UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Policy Statement on Hold Harmless Commitments	Docket No. PL15-3-000

COMMENTS OF THE
TRANSMISSION ACCESS POLICY STUDY GROUP

The Transmission Access Policy Study Group ("TAPS") submits the following comments in response to the January 22, 2015 Proposed Policy Statement in the above-captioned proceeding.[1] TAPS supports the Commission's proposed guidance and strengthening of hold-harmless provisions intended to protect ratepayers from the adverse impacts of Federal Power Act ("FPA") section 203 transactions. TAPS focuses its comments principally on the Proposed Policy Statement discussion of "Transactions Without Adverse Effects on Rates" (PP 38-42) and seeks clarification that the Commission is not proposing to find that certain types of FPA section 203 transactions conclusively or presumptively do not have an adverse effect on rates. Such a finding would constitute an unsupported and fundamental departure from the Commission's practice of assessing each transaction on a case-by-case basis to determine whether it is consistent with the public interest as section 203 requires.

- TAPS supports the Proposed Policy Statement's (PP 21-27) proposed clarification of what constitutes transaction costs.
- TAPS supports the Proposed Policy Statement's (PP 30-32) proposed clarification of the internal measures necessary to track identification, accounting, and rate treatment of transaction costs for purposes of implementing hold harmless mechanisms.

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[1] Policy Statement on Hold Harmless Commitments, 150 FERC ¶ 61,031 (Jan. 22, 2015) ("Proposed Policy Statement"), *available at* http://www.ferc.gov/whats-new/comm-meet/2015/012215/E-4.pdf.

- TAPS supports the Proposed Policy Statement's (P 34) proposal "that there be no time limit on hold harmless commitments."

- TAPS seeks clarification that the Commission is not proposing to find that certain kinds of section 203 transactions (i.e., to meet state resource adequacy requirements at the state level, to improve system reliability and/or meet other regulatory requirements) conclusively or presumptively have no adverse effect on rates. Proposed Policy Statement, P 11; PP 38-42. Such a finding is unsupported, an unwinding of necessary ratepayer protections and would depart fundamentally from the Commission's recognition that each section 203 transaction is unique and must be assessed on a case-by-case basis. The Commission should clarify that all section 203 applicants have the burden of showing that the transaction will not have an adverse effect on rates based on a case-specific analysis of the record evidence, and that there is no presumptive or conclusive rule that certain kinds of transactions have no adverse effect on rates.

INTEREST OF TAPS

TAPS is an association of transmission-dependent utilities in more than 35 states, promoting open and non-discriminatory transmission access.[2] TAPS members have 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 industry that could adversely affect competition, rates or regulation, or could expose customers to harm from unmitigated market power. TAPS has commented on nearly all major Commission rulemakings, including those pertaining to transactions subject to section 203 of the Federal Power Act. TAPS commented on the Merger Policy Statement that serves as the current underpinning of the Commission's regimen of ratepayer protection in section 203 proceedings.[3]

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[2] Duncan Kincheloe, Missouri Joint Municipal Electric Utility Commission, chairs the TAPS Board. Jane Cirrincione, Northern California Power Agency, is the TAPS Vice Chair. John Twitty is the TAPS Executive Director.

[3] Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, Order No. 592, 61 Fed. Reg. 68,595, 68,596, 68,612 (Dec. 30, 1996), FERC Stats. & Regs. ¶ 31,044, at

Communications regarding these proceedings should be directed to:

John Twitty
Executive Director
TRANSMISSION ACCESS POLICY STUDY GROUP
4203 E. Woodland
Springfield, MO 65809
Tel.: (417) 838-8576
E-mail: 835consulting@gmail.com

Cynthia S. Bogorad
Peter J. Hopkins
SPIEGEL & MCDIARMID LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
Tel.: (202) 879-4000
Fax: (202) 393-2866
E-mail: cynthia.bogorad@spiegelmcd.com
peter.hopkins@spiegelmcd.com

COMMENTS

I. TAPS SUPPORTS THE COMMISSION'S PROPOSED CLARIFICATION AND GUIDANCE CONCERNING HOLD HARMLESS COMMITMENTS

TAPS supports the Proposed Policy Statement's clarification: (i) of what constitutes transaction costs (PP 21-27); and (ii) of internal measures necessary to track identification, accounting and rate treatment of transaction costs for purposes of implementing hold harmless mechanisms (PP 30-32); and proposed determination (iii) that hold harmless commitments cannot be time limited (PP 34-36). The Proposed Policy Statement's identification of transactions costs is in the interest of efficiency, beneficial to all stakeholders and based upon the Commission's substantial expertise and body of precedent concerning FPA section 203 transactions. TAPS strongly supports the Commission's reaffirmation "to preclude recovery of acquisition premiums as part of transaction-related costs, and . . . that a showing of 'specific, measurable, and substantial benefits to ratepayers' must be made in a subsequent FPA section 205 proceeding in

