UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Modifications to Commission Requirements for Review of Transactions under Section 203 of the Federal Power Act and Market-Based Rate Applications under Section 205 of the Federal Power Act	Docket No. RM16-21-000

COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION AND
TRANSMISSION ACCESS POLICY STUDY GROUP

In its Notice of Inquiry ("NOI"),[1] the Commission seeks comments on whether, and if so, how, it should revise its current approach to identifying and assessing market power in the contexts of transactions subject to section 203 of the Federal Power Act ("FPA") and applications for market-based rate ("MBR") authority under section 205 of the FPA. The American Public Power Association ("APPA") and the Transmission Access Policy Study Group ("TAPS") (collectively "Joint Commenters") appreciate the opportunity to respond to this important NOI. Joint Commenters support the Commission's efforts to periodically reassess its regulatory approach in light of the ever-evolving nature of the energy industry.

The NOI seeks comment on several specific changes to the Commission's approach to market power analysis. Joint Commenters support the NOI's goal of both streamlining section 203 review for those situations unlikely to raise any market power

[1] Federal Energy Regulatory Commission, Modifications to Commission Requirements for Review of Transactions Under Section 203 of the Federal Power Act and Market-Based Rate Applications Under Section 205 of the Federal Power Act, 81 Fed. Reg. 66,649 (Sept. 28, 2016), eLibrary No. 20160922-3064.

concerns and updating elements of its current analysis to improve accuracy and better protect consumers against the exercise of market power and anticompetitive pricing. Joint Commenters also urge the Commission to recognize that no screen will be able to detect all types of market power concerns, and therefore, the Commission should continue to permit and increase its receptivity to intervenors in section 203 proceedings raising market power arguments that go beyond the Competitive Analysis Screen, *see, e.g., Inquiry Concerning the Comm'n's Merger Policy Under the Fed. Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595, 68,600 (Dec. 30, 1996), FERC Stats. & Regs. ¶ 31,044 at 30,119 (1996) ("1996 Merger Policy Statement") ("Intervenors may also file an alternative competitive analysis, accompanied by appropriate data, to support their arguments"), *order on reconsideration*, Order No. 592-A, 79 FERC ¶ 61,321 (1997); *FPA Section 203 Supplemental Policy Statement*, 122 FERC ¶ 61,157, P 7 (2008) ("the Commission's review goes beyond those screens and looks at all relevant factors regarding the effect on competition.").

In response to the specific questions raised in the NOI, Joint Commenters request that the Commission take actions to:

- Continue its current practice of finding that transactions that result in a post-transaction market share of less than three percent are *de minimis,* but recognize that the 2ab test is not a reliable indicator for this purpose;
- Continue to evaluate concerns about serial *de minimis* transactions;
- Consider inclusion of supply curve analysis in section 203 review, and at minimum, fulfill its commitment to consider alternative theories of competitive harm raised by intervenors, particularly supply curve analysis, and facilitate intervenors' ability to access on a timely basis the information needed to conduct supply curve analysis;
- Not add to section 203 analysis either the existing pivotal supplier test used in the MBR context or the alternative pivotal supplier test described

in the NOI, but explore alternative pivotal supplier tests such as those now used in Regional Transmission Organizations;[2]

- Not add a market share test to section 203 analysis;

- Implement in section 203 review the alternative methodologies described in the NOI for accounting for the capacity associated with Power Purchase Agreements ("PPAs"), and more generally consider known or reasonably foreseeable future changes in market conditions;[3]

- Require section 203 applicants to submit internal merger-related documents shared with the Department of Justice ("DOJ") and/or Federal Trade Commission ("FTC") to the Commission and make these documents available to intervenors;

- Allow existing and new blanket authorizations under section 203 only when doing so is consistent with the Commission's statutory obligation to ensure that transactions are consistent with the public interest;

- Create a blanket authorization for section 203(a)(1)(B) transactions valued at $10 million or less, with a notice requirement for transactions between $1 million and $10 million to allow intervenors to raise concerns about particular transactions.

I. INTEREST OF JOINT COMMENTERS

APPA is the national service organization representing the interests of not-for-profit, state, municipal and other locally owned electric utilities in the United States. One in seven electricity customers in the nation is served by public power. More than 2,000 public power utilities, operating in every state but Hawaii, collectively serve more than 48 million persons and account for over 15 percent of all electric energy (kilowatt-hours) sales to ultimate consumers. The primary goal of public power utilities is to provide

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[2] If the Commission adopts an improved pivotal supply test in the MBR context, it could then consider whether it should also use this test in its section 203 analysis.

[3] For example, the Commission should continue to thoroughly review potential new blanket authorizations, as it did when it recently dismissed a proposed rulemaking that would have reduced oversight over transactions in which an investor acquires more than 10 percent, but less than 20 percent, of a public utility. *Control & Affiliation for Purposes of Mkt.-Based Rate Requirements under Section 205 of the Fed. Power Act & the Requirements of Section 203 of the Fed. Power Act*, 157 FERC ¶ 61,064 (2016).

customers in the communities they serve with reliable electric power and energy at the lowest reasonable cost, consistent with good environmental stewardship. This orientation aligns the interests of public power utilities with the long-term interests of the residents and businesses in their communities.

