

175 FERC ¶ 61,058  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;  
Neil Chatterjee, James P. Danly,  
Allison Clements, and Mark C. Christie.

Iberdrola, S.A.  
Avangrid, Inc.  
Avangrid Networks, Inc.  
PNM Resources, Inc.  
Public Service Company of New Mexico  
NMRD Data Center II, LLC  
NMRD Data Center III, LLC  
New Mexico PPA Corporation

Docket No. EC21-25-000

ORDER AUTHORIZING MERGER, DISPOSITION OF JURISDICTIONAL  
FACILITIES AND ACQUISITION OF SECURITIES

(Issued April 20, 2021)

1. On November 23, 2020, pursuant sections 203(a)(1) and 203(a)(2) of the Federal Power Act (FPA)<sup>1</sup> and part 33 of the Commission's regulations,<sup>2</sup> Iberdrola, S.A. (Iberdrola), Avangrid, Inc. (Avangrid), Avangrid Networks, Inc. (Avangrid Networks, and together with Iberdrola and Avangrid, Avangrid Applicants), PNM Resources, Inc. (PNM Resources), Public Service Company of New Mexico (PNM), NMRD Data Center II, LLC (NMRD II), NMRD Data Center III, LLC (NMRD III), and New Mexico PPA Corporation (PPA Corp., and together with PNM Resources, PNM, NMRD II, and NMRD III, the PNM Resources Applicants) (collectively, Applicants) filed an application requesting authorization for a transaction whereby Avangrid, through an indirect subsidiary, will merge with and into PNM Resources (Proposed Transaction).<sup>3</sup>

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

<sup>2</sup> 18 C.F.R. pt. 33 (2020).

<sup>3</sup> Application for Authorization Under Section 203 of the Federal Power Act, Docket No. EC21-25-000 (Nov. 23, 2020) (Application).

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

## **I. Background**

### **A. Description of the Parties**

#### **1. Avangrid Applicants**

3. Applicants state that Iberdrola is a Spanish corporation whose shares are publicly traded on the Madrid Stock Exchange. Applicants state that Avangrid's common stock is publicly traded on the New York Stock Exchange, and Iberdrola owns 81.5% of Avangrid's stock. Applicants further state that Avangrid, through its subsidiary Avangrid Networks, owns a number of franchised public utilities in the Northeast United States, including: New York State Electric & Gas Corporation; Rochester Gas and Electric Corporation; Central Maine Power Company; and The United Illuminating Company. Applicants additionally state that Avangrid, through its subsidiary Avangrid Renewable Holdings, Inc., owns several subsidiaries that own wind-powered and solar generation facilities.<sup>5</sup>

#### **2. PNM Resources Applicants**

4. Applicants explain that PNM Resources is a holding company that owns PNM, a public utility engaged in the generation, transmission, and sale of electricity at wholesale in New Mexico. Applicants state that PNM owns approximately 2,150 megawatts (MW) of generation and owns or leases approximately 3,200 circuit miles of electric transmission lines in New Mexico and Arizona. Applicants state that PNM provides

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<sup>4</sup> *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996) (cross-referenced at 77 FERC ¶ 61,263) (Merger Policy Statement), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997); *see also FPA Section 203 Supplemental Policy Statement*, 120 FERC ¶ 61,060 (2007) (Supplemental Policy Statement), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008); *Transactions Subject to FPA Section 203*, Order No. 669, 113 FERC ¶ 61,315 (2005), *order on reh'g*, Order No. 669-A, 115 FERC ¶ 61,097, *order on reh'g*, Order No. 669-B, 116 FERC ¶ 61,076 (2006); *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000) (cross-referenced at 93 FERC ¶ 61,164), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001).

<sup>5</sup> Application at 3-15.

open access transmission service pursuant to an Open Access Transmission Tariff (OATT) on file with the Commission.<sup>6</sup>

5. Applicants explain that NMRD II and NMRD III are direct subsidiaries of NM Renewable Development, LLC (NM Renewable), a 50/50 joint venture between PNM Resources Development and Management Corporation, a wholly owned subsidiary of PNM Resources, and AEP OnSite Partners, LLC, a wholly owned subsidiary of American Electric Power, Inc. Applicants state that the NM Renewable joint venture was formed to invest in, own, and operate renewable power resources, and that NM Renewable formed NMRD II and NMRD III to develop, construct, own and operate two solar electric generating facilities in New Mexico.<sup>7</sup>