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30,111, App. C (1996) ("Merger Policy Statement"), *on reconsideration*, Order No. 592-A, 79 FERC ¶ 61,321 (1997).

order to recover an acquisition premium." Proposed Policy Statement, P 27 (quoting *Duke Energy Progress, Inc.*, 149 FERC ¶ 61,220, PP 67-68 (2014)).

The requirement to implement internal controls and tracking mechanisms necessary to ensure compliance with hold harmless commitments is both feasible and essential. *See, e.g.*, *Exelon Corp.*, 149 FERC ¶ 61,148, PP 84, 149-52 (2014) (discussing Exelon's commitment to track merger-related costs and the necessary internal controls for doing so). This would appear to be good housekeeping, consistent with the practice of regulated utilities to operate pursuant to systems of accounts and fundamental to honoring such commitments. The Commission's proposal "that there be no time limit on hold harmless commitments" is also well-founded and an appropriate strengthening of section 203 ratepayer protection. *See* Proposed Policy Statement, P 35 (explaining how time limited commitment could be defeated by "certain transaction-related expenditures . . . properly capitalized as an asset during the hold harmless period").

The Commission should not be dissuaded from its Proposed Policy Statement's guidance and proposals concerning hold harmless protections based on speculative contentions that these measures will frustrate or chill investment sentiment and FPA section 203 transactional activity. The industry is at a time of significant merger and other transactional activity as evidenced by the plethora of recent section 203 precedent cited in the Proposed Policy Statement, and at least some substantial portion of these transactions are being undertaken in response to, or anticipation of, significant technological advances, or regulatory changes (concerning, e.g., market design and environmental matters). It is not reasonable to believe that the Proposed Policy Statement's guidance and proposals concerning hold harmless protections, which are

commonsensical, readily implemented, and modest in the larger scheme of things, will have any material impact on the scope of future section 203 transactional activity.

II. THE COMMISSION SHOULD CONFIRM THAT IT IS NOT PROPOSING TO FIND THAT CERTAIN KINDS OF SECTION 203 TRANSACTIONS CONCLUSIVELY OR PRESUMPTIVELY HAVE NO ADVERSE EFFECT ON RATES

In order to ascertain whether an FPA section 203 transaction is consistent with the public interest the Commission generally considers the transaction's: (1) effect on competition; (2) effect on rates; and (3) effect on regulation. Proposed Policy Statement, P 2.[4] For almost fifteen (15) years the Commission's basic approach to protecting ratepayers from the adverse impacts of section 203 transactions has remained largely the same. That approach is predicated upon the threshold consideration that "each transaction is unique" and is subject "to a case-by-case analysis." Proposed Policy Statement, P 21.[5] As the Commission explains, section 203 applicants have the choice of seeking to show that there are: (i) quantifiable offsetting benefits that outweigh potential transactional rate increases; (ii) or non-quantifiable offsetting benefits that support a public interest finding regardless of the potential for a rate increase; or instead (iii) proposing a ratepayer protection mechanism. Proposed Policy Statement, PP 5-7.

The Commission has approved a wide-range of ratepayer protection mechanisms, and favors negotiated settlements between the applicant and affected ratepayers. *Id.* PP 7-8. This system has substantially obviated contentious litigation concerning "estimate[s]

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[4]In addition, pursuant to FPA § 203(a)(4) the Commission must determine that a 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." 16 U.S.C. § 824b(a)(4).

[5] What type of ratepayer protection is "appropriate in a particular case will depend on the circumstances of the merging companies and the customers and the details of the proposals." Merger Policy Statement,

[of] the future costs and benefits of a transaction." *Id.* P 6. Moreover, and fundamentally, the current regimen of section 203 ratepayer protection has served the core statutory and public interest purpose of protecting against "resulting combination[s] [of companies and] facilities [that] would be likely to lead to unnecessary rate increases or inhibit rate reductions." Merger Policy Statement, FERC Stats. & Regs. at 30,121-2 (footnote omitted).

