

150 FERC ¶ 61,031
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 33

Docket No. PL15-3-000

Policy Statement on Hold Harmless Commitments

(Issued January 22, 2015)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Proposed policy statement.

SUMMARY: The Commission proposes, as a statement of policy, the following clarifications regarding 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 proposes to clarify the scope and definition of the costs that should be subject to hold harmless commitments. Second, the Commission proposes to clarify that applicants offering hold harmless commitments must implement controls and procedures to track the costs from which customers will be held harmless. The Commission also proposes to clarify the types of controls and procedures that applicants offering hold harmless commitments must implement. Third, the Commission proposes to no longer accept hold harmless commitments that are limited in duration. Fourth, the Commission proposes to clarify that applicants may demonstrate that, under certain circumstances,

transactions will not have an adverse effect on rates without relying on hold harmless commitments or other ratepayer protection mechanisms.

DATES: Comments on the proposed policy statement are due within [Insert Date 60 days after publication in the *Federal Register*].

FOR FURTHER INFORMATION CONTACT:

Eric Olesh (Technical Information)
Office of Energy Market Regulation
888 First Street, NE
Washington, DC 20426
(202) 502-6524
eric.olesh@ferc.gov

Adam Batenhorst (Legal Information)
Office of the General Counsel
888 First Street, NE
Washington, DC 20426
(202) 502-6150
adam.batenhorst@ferc.gov

Olga Anguelova (Accounting Information)
Office of Enforcement
888 First Street, NE
Washington, DC 20426
(202) 502-8098
olga.anguelova@ferc.gov

SUPPLEMENTARY INFORMATION:

150 FERC ¶ 61,031
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
Norman C. Bay, and Colette D. Honorable.

Policy Statement on Hold Harmless Commitments

Docket No. PL15-3-000

PROPOSED POLICY STATEMENT

(Issued January 22, 2015)

1. We propose, as a statement of policy, the following clarifications regarding 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).¹ First, we propose to clarify the scope and definition of the costs that should be subject to hold harmless commitments. Second, we propose to clarify that applicants offering hold harmless commitments must implement controls and procedures to track the costs from which customers will be held harmless. We also propose to clarify the types of controls and procedures that applicants offering hold harmless commitments must implement. Third, we propose to no longer accept hold harmless commitments that are limited in duration. Fourth, we propose to clarify that applicants may demonstrate that, under certain circumstances, transactions will not have

¹ 16 U.S.C. 824b.

an adverse effect on rates without relying on hold harmless commitments or other ratepayer protection mechanisms.

I. Background

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

2. FPA section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest.² The Commission has stated that its analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.³ 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

² 16 U.S.C. 824b(a)(4).

³ 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).

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.”⁴

3. This proposed policy statement focuses on the second prong of the Commission’s FPA section 203 analysis, the effect of a proposed transaction on rates. The Commission has stated that, when considering a proposed transaction’s effect on rates, its focus “is on the effect that a proposed transaction itself will have on rates, whether that effect is adverse, and whether any adverse effect will be offset or mitigated by benefits that are likely to result from the proposed transaction.”⁵ Specifically, as relevant here, the Commission considers whether the transaction could result in an adverse effect on rates to wholesale requirements or transmission customers.

4. 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 customers.⁶ If, however, the transaction could result in an increase in rates and the

⁴ 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).

⁵ *ITC Midwest LLC*, 140 FERC ¶ 61,125, at P 19 (2012).

⁶ *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

(continued...)

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 potential economic benefits that offset the projected increase in rates. 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.⁷

5. 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 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.⁸ When the Commission has considered such non-

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.”).

⁷ 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).

⁸ 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

(continued...)

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.⁹

6. 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 established various mechanisms that applicants could implement to show that a merger would have no

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.”).

⁹ 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).

adverse effect on rates.¹⁰ As the Commission explained:

Merger applicants should propose ratepayer protection mechanisms to assure that customers are protected if the expected benefits do not materialize. The applicant bears the burden of proof to demonstrate that the customer will be protected. This puts the risk that the benefits will not materialize where it belongs—on the applicants.