Public power utilities buy substantial quantities of wholesale electricity from Commission-regulated public utilities. These wholesale purchases are made under long-term bilateral power contracts, in spot markets, and in the organized wholesale markets operated by Commission-approved Independent System Operators and Regional Transmission Organizations (collectively "RTOs"). The Commission's regulations aimed at ensuring competitive market structures and competitive market behavior in wholesale electricity markets are of vital concern to the nation's public power utilities and the consumers they serve.

TAPS is an association of transmission-dependent utilities in more than thirty-five states.[4] Because TAPS members rely on transmission facilities owned and controlled by others, TAPS has a vital interest in the proper competitive functioning of wholesale power markets, including the prevention of the exercise of market power in wholesale capacity, energy, and ancillary markets. TAPS members have long been concerned about structural changes in the electric industries that could adversely affect competition, rates or regulation, or could expose consumers to harm from unmitigated market power. TAPS has commented on nearly all major Commission rulemakings, including those pertaining to market-based rates and mergers.

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[4] David Geschwind, Southern Minnesota Municipal Power Agency, chairs the TAPS Board. Jane Cirrincione, Northern California Power Agency, is TAPS Vice Chair. John Twitty is TAPS Executive Director.

II. COMMUNICATIONS

Communications regarding these proceedings should be directed to:

Delia D. Patterson, General Counsel and
VP, Regulatory Affairs
Randolph Elliot, Senior Regulatory Counsel
AMERICAN PUBLIC POWER ASSOCIATION
2451 Crystal Drive, Suite 1000
Arlington, VA 22202
Tel:
(202) 467-2993
(202) 467-2952
Email:
dpatterson@publicpower.org
relliott@publicpower.org

Cynthia S. Bogorad
Peter J. Hopkins
Jeffrey M. Bayne
SPIEGEL & MCDIARMID LLP
1875 Eye Street, N.W.
Suite 700
Washington, D.C. 20006
Tel: (202) 879-4000
Email:
cynthia.bogorad@spiegelmcd.com
peter.hopkins@spiegelmcd.com
jeffrey.bayne@spiegelmcd.com

John Twitty
Executive Director
TRANSMISSION ACCESS POLICY STUDY GROUP
P.O. Box 14364
Springfield, MO 65814
Tel: (417) 838-8576
Email: 835consulting@gmail.com

III. COMMENTS

A. Simplified *De Minimis* Analysis

The NOI seeks comment on whether, and if so, how, to define the term "*de minimis*" as used in reviewing section 203 applications. NOI, P 13. The Commission's regulations require section 203 applicants to file a Competitive Analysis Screen unless the applicant "[a]ffirmatively demonstrates that the merging entities do not currently conduct business in the same geographic markets or that the extent of the business transactions in the same geographic markets is *de minimis*"[5] and "[n]o intervenor has alleged that one of the merging entities is a perceived potential competitor in the same

[5] 18 C.F.R. § 33.3(a)(2)(i).

geographic market as the other."[6] As explained in the NOI, the Commission has neither defined *de minimis* nor identified a threshold that it would consider sufficient to meet the requirement of 18 C.F.R. § 33.3(a)(2)(i). NOI, P 15.

The Commission's existing practice is to find that transactions are *de minimis* when they result in a post-market share below three percent.[7] Transactions that result in a post-market share of less than three percent are sufficiently small as to not raise significant market power concerns. This threshold is significantly lower than the 20 percent threshold used in the market share screen used in the MBR context to detect market power issues. NOI, P 8.

As the NOI explains, some applicants have used the 2ab analysis[8] to demonstrate that a transaction is *de minimis* and thus does not require a delivered price test. NOI, P 15. While the 2ab analysis may be an appropriate means of determining whether the

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[6] 18 C.F.R. § 33.3(a)(2)(ii).

[7] *See, e.g.*, *Alcoa Power Generating Inc.*, 156 FERC ¶ 62,237 (2016) (approving a proposed transaction where applicants stated that the post-transaction did not raise horizontal market power concerns because the combined market share would be less than 1 percent and 1.6 percent in the relevant markets); *RA Generation, LLC*, 156 FERC ¶ 62,023 (2016) (approving a proposed transaction where applicants stated that the post-transaction did not raise horizontal market power concerns because the combined market share would be 2.8 percent in the relevant market); FERC Office of Energy Market Regulation, Letter 4 (Jan. 16, 2015), eLibrary No. 20150116-3046 (noting that "[t]he applications also do not adequately demonstrate that a 6.5% market share is *de minimis*."); *PPL Corp.*, 149 FERC ¶ 61,260, P 82 n.81 (2014) ("Since post-transaction Applicants' combined market share will be less than 1 percent in ISO-NE, we agree with Applicants that the extent of Applicants' business transactions involving ISO-NE is *de minimis* and no competitive analysis is required for that market."); *Seneca Generation, LLC*, 145 FERC ¶ 61,098, P 14 (2013) (finding that "[a]pplicants have demonstrated that the Proposed Transaction will have a *de minimis* impact on the amount of generation held by" the purchaser where the post-transaction market share is about 2.1 percent).