6. Applicants state that PPA Corp. is a wholly owned, special purpose subsidiary of PNM Resources and a power marketer with market-based rate authority outside of the PNM and El Paso Electric Company balancing authority areas.<sup>8</sup>

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

7. According to Applicants, pursuant to an Agreement and Plan of Merger (Merger Agreement), NM Green Holdings, Inc., a direct and wholly owned subsidiary of Avangrid created solely for the purpose of effectuating the Proposed Transaction, will merge with and into PNM Resources, with PNM Resources being the surviving entity of the merger. As a result of Proposed Transaction, the PNM Resources Applicants will become subsidiaries of Avangrid and Iberdrola.<sup>9</sup>

## **II. Notice of Filing and Responsive Pleadings**

8. Notice of the Application was published in the *Federal Register*, 85 Fed. Reg. 77,205 (Dec. 1, 2020), with interventions and protests due on or before January 22, 2021. Public Citizen, Inc., Westmoreland Mining, LLC, Enchant Energy, Corp. (Enchant), and The City of Farmington, New Mexico (Farmington) filed timely motions to intervene. On January 22, 2021, Farmington and Enchant filed a protest and request for hearing (Farmington-Enchant Protest). On February 8, 2021, Applicants filed a motion for leave to answer and answer (Applicants Answer). On February 18, 2021, Farmington and

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<sup>6</sup> *Id.* at 16.

<sup>7</sup> *Id.* at 16-17.

<sup>8</sup> *Id.* at 17.

<sup>9</sup> *Id.* at 17-18.

Enchant filed a motion for leave to respond and limited response to the Applicants Answer (Farmington-Enchant Answer).

### **III. Discussion**

#### **A. Procedural Matters**

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2020), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We accept the Applicants Answer and the Farmington-Enchant Answer because they have provided information that assisted us in our decision-making process.

#### **B. Substantive Matters**

##### **1. FPA Section 203 Standard of Review**

11. FPA section 203(a)(4) requires the Commission to approve proposed dispositions, consolidations, acquisitions, or changes in control if the Commission determines that the proposed transaction will be consistent with the public interest.<sup>10</sup> The Commission's analysis of whether a proposed transaction is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.<sup>11</sup> FPA section 203(a)(4) also requires the Commission to find that the proposed transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."<sup>12</sup> The Commission's regulations establish verification and informational requirements for

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<sup>10</sup> 16 U.S.C. § 824b(a)(4). Approval of the Proposed Transaction is also required by other regulatory agencies pursuant to their respective statutory authorities before the Proposed Transaction may be consummated. *See* Exhibit L. Our findings under FPA section 203 do not affect those agencies' evaluation of the Proposed Transaction pursuant to their respective statutory authorities.

<sup>11</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

<sup>12</sup> 16 U.S.C. § 824b(a)(4).

entities that seek a determination that a proposed transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.<sup>13</sup>

**2. Analysis of the Proposed Transaction**

**a. Effect on Horizontal Competition**

**i. Applicants' Analysis**

12. Applicants state that the Proposed Transaction will not have an adverse effect on competition. Applicants explain that none of the generation owned or purchased by the PNM Resources Applicants and their affiliates is located electrically in any markets where the Avangrid Applicants and their affiliates own uncommitted capacity, and correspondingly none of the uncommitted capacity owned by the Avangrid Applicants and their affiliates is located electrically in markets where the PNM Resources Applicants and their affiliates own or control generation. Applicants explain that Avangrid is affiliated with approximately 604 MW of existing and planned generation capacity in the PNM market which is all committed under long-term contracts.<sup>14</sup>

13. Applicants also performed a Delivered Price Test, also referred to as an Appendix A analysis or Competitive Analysis Screen,<sup>15</sup> to analyze the impacts of the Proposed

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<sup>13</sup> 18 C.F.R. § 33.2(j) (2020).

<sup>14</sup> Application at 20.

