup> EEI asserts that the Commission should also recognize a commitment of less than five years may be appropriate for “relatively minor” transactions and that an indefinite hold harmless commitment is simply unreasonable.<sup>151</sup>

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<sup>148</sup> *Id.*

<sup>149</sup> EEI Comments at 8.

<sup>150</sup> *Id.* at 9.

<sup>151</sup> *Id.*

79. APPA and NRECA, Transmission Access Policy Study Group, and the Transmission Dependent Utilities support the Commission's proposal not to accept time-limited hold harmless commitments.<sup>152</sup> These commenters state that the Commission should focus on whether a cost is transaction-related, not on when it was incurred or when recovery is sought.<sup>153</sup>

80. APPA and NRECA state that unlimited duration hold harmless commitments will not impose a significant additional burden on applicants because most transition costs are incurred in the first few years after the merger is consummated.<sup>154</sup> Furthermore, to the extent that a longer commitment may lead to an additional burden on applicants, APPA and NRECA state that this burden is reasonable because it would mean that transaction-related costs continued to be incurred and offsetting merger savings failed to materialize.<sup>155</sup> Transmission Dependent Utilities state that time-limited commitments provide incentives for utilities to make inefficient spending and rate recovery decisions while failing to provide full protection to ratepayers.<sup>156</sup> Therefore, Transmission

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<sup>152</sup> APPA and NRECA Comments at 11; Transmission Access Policy Study Group Comments at 2; Transmission Dependent Utilities Comments at 8.

<sup>153</sup> APPA and NRECA Comments at 11; Transmission Dependent Utilities Comments at 7-8.

<sup>154</sup> APPA and NRECA Comments at 11.

<sup>155</sup> *Id.*

<sup>156</sup> Transmission Dependent Utilities Comments at 7.

Dependent Utilities assert that eliminating any time limit on a hold harmless commitment is in the public interest because it will bring greater certainty to the electric markets regarding costs subject to recovery in the future.<sup>157</sup>

### 3. Commission Determination

81. After careful consideration of the comments, we withdraw our proposal to no longer accept time-limited hold harmless commitments and will continue to accept hold harmless commitments that are time limited as a method to show no adverse effect on rates. We agree with certain commenters that there is a tradeoff between the articulation of transaction-related costs adopted in section II.A above<sup>158</sup> and the duration of a hold harmless commitment, as there is less of a nexus between activities that are identified as transition costs and the transaction as time passes. While the Commission intends to ensure that ratepayers are adequately protected from potential adverse effects on rates, a hold harmless commitment must also be administratively manageable.

82. As some commenters note, as time passes, it becomes more difficult to distinguish actions taken, and related expenditures, to integrate the operations and assets of newly-merged companies from the conduct of an applicant's normal business activities, and it becomes more difficult to determine which costs share a nexus with the transaction and should thus be subject to an offered hold harmless commitment. Future actions, such as

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<sup>157</sup> *Id.*

<sup>158</sup> *See supra* PP 44-58.

engineering studies, taken in the normal course of business need to be distinguished from those undertaken to effectuate the transaction for the duration of the hold harmless commitment. If we were to adopt the proposal to no longer accept time-limited hold harmless commitments, applicants may be required to make these distinctions years removed from a transaction. As both commenters who support and oppose time limits on any hold harmless commitment recognize, the majority of these costs are incurred in the first five years after the closing of the transaction. At this time we do not find that there is sufficient evidence to conclude that applicants are indeed incurring substantial transaction-related costs after five years.

83. Therefore, we find that the articulation of transaction-related costs set forth in section II.A above, paired with the incentive of applicants to achieve integration and transaction related synergies as soon as possible, adequately protect ratepayers while providing applicants with regulatory certainty that a time-limited hold harmless commitment will not result in endless litigation regarding costs incurred after a transaction is consummated. We intend hold harmless commitments to avoid protracted litigation while at the same time protecting customers from the uncertain costs incurred to complete transactions.