Furthermore, we believe that the most promising and expeditious means of addressing ratepayer protection is for the parties to negotiate an agreement on ratepayer protection mechanisms. The applicants should attempt to resolve the issue with customers even before filing, and should propose a mechanism as part of their filing. Even if these negotiations have not succeeded by the time of filing, the parties should continue to try to reach a settlement. What constitutes adequate ratepayer protection necessarily will depend on the particular circumstances of the merging utilities and their ratepayers, and we strongly encourage parties to minimize contentious issues and to resolve them without the time and expense of a formal hearing. Parties may not be able to reach an agreement on an appropriate ratepayer protection and the Commission may still be able to approve the merger. As mentioned earlier, this could occur either after a hearing or on the basis of parties' filings if we determine that the applicants' proposal sufficiently insulates the ratepayers from harm.¹¹

¹⁰ 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.”).

¹¹ *Id.* at 30,123-24.

7. 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.”¹² 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.¹³

8. The Commission concluded that, although each mechanism would provide some benefit to ratepayers, in the majority of circumstances the most meaningful (and the most likely to give wholesale customers the earliest opportunity to take advantage of emerging competitive wholesale markets) was an open season provision.¹⁴ The Commission stated

¹² *Id.* at 30,124.

¹³ *Id.* (footnotes omitted).

¹⁴ *Id.*

that if intervenors raised a substantial question as to the adequacy of a merger applicant's proposal, the parties should continue to pursue a settlement; if no agreement could be reached, the Commission explained it might decide the issue on the written record or set the issue for hearing.¹⁵

9. 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.¹⁶

¹⁵ *Id.*

¹⁶ Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,914.

10. 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.¹⁷

B. Current Commission Practice Regarding Hold Harmless Commitments

11. 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.¹⁸ More recently, some applicants have made hold harmless commitments in connection with transactions involving the acquisition or disposition of existing jurisdictional facilities, including in circumstances where the acquiring entity was a traditional franchised utility and entered into the transaction in

¹⁷ *Id.*

¹⁸ 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).

order to satisfy resource adequacy requirements at the state level, to improve system reliability and/or meet other regulatory requirements.¹⁹

12. 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.²⁰ Thus, hold harmless commitments typically focus on preventing recovery in rates of the costs incurred that are “related” to the transaction. The Commission has previously found that hold harmless commitments under which applicants commit not to

¹⁹ 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).

²⁰ *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 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).

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.”²¹

13. Although the Commission has relied on commitments to hold customers harmless from transaction-related costs to support findings of no adverse effects on rates, in many of these cases, these commitments have not included detailed definitions of transaction-related costs or savings.²² Further, the Commission has only provided general guidance on the scope of these costs. In most orders addressing transactions in which the Commission has accepted hold harmless commitments, the Commission has explained that transaction-related costs are not just those costs related to consummating the proposed transaction, such as legal, investment advisory, accounting and financing costs. Rather, the Commission has stated that the costs subject to hold harmless commitments include all costs that are related to the transaction. The Commission, however, has never

²¹ *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. *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).

²² *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.”).

specified what these other costs may include.²³ In more recent cases, the Commission has specified that transaction-related costs include costs, both capital and operating, incurred to achieve merger synergies.²⁴ The Commission has also specifically noted that acquisition premiums, including goodwill,²⁵ are not considered part of transaction-related costs, and that recovery of such costs must be pursued through FPA section 205 filings.²⁶ The Commission has also explained that protection from transaction-related costs does not mean that consumers are necessarily insulated from any rate increase, such as those

²³ *ITC Holdings Corp.*, 143 FERC ¶ 61,256, at P 138 (2013); *see also Cinergy*, 140 FERC ¶ 61,180 at P 42; *FirstEnergy Corp.*, 133 FERC ¶ 61,222, at PP 62-63 (2010); *NSTAR*, 136 FERC ¶ 61,016, at PP 62-63 (2011); *PPL Corp.*, 133 FERC ¶ 61,083, at PP 26-27 (2010); *Consumers Energy Co.*, 118 FERC ¶ 61,143, at P 33, *order on clarification*, 120 FERC ¶ 61,091 (2007).