<sup>15</sup> The Delivered Price Test determines the pre- and post-transaction market shares from which the change in market concentration, or the change in the Herfindahl-Hirschman Index (HHI), due to a proposed transaction can be derived. The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are considered to be unconcentrated; markets in which the HHI is greater than or equal to 1,000, but less than 1,800 points, are considered to be moderately concentrated; markets in which the HHI is greater than or equal to 1,800 points are considered to be highly concentrated. In the Merger Policy Statement, the Commission adopted the 1992 Federal Trade Commission/Department of Justice Horizontal Merger Guidelines, which state that in a horizontal merger, an increase of more than 50 HHI points in a highly concentrated market or an increase of 100 HHI points in a moderately concentrated market fails its screen and warrants further review. Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,129; *see also Analysis of Horizontal Market Power under the Federal Power Act*, 138 FERC ¶ 61,109 (2012) (affirming the Commission's use of the thresholds

Transaction on horizontal competition. The Delivered Price Test shows no change in HHI in the PNM market or any markets first-tier to PNM because all of the output of generation affiliated with Avangrid is committed through long-term power purchase agreements.<sup>16</sup> With no change in market concentration, Applicants conclude the Proposed Transaction will not have an adverse effect on competition.<sup>17</sup>

**ii. Farmington-Enchant Protest**

14. Farmington and Enchant (collectively, Farmington-Enchant) filed a protest and request for hearing regarding the Proposed Transaction.<sup>18</sup> Farmington-Enchant claim that approval of the Proposed Transaction without conditions will impede or block Farmington-Enchant's conversion of an existing coal generation resource "designed to support an economically viable and sustainable clean energy future for New Mexico and Western energy markets."<sup>19</sup>

15. Farmington-Enchant explain that the San Juan Generating Station is a net 847 MW coal-fired electric generation facility in Waterflow, New Mexico, currently producing electricity from Units 1 and 4. Farmington-Enchant state that the San Juan Generating Station electrically connects to the Four Corners Hub through the FC Line, an approximately 10-mile long, 345 kilovolt generation-tie line. Farmington-Enchant state that PNM and Farmington are among several owners of the San Juan Generating Station, owning approximately 66% and five percent, respectively. Farmington-Enchant state that an ownership agreement among the San Juan Generating Station owners allows Farmington to acquire the power plant and transfer a portion of the asset to Enchant, whereby Farmington-Enchant will retrofit the existing coal fired units with carbon capture and sequestration technology and sell the converted plant's electricity into the wholesale power market.<sup>20</sup> Farmington-Enchant state that the FC Line is a critical part of the switchyard facilities of the San Juan Generating Station, and is part of the rights, title, and interests needed for the continued operation of the San Juan Generating Station.<sup>21</sup>

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adopted in the Merger Policy Statement).

<sup>16</sup> Application at 20, Exh. J.

<sup>17</sup> *Id.* at 22.

<sup>18</sup> Farmington-Enchant Protest at 1-2.

<sup>19</sup> *Id.* at 2.

<sup>20</sup> *Id.* at 3.

<sup>21</sup> *Id.* at 12-13.

Farmington-Enchant state that PNM, as the designated operating agent, is currently responsible for operating and maintaining the San Juan Generating Station. Farmington-Enchant note that PNM has already received approval from the New Mexico Public Regulation Commission (New Mexico Commission) to end its operation of the power plant in 2022.<sup>22</sup>

16. Farmington-Enchant assert that Applicants in their Application inform the Commission that the San Juan Generating Station will be retired by the end of 2022,<sup>23</sup> despite Farmington's legal right to operate the San Juan Generating Station past 2022 and Farmington's agreement with Enchant Energy. Farmington-Enchant state that the premature retirement of the San Juan Generating Station will deny Western energy markets up to 847 MW of uncommitted baseload capacity that also provides voltage support and other ancillary services.<sup>24</sup> Farmington-Enchant argue that the record needs to be developed to reflect "whether Applicants intend to cause PNM, despite its legal obligation to negotiate in good faith, to fail to reach agreement with Farmington and force the San Juan Generating Station to retire."<sup>25</sup>

17. Farmington-Enchant refer to PNM's July 2020 system impact study assumption that the San Juan Generating Station will retire by the end of 2022 as evidence that Applicants seek to bar a competitor from the market. Farmington-Enchant state that the record needs to be developed to determine how PNM modeled the San Juan Generating Station in Avangrid Applicants' pending request for 403 MW of firm point-to-point transmission from the PNM Clines Corner to the PNM Four Corners Hub substation to ensure that no preferential treatment was provided to this request.<sup>26</sup> Farmington-Enchant argue that this is critically important because Applicants' market power analysis rests on the premise that Avangrid Applicants have no uncommitted capacity to sell, and as such, there is no market power risk from the Proposed Transaction.<sup>27</sup>

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<sup>22</sup> *Id.* at 3.