Under the heading "Transactions Without Adverse Effects on Rates," the Proposed Policy Statement sets out "to clarify" that "applicants engaging in [certain] 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." Proposed Policy Statement, P 40 (emphasis supplied). To the extent this clarification is simply guidance that based upon the specific facts of a particular transaction, and for reasons of necessity in providing jurisdictional service, an applicant may be able to show that offsetting benefits support a public interest finding notwithstanding the potential for an anticipated rate increase, then TAPS agrees. However, because the Proposed Policy Statement is unclear, TAPS seeks confirmation the Commission is *not* proposing to depart from the fact specific case-by-case analysis requisite to analyzing the potential adverse rate impact of each "unique" section 203 transaction, and to instead conclusively or presumptively find that certain categories or kinds of transactions do not have an adverse effect on rates.

FERC Stats. & Regs. at 30,124 n.53.

The Commission relies heavily upon the *FirstEnergy*[6] decision as the basis for its proposal. Proposed Policy Statement, P 39 n.58, P 41. In *FirstEnergy,* the Commission reviewed the particular facts of the proposed section 203 transaction and found record evidence of offsetting benefits sufficient to justify anticipated rate increases. Far from supporting a categorical presumption, *FirstEnergy* is a fact-bound decision concerning a particularized transaction.[7] The section 203 acquisition at issue was limited to a specific facility, intended to be used exclusively for voltage support essential for the provision of transmission service, and was the least-cost solution going forward. *FirstEnergy*, PP 24-26. All of these facts were supported by a PJM Interconnection, LLC study or the undisputed statements of the applicant. The Commission found that:

> [b]ased on the evidence in the record as discussed above, including the approval from PJM and reliability benefits from the proposed conversion, we find that the proposed transfer of the generating units and their conversion to synchronous condensers will not have an adverse effect on rates.

Id. P 26. The Commission went on to note that the applicant had nevertheless proposed a hold-harmless commitment, which the Commission chose to accept. *Id.* P 27. The Proposed Policy Statement (P 41) would clarify that the proffered hold-harmless commitment was unnecessary, a conclusion that seems axiomatic given the express findings that the transaction provided the necessary and least cost means of addressing

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[6] *FirstEnergy Generation Corp.*, 141 FERC ¶ 61,239 (2012), *clarification granted*, 144 FERC ¶ 61,103 (2013).

[7] The same is true with respect to the other decisions cited at Proposed Policy Statement, P 39 n.58, which involved a case specific finding that the transactions at issue would not have an adverse effect on rates based on the record submissions. *ITC Midwest LLC*, 140 FERC ¶ 61,125, P 20 (2012) (*de minimis* increase in return on equity component of transmission rate associated with book value transfer of facility from governmental entity to investor owned utility offset by administrative benefits and increased reliability); *Int'l Transmission Co.*, 139 FERC ¶ 61,003, P 17 (2012) ("nothing in the application indicates that rates to customers will increase as a result of the Closed Transactions, and no customer argues otherwise").

identified voltage support needs that obtained independent of the transaction, and thus the transaction had no adverse effects on rates from which ratepayers needed to be protected by a hold harmless commitment.

Based upon paragraph 42 of the Proposed Policy Statement, it appears that the proposed clarification is a reminder to applicants and affected stakeholders that in particular circumstances (such as those in *FirstEnergy*) there may be no need for a hold-harmless commitment to support a finding that a particular transaction has no adverse impact on rates. However, the applicant must show that the transaction will have no adverse effect on rates based upon the specifics of the transaction and the proffered justification subject to Commission scrutiny, as the Proposed Policy Statement explains:

> 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, applicants may provide 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 will carefully review such a showing before determining that a proposed transaction without any proposed ratepayer protection mechanism has no adverse effect on rates*.

Id. P 42 (emphasis supplied). Thus, the Commission appears to state that where an acquisition is undertaken to meet a regulatory requirement (such as a reliability need), the applicant has the opportunity to show that it is the least cost means to satisfy a requirement necessary for the provision of jurisdictional service and therefore has no adverse effect on rates for purposes of section 203 analysis.

Similarly, the Commission states that it is "propos[ing] that under certain circumstances, applicants *may show* that a transaction will not have an adverse effect on rates without proposing additional ratepayer protection mechanisms." *Id.* P 19 (emphasis supplied). And at paragraph 41(emphasis supplied), the Commission identifies

> [e]xamples of the transactions in which applicants *may* demonstrate no adverse effect on rates without offering a hold harmless commitment or other ratepayer protection mechanism would include 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 North American Electric Reliability Corporation (NERC) standards.

