UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

MONONGAHELA POWER COMPANY	**)**	
and	**)**	**Docket No. EC17-88-000**
ALLEGHENY ENERGY SUPPLY COMPANY	**)**	

PROTEST OF WV SUN AND WEST VIRGINIA CITIZEN ACTION GROUP

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("the Commission" or "FERC"), 18 C.F.R. § 385.211, intervenors Community Power Network/West Virginia Solar United Neighborhoods ("WV SUN") and West Virginia Citizen Action Group ("CAG") (collectively, "WVSUN/CAG")[1] file this Protest to the Application filed by Monongahela Power Company ("Mon Power") and Allegheny Energy Supply Company, LLC ("AE Supply") (collectively, "Applicants) in the above-referenced docket. The Applicants, both subsidiaries of FirstEnergy Corp. ("FirstEnergy"), seek authorization under Section 203 of the Federal Power Act to transfer the Pleasants Power Station ("Pleasants" or "Pleasants plant"), a 1,300 megawatt ("MW"), 37-year-old merchant generator owned by AE Supply, to Mon Power, a West Virginia public utility with captive customers.

The Commission should deny the Application because the proposed transaction would result in the inappropriate cross-subsidization of a non-utility associate company. 16 U.S.C. § 824b(a)(4). As a merchant plant, the profitability of Pleasants is tied to the revenues it receives from the wholesale markets. AE Supply – and, ultimately, FirstEnergy and its shareholders –

[1] On March 28, 2017, WVSUN/CAG filed a doc-less Motion to Intervene in this proceeding. The Motion to Intervene was timely filed and no answers in opposition were filed within 15 days after the Motion to Intervene was filed. Therefore, WVSUN/CAG are parties to this proceeding. *See* 18 C.F.R. § 385.214(c).

bear the market risks associated with the plant. In recent years, market conditions have turned unfavorable for aging coal plants like Pleasants as a result of lower market prices for energy, capacity, natural gas, and renewable resources. Faced with such situation, FirstEnergy now seeks to transfer the plant to Mon Power, a regulated entity whose captive customers would bear the plant's market risks while ensuring that the plant's costs are covered and a steady rate of return on the plant's regulated rate base is provided. By shifting the plant's market risks to captive customers, and ensuring a steady revenue stream from the plant, the ultimate beneficiaries of the proposed transaction are FirstEnergy and its shareholders. Put simply, the transfer of Pleasants from AE Supply to one of FirstEnergy's utility subsidiaries would result in "a transfer of benefits from a public utility's captive customers to shareholders of the public utility's holding company."[2]

The Applicants attempt to hide their goals behind claims that Mon Power needs 1,300 MWs of additional capacity, and that the Pleasants plant was selected through a purportedly objective and independent Request for Proposals ("RFP") process. But even basic scrutiny shows that those claims are unsupported, and are simply an attempt to rationalize FirstEnergy's pre-determined plan to use Mon Power's captive customers to shield itself from the unfavorable market risks facing Pleasants. That FirstEnergy had such a plan is not mere speculation; indeed, the company's executives have repeatedly and publicly made clear since at least April 2016 their intent to transfer the Pleasants plant to Mon Power. The pending application is nothing more than an attempt to realize that plan.

This attempt to shift market risks to captive customers is the very type of cross-subsidization that Section 203(a)(4) is designed to prevent. And the Applicants have not come

[2] FPA Section 203 Supplemental Policy Statement, FERC Docket No. PL07-1-000, 72 Fed. Reg. 42,277, 42,280 (Aug. 2, 2007).

close to showing that such cross-subsidization is somehow in the public interest or entitled to a safe harbor exemption. As such, the Commission should, on this record, deny the Application so that decisions regarding the merchant Pleasants plant can be made on the basis of objective and reasonable evaluations of market conditions and need, rather than on FirstEnergy's desire to make captive utility customers responsible for a financially risky asset like the Pleasants plant.[3]

I. The Section 203 Application and FirstEnergy's Plan to Shed its Merchant Operations.

On March 7, 2017, Mon Power and AE Supply filed with the Commission their application for authorization, pursuant to Section 203 of the Federal Power Act, for the transfer of ownership of the Pleasants plant from AE Supply, a merchant subsidiary of FirstEnergy, to Mon Power, a regulated public utility affiliate (hereinafter, the "Application"). In support of the Application, Applicants claim that Mon Power has a need for additional generating capacity that was initially identified in a 2015 Integrated Resource Plan ("IRP") filed with the West Virginia Public Service Commission ("PSC") by Mon Power and another FirstEnergy subsidiary, The Potomac Edison Company ("PE").[4] The Applicants further contend that, through an RFP process that started in December 2016, Pleasants was identified as the least-cost resource for Mon Power to acquire to meet its purported capacity need.[5]

The available evidence, however, shows that the proposal to transfer the Pleasants plant stems not from an assessment of Mon Power's capacity needs or from the December 2016 RFP process. Instead, FirstEnergy and its subsidiaries decided by at least early 2016 that they would

[3] In the alternative, given the paucity of the Applicants' showing regarding the cross-subsidization issues at stake here, the Commission should set this matter for a hearing and order a discovery schedule so the parties can further investigate the proposed Pleasants transfer

[4] Application at 7-8; Exh. M at 5-6; Ruberto Testimony at 4-6, 8. Note: any references to witness testimony in this Protest are citing to the public, redacted versions that were filed with this Commission or with the West Virginia PSC.