[8] As the Commission has previously explained, 2ab analysis is an algebraic formula derived from the Herfindahl-Hirschman Index ("HHI") used to calculate changes in market concentration. *Dynegy Inc.*, 150 FERC ¶ 61,231, P 25 n.34 (2015) (citing *Horizontal Merger Guidelines*, 57 Fed. Reg. 41,552, 41,558 n.18 (Apr. 2, 1992)). Since the HHI is calculated based on the sum of the squares of market participants' market shares, the change in market concentration can be determined from the following formula, where "a" represents one of the merging entities and "b" represents the market share of the other merging entity: $(a + b)^2 - (a^2 + b^2) = a^2 + 2ab + b^2 - a^2 - b^2 = 2ab$. *Dynegy, Inc.*, 150 FERC ¶ 61,231, P 25 n.34.

"extent of the business transactions in the same geographic markets is *de minimis*"[9] in certain circumstances, it is inappropriate as a generic *de minimis* test.[10] In particular, in a highly concentrated market, the 2ab analysis does not show whether a transaction is *de minimis*; in fact, it may fail to detect transactions that raise significant competitive concerns.

The Commission analyzes market concentration using the HHI thresholds from the DOJ/FTC 1992 Horizontal Merger Guidelines. NOI, P 3. For a highly concentrated post-merger market (a market with an HHI that exceeds 1,800), a change in HHI that exceeds 50 points potentially raises significant competitive concerns. *Id.* P 3 n.9.[11] Thus, in highly concentrated markets both the 2ab analysis and the delivered price test in the Competitive Analysis Screen use a 50 point threshold, and it is inappropriate to use 2ab analysis to determine whether a transaction is *de minimis* using the same threshold used to determine whether transactions raise *significant* competitive concerns. In addition, as the NOI notes (NOI, P 15), a 2ab analysis often uses installed capacity as the product market rather than economic capacity and available economic capacity, which the Commission requires in its Section 203 HHI analysis. As a result, in a highly concentrated market, a 2ab analysis using installed capacity that shows close to a 50 point

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[9] 18 C.F.R. § 33.3(a)(2)(i).

[10] The Commission has recognized this fact, and in some circumstances ordered applicants to conduct delivered price tests even where 2ab analysis shows an HHI increase of less than 50 points. *See* Fed. Energy Regulatory Comm'n, Request for Additional Information 3-4 (Jan. 16, 2015), Docket Nos. EC14-140-000 and EC14-141-000, eLibrary No. 20150116-3046 (stating that Applicant's 2ab analysis, which showed an HHI increase of 21 points based on installed capacity, "does not adequately address whether the Proposed Transactions raise any horizontal market power issues in PJM.").

[11] A moderately concentrated market (a market with an HHI range from 1,000 to 1,800) requires an increase of 100 points for a merger to potentially raise significant competitive concerns, and no change in HHI is likely to raise adverse competitive effects in unconcentrated post-merger markets (markets with an HHI under 1,000). NOI, P 3 n.9.

increase might mask a significant competitive concern that would be revealed by performing the HHI test with economic and available economic capacity.

The purpose of the *de minimis* exception to the Competitive Analysis Screen is to allow for simplified analysis of competitive impacts where the Commission can be confident that a transaction is unlikely to raise competitive harms. The Commission's current practice of using a three percent post-transaction market share threshold serves this purpose. However, 2ab analysis does not consistently serve this purpose, and thus is not an appropriate generic *de minimis* test.

B. Serial *De Minimis* Mergers

The NOI seeks comment on whether the Commission should incorporate consideration of incremental acquisitions in its competition analysis and its analysis of whether a proposed section 203 transaction is *de minimis*. NOI, P 19. Joint Commenters share the Commission's concern with the possibility that an acquirer could evade the Commission's Competitive Analysis Screen by engaging in a series of transactions that individually can be considered *de minimis*, but, taken together, warrant more in-depth examination. We encourage the Commission to continue to examine this issue and the ways in which serial transactions could be addressed under the FPA.

C. Supply Curve Analysis

The NOI "seeks comment on whether the existing section 203 horizontal market power analysis could be strengthened by incorporating a supply curve analysis." NOI, P 20. As the NOI explains, supply curve analysis "assess[es] whether a merged company has the ability and incentive to exercise market power by withholding output from marginal units (i.e., ability units) to raise prices in order to benefit its baseload units (i.e.,

incentive units) and increase its total profits." *Id.* P 20 (footnote omitted). As the Commission notes, a supply curve analysis differs significantly from the delivered price test because:

> the delivered price test examines aggregate MW of capacity in the relevant geographic area(s), not the structure of capacity (i.e., not the number of units in the baseload, intermediate, and peaking segments by ownership). A supply curve analysis can be used to calculate the responsiveness of prices to a reduction in supply for the market price calculated for each season/load, and establish a threshold that indicates the market may be subject to price movement through unilateral action.