²⁴ *See, e.g., Silver Merger Sub, Inc.*, 145 FERC ¶ 61,261, at P 68 (2013) (“We interpret Applicants’ hold harmless commitment to apply to all transaction-related costs, including costs related to consummating the Proposed Transaction and transition costs (both capital and operating) incurred to achieve merger synergies.”); *Bangor Hydro Elec. Co.*, 144 FERC ¶ 61,030, at P 20 (2013) (same); *Exelon Corp.*, 138 FERC ¶ 61,167, at P 118 (2012) (same).

²⁵ An acquisition premium is the excess of the total purchase price or consideration paid in the transaction over the historical cost of the net assets of the entity acquired.

²⁶ *Exelon*, 138 FERC ¶ 61,167 at P 118 (citing *Merger Policy Statement*, FERC Stats. & Regs. ¶ 31,044 at 30,126; *Duke Energy Moss Landing LLC*, 83 FERC ¶ 61,318 (1998), *reh’g denied*, 86 FERC ¶ 61,227, at 61,816 (1999) (citing *Mid-Louisiana Gas Co.*, 7 FERC ¶ 61,316, at 61,682, *reh’g denied*, 8 FERC ¶ 61,227 (1979), *aff’d sub nom. Transcon. Gas Pipe Line Corp. v. FERC*, 652 F.2d 179 (D.C. Cir. 1981)) (rate recovery of an existing facility is generally limited to the original cost of the facility)).

related to market conditions or those unrelated to the transaction,²⁷ or unspecified or speculative costs that intervenors claim may result from a merger.²⁸

14. With respect to recovering transaction-related costs, as noted earlier, the standard hold harmless commitment provides that applicants may not seek to recover in rates any transaction-related costs except to the extent that such costs are exceeded by demonstrated transaction-related savings. The Commission recently clarified its policy on the recovery of transaction-related costs.²⁹ As clarified, applicants may seek to

²⁷ *BHE Holdings*, 133 FERC ¶ 61,231 at P 36 (citing *PNM Resources, Inc.*, 124 FERC ¶ 61,019, at P 43 (2008) (“Applicants are not required to apply a rate freeze and may propose rate increases under section 205 filings.”)); *ITC Holdings*, 121 FERC ¶ 61,229 at P 124 (“[T]he Commission finds that any increased costs of ITC Midwest attributable to prudent transmission investment do not make the Transaction contrary to the public interest”); *Boston Generating, LLC*, 113 FERC ¶ 61,016, at P 26 (2005) (“In reviewing an application under section 203, the Commission looks at the effects of the transaction on rates, not at rate changes that may occur regardless of the transaction.”)); *Jersey Central Power & Light Co.*, 87 FERC ¶ 61,014, at 61,039 (1999) (“The Commission does not require applicants under [s]ection 203 to insulate their customers from the rate effects of market forces. Accordingly, customers are not entitled in a [s]ection 203 proceeding to be held harmless from external factors such as rising market prices.”); *Cincinnati Gas & Elec. Co.*, 64 FERC ¶ 61,237, at 62,686, 62,714 (1993), *reh’g denied*, 69 FERC ¶ 61,005, *order on clarification*, 69 FERC ¶ 61,088 (1994), *reh’g denied*, 71 FERC ¶ 61,380 (1995).

²⁸ *Exelon Corp.*, 127 FERC ¶ 61,161, at P 102 (2009) (citing, *inter alia*, *NorthWestern Corp.*, 117 FERC ¶ 61,100, at P 40 (2006) (finding speculative protestor’s argument that the proposed transaction would result in a credit ratings downgrade and lead to higher rates or lower reliability)); *Old Dominion Elec. Coop.*, 117 FERC ¶ 61,313, at P 29 (2006) (affirming initial decision that “the record supports the conclusion that the credit downgrade will not raise rates”).