[5] Application at 9-15; Exh. M at 6-7; Ruberto Testimony at 12-17; Lee Testimony at 3-11.

transfer the Pleasants plant to Mon Power. In fact, Mon Power tipped its hand about the planned Pleasants transfer during the 2015 IRP process. While the IRP itself did not identify the "existing facilit[y] within the region" that Mon Power planned to purchase,[6] two spreadsheets produced in discovery by Mon Power in that proceeding in early 2016 assumed that Pleasants would be added to Mon Power's generating fleet on or before the 2018/2019 delivery year.[7]

Similarly, more than a year ago, in April 2016, FirstEnergy's CEO endorsed the notion of rate basing Pleasants, describing Mon Power's previous purchase of the Harrison Power Station from AE Supply as a "model."[8] Similarly, in September 2016, FirstEnergy's chief financial officer reiterated this plan, stating that the company "would look at opportunities to move [the 1300 MW Pleasants plant] back into the regulated framework similar to what we did with the Harrison plant."[9] FirstEnergy also signaled that this scheme would be accomplished under the auspices of an RFP.[10]

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[6] *See* West Virginia PSC, Case No. 15-2002-E-IRP, 2015 Integrated Resource Plan at 55 (filed Dec. 30, 2015), available at http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=441858&NotType=%27WebDocket%27 (hereinafter, "2015 IRP").

[7] Case No. 15-2002-E-IRP, Resp. to CAG-I-5 Att. A, "Generation" tab, Resp. to CAG-I-15, Att. A, available at http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=448977&NotType=%27WebDocket%27. The spreadsheets can be found on the 19th and 209th pages of this 290-page PDF.

[8] *FirstEnergy (FE) Charles E. Jones on Q1 2016 Results – Earnings Call Transcript* (Apr. 27, 2016), *available at* http://seekingalpha.com/article/3968677-firstenergy-fe-chales-e-jones-q1-2016-results-earnings-call-transcript?part=single. On the call, a participant noted the company's effort to "transition more to a regulated utility" and then asked for the CEO's "thoughts on maybe rate basing or getting some type of cost of severance return on Pleasants, on other power plants, particularly Pleasants . . . ." In his response, FirstEnergy's CEO broadly hinted that Pleasants would be the subject of a future proposal: ". . . . We filed our integrated resource plan with West Virginia. I think later this year, they'll start taking a look at it seriously and it's up to the [PSC] to decide would Pleasants be the appropriate solution. Obviously, we have a model in place already with Harrison and we think that is something they have to look at."

[9] "Barclays CEO Energy-Power Conference 2016," *available at* http://investors.firstenergycorp.com/Presentations (audio recording). *See also* Bob Matyi, S&P Global Platts, *FirstEnergy may support New York-style solution for nuclear plants* (Sept. 8, 2016) (discussing comments of the CFO, and noting that he "repeated his company's previously stated desire to transfer its

These plans to transfer the Pleasants plant to Mon Power were developed against the backdrop of FirstEnergy's overall strategy to reduce its exposure to market risks by shedding its merchant operations. As FirstEnergy has explained in statements to investors and regulators, the company's merchant operations are facing significant market risks resulting from a "prolonged decrease in demand and excess generation supply" in the PJM region.[11] As FirstEnergy has acknowledged, "significantly depressed" capacity prices in the 2019/2010 PJM Base Residual Auction, along with a negative "long term fundamental view" on energy and capacity prices, indicate that energy and capacity markets "continue to be weak."[12] These factors, together with "anemic demand forecasts," have "lowered the value of the business."[13]

As a result of these market challenges, FirstEnergy has announced that it will exit the merchant generation sector in an effort to remake itself into "a fully regulated utility."[14] As FirstEnergy's CEO has explained:

> At this time, however, we do not see any short-term solutions to the current challenging market situation. Longer-term, we do not believe competitive generation is a good fit for FirstEnergy and are focused on regulated operations. And we cannot put investors and our company at risk as we wait for the country and PJM to address the issues with the current construct.