Id. The NOI states that "a supply curve analysis is not explicitly required by the Commission's regulations although it can be submitted by some applicants as alternative evidence" for applicants with screen failures. *Id.* P 21 (citing Order No. 642).

While the NOI does not mention intervenor supply curve analyses, the Commission has stated that it will consider "theories of competitive harm raised by intervenors, even if an applicant passes the Competitive Analysis Screen." *Analysis of Horizontal Mkt. Power under the Fed. Power Act*, 138 FERC ¶ 61,109, P 36 (2012) (citing *FPA Section 203 Supplemental Policy Statement*, 72 Fed. Reg. 42,277, 42,286 & 42,287 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253, PP 60, 65 (2007). *See also* 1996 Merger Policy Statement at 30,119 (same). Nevertheless, the Commission has dismissed efforts by intervenors to use supply curve analysis to show market power concerns that screens fail to detect.[12] Because supply-curve analysis does address "the structure of

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[12] *See, e.g.*, *Westar Energy, Inc.* 115 FERC ¶ 61,228, P 77 (2006), *on reh'g*, 117 FERC ¶ 61,011 (2006), *on reh'g* 118 FERC ¶ 61,237 (2007) ("We are not convinced by [intervenor's] argument that a strategic bidding analysis should be considered in assessing of [sic] the effect of the acquisition on competition. As we stated in *Exelon*, the Commission's analysis focuses on a merger's effect on competitive conditions in the market.") (citing *Exelon Corp.*, 112 FERC ¶ 61,011 (2005), *reh'g denied*, 113 FERC 61,299, P 131

capacity" that would result from a proposed merger and can forecast potential market harm from "price movement through unilateral action" (NOI, P 20), the Commission should consider including supply curve analysis in its section 203 review. At minimum, the Commission should be receptive to supply curve analysis provided by intervenors and, to further that end, provide intervenors with prompt access to the data necessary to conduct supply curve analysis.[13]

In comments in previous rulemaking proceedings, TAPS has explained the ways in which HHI analysis does not always detect competitive harms associated with an applicant's ownership of strategic assets on a market's supply curve, where a relatively small market share can translate into meaningful market power.[14] The DOJ and FTC have similarly recognized this problem in their 2010 Horizontal Merger Guidelines, stating that a relevant area of inquiry is "evaluat[ing] whether the merged firm will find it profitable unilaterally to suppress output and elevate the market price."[15] The 2010 Horizontal Merger Guidelines note that a unilateral output suppression strategy is more likely to be profitable when, among other things "the margin on the suppressed output is

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(2005), *vacated as moot sub nom. PPL Elec. Utils. Corp. v. FERC*, 2006 U.S. App. LEXIS 31478 (D.C. Cir. Dec. 21, 2006)).

[13] Similarly, the Commission should be open to considering intervenors' alternate theories of the relevant geographic market for section 203 and MBR applications. While the default relevant geographic market is the balancing authority area or RTO market (or submarket, if known or appropriate), a different relevant geographic market may provide the Commission with a more accurate understanding of market realities when there are transmission constraints or other unique circumstances. *Compare Fla. Power & Light Co.*, 156 FERC ¶ 61,246, P 7 (2016) (discounting evidence presented by intervenors regarding the relevant geographic market).

[14] *See* Transmission Access Policy Study Grp., Comments 18-21 (May 23, 2011), Docket No. RM11-14-000, eLibrary No. 20110523-5074; Transmission Access Policy Study Grp., Comments 25-30 (May 7, 1996), Docket No. RM96-6-000, eLibrary No. 19960509-0242.

[15] U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 6.3, at 22 (Aug, 19, 2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf ("2010 Horizontal Merger Guidelines").

relatively low," "the supply responses of rivals are relatively small," and "the market elasticity of demand is relatively low."[16] All of these factors may be present in a proposed section 203 merger.

Supply curve analysis is especially valuable to the Commission's section 203 analysis of transactions occurring in RTOs. These markets are sufficiently large that relatively large transactions may not raise market power concerns under the Competitive Analysis Screen. However, this does not mean that the section 203 transaction does not increase exposure to the exercise of market power in RTOs.

For instance, the Commission is currently investigating allegations of market manipulation in the context of the MISO 2015/16 Planning Resource Auction ("PRA"). *Investigation into MISO Zone 4 Planning Res. Auction Mkt. Participant Offers*, 153 FERC ¶ 61,005 (2015). In 2013, the Commission approved a section 203 transaction in which Dynegy Inc., though a special purpose vehicle, acquired certain jurisdictional facilities of Ameren Corporation ("Ameren"). *Ameren Energy Generating Co.*, 145 FERC ¶ 61,034 (2013). These transactions involved five coal-fired generation resources, all but one of which are located in MISO Zone 4.[17] The Commission found that the

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[16] *Id*. § 6.3, at 23.