84. In response to EEI's view that a commitment of less than five years may be appropriate for what EEI terms "relatively minor" transactions, as we stated in the Proposed Policy Statement, the Commission has found hold harmless commitments under which applicants commit not to seek to recover transaction-related costs except to

the extent that such costs are exceeded by demonstrated transaction-related savings for a period of five years to be “standard.”<sup>159</sup> While applicants may nevertheless propose hold harmless commitments of any number of years, we caution that applicants retain the burden of demonstrating that proposed ratepayer protections are adequate.<sup>160</sup> Applicants must adequately support and demonstrate that any commitment they propose provides adequate ratepayer protection when compared to other ratepayer protection mechanisms, including the offer of a five year hold harmless period that has become the norm in the industry.

**D. Transactions Without An Adverse Effect on Rates**

**1. Proposed Policy Statement Recommendations**

85. The Commission noted in the Proposed Policy Statement that some applicants have made hold harmless commitments in connection with transactions involving the acquisition of existing jurisdictional facilities where the acquiring entity is a traditional franchised utility and is entering into the transaction in order to satisfy resource adequacy requirements at the state level, to improve system reliability, and/or meet other regulatory

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<sup>159</sup> Proposed Policy Statement, 150 FERC ¶ 61,031 at P 12 (citing *ITC Holdings Corp.*, 121 FERC ¶ 61,229, at P 128 (2007)). Although five-year hold harmless commitments are most common, the Commission has also accepted three-year hold harmless commitments. *Id.* n.21 (citing *Westar Energy, Inc.*, 104 FERC ¶ 61,170, at PP 16-17 (2003); *Long Island Lighting Co.*, 82 FERC ¶ 61,129, at 61,463-65 (1998)).

<sup>160</sup> Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,914.

requirements.<sup>161</sup> Furthermore, the Commission noted that, while customers in these examples may experience a rate increase due to the costs of the facilities, such rate effect may not necessarily be adverse because those costs were incurred to meet a governmental regulatory requirement. The Commission stated that it has held that, as a general matter of policy, ratepayers should bear the cost of utility service.<sup>162</sup>

86. The Commission proposed to clarify that applicants undertaking certain types of transactions to fulfill documented utility service needs may not need to offer a hold harmless commitment in order to show that the transaction does not have an adverse effect on rates.<sup>163</sup> Specifically, the Commission stated that it believed that applicants engaging in these types of transactions can make the requisite showing that, even though the proposed transaction may have an effect on rates, such effect on rates is not adverse.

87. The Commission noted several examples of transactions in which applicants may demonstrate no adverse effect on rates without offering a hold harmless commitment or other ratepayer protection mechanism, including the purchase of an existing generating

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<sup>161</sup> Proposed Policy Statement, 150 FERC ¶ 61,031 at P 39. *See, e.g., FirstEnergy*, 141 FERC ¶ 61,239 at PP 1, 16, 27-30 (accepting a hold harmless commitment in an asset transaction where generation assets would be turned into assets to support transmission system upgrades in order to meet needs identified in a study by PJM Interconnection, L.L.C. following the retirement of other generating facilities); *ITC Midwest*, 140 FERC ¶ 61,125 at P 15; *Int'l Transmission Co.*, 139 FERC ¶ 61,003 at P 16.

<sup>162</sup> *See, e.g., Old Dominion Elec. Cooperative and N.C. Elec. Membership Corp. v. Va. Elec. and Power Co.*, 146 FERC ¶ 61,200 (2014).

<sup>163</sup> Proposed Policy Statement, 150 FERC ¶ 61,031 at P 40.

plant or transmission facility that is needed to serve the acquiring company's customers or forecasted load within a public utility's existing footprint, in compliance with a resource planning process, or to meet specified North American Electric Reliability Corporation (NERC) standards. The Commission proposed that applicants seeking to demonstrate that a transaction will not have an adverse effect on rates for these or other reasons should provide supporting evidence and documentation which could include an explanation that the transaction is intended to serve existing customers or forecasted load within an existing footprint; to address a state commission order or directive requiring acquisition of specific assets; to address a need for a transmission facility, as established through a regional transmission planning process or as required to satisfy a NERC standard; or to address other state or federal regulatory requirements.<sup>164</sup> Under the clarification proposed therein, however, the Commission stated that a hold harmless commitment would not need to be offered in order to show that the transaction would not have an adverse effect on rates.