<sup>23</sup> Farmington-Enchant cite to a statement in Applicants' market power analysis that the San Juan Generating Station will retire by the end of 2022. *Id.* at 22 (citing Application, Exh. J at 18 n.33).

<sup>24</sup> *Id.* at 14-15.

<sup>25</sup> *Id.* at 22.

<sup>26</sup> *Id.* at 21.

<sup>27</sup> *Id.* at 30.

iii. **Applicants Answer**

18. In response, Applicants argue that the Farmington-Enchant Protest focuses entirely on a contractual issue about PNM's decision to exit its ownership interest in the San Juan Generating Station, a decision that Applicants note was approved by the New Mexico Commission, pre-dates the Proposed Transaction, and will survive the Proposed Transaction. Applicants assert Farmington-Enchant's allegation that the Proposed Transaction will result in the retirement of the San Juan Generating Station is simply incorrect, because the Proposed Transaction neither caused the planned retirement of the San Juan Generating Station nor provided any incentive for retirement plans that pre-existed the Merger Agreement, which is dated October 20, 2020.<sup>28</sup> Applicants argue that, by definition, Farmington-Enchant's pre-existing contractual dispute with PNM is unrelated to and of no consequence in this section 203 proceeding.<sup>29</sup> Applicants state that the Protest is beyond the scope of a section 203 review and the Commission should reject it as such.<sup>30</sup>

19. Applicants also argue that the Farmington-Enchant Protest fails to defend its "vague and simplistic statements about the competitive effects of the retirements (or to demonstrate how even if such effects exist, they are related to the Proposed Transaction)," and instead reverts to more arguments regarding its contractual dispute.<sup>31</sup> Applicants state that the Farmington-Enchant Protest does not attempt to rebut the detailed and supported market concentration analyses the Applicants provided, and Farmington-Enchant do not undertake their own market power analysis. Applicants argue that the Farmington-Enchant Protest raises no issues of material fact that are in any way relevant to the Commission's analysis pursuant to section 203 and assert that Farmington-Enchant's repeated requests to set this matter for evidentiary hearing have no merit and should be rejected.<sup>32</sup>

20. Applicants note that all of the relevant existing and planned generation of the Avangrid Applicants and their affiliates in the PNM balancing authority area and first tier markets is fully contracted to unaffiliated third parties or already assigned to PNM under a long-term contract. Applicants also note that the full market power analysis contained in the Application demonstrated no screen failures and no competitive concerns.

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<sup>28</sup> Applicants Answer at 6.

<sup>29</sup> *Id.* at 5.

<sup>30</sup> *Id.* at 3.

<sup>31</sup> *Id.* at 7.

<sup>32</sup> *Id.* at 4.



Furthermore, Applicants assert that treatment of coal-fired resources in the market power analysis, including the remaining units of the San Juan Generating Station, was actually conservative because it reduces the amount of affiliated capacity (and consequently Applicants' market share).<sup>33</sup> Applicants state that their treatment of development projects in the market power analysis is in complete conformance with Commission policy and accepted practice.<sup>34</sup>

21. Applicants contend that the system impact study that was referenced in the Farmington-Enchant Protest was completed and issued approximately three months prior to the execution of the Merger Agreement on October 20, 2020 and has nothing to do with the Proposed Transaction.<sup>35</sup> Applicants note that to the extent any party has a concern about whether PNM is complying with its OATT in any respect, including with respect to interconnection and/or transmission requests and any assumptions used in any studies related thereto, a party can file a complaint at the Commission pursuant to FPA section 206<sup>36</sup> (or otherwise avail itself of the Commission's rules and procedures). Applicants state that, accordingly, Farmington-Enchant's arguments with respect to transmission and interconnection access should be rejected.<sup>37</sup>

#### iv. Farmington-Enchant Answer

22. In response, Farmington-Enchant assert that the Applicants' assumption in the market power analysis that the San Juan Generating Station would cease operations is incorrect and, therefore, cannot be relied upon to find the Proposed Transaction is in the public interest.<sup>38</sup> Farmington-Enchant also clarify that their protest is not a request for the Commission to involve itself in contract negotiations. Rather, Farmington-Enchant state that they are urging the Commission to consider the Application based on a full and complete record that takes into account Applicants' long-term interest in shuttering the San Juan Generating Station and the leverage that the approval of the Proposed

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<sup>33</sup> *Id.* at 10.