[17] Dynegy acquired the following jurisdictional facilities from Ameren:

> Duck Creek (410 MW), Coffeen (895 MW), E.D. Edwards (650 MW), Newton (1,197 MW), and Joppa (1,241 MW). With the exception of Joppa, these resources were located in Zone 4. However, if cleared, Joppa's capacity counts toward satisfying the Zone 4 Local Clearing Requirement. In the Section 203 Application, Ameren Companies and Dynegy represented that the transaction would increase Dynegy's capacity ownership in MISO by 3,152 MW, from 2,954 MW to 6,106 MW.

Pub. Citizen, Inc. v. MISO, 153 FERC ¶ 61,385, P 9 (2015) (footnotes omitted), *reh'g denied*, 154 FERC ¶ 61,224 (2016).

proposed transaction would not exceed the HHI thresholds in the Competitive Analysis Screen and that the MISO market "remains unconcentrated under each scenario and sensitivity submitted by Applicants," and thus concluded that the transaction "will not create horizontal market power concerns." *Ameren Energy Generation Co.*, 145 FERC ¶ 61,034, P 54. Nevertheless, in the MISO 2015/16 PRA, the clearing price in Zone 4 increased from $16.76/MW-day to $150.00/MW-day. *Pub. Citizen, Inc. v. MISO*, 153 FERC ¶ 61,385, P 7 (2015), *reh'g denied*, 154 FERC ¶ 61,224 (2016). No other Zone experienced such a dramatic increase in clearing price. An investigation into allegations of market manipulation, specifically capacity withholding,[18] is still ongoing. *Investigation into MISO Zone 4 Planning Res. Auction Mkt. Participant Offers*, 153 FERC ¶ 61,005 (2015). A supply curve analysis may have detected potential competitive harm associated with the capacity structure at issue in *Ameren Energy Generating Co.* and led to consideration of appropriate mitigation.

This case illustrates not only the potential value of supply curve analysis in detecting potential market power concerns as part of the Commission's section 203 review, but it also highlights the need for the Commission to make available to intervenors the data necessary to conduct supply curve analyses. In approving the 2013 Dynegy/Ameren transaction, the Commission noted that although "it will consider other evidence of anticompetitive effects beyond HHI," it was the case that "intervenors have not provided alternative evidence for the Commission to consider." *Ameren Energy*

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[18] *Pub. Citizen, Inc. v. MISO*, 153 FERC ¶ 61,385, P 10 (2015) ("Public Citizen alleges that the 'highly excessive, unjust, unreasonable and unduly discriminatory rate increases' for Zone 4 may be the result of illegal manipulation and gaming of the auction bidding process, specifically capacity withholding.") (quoting Public Citizen Complaint at 1), *reh'g denied*, 154 FERC ¶ 61,224 (2016).

Generation Co., 145 FERC ¶ 61,034, P 58. In addition to the Commission's mixed signals on this point,[19] intervenors currently face practical obstacles in obtaining the requisite data necessary for them to provide supply curve analyses in section 203 proceedings. Intervenors lack a timely and available process by which they can obtain the information they need to conduct supply curve analysis within the sixty-day comment period on section 203 proceedings.[20] The Commission should, at minimum, (i) recognize the importance of supply curve analysis, particularly in RTOs, for certain market power concerns not identified by the Competitive Analysis Screen; (ii) make good on its commitment to consider theories of competitive harm raised by intervenors, including supply curve analysis; and (iii) facilitate intervenors' ability to conduct supply curve analysis by providing an expedited process for intervenors to obtain promptly the requisite data.[21] These actions will better enable the Commission to detect market power concerns associated with the particular structure of the capacity at issue that cannot be detected through HHI analysis.

D. Pivotal Supplier Analysis

The Commission seeks comment on its current use of the pivotal supplier test in the MBR context and whether the Commission's section 203 analysis would benefit from the addition of a pivotal supplier test. NOI, P 22. As the NOI explains, "in practice,

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[19] *See infra* discussing *Westar Energy, Inc.*, 115 FERC ¶ 61,228, P 77.

[20] *Revised Filing Requirements Under Part 33 of the Comm'n's Regulations*, Order No. 642, 65 Fed. Reg. 70,983, 70,988 (Nov. 28, 2000), FERC Stats. & Regs. ¶ 31,111, at 31,878 (2000) ("[W]e revise our policy on noticing Section 203 filings to provide that any such filings containing either a competitive analysis screen or a vertical competitive analysis will generally be noticed for 60 days, while all other filings (including mergers not requiring a competitive analysis screen or a vertical competitive analysis) will generally be noticed for less than 60 days."), *order on reh'g* Order No. 642-A, 94 FERC ¶ 61,289 (2001).

[21] This could entail the provision of data from the RTO or market monitor as well as from the Applicant(s).

market-based rate sellers rarely fail the pivotal supplier screen," and it therefore requests comment on whether the Commission should consider "replacing the current wholesale load proxy with the study area's annual peak load." *Id.* P 24.