88. The Commission proposed that applicants may make a showing that a particular transaction does not have an adverse effect on rates based on other grounds, but the burden remains on applicants to show in their application for authorization under FPA section 203 that the costs, or a portion of the costs, related to such a transaction should be passed on to ratepayers. Further, the Commission proposed that applicants may provide

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<sup>164</sup> *Id.* P 41.

the Commission with information to show the need to meet other regulatory requirements as a means to demonstrate that the effect on rates due to the transaction is not adverse. The Commission proposed that it would carefully review such a showing before determining that a proposed transaction without any proposed ratepayer protection mechanism has no adverse effect on rates.

## 2. Comments

89. Several commenters support the Commission's proposal that hold harmless commitments may not be necessary for certain categories of transactions when undertaken to provide utility service for which ratepayers should bear cost responsibility.<sup>165</sup> Several parties recommend that the Commission more directly and clearly acknowledge that hold harmless commitments are not always necessary and that the Proposed Policy Statement does not mandate their inclusion in every FPA section 203 application.<sup>166</sup> EEI states that each transaction is unique and suggests that the need for and role of a hold harmless commitment will vary.<sup>167</sup> Additionally, commenters request that the Commission clarify that the circumstances articulated in the Proposed Policy

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<sup>165</sup> See AEP Comments at 13; EEI Comments at 12; EPSA Comments at 3; Kentucky Utilities Comments at 4; Southern Company Comments at 3; Transmission-Only Companies Comments at 1.

<sup>166</sup> See EEI Comments at 11 (contending that it is not clear how the different sections of the document interact); Kentucky Utilities Comments at 5.

<sup>167</sup> EEI Comments at 11-12 (suggesting additional exemptions such as a transaction where the benefits outweigh any potential negative effects, or those negative effects may be *de minimis*).

Statement for when a hold harmless commitment may not be necessary are not exclusive or comprehensive,<sup>168</sup> and that the examples given were intended to be illustrative and will be interpreted broadly.<sup>169</sup>

90. Other commenters request that the Commission clarify that it does not intend to identify certain categories of transactions that do not have an adverse effect on rates or transactions that do not require ratepayer protection mechanisms.<sup>170</sup> These commenters seek confirmation that the Commission is stating only that applicants may make a showing for any FPA section 203 transaction that there is no adverse effect on rates based on case-specific evidence, and as such those applicants need not offer a hold harmless commitment if they have otherwise met their burden of proof to make such a demonstration.<sup>171</sup> Furthermore, APPA and NRECA urge the Commission to proceed with caution and avoid reducing the requirement of showing no adverse effect on rates to an exercise where any claimed, non-quantifiable benefits from a transaction are determined to outweigh rate increases.<sup>172</sup>

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<sup>168</sup> EPSA Comments at 3; Southern Company Comments at 4.

<sup>169</sup> Kentucky Utilities Comments at 5.

<sup>170</sup> See APPA and NRECA Comments at 12; Transmission Access Policy Study Group Comments at 6.

<sup>171</sup> See APPA and NRECA Comments at 12-13; Transmission Access Policy Study Group Comments at 8-9.

<sup>172</sup> APPA and NRECA Comments at 14.

91. Similarly, the Transmission Dependent Utilities also urge the Commission not to exempt certain transactions from the requirement to adopt ratepayer protection mechanisms and state that the proposal undercuts the other ratepayer protection mechanisms proposed in the Proposed Policy Statement.<sup>173</sup> They assert that the Commission should not adopt the proposal because: (1) practically any asset transaction could meet the Commission's proposed standard as nearly any such transaction could be deemed necessary to serve existing or forecasted load or to satisfy at least one federal or state regulatory requirement; (2) wholesale customers may derive no benefits from transactions that satisfy state resource adequacy requirements; (3) FPA section 215<sup>174</sup> prohibits reliability standards from including any requirement to enlarge such facilities or to construct new transmission capacity or generation capacity and therefore, the Commission should not grant a special exemption from adopting ratepayer protection mechanisms to utilities that purchase facilities in order to comply with NERC standards; and (4) the premise that an increase in rates may not be adverse because of the reason for the transaction is flawed.<sup>175</sup> The Transmission Dependent Utilities state that no such exemption is needed because to the extent that such a transaction provides for benefits to

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<sup>173</sup> See Transmission Dependent Utilities Comments at 8-9.

<sup>174</sup> 16 U.S.C. 824o(a)(3) (2012).