<sup>34</sup> *Id.* at 12.

<sup>35</sup> *Id.* at 13-14 (citing Notice of Assignment of Transmission Service Requests, OATI OASIS, [http://www.oasis.oati.com/woa/docs/PNM/PNMdocs/Notice\\_of\\_Assignment\\_of\\_TSRs\\_by\\_Pattern\\_NM\\_Wind\\_LLC\\_to\\_Avangrid\\_Renewables,\\_LLC\\_posted\\_12-17-18.pdf](http://www.oasis.oati.com/woa/docs/PNM/PNMdocs/Notice_of_Assignment_of_TSRs_by_Pattern_NM_Wind_LLC_to_Avangrid_Renewables,_LLC_posted_12-17-18.pdf)).

<sup>36</sup> 16 U.S.C. § 824e.

<sup>37</sup> Applicants Answer at 18-19.

<sup>38</sup> Farmington-Enchant Response at 9.

Transaction would provide PNM to ensure that the rights to acquire the plant never transfer.<sup>39</sup>

**v. Commission Determination**

23. In analyzing whether a proposed transaction will adversely affect horizontal competition, the Commission examines the effects on concentration in the generation markets and whether the proposed transaction otherwise creates the incentive and ability to engage in behavior harmful to competition, such as withholding of generation.<sup>40</sup>

24. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on horizontal competition. We note that because Applicants attribute the contracted capacity owned by Avangrid to the purchaser of that capacity which will not change due to the Proposed Transaction, the Delivered Price Test shows virtually no change in market concentration under any measurement.<sup>41</sup>

25. We do not find persuasive Farmington-Enchant's arguments that the Proposed Transaction will harm horizontal competition. As an initial matter, we find that the pre-existing contractual dispute over the San Juan Generating Station is outside the scope of the Commission's section 203 analysis. Farmington-Enchant has not demonstrated that the Proposed Transaction creates the incentive or ability to engage in behavior harmful to competition. The 2022 scheduled retirement of the San Juan Generating Station predates the announcement of the Proposed Transaction, and Farmington-Enchant has not shown that the Proposed Transaction provided any incentive for retirement plans that did not exist prior to the Merger Agreement. We agree with Applicants that any contractual dispute over the continued operation of the San Juan Generating Station is not related to the Proposed Transaction; the dispute pre-existed the Proposed Transaction and may continue after the closing of the Proposed Transaction. We further agree with Applicants that the parties to the contract have whatever rights and remedies are available to them under the contract that are available today, and those parties will continue to have those rights regardless of the Proposed Transaction.<sup>42</sup> Accordingly, we see no evidence that the Proposed Transaction will cause any change to market concentration or withdrawal of capacity from the relevant markets.

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<sup>39</sup> *Id.* at 17.

<sup>40</sup> *Nev. Power Co.*, 149 FERC ¶ 61,079, at P 28 (2014).

<sup>41</sup> Application at Exh. J-6.

<sup>42</sup> Applicants Answer at 5.

**b. Effect on Vertical Competition****i. Applicants' Analysis**

26. Applicants state that the Proposed Transaction will not have an adverse effect on vertical competition. Applicants state that none of the Avangrid Applicants own or control transmission assets in the relevant markets other than those necessary to interconnect their generating facilities to the transmission grid. Additionally, Applicants state that the PNM Resources Applicants do not own or control transmission assets other than: (1) transmission assets in New Mexico that are subject to the PNM OATT and (2) those facilities necessary to interconnect their generating facilities to the transmission grid. Applicants note that the Commission has consistently found that vertical market power concerns regarding the control of transmission facilities are adequately mitigated when those facilities are subject to an OATT.<sup>43</sup> Applicants note that customers seeking service on the PNM transmission system may do so on an open access, nondiscriminatory basis and on rates, terms, and conditions that have been approved by the Commission, and PNM is not able to use such facilities to frustrate competition in wholesale electricity markets.<sup>44</sup> Applicants also state that there are no issues with respect to upstream inputs to power production. Applicants represent that none of Applicants nor any of their affiliates owns or controls intrastate natural gas transportation, storage, or distribution facilities in the PNM market. Applicants state that there are no other barriers to entry that raise concerns.<sup>45</sup>