Joint Commenters agree that the current pivotal supplier test used in the MBR context is largely ineffective and results in too many false negatives. However, replacing the current wholesale load proxy with the study area's annual peak load will likely have the opposite problem of too many false positives; it will fail too many applicants who cannot unilaterally create a shortage of supply. As a result, adding a pivotal supplier test—either as currently used in the MBR context or using the study area's annual load—will not be a beneficial addition to the delivered price test used in section 203 analysis.

To improve the pivotal supply test, the Commission should explore tests used by RTOs. For example, PJM uses a Three Pivotal Supplier Test, which looks at "when there are three or fewer generation suppliers available for redispatch that are jointly pivotal with respect to a transmission limit." *PJM Interconnection, L.L.C.*, 154 FERC ¶ 61,151, P 3 n.5 (2016), *reh'g denied*, 155 FERC ¶ 61,281 (2016). The California ISO uses a residual supply index, in addition to a pivotal supplier test, to assess structural competitiveness of markets.[22] The residual supply index is the ratio of supply from non-pivotal suppliers to demand, and a residual supply index less than 1.0 indicates an uncompetitive level of supply.[23] The Commission should explore whether the pivotal supply test it uses in the MBR context could be modified based on these, or other market

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[22] California ISO, Department of Market Monitoring, *2015 Annual Report on Market Issues & Performance*, § 7.1 (May 2016), http://www.caiso.com/Documents/2015AnnualReportonMarketIssuesandPerformance.pdf.

[23] *Id.*

power, tests used in RTOs. If the Commission adopted a more robust pivotal supply test in the MBR context, it may be appropriate to also consider its inclusion for purposes of section 203 analysis.

E. Market Share Analysis

The NOI seeks comment on whether the Commission's section 203 analysis could benefit from the inclusion of market share analysis. NOI, P 28. The Commission applies a 20 percent market share threshold in determining whether an application for MBR authority raises market power concerns (*Id.* P 29); however, market share analysis is not included in the Commission's current section 203 review, which "focuses largely on concentration of the market and not an examination of market share changes or accumulation of market share over time." *Id.* P 28. While the 20 percent market share threshold used in the MBR context may be reasonable for MBR purposes,[24] it is weaker than the analysis already required in the merger context. Therefore, the inclusion of a 20 percent market share test would not benefit the Commission's section 203 review.

The Commission's section 203 analysis includes the HHI thresholds set forth in the 1992 DOJ/FTC Horizontal Merger Guidelines. *Id.* P 3. Based on these thresholds, an HHI of 1,800 is deemed highly concentrated. *Id.* P 3 n.9. In a market with six firms, five of which each had market shares of 19 percent (just below the 20 percent market share threshold used in the MBR context) and the sixth had a market share of 5 percent, the HHI would be 1,830. None of the six firms in such a market would fail a market share threshold of 20 percent, even though this market is considered highly concentrated.

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[24] The Commission should consider requiring the use of the delivered price test of all applicants in the MBR context. As discussed below, the delivered price test is a more robust and thorough analysis of potential market power concerns.

Including a market share analysis in the context of section 203 could give the false impression of a lack of market power concerns when a transaction fails to reach a market share of 20 percent. As discussed above, many transactions will fall below the 20 percent market share threshold yet still fail other tests used in the Commission's section 203 review. Because that market share analysis will not improve the Commission's efforts in detecting market power concerns in the merger context, and could incorrectly suggest a lack of transactional market power issues, the Commission should continue its current practice of using the market share test in only the MBR context.

F. Capacity Associated with Power Purchase Agreements

The NOI requests comment on whether the Commission should alter the way it accounts for capacity associated with long-term firm PPAs in its section 203 analysis. NOI, P 31. Under the Commission's current approach, the capacity associated with the PPA is generally attributed to the purchasing utility's pre-section 203 transaction market share. *Id.* The Commission is correct to be concerned with this current approach. In general, section 203 review should consider known or reasonably foreseeable future changes in market conditions, including planned generation investments, retirements, changes in load, as well as the termination of PPAs. The Commission's current approach to capacity associated with PPAs provides only a one-time snapshot of the relevant market at the time the section 203 filing is made and ignores post-PPA market conditions. *See* Order No. 642, 65 Fed. Reg. at 70,993, FERC Stats. & Regs. at 31,887 ("merger analysis should be as forward-looking as practicable"). Implementing the NOI's

alternative methodologies described in the NOI will enable the Commission to more accurately account for capacity associated with PPAs.[25]

The Commission should attribute a facility's capacity to the facility owner (rather than the purchaser) under the three specific circumstances identified in the NOI:

> (1) if the term of the PPA began one year or less prior to the filing of the section 203 application; (2) if the PPA expires prior to the end of the study period used in the applicant's delivered price test analysis; or (3) if the facility is external to the purchaser's [balancing authority area ("BAA")] but does not have firm transmission service to the purchaser's BAA.

NOI, P 32 (footnote omitted). The first circumstance addresses the possibility that the PPA represents a strategic decision made in anticipation of the section 203 application, and it would be inappropriate to attribute such capacity to the purchaser in such a scenario. In the second circumstance, the facility must be considered as part of the owner's portfolio for the analysis to be forward-looking, and in the third circumstance there are obvious barriers to the purchaser's use of the facility, making such attribution inappropriate.