Because these are identified as examples of section 203 transactions where an applicant "may" be able to make the requisite showing of no adverse effects on rates, the Commission does not appear to propose to recognize *per se* categorical exceptions for certain types of section 203 transactions as conclusively or presumptively not having an adverse effect on rates. Transactions falling within these categories may have no adverse effects on rates given the particulars of the transaction, but the nature of the transaction (i.e., its claimed relationship to a regulatory obligation) is not of and by itself a sufficient basis for that determination.

TAPS is concerned, and asks the Commission to clarify, that it is not recognizing as an exception to the Merger Policy Statement and applicable precedent that certain kinds of section 203 transactions are categorically deemed to have no adverse effect on rates. It would be unsound, and contrary to the Commission's statutory obligation to approve mergers only if they are consistent with the public interest, for the Commission to find by policy statement that every section 203 acquisition undertaken by "a traditional

franchised utility and enter[ed] into … in order to satisfy resource adequacy requirements at the state level, to improve system reliability and/or meet other regulatory requirements" (Proposed Policy Statement, P 39 (footnote omitted)) necessarily, and—for that reason alone—has no adverse effect on rates from which ratepayers should be protected by hold harmless conditions. An acquisition may be justified, in part, to serve forecasted load, but absent an exacting fact specific inquiry (including consideration of lesser cost alternatives), there is no reason to conclude that the resulting combination of facilities will *not* "likely to lead to unnecessary rate increases." Merger Policy Statement, FERC Stats. & Regs. at 30,121. For example, a particular acquisition may satisfy an integrated resource plan requirement to meet forecasted retail load growth, but also enable the acquiring utility to make merchant sales out of excess capacity during some extended period of time as demand grows or during off-peak hours. A transfer of transmission facilities could result in increased transmission rates due to differences between the seller's and buyer's respective capital structures, authorized rates of return, tax obligations or a host of other considerations without providing benefits sufficient to find that the transaction will not have an adverse impact on rates. In such instances, serious fact-specific inquiry must be undertaken to determine whether given the obligation to satisfy regulatory requirements, the proposed transaction has an adverse impact on rates, particularly as compared to other lesser cost options.

Thus, the ability of the applicant to point to a regulatory requirement as motivating the transaction is the beginning, not the end, of the inquiry as to whether the acquisition is one that does not adversely impact rates, thereby obviating the need for a hold harmless commitment. An FPA section 203 acquisition can have multiple purposes

and serve multiple needs, including facilitating an applicant's merchant sales. No transmission customer or wholesale customer served under a cost-based arrangement should be required to pay rates reflecting acquisitions pursued to further an applicant's merchant business interests, or to otherwise unnecessarily bear increased costs that may arise in myriad ways due to a change in ownership.

Reading the language of the Proposed Policy Statement in light of these considerations, it would appear that the Commission does not intend to create a presumptive or conclusive finding that certain kinds of FPA section 203 transactions have no adverse effect on rates, and there is no good reason or adequate basis for doing so. A conclusive or presumptive determination that particular kinds of section 203 transactions have no adverse effects on rates would depart fundamentally from the Commission's precedent and work against the statutory imperative of ratepayer protection.[8] TAPS asks that the Commission clarify that all section 203 applicants in all transactions have the burden of showing that the transaction will not have an adverse effect on rates based on a case-specific analysis of the record evidence, and that there is no presumptive or conclusive rule that certain kinds of transactions have no adverse effect on rates.

CONCLUSION

The Commission should adopt its Proposed Policy Statement, with the clarification it is *not* finding that certain kinds of section 203 transactions (i.e., to meet state resource adequacy requirements at the state level, to improve system reliability and/or meet other regulatory requirements) conclusively or presumptively have no

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[8] The purpose of the FPA, like the Natural Gas Act is "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atl. Ref. Co. v. Pub. Serv. Comm'n of the State of N.Y.*, 360 U.S. 378, 388 (1959).

adverse effect on rates. Rather, applicant's identification of a regulatory requirement supporting the transaction creates the opportunity for it to demonstrate that, in light of the available alternatives, the transaction does not have an adverse impact on rates requiring ratepayer protection.

Respectfully submitted,

/s/ Cynthia S. Bogorad
Cynthia S. Bogorad
Peter J. Hopkins

Attorneys for
Transmission Access Policy Study Group

Law Offices of:
SPIEGEL & MCDIARMID LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000

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