**ii. Farmington-Enchant Protest**

27. Farmington-Enchant argue that Applicants' market power analysis does not consider the impact on competition of Avangrid Applicants teaming with PNM Resources Applicants and the potential for harm to other wholesale market participants from possible anti-competitive action in accessing those transmission assets.<sup>46</sup> Farmington-Enchant claim that the inability of the San Juan Generating Station generating capacity to access the Four Corners Hub via the FC Line would reduce competition at the Four Corners Hub and thereby adversely impact Western energy

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<sup>43</sup> *Id.* at 24 (citing *Duke Energy Corp.*, 136 FERC ¶ 61,245, at P 161 (2011); *Sharyland Utils., L.P.*, 131 FERC ¶ 61,275, at PP 17-18 (2010); *Great Plains Energy Inc.*, 121 FERC ¶ 61,069, at P 34 (2007)).

<sup>44</sup> Application at 12.

<sup>45</sup> *Id.* at 23-24.

<sup>46</sup> Farmington-Enchant Protest at 30-31.

markets.<sup>47</sup> Farmington-Enchant argue that the Proposed Transaction demonstrates that Applicants are on a “path to frustrate” Farmington’s right to acquire the associated San Juan Generating Station FC Line transmission rights that are needed to access the Western Energy market past 2022.<sup>48</sup> Farmington-Enchant request the Commission establish hearing and settlement procedures to allow the parties to develop the record to fully understand and examine whether Applicants’ “understanding” that the San Juan Generating Station will retire by the end of 2022 conflicts with PNM’s obligation to negotiate in good faith with Farmington to allow transfer of all San Juan Generating Station assets, including the switchyard facilities and FC Line.<sup>49</sup>

**iii. Applicants Answer**

28. In response, Applicants state that vertical market power concerns regarding the control of transmission facilities are adequately mitigated because all of the relevant PNM transmission facilities are subject to an OATT.<sup>50</sup> Applicants state that PNM is not able to use such facilities to frustrate competition in wholesale electricity markets because all persons seeking interconnection or transmission service on the PNM system may do so on an open access, nondiscriminatory basis and on rates, terms, and conditions that have been approved by the Commission.<sup>51</sup>

**iv. Commission Determination**

29. In analyzing whether a proposed transaction presents vertical market power concerns, the Commission considers the vertical combination of upstream inputs, such as transmission or natural gas, with downstream generating capacity. As the Commission has previously found, transactions that combine electric generation assets with inputs to generating power (such as natural gas, transmission, or fuel) can harm competition if the transaction increases an entity’s ability or incentive to exercise vertical market power in wholesale electricity markets. For example, by denying rival entities access to inputs or by raising their input costs, an entity created by a transaction could impede entry of new

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<sup>47</sup> *Id.* at 24.

<sup>48</sup> *Id.* at 25.

<sup>49</sup> *Id.* at 25-26.

<sup>50</sup> Applicants Answer at 14.

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

competitors or inhibit existing competitors' ability to undercut an attempted price increase in the downstream wholesale electricity market.<sup>52</sup>

30. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on vertical competition. Applicants represent that none of Applicants nor any of their affiliates owns or controls intrastate natural gas transportation, storage, or distribution facilities in the PNM balancing authority area, and that there are no other barriers to entry that raise concerns. Additionally, Applicants state that none of the Avangrid Applicants own or control transmission assets in the relevant markets other than facilities necessary to interconnect their generating facilities to the transmission grid, and that the PNM Resources Applicants do not own or control transmission assets other than (1) transmission assets in New Mexico that are subject to the PNM OATT, and (2) those facilities necessary to interconnect their generating facilities to the transmission grid.<sup>53</sup>

31. We find no evidence to support Farmington-Enchant's arguments that the Proposed Transaction demonstrates that Applicants are on a path to frustrate Farmington's right to acquire the associated San Juan Generating Station FC Line transmission rights. Farmington-Enchant does not explain how Applicants may frustrate Farmington's transmission rights or identify any potential defects in PNM's OATT that would allow for discriminatory treatment of transmission requests. We note that should Farmington-Enchant believe that PNM has violated its OATT, or should Farmington-Enchant identify provisions that allow for undue discrimination, Farmington-Enchant may file a complaint with the Commission pursuant to FPA section 206 to seek appropriate relief.