In addition, the Commission should require a section 203 applicant seeking approval for the purchase, or acquisition through a merger, of a generating facility from which it already purchases the output under a long-term firm PPA, "to provide a delivered price test analysis showing the HHI impacts under two different scenarios: (1) with the capacity attributed solely to the current facility owner; and (2) with the capacity attributed solely to the applicant proposing to acquire the facility." *Id.* P 32. This

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[25] While the NOI presents these as two alternative methodologies (NOI, P 32), they are not mutually exclusive. By employing both methodologies described in the NOI, the Commission can obtain a fuller understanding of the relevant market than it could by using either alternative methodology on its own.

will provide the Commission with information about the market both at the time of the section 203 application and after the term of the PPA expires, which will allow the Commission to more fully consider the competitive impacts of the section 203 transaction.

These new approaches to accounting for capacity associated with PPAs are steps in the right direction toward assessing market power in the context of known or reasonably foreseeable future changes, rather than at a single moment in time, and will improve the accuracy of the Commission's section 203 analysis. In addition, we urge the Commission to be receptive to additional evidence of other reasonably foreseeable changes to assure that section 203 review is realistic and forward-looking.

G. Applicant Merger-Related Documents

The NOI seeks comment on whether the Commission should require applicants to submit consultant reports and other internal reports that assess the competitive effects of the merger that they separately submit to DOJ and FTC for transactions that require a full Competitive Analysis Screen. NOI, P 33. Joint Commenters support the requirement that applicants, for non-*de minimis* transactions, submit these merger-related documents to the Commission.[26] These materials may include internal "intent documents" that "disclose the purpose or intent of the acquiring or acquired firm in effecting a merger." 4A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 964a (4th ed. 2016). Such documents may "predict[] that the merger will produce an adverse price or non-price effect on

[26] The Commission already communicates with the DOJ and FTC regarding mergers. *See Great Plains Energy Inc.*, 156 FERC ¶ 61,224 (2016) (providing notice of proposed communication with the DOJ regarding a section 203 application). Including merger-related documents in the Commission's section 203 review will further facilitate coordination and cooperation among federal agencies.

competition."[27] *See, e.g.*, *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 717 (D.C. Cir. 2001) ("Heinz's own documents recognize the wholesale competition and anticipate that the merger will end it."), *rev'g* 116 F. Supp. 2d 190 (D.D.C. 2000).

A requirement that the applicant's merger-related documents be provided in section 203 proceedings creates little burden because the applicant is otherwise required to produce these materials to DOJ or FTC. Access to internal merger-related documents would afford the Commission unique insights into applicants' understanding of market and competition considerations incident to the proposed merger and enable the Commission to better detect case-specific market power concerns that may not be detected by the screens.[28]

These merger-related documents should be made accessible to intervenors in section 203 proceedings to facilitate intervenors' development of alternative theories of competitive harm.[29] In order for intervenors to have a meaningful ability to raise issues outside of the Competitive Analysis Screen, they must have access to relevant information. To the extent that the Commission relies on any of these merger-related documents, they must be included in the record. *See N. States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994) ("the Commission must be able to demonstrate that it has

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[27] Fed. Trade Comm'n, *Horizontal Merger Investigation Data, Fiscal Years 1996–2005* at 5 n.18 (Jan. 25,2007) https://www.ftc.gov/sites/default/files/documents/reports/horizontal-merger-investigation-data-fiscal-years-1996-2005/p035603horizmergerinvestigationdata1996-2005.pdf.

[28] *See* Fed. Trade Comm'n, *In re Evanston Nw. Healthcare Corp.*, FTC Docket No. 9315, *Opinion of the Commission* 66 (Aug. 6, 2007), https://www.ftc.gov/sites/default/files/documents/cases/2007/08/070806opinion.pdf (noting that the "documents [at issue were] probative not because they reflect the *desire* of [the parties' CEOs] . . . but because they contain the informed analysis of experienced executives about when, why, and how the transaction would enable the merged hospitals to increase prices").

[29] *See FPA Section 203 Supplemental Policy Statement*, 72 Fed. Reg. 42,277, 42,287 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253, P 65 (2007) ("Moreover, even where an applicant passes the HHI screen, the Commission also considers intervenor theories of competitive harm.").

'made a reasoned decision based upon substantial evidence in the record.'") (quoting *Town of Norwood v. FERC*, 962 F.2d 20, 22 (D.C. Cir. 1992). FTC and DOJ have found ways to address the merging parties' confidentiality concerns while using these materials in public proceedings.[30] The Commission can also develop appropriate tools to address legitimate concerns regarding commercially sensitive matters in these merger-related documents for the purposes of section 203 proceedings.

H. Blanket Authorizations

The Commission's regulations provide for blanket authorizations for several types of transactions that are jurisdictional under section 203. NOI, PP 35-36. The NOI seeks comment on whether there are existing blanket authorizations that are no longer appropriate and whether there are classes of transactions that warrant new blanket authorization. Joint Commenters support the Commission's interest in periodically reviewing the appropriateness of its blanket authorizations in light of industry changes.