²⁹ *Exelon Corp.*, 149 FERC ¶ 61,148 (2014) (*Exelon-Pepco*).

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.³⁰ Specifically, applicants must submit a new filing under FPA section 205, and a concurrent informational filing in the relevant FPA section 203 docket.³¹ Consistent with Commission precedent, in the FPA section 205 filing, applicants must still: (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.³² The Commission further clarified that it will not authorize the recovery of merger-related costs in an annual informational filing under existing formula rates. After noticing the new section 205 filing for public comment, the Commission will determine both if there is adequate support to show that recovery of merger-related costs is consistent with the hold harmless commitment and that the resulting new rate is just and reasonable in light of all the other factors underlying the proposed new rate.³³ In accordance with the Merger Policy Statement, the Commission's

³⁰ *Id.* P 106.

³¹ *Id.* P 105.

³² *Id.* P 107.

³³ *Id.* P 106.

approach places the burden of proof on applicants to demonstrate that customers are protected if the expected benefits do not materialize.³⁴

II. Discussion

A. Purpose of Proposed Policy Statement

15. Upon consideration of the Commission's experience regarding hold harmless commitments since issuance of the Merger Policy Statement, we believe that clarifying the Commission's policy regarding hold harmless commitments, a frequently proposed ratepayer protection mechanism in FPA section 203 applications, would be beneficial to applicants, customers, and interested persons. We note, however, that unless specifically discussed herein, we reaffirm the guidance provided in the Merger Policy Statement and subsequent precedent, and reiterate that applicants under FPA section 203 should propose ratepayer protection mechanisms that ensure that customers are protected from the adverse rate effects of a proposed transaction. Furthermore, the guidance here should not discourage applicants from working with interested parties to resolve contentious issues regarding appropriate ratepayer protection mechanisms prior to the submission of an

³⁴ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,123. *See, e.g., Consol. Edison, Inc.*, 94 FERC ¶ 61,079, at 61,366 (2001) (“customers do have the opportunity to scrutinize costs before they are included in NEPOOL’s formula rate, and could therefore alert the Commission to costs that, contrary to Applicants’ commitments here, might be merger-related. In such a situation, we read Applicants’ commitment to require them to shoulder the burden of proof, and to justify their failure to identify the costs as merger-related.”) (citing *BEC Energy*, 88 FERC ¶ 61,002, at 61,007 (1999); *New England Power Co.*, 87 FERC ¶ 61,287, at 62,146 (1999)).

application under FPA section 203. As the Commission stated in the Merger Policy Statement, “the most promising and expeditious means of addressing ratepayer protection is for the parties to negotiate an agreement on ratepayer protection mechanisms.”³⁵

Accordingly, we continue to expect applicants under FPA section 203 to engage their customers, when appropriate, and discuss with them any potential adverse rate effects that may result from a proposed transaction under FPA section 203, and how those effects can be mitigated.

16. In this proposed policy statement, we propose to provide greater clarity to and seek comment from interested persons regarding the following issues related to hold harmless commitments. First, we propose to clarify those costs to which hold harmless commitments will apply. Although the Commission has provided broad guidance regarding the costs that should be covered under hold harmless commitments, it has never defined those costs with much specificity, leading to inconsistency with respect to this issue. Below, we propose to provide additional guidance by clarifying the costs that the Commission considers to be transaction-related costs. These are also the transaction-related costs that the Commission will review if and when applicants make the requisite filing under FPA section 205 to attempt to recover those costs by showing that they have been offset by savings due to the transaction. Finally, although we identify specific

³⁵ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,123.

categories of costs below, we continue to believe that the Commission's policy must remain flexible enough to permit a case-by-case determination of transaction-related costs, and that an attempt to articulate those costs precisely could have unintended consequences.