**c. Effect on Rates**

**i. Applicants' Analysis**

32. Applicants state that the Proposed Transaction will have no adverse effect on rates. Applicants explain that none of the PNM Resources Applicants have wholesale requirements customers with contracts that would permit the pass-through of any transaction costs. Applicants further offer a hold harmless commitment. Applicants commit that for a period of five years following the consummation of the Proposed Transaction, they will not seek recovery of any transaction-related costs incurred to consummate the Proposed Transaction from any transmission customer or any customer purchasing wholesale power at cost-based rates, except to the extent that they can

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<sup>52</sup> *Upstate N.Y. Power Producers*, 154 FERC ¶ 61,015, at P 15 (2016); *Exelon Corp.*, 138 FERC ¶ 61,167, at P 112 (2012).

<sup>53</sup> Application at 23-24.

demonstrate in a separate FPA section 205 proceeding that such costs are offset by transaction-related savings.<sup>54</sup>

33. Applicants further commit that they will not seek recovery of any acquisition premium absent a showing of specific, measurable, and substantial benefits to ratepayers made in a subsequent FPA section 205 proceeding. Finally, Applicants explain that Applicants will track transaction-related costs using existing accounting and recordkeeping systems and will apply appropriate allocation methodologies for costs that are attributable to the Proposed Transaction.<sup>55</sup>

**ii. Farmington-Enchant Protest**

34. Farmington-Enchant alleges that the Applicants do not adequately study or explain how PNM's pre-existing planned retirement of the San Juan Generating Station will affect rates. Farmington-Enchant claim that the Applicants' market power analysis does not consider the effect on rates or markets when a merging entity's business model benefits from the failure to complete a prior commitment to negotiate in good faith the transfer of assets that will compete with the projects Applicants have and intend to develop. Farmington-Enchant state that the Commission cannot know whether market prices will increase if the San Juan Generating Station retires by the end of 2022 because Applicants have not studied the effect on prices from the retirement of the San Juan Generating Station. Farmington-Enchant state that the Commission should establish hearing and settlement procedures to allow parties to examine the effect on competition and rates from Applicants' improper and premature retirement of the San Juan Generating Station at the end of 2022.<sup>56</sup>

**iii. Applicants Answer**

35. In response, Applicants argue that Farmington-Enchant are unable to point to any current rates that would be impacted by the Proposed Transaction and that they cannot do so. Applicants state that the Application's analysis of the Proposed Transaction's effect on rates is thorough and aligned with Commission policy and precedent. Applicants assert that none of the PNM Resources Applicants have wholesale requirements

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<sup>54</sup> *Id.* at 26.

<sup>55</sup> *Id.* at 27.

<sup>56</sup> Farmington-Enchant Protest at 23-24.

customers with contracts that would permit the pass-through of any transaction costs. Applicants additionally note their hold harmless commitments in the Application.<sup>57</sup>

**iv. Commission Determination**

36. Based on Applicants' representations and commitments, we find that the Proposed Transaction will not have an adverse effect on rates. None of the PNM Resources Applicants have wholesale requirements customers with contracts that would permit the pass-through of any transaction costs.

37. We accept Applicants' commitment to hold customers harmless from costs related to the Proposed Transaction. We interpret Applicants' hold harmless commitment to apply to all transaction-related costs, including costs related to consummating the Proposed Transaction, incurred prior to the consummation of the Proposed Transaction, or in the five years after the Proposed Transaction's consummation in accordance with the Commission's policy on hold harmless commitments.<sup>58</sup>

38. We find that Farmington-Enchant's concern regarding the effect on rates is misplaced. Farmington-Enchant has not identified a pass-through mechanism that would allow for an adverse effect on rates, nor explained how the hold harmless commitment is inadequate to protect ratepayers. While Farmington-Enchant questions whether rates in 2022 were considered, the hold harmless period continues for five years following the closing of the Proposed Transaction, thereby encompassing the year 2022. Therefore, we find Applicants' commitment sufficient to protect ratepayers from an adverse effect on rates due to the Proposed Transaction.

**d. Effect on Regulation**

**i. Applicants' Analysis**

39. Applicants state that the Proposed Transaction will not result in an adverse effect on regulation. Applicants explain that no FPA-jurisdictional Applicant's status as an FPA-jurisdictional utility will change as a result of the Proposed Transaction, and the Proposed Transaction will not result in any facilities being removed from the Commission's jurisdiction. Further, Applicants state that the Proposed Transaction will not in any way modify the applicable states' jurisdiction and authority over the Applicants' state-regulated utility operations. Applicants state that they will file

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<sup>57</sup> Applicants Answer at 15-16.