To fulfill its FPA obligation to determine whether a proposed merger is consistent with public interest,[31] the Commission must thoroughly examine whether it is appropriate to remove the protections of the Commission's section 203 review and approval when it considers issuing additional blanket authorizations. For example, the Commission

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[30] FTC merger investigations are generally non-public. However, FTC administrative proceedings are public proceedings. *See* 16 C.F.R. § 3.41(a) ("All hearings in adjudicative proceedings shall be public unless an *in camera* order is entered by the Administrative Law Judge pursuant to §3.45(b) of this chapter or unless otherwise ordered by the [Federal Trade] Commission."). Similarly, when the FTC seeks merger-related preliminary injunctions in federal court, these are also public proceedings. *See FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1070 (D.D.C. 1997) ("FTC may seek a preliminary injunction to prevent a merger pending the Commission's administrative adjudication of the merger's legality.") (citing 15 U.S.C. § 53(b)). The same is also true when DOJ files a complaint in district court to enjoin a proposed merger under the Clayton Act.

[31] 16 U.S.C. § 824b(a)(4).

recently withdrew a Notice of Proposed Rulemaking that would have established a new blanket authorization:

> for acquisitions of 10 percent or more, but less than 20 percent of the outstanding voting securities of a public utility or holding company, where the acquiring company files a statement certifying that such securities were not acquired and not held for the purpose or with the effect of changing or influencing the control of the public utility and such acquiring company complies with certain conditions designed to limit its ability to exercise control ([i.e.,] Affirmation).

Control & Affiliation for Purposes of Mkt.-Based Rate Requirements under Section 205 of the Fed. Power Act & the Requirements of Section 203 of the Fed. Power Act, 157 FERC ¶ 61,064, P 5 (2016) *withdrawn*, 81 Fed. Reg. 78,756 (Nov. 9, 2016), FERC Stats. & Regs. ¶ 35,058 (2016). Joint Commenters agree with the Commission's decision to decline to establish this blanket authorization, and request that it take a similarly thorough approach to evaluating new blanket authorizations, as well as the continued appropriateness of existing ones. As the NOI suggests (P 37), given changes in the industry, the blanket authorization for holding companies that only hold exempt wholesale generators merits reassessment.

I. Transactions Subject to Only Section 203(a)(1)(B)

In addition to the general request for comments about blanket authorizations, the NOI seeks comments on whether there are categories of proposed transactions that are jurisdictional only under section 203(a)(1)(B) that may warrant reduced scrutiny by the Commission. NOI, P 40. Section 203(a)(1)(B) requires Commission approval before a public utility can "merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever." 16 U.S.C.

§ 824b(a)(1)(B). Unlike the transactions requiring Commission jurisdiction under sections 203(a)(1)(A), (C), and (D), section 203(a)(1)(B) does not require that the transaction have a value in "excess of $10,000,000." 16 U.S.C. § 824b(a)(1). Joint Commenters support requiring abbreviated filings for transactions under section 203(a)(1)(B) that have a value not in excess of $10 million.

In general, transactions valued at $10 million or less are likely to have minimal, if any, impact on market power. A requirement for public notice of transactions valued between $1 million and $10 million will allow intervenors to raise, and the Commission to consider, concerns about any unusual circumstances present, such as serial transactions valued just under $10 million, or transactions within load pockets or involving essential facilities that could give rise to market power concerns.[32] Transactions valued at under $1 million are sufficiently insignificant to not warrant filing requirements. A blanket authorization for transactions under section 203(a)(1)(B) for transactions not valued in excess of $10 million, with notice requirements for transactions between $1 million and $10 million to enable intervenors to raise concerns about particular transactions, will both reduce burdens on section 203 applicants and allow the Commission fulfill its obligation to ensure that transitions are consistent with the public interest.

[32] Such a notice requirement is consistent with the plain language of the statute, which does not exempt from Commission jurisdiction transactions valued at $10 million or less (unlike sections 203(a)(1)(A), (C), and (D)).

CONCLUSION

The Commission should consider these comments as it further assesses its approach to market power analysis under sections 203 and 205 of the FPA.

Respectfully submitted,

American Public Power Association

Delia D. Patterson
General Counsel and VP, Regulatory Affairs
Randolph Elliott
Senior Regulatory Counsel
American Public Power Association
2451 Crystal Drive, Suite 1000
Arlington, VA 22202
202-467-2900
dpatterson@publicpower.org
relliott@publicpower.org

Counsel for the
American Public Power Association

Transmission Access Policy Study Group

/s/ *Cynthia S. Bogorad*
Cynthia S. Bogorad
Peter J. Hopkins
Jeffrey M. Bayne
Spiegel & McDiarmid LLP
1875 Eye Street, NW, Suite 700
Washington, DC 20005
202-879-4000

Counsel for the
Transmission Access Policy Study Group

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