<sup>175</sup> See Transmission Dependent Utilities Comments at 9-10.

wholesale ratepayers, applicants should be able to demonstrate such benefits or savings exceed the transaction-related costs.<sup>176</sup>

92. Some commenters also identified other types of transactions that may have a rate impact, but not one that is adverse, and therefore should not require any additional ratepayer protection. These commenters request that the Commission clarify that, in addition to transactions involving purchases of existing generation facilities, a hold harmless commitment may also be unnecessary in connection with: (1) purchases of existing transmission facilities that provide benefits, such as added capacity or increased reliability;<sup>177</sup> (2) transactions consummated under a blanket authorization;<sup>178</sup> (3) transactions that involve necessary contract rights or other jurisdictional assets, rather than physical facilities;<sup>179</sup> (4) transactions undertaken in order to comply with any other federal or state regulatory framework;<sup>180</sup> (5) transactions with “no identified or reasonably *de minimis* costs, such as internal reorganizations or restructurings;”<sup>181</sup> (6)

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<sup>176</sup> *See id.* at 11.

<sup>177</sup> Southern Company Comments at 3.

<sup>178</sup> EEI Comments at 12.

<sup>179</sup> Kentucky Utilities Comments at 5.

<sup>180</sup> *Id.* at 5-6 (including environmental, antitrust, market power regulation, energy efficiency standards, or portfolio standards).

<sup>181</sup> *Id.* at 6.

transactions involving the transfer of non-energized turn-key facilities;<sup>182</sup> and (7) acquisitions of non-jurisdictional transmission assets by a transmission-only company.<sup>183</sup>

93. EPSA requests that the Commission reaffirm its policy that there is no adverse effect on rates and that no hold harmless commitment is required where an applicant's cost-based rates do not allow for automatic pass-through of transaction-related costs because applicants can only recover transaction-related costs through a filing under FPA section 205 in such circumstances.<sup>184</sup> EPSA also asks that the Commission recognize that particular types of rate schedules, including schedules and agreements for reliability must run, reactive power/voltage control, and restoration services, do not allow for automatic pass-through of costs.<sup>185</sup>

### **3. Commission Determination**

94. We clarify that the Commission does not intend to exempt classes of transactions that require authorization under FPA section 203 from the requirement to make a showing of no adverse effect on rates. Our intention is to make it clear that, under the Merger Policy Statement, a hold harmless commitment is just one of several ratepayer

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<sup>182</sup> See AEP Comments at 14; Southern Company Comments at 4.

<sup>183</sup> Transmission-Only Companies Comments at 1. The Transmission-Only Companies explain that their business model itself carries benefits and will further Commission policy. *Id.* at 5-6.

<sup>184</sup> EPSA Comments at 3 (citing *NRG Energy Holdings*, 146 FERC ¶ 61,196 at P 87).

<sup>185</sup> *Id.* at 3-4.

protection mechanisms that may be appropriate in a given case, but that a hold harmless commitment (or other ratepayer protection) may be unnecessary for some categories of transactions.<sup>186</sup> In addition, we reaffirm that a hold harmless commitment is not a requirement for an FPA section 203 application; in cases in which some form of ratepayer protection may be appropriate, applicants may offer other forms of ratepayer protection to demonstrate that the transaction has no adverse effect on rates.<sup>187</sup> This observation does not relieve applicants of their obligation to demonstrate that the proposed transaction does not have an adverse effect on rates based on the circumstances of their transaction or to offer ratepayer protection mechanisms where appropriate.<sup>188</sup> Further, the burden of demonstrating that any given transaction presents no adverse effect on rates continues to lie with the applicants.<sup>189</sup>

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<sup>186</sup> See, e.g., *Pub. Serv. Co. of New Mexico*, 153 FERC ¶ 61,377 at P 39 (finding that there was no adverse effect on wholesale requirements customers because those customers receive service under long-term, Commission-approved contracts with stated rates whose terms would not change a result of the proposed transaction and cannot change absent a filing under FPA section 205 with the Commission to change those rates); *NRG Energy Holdings*, 146 FERC ¶ 61,196 at P 87 (finding that there was no adverse effect on wholesale rate because applicants would continue to make wholesale sales at market-based rates or at cost-based rates, under which applicants had no ability to pass through any increased costs resulting from the proposed transaction).

<sup>187</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,123-24.

<sup>188</sup> See *id.*

<sup>189</sup> *Id.* at 30,123.