<sup>58</sup> *Policy Statement on Hold Harmless Commitments*, 155 FERC ¶ 61,189 (2016).

applications for approval of the Proposed Transaction with the New Mexico Commission and the Public Utility Commission of Texas.<sup>59</sup>

**ii. Commission Determination**

40. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap.<sup>60</sup> As to whether a proposed transaction will have an effect on state regulation, the Commission explained in the Merger Policy Statement that it ordinarily will not set the issue of the effect of a proposed transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the proposed transaction. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission may set the issue for hearing and it will address such circumstances on a case-by-case basis.<sup>61</sup> Based on Applicants' representations, we find no evidence that either state or federal regulation will be impaired by the Proposed Transaction. We note that no party has argued otherwise.

**e. Cross-Subsidization**

**i. Applicants' Analysis**

41. Applicants provide an Exhibit M analysis showing that the Proposed Transaction will not result in proscribed cross-subsidization or the pledge or encumbrance of utility assets. Applicants state that, based on facts and circumstances known to it or that are reasonably foreseeable, that the Proposed Transaction will not result in, at the time of the Proposed Transaction or in the future, cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company.<sup>62</sup>

**ii. Commission Determination**

42. Based on Applicants' representations, we find that the Proposed Transaction will not result in the cross-subsidization of a non-utility associate company by a utility

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<sup>59</sup> Application at 28.

<sup>60</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

<sup>61</sup> *Id.*

<sup>62</sup> Application at Exh. M.



company, or in a pledge or encumbrance of utility assets for the benefit of an associate company. We note that no party has argued otherwise.<sup>63</sup>

### 3. Other Considerations

43. Information and/or systems connected to the bulk system involved in this transaction may be subject to reliability and cybersecurity standards approved by the Commission pursuant to FPA section 215.<sup>64</sup> Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information database, and operating systems. If affiliates, personnel or investors are not authorized for access to such information and/or systems connected to the bulk power system, a public utility is obligated to take the appropriate measures to deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, etc., must comply with all applicable reliability and cybersecurity standards. The Commission, North American Electric Reliability Corporation, or the relevant regional entity may audit compliance with reliability and cybersecurity standards.

44. FPA section 301(c) gives the Commission authority to examine the books and records of any person who controls, directly or indirectly, a jurisdictional public utility insofar as the books and records relate to transactions with or the business of such public utility. The approval of the Proposed Transaction is based on such examination ability. In addition, applicants subject to the Public Utility Holding Company Act of 2005<sup>65</sup> (PUHCA 2005) are subject to the record-keeping and books and records requirements of PUHCA 2005.

45. Section 35.42 of the Commission's regulations requires that sellers with market-based rate authority timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting

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<sup>63</sup> We note that Applicants explain that La Joya Wind, LLC, an affiliate of Avangrid Applicants, will own a planned wind facility that is fully committed to PNM under two long-term power purchase agreements. These agreements will become affiliate power sales upon closing of the Proposed Transaction, requiring authorization under FPA section 205. La Joya Wind, LLC and PNM requested authorization under FPA section 205 to make affiliate sales under the agreements. *See Request for Authorization to Make Affiliate Sales and for Contract Specific Authorization*, Docket No. ER21-1379-000 (Mar. 12, 2021).

<sup>64</sup> 16 U.S.C. § 824o.

<sup>65</sup> 42 U.S.C. §§ 16451-63.

market-based rate authority.<sup>66</sup> To the extent that a transaction authorized under FPA section 203 results in a change in status, sellers that have market-based rates are advised that they must comply with the requirements of Order No. 652.

The Commission orders:

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

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

(C) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever not pending or may come before the Commission.

(D) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(E) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(F) Applicants shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction.

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

(H) If the Proposed Transaction affects the books and records of a jurisdictional entity required to follow the Commission's Uniform System of Accounts, then Applicants shall submit their final accounting entries within six months of the date that the transaction is consummated, and the accounting submissions shall provide all the accounting entries and amounts related to the transaction along with narrative explanations describing the basis for the entries.

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<sup>66</sup> 18 C.F.R. § 35.42 (2020); *see also Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 110 FERC ¶ 61,097, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

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By the Commission.

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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