17. Second, we propose to clarify that applicants offering hold harmless commitments must implement appropriate internal controls and procedures to track those costs from which they have committed to hold their customers harmless and must describe such controls and procedures as a part of their FPA section 203 applications and any section 205 filings.³⁶ We believe that these controls and procedures will 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. Requiring applicants to explain how they will track costs related to a hold harmless commitment will improve the Commission's ability to ensure that there is a process in place to prevent those costs from being recovered in rates prior to the Commission approving the recovery of them at

³⁶ The Commission has previously explained that applicants should ensure that they have appropriate internal controls and procedures to ensure the proper identification, accounting, and rate treatment for all transaction-related costs incurred prior to and subsequent to proposed transactions, including all transition costs incurred after a merger is consummated. *See, e.g., ITC Holdings*, 143 FERC ¶ 61,256 at P 168; *Silver Merger Sub*, 145 FERC ¶ 61,261 at P 78.

a later date under FPA section 205, and will also clarify for customers what types of costs are covered under a hold harmless commitment, as required by Commission precedent.³⁷

18. Third, we propose that, in order for a hold harmless commitment to provide adequate ratepayer protection, it should not be limited in duration. As discussed in further detail below, we are concerned that limiting the hold harmless commitment to a certain period (generally five years) raises the risk that transaction-related costs could be included in future formula rate billings without applicants making the showing of offsetting savings. Eliminating the time limit will ensure that transaction-related costs cannot be recovered from ratepayers at any time, unless applicants can demonstrate that there are offsetting transaction-related savings. 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.³⁸

19. Finally, we propose to clarify that applicants may demonstrate that, under certain circumstances, transactions will not have an adverse effect on rates without relying on

³⁷ See, e.g., Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,914 (“[A]pplicants 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.”).

³⁸ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,123.

hold harmless commitments or other ratepayer protection mechanisms. As noted above, some applicants have made hold harmless commitments in connection with transactions involving the acquisition or disposition of existing jurisdictional facilities where the acquiring entity was a traditional franchised utility and entering into the transaction in order to satisfy resource adequacy requirements at the state level, to improve system reliability, and/or meet other regulatory requirements.³⁹ Hold harmless commitments may not be appropriate in these and other similar circumstances given that while these proposed transactions may have an effect on rates, that effect may not be adverse. Accordingly, as discussed in further detail below, we propose that under certain circumstances, applicants may show that a transaction will not have an adverse effect on rates without proposing additional ratepayer protection mechanisms.

20. Our intent is to apply any changes to our policy on hold harmless commitments on a prospective basis, for applications submitted after the Commission has issued a policy statement, and not alter existing hold harmless commitments accepted by the

³⁹ See, e.g., *FirstEnergy*, 141 FERC ¶ 61,239, at PP 1, 16, 27-30 (2012) (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).

Commission or submitted in applications pending at the time the Commission issues the policy statement. We seek comments from interested persons on these proposals.

B. Revisions to the Commission's Policy on Hold Harmless Commitments

1. Identifying and Accounting for Transaction-Related Costs

21. We propose to designate the following categories of costs as the transaction-related costs that should be subject to any hold harmless commitment. Accordingly, 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 savings.⁴⁰ As noted above, although we propose to provide guidance in this proposed policy statement regarding how to identify transaction-related costs, we continue to believe that attempts to precisely articulate all such costs are not feasible. For example, while many direct costs of a transaction can be tracked with proper mechanisms and controls, other costs may be more difficult to classify. Accordingly, 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; specifically, this determination will be made if and when applicants propose to recover transaction-related

⁴⁰ We expect that applicants proposing to recover these costs would track and record them pursuant to the procedures established below. *See infra* section II.B.2.

costs and demonstrate offsetting savings in the subsequent FPA section 205 filing described previously by the Commission.

22. First, we propose 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);
- the internal labor costs of employees⁴¹ and the costs of external, third-party, consultants and advisors to evaluate potential merger transactions, and once a

⁴¹ 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.

merger candidate has been identified, to negotiate merger terms, to execute financing and legal contracts, and to secure regulatory approvals;⁴²

- the costs of obtaining shareholder approval (e.g., costs of proxy solicitation and special meeting 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

23. Moreover, for transactions that are pursued but never completed (transactions that ultimately fail), their costs should not be recovered from ratepayers. In addition, we recognize that not every cost listed above will be found in every transaction.