95. For example, certain rate schedules do not contain a mechanism that would allow an applicant to pass on transaction-related costs.<sup>190</sup> Although it would be unnecessary to make any hold harmless commitment in connection with such a transaction, the applicant would nonetheless have to demonstrate how the rate schedule precludes passing on transaction-related costs to customers. Furthermore, if applicants believe the transaction for which they seek approval provides needed benefits to customers, they may choose to make such a showing.

96. The transactions we identified in the Proposed Policy Statement (i.e., documented utility needs such as the purchase of an existing generating plant or transmission facility that is needed to serve the acquiring company's customers or forecasted load within a public utility's existing footprint, in compliance with a resource planning process, or to meet specified NERC standards), were only illustrative, and not intended to be an all-inclusive list. As a result, we do not adopt the suggestion by some commenters that the Commission identify other types of transactions that may not require a hold harmless commitment. We emphasize that, in all cases, applicants have the burden of

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<sup>190</sup> See, e.g., *Pub. Serv. Co. of New Mexico*, 153 FERC ¶ 61,377 at P 39 (finding that there was no adverse effect on wholesale requirements customers because those customers receive service under long-term, Commission-approved contracts with stated rates whose terms would not change a result of the proposed transaction and cannot change absent a filing under FPA section 205 with the Commission to change those rates).

demonstrating that a proposed transaction will have no adverse effect on rates. A hold harmless commitment or other form of ratepayer protection is only called for in those instances where an applicant cannot otherwise meet this burden.

97. Finally, we note that the Transmission Dependent Utilities misapprehend the statement in the Proposed Policy Statement regarding transactions involving acquisitions of existing facilities to fulfill a NERC reliability standard. Nothing in this Policy Statement requires an entity to acquire or invest in facilities. Instead, this Policy Statement states that if an entity acquires a facility to fulfill a requirement of a NERC reliability standard and it seeks approval under FPA section 203 for that transaction, the entity may present evidence that the transaction's effect on rates is not an adverse effect on rates instead of offering a hold harmless commitment.

**E. Other Issues Raised**

**1. Comments**

98. EEI states that the Commission's FPA section 203 analysis already protects customers well.<sup>191</sup> EEI asserts that the Commission's current regulations and guidance already ensure that the proper information to examine and address potential effects on customers and markets is required to be provided to the Commission.<sup>192</sup> EEI states that it appreciates the Commission's goal of providing clarity, but it encourages modification

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<sup>191</sup> EEI Comments at 3

<sup>192</sup> *Id.* at 5.

of the proposal so that any policy the Commission adopts “puts use of the commitments in perspective within the [FPA] section 203 process and is fair and workable.”<sup>193</sup> EEI asserts that the structure of the Proposed Policy Statement does not clearly identify what the text of the proposed policy is, which it asserts is essential for readers to understand and comment on the proposal.<sup>194</sup> EEI further asserts that given the fundamental changes it suggested to the Proposed Policy Statement, the Commission should respond to those suggestions, re-notice the statement and provide a chance for entities to provide additional feedback.<sup>195</sup>

99. EEI and EPSA ask the Commission to clarify that it will not apply any new requirements set out in this Policy Statement to pending or previously-approved section 203 transactions, even if there is a subsequent related FPA section 205 filing.<sup>196</sup> EEI states that parties have structured pending or previous transactions based on the then-applicable review process and it would be “manifestly unfair” to apply new conditions on parties after they have submitted their applications.<sup>197</sup> EPSA states that its members and other market participants seek clarity that any such filings would not be evaluated against

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<sup>193</sup> *Id.* at 6.

<sup>194</sup> *Id.* at 20.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*; EPSA Comments at 6.

<sup>197</sup> EEI Comments at 20.

any new requirements or policies implemented in a final Policy Statement, but under the policies in existence at the time the relevant transaction was approved.<sup>198</sup>

## **2. Commission Determination**

100. We will apply all changes contained in this Policy Statement on a prospective basis, **effective 90 days after publication of this Policy Statement in the Federal Register**, for applications submitted on and after that effective date. The guidance herein does not alter existing hold harmless commitments accepted by the Commission nor does it modify hold harmless commitments in applications pending at the time of issuance of this Policy Statement. Finally, we decline EEI's request that the Commission refine and reissue the Proposed Policy Statement to allow for additional feedback. The Policy Statement has incorporated and addressed suggestions by commenters, clarifies the scope and definition of the costs that should be subject to hold harmless commitments, and provides general guidance to be implemented on a case-by-case basis.