24. The second category of transaction-related costs relates to mergers, where, in addition to the transaction-related costs described above, parties typically also incur costs to integrate individuals and assets into the acquiring utility and costs to achieve merger synergies.⁴³ These costs, which are sometimes referred to collectively as “transition”

⁴² Some of these costs are typically incurred prior to the announcement of a merger.

⁴³ 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.

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, etc.) and expense items (e.g., costs to eliminate redundancies, combine departments, or maximize contracting efficiencies). We propose that transaction-related costs incurred to integrate the operations of merging companies include, but are not limited to, the following:

- 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.

25. As above, this list of transition costs is not exhaustive, and may not include some material costs involved in the integration of two utilities after a merger. We propose to consider transition costs as transaction-related costs that should be subject to hold

harmless commitments. We propose to assume that such transaction-related costs should be covered under hold harmless protection, though applicants will have an opportunity on a case-by-case basis to show why certain of those costs should not have to be covered under their hold harmless commitment based on their particular circumstances. Also, we propose to consider, on a case-by-case basis, whether other costs not discussed herein should be subject to hold harmless commitments.

26. Additionally, we note that accounting journal entries related to a merger transaction may affect expense, asset, liability, or proprietary capital accounts used in the development of a public utility's rates. 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.⁴⁴ If the acquired company is a holding company, purchase accounting also provides for the fair value adjustments and goodwill to be recorded on

⁴⁴ 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), *available at* <http://asc.fasb.org>.

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 ratemaking purposes.⁴⁵ We believe 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.

27. Similarly, in the context of the acquisition of discrete assets 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

⁴⁵ *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); *PPL*, 133 FERC ¶ 61,083 at P 39.

FPA section 205 filing. In the past, applicants have proposed to include acquisition premiums as transaction-related costs subject to their proposed hold harmless commitments,⁴⁶ and intervenors have requested that the Commission require applicants to include acquisition premiums as transaction-related costs.⁴⁷ The Commission has not, and does not, consider acquisition premiums to be part of transaction-related costs. The recovery of acquisition premiums must be pursued through a separate FPA section 205 filing, whether or not a hold harmless commitment has been made.⁴⁸ We do not believe that our proposed treatment of transaction-related costs here requires a change in the Commission's current practice with respect to acquisition premiums. 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

⁴⁶ See, e.g., *Florida Power & Light Co.*, 145 FERC ¶ 61,018, at PP 53, 60 (2013); *FirstEnergy*, 141 FERC ¶ 61,239 at P 16 n.13.

⁴⁷ See, e.g., *Silver Merger Sub*, 145 FERC ¶ 61,261 at PP 61-62.

⁴⁸ *Exelon-Pepco*, 149 FERC ¶ 61,148 at n.180; *Silver Merger Sub*, 145 FERC ¶ 61,261 at P 68; *Florida Power & Light*, 145 FERC ¶ 61,018 at P 60; *Exelon*, 138 FERC ¶ 61,167 at P 118 (citing Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,126; *Duke Energy Moss Landing*, 83 FERC ¶ 61,318, *reh'g denied*, 86 FERC ¶ at 61,816 (citing *Mid-Louisiana Gas*, 7 FERC ¶ 61,316, at 61,682, *reh'g denied*, 8 FERC ¶ 61,227, *aff'd sub nom. Transcon. Gas Pipe Line Co. v. FERC*, 652 F.2d 179 (D.C. Cir. 1981)) (rate recovery of an existing facility is generally limited to the original cost of the facility)).

ratepayers” must be made in a subsequent FPA section 205 proceeding in order to recover an acquisition premium.⁴⁹

28. We seek comments from interested persons on these proposals. In particular, we seek comments on the categories of costs, including transition costs, that are proposed to be transaction-related costs which should be subject to hold harmless protection. We also seek comments on the costs that should not be subject to hold harmless commitments.

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

29. As noted above, 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.⁵⁰ As contemplated in the Merger Policy Statement, a hold harmless commitment offered by applicants must be “enforceable and administratively manageable.”⁵¹ In creating an enforceable and administratively manageable

⁴⁹ *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).

⁵⁰ *See* Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,914.

⁵¹ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

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 that applicants offering hold harmless commitments establish internal controls and/or tracking mechanisms.⁵² We propose additional guidance below regarding these requirements.

30. First, we propose 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.

31. Second, we propose that applicants offering hold harmless commitments should include, as part of their FPA section 203 applications and any separate FPA section 205 filings, 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

⁵² See *Silver Merger Sub*, 145 FERC ¶ 61,261 at P 78; *ITC Holdings*, 143 FERC ¶ 61,256 at P 168.

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, 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.

32. We note that the Commission has, 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.⁵³ As a part of this accounting filing, we propose to require applicants subject to the Commission's accounting regulations to provide 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.

33. We seek comments on these proposals.

⁵³ See, e.g., *Central Vermont Public Service Corp.*, 138 FERC ¶ 61,161, at P 55 (2012).

3. Time Limits on Hold Harmless Commitments

34. The Commission previously stated in the Merger Policy Statement that a hold harmless commitment need only protect customers “for a significant period of time following the merger.”⁵⁴ However, in light of the proposed treatment of certain categories of costs discussed above, the Commission’s experience auditing utilities that have made hold harmless commitments and concerns of protestors in previous FPA section 203 applications,⁵⁵ we propose to reconsider whether hold harmless commitments that are limited to five years (or another specified period) adequately protect ratepayers from an adverse effect on rates. As part of this reconsideration, we believe that time-limited hold harmless commitments may not adequately protect ratepayers from transaction-related costs. Therefore, we propose 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.⁵⁶ This revised approach is consistent with the Merger Policy Statement, which

⁵⁴ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

⁵⁵ See, e.g., *PNM Resources*, 124 FERC ¶ 61,019 at P 36 (protestor alleging that the five-year limitation on recovery will simply result in the deferred recovery of transaction-related costs).

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.⁵⁷

35. Specifically, we are concerned that limiting the applicability of hold harmless commitments to specific time periods may create incentives for applicants to modify how they would otherwise seek to recover or account for recovery of certain transaction-related costs based on the time period. For example, an applicant could try to include transaction-related costs in formula rates without making a showing of offsetting savings if the costs, though incurred during the hold harmless period, do not enter the ratemaking process until after the hold harmless period expires. Moreover, whether or not any such incentives exist, certain transaction-related expenditures could be properly capitalized as an asset during the hold harmless period, but the recovery of the costs associated with that asset would occur only as the asset is depreciated over future periods that extend beyond the hold harmless period.

⁵⁶ 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-Pepco, 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)).

⁵⁷ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,123.

36. Similarly, limiting the applicability of hold harmless commitments to specific time periods may incentivize applicants to delay incurring some types of transaction-related costs until after the hold harmless period expires. By waiting to incur costs subject to hold harmless commitments until after the expiration of the hold harmless period, applicants could attempt to include such costs in their future formula rate billings without making the showing of offsetting savings required to justify recovery of such costs. In this regard, we believe that the focus of a hold harmless commitment should be on whether a cost is transaction-related, and not on when the cost is incurred.

37. We seek comments on this proposal.

4. Transactions Without Adverse Effects on Rates

38. As explained above, applicants under FPA section 203 must demonstrate that proposed transactions do not have an adverse effect on rates. In order to make this showing, applicants sometimes propose, and the Commission has accepted, hold harmless commitments. Pursuant to these hold harmless commitments, the Commission has held that customers must be held harmless from transaction-related costs unless and until applicants demonstrate offsetting transaction-related benefits – whether quantifiable cost savings or other non-quantifiable benefits.