## **III. Information Collection Statement**

101. The Paperwork Reduction Act (PRA)<sup>199</sup> requires each federal agency to seek and obtain Office of Management and Budget (OMB) approval before undertaking a collection of information directed to ten or more persons or contained in a rule of general applicability. OMB regulations require approval of certain information collection

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<sup>198</sup> EPSA Comments at 6-7.

<sup>199</sup> 44 U.S.C. 3501-3520.

requirements imposed by agency rules.<sup>200</sup> Upon approval of a collection(s) of information, OMB will assign an OMB control number and an expiration date.

Respondents subject to the filing requirements of an agency rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control numbers. The following table shows the Commission's estimates for the additional burden and cost,<sup>201</sup> as contained in the Policy Statement:

<b>Revisions, in the Policy Statement in Docket No. PL15-3</b>					
<b>Requirements</b>	<b>Number and Type of Respondents (1)</b>	<b>Number of Responses per Respondent (2)</b>	<b>Total Number of Responses (1)*(2)=(3)</b>	<b>Average Burden Hours &amp; Cost Per Response (4)</b>	<b>Total Burden Hours &amp; Total Cost (3)*(4)</b>
FERC-519 (FPA Section 203 Filings) <sup>202</sup>	18	1	18	20 hrs.; \$1,440	360 hrs.; \$25,920
FERC-516 (FPA Section 205, Rate and Tariff Filings)	1	1	1 <sup>203</sup>	103.26 hrs.; \$7,434.72	103.26 hrs.; \$7,434.72

<sup>200</sup> See 5 CFR 1320.

<sup>201</sup> The hourly cost figures are based on data for salary plus benefits. The Commission staff thinks that industry is similarly situated to FERC in terms of the average cost of a full time employee. Therefore, we are using the 2015 FERC hourly average for salary plus benefits of \$72 per hour.

<sup>202</sup> Commission staff estimates that, due to the Policy Statement, 18 of the FPA Section 203 filings will take 20 additional burden hours. The estimated number of filings is not changing.

<sup>203</sup> Commission staff estimates that one FPA section 205 filing may be made annually subject to the Policy Statement.

FERC-555, Record Retention	18	1	18	4 hrs.; \$288	72 hrs.; \$5,184
<b>TOTAL</b>					535.26 hrs.; \$38,538.72

Title: FERC-519, Application under Federal Power Act Section 203; FERC-516, Electric Rate Schedules and Tariff Filings; and FERC-555, Preservation of Records for Public Utilities and Licensees, Natural Gas and Oil Pipeline Companies.

Action: Revised Collections of Information.

OMB Control No: 1902-0082 (FERC-519), 1902-0096 (FERC-516), and 1902-0098 (FERC-555).

Respondents: Business or other for profit, and not for profit institutions.

Frequency of Responses: As needed and ongoing.

Necessity of the Information: To protect ratepayers and to mitigate possible adverse effects on rates that may result from mergers or certain other transactions that are subject to section 203 of the FPA, we propose clarifications and additional information collection requirements related to hold harmless commitments offered by applicants.

Internal review: The Commission has reviewed the changes included in the Policy Statement and has determined that the additional reporting and recordkeeping requirements are necessary.

Interested persons may obtain information on the reporting requirements by contacting:  
Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426  
[Attention: Ellen Brown, Office of the Executive Director, e-mail:  
DataClearance@ferc.gov, Phone: (202) 502-8663, fax: (202) 273-0873].

#### **IV. Document Availability**

102. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, NE, Room 2A, Washington DC 20426.

103. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

104. User assistance is available for eLibrary and the FERC's website during normal business hours from FERC Online Support at (202) 502-6652 (toll free at 1-866-208-3676) or email at [ferconlinesupport@ferc.gov](mailto:ferconlinesupport@ferc.gov), or the Public Reference Room at (202) 502-8371, TTY (202)502-8659. E-mail the Public Reference Room at [public.referenceroom@ferc.gov](mailto:public.referenceroom@ferc.gov).

By the Commission.

Issued: May 19, 2016

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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