39. As noted above, some applicants have made hold harmless commitments in connection with transactions involving the acquisition or disposition of existing jurisdictional facilities where the acquiring entity was a traditional franchised utility and

entering into the transaction in order to satisfy resource adequacy requirements at the state level, to improve system reliability, and/or meet other regulatory requirements.⁵⁸

However, 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 has held that, as a general matter of policy, ratepayers should bear the cost of utility service.⁵⁹

40. Accordingly, we propose to clarify that applicants undertaking certain transactions to fulfill documented utility service needs need not propose ratepayer protection mechanisms such as a hold harmless commitment in an application under FPA section 203 in order to show that the transaction will not have an adverse effect on rates. We believe 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.

⁵⁸ 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 (2012).

⁵⁹ See, e.g., *Old Dominion Elec. Cooperative and N.C. Elec. Membership Corp. v. Va. Elec. and Power Co.*, 146 FERC ¶ 61,200 (2014).

41. Examples 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. We propose 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. For instance, in FirstEnergy, applicants requested approval from the Commission under FPA section 203 for an internal transfer of certain assets that would address significant reliability concerns, including a potential NERC violation, at a cost that was two-thirds that of the next possible solution.⁶⁰ In that order, consistent with existing policy, the Commission accepted applicants' hold harmless

⁶⁰ *FirstEnergy*, 141 FERC ¶ 61,239 at P 5.

commitment as it was offered. Under the clarification proposed herein, however, such 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.

42. 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. We believe this approach is consistent with both the Merger Policy Statement and the Commission's policy that ratepayers should bear the costs of utility service. We seek comments on this proposal.

III. Comment Procedures

43. We invite comments on this proposed policy statement within **[Insert Date 60 days after publication in the *Federal Register*]**.

IV. Document Availability

44. 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 the Commission's Home Page (<http://www.ferc.gov>) and in the Commission'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.

45. From the Commission'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.

46. User assistance is available for eLibrary and the Commission'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, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. Email the Public Reference Room at public.referenceroom@ferc.gov.

V. **Information Collection Statement**

47. The Paperwork Reduction Act (PRA)⁶¹ 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

⁶¹ 44 U.S.C. 3501-3520.

applicability. OMB regulations require approval of certain information collection requirements imposed by agency rules.⁶² 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 number.

The following table shows the Commission's estimates for the additional burden and cost, as contained in the Proposed Policy Statement:

⁶² See 5 CFR 1320.

| Revisions, in the Proposed Policy Statement in Docket No. PL15-3 | | | | | |
|---|---|---|--|--|--|
| Requirements | Number and Type of Respondents (1) | Number of Responses per Respondent (2) | Total Number of Responses (1)*(2)=(3) | Average Burden Hours & Cost Per Response⁶³ (4) | Total Burden Hours & Total Cost (3)*(4) |
| FERC-519 (FPA Section 203 Filings) | 18 | 1 | 18 | 20 hrs.; \$1,410 | 360 hrs.; \$25,380 |
| FERC-516 (FPA Section 205, Rate and Tariff Filings) | 1 | 1 | 1 ⁶⁴ | 103.26 hrs.; \$7,279.83 | 103.26 hrs.; \$7,279.83 |
| FERC-555, Record Retention | 18 | 1 | 18 | 4 hrs.; \$282 | 72 hrs.; \$5,076 |
| TOTAL | | | | | 535.26 hrs.; \$37,735.83 |

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.

⁶³ The hourly cost figures are based on data for salary plus benefits. We think industry is similarly situated to FERC in terms of the average cost of a full time employee, and we are using \$70.50 per hour for salary plus benefits.

The estimates for cost per response are derived using the following formula:
Average Burden Hours per Response * \$70.50 per Hour = Average Cost per Response.

⁶⁴ We estimate that one FPA section 205 filing may be made annually subject to the Proposed Policy Statement.

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 Proposed 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, D.C. 20426 [Attention: Ellen Brown, Office of the Executive Director, e-mail: DataClearance@ferc.gov, Phone: (202) 502-8663, fax: (202) 273-0873].

By the Commission. Commissioner Honorable is voting present.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.