1,300-MW unregulated Pleasants coal-fired baseload power plant . . . to its regulated Monongahela Power subsidiary"), *available at* http://www.platts.com/latest-news/electric-power/louisville-kentucky/firstenergy-may-support-new-york-style-solution-21470912.

[10] FirstEnergy Q3 2016 Results - Earnings Call Transcript (Nov. 4, 2016).

[11] FirstEnergy Corp. 10-K FY2016, at 4, 30 (Feb. 21, 2017) ("Continued depressed prices in the wholesale energy and capacity markets may further negatively and materially impact the future results of operations and financial condition of FirstEnergy and FES and have resulted in FirstEnergy and FES conducting a strategic review of competitive operations . . . .") (hereinafter, "2016 10-K").

[12] *Id.* at 4.

[13] *Id.* at 28.

[14] *Id*. ("Consistent With Our Strategy to Be A Fully Regulated Utility, We Intend to Exit the Competitive Generation Business.").

> We will continue to seek opportunities both within the competitive realm and the states to further de-risk the business and convert megawatts from competitive markets to a regulated or regulated-like construct.[15]

The company intends to complete its planned exit from competitive operations by mid-2018.[16] The available evidence shows that the proposed Pleasants transfer is an important part of shifting risks that FirstEnergy does not want to bear onto the captive customers of public utilities such as Mon Power. Yet this corporate strategy is not even mentioned in the Section 203 Application that seeks approval for the plant's transfer.

II. Legal Standard

Under Section 203 of the Federal Power Act, a public utility must secure Commission authorization in order to purchase a generation facility whose value is in excess of $10,000,000 and which is used for interstate wholesale sales. *See* 16 U.S.C. § 824b(a)(1)(D). The Commission will approve such a transaction only if it is "consistent with the public interest" and "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." *Id.* § 824b(a)(4). When analyzing whether a transaction would be consistent

[15] *See FirstEnergy (FE) Charles E. Jones on Q1 2016 Results – Earnings Call Transcript* (Apr. 27, 2016), *available at* http://seekingalpha.com/article/3968677-firstenergy-fe-chales-e-jones-q1-2016-results-earnings-call-transcript?part=single; *see also* FirstEnergy Presentation at Barclay's CEO Energy-Power Conference (Sept. 8, 2016) at 8, *available at* http://investors.firstenergycorp.com/Cache/1001214187.PDF?O=PDF&T=&Y=&D=&FID=1001214187&iid=4056944.

[16] Toward this goal, the company announced in November 2016 that it is undertaking a strategic review of its competitive operations. 2016 10-K at 4. FirstEnergy "does not intend to infuse additional equity" into its merchant operations, and will continue to support them only "as necessary to maintain safe operations and to preserve the fleet as it pursues strategic alternatives." *Id.* at 31. Meanwhile, the company continues to invest in its regulated public utility sector, where procedures for rate recovery insulate the company from the market risks that are posing significant challenges to its merchant operations. *See id.* at 6-10, 28 (summarizing state-by-state regulatory matters; addressing factors that affect rate recovery).

with the public interest, the Commission generally considers the effect on competition, the effect on rates, and the effect on regulation.[17]

Under the Commission's cross-subsidy review, "the applicant bears the burden of proof to demonstrate that customers will be protected" from cross-subsidization.[18] The application must include a "detailed showing" that the transaction will not result in, among other things, "[a]ny transfer of facilities between a traditional public utility associate company that has captive customers . . . and an associate company." 18 C.F.R. § 33.2(j)(1)(ii)(A). If the applicant cannot make that showing, it must explain "how such cross-subsidization . . . will be consistent with the public interest." *Id.* § 33.2(j)(2).

III. Argument

The Commission should deny the Application because it would result in a public utility improperly cross-subsidizing a non-utility associate company. Under the proposed transaction, FirstEnergy's merchant subsidiary would sell the Pleasants plant to Mon Power, thereby shifting the plant's market risks onto captive ratepayers, while enabling FirstEnergy to collect a steady revenue stream from the plant's capitalized rate base. Such cross-subsidization is prohibited by Section 203 of the Federal Power Act, and is a paradigmatic example of the "safety net" transactions the Commission warned against in *Ameren*.[19]

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[17] *See, e.g., Ohio Power Company AEP Generation Resources Inc.*, 143 FERC ¶ 61075 at P 16 & n.15 (Apr. 29, 2013) (citing 1996 Merger Policy Statement, Order No. 592, Docket No. RM96-6-000, FERC Stats. & Regs. ¶ 31,044 at 30,111); *see also, e.g., Entegra Power Grp., LLC Gila River Power, L.P. Gila River Energy Supply LLC Union Power Partners, L.P. Entegra Power Servs. LLC Merrill Lynch Genco II, LLC*, Docket No. EC11-68-000, 136 FERC ¶ 61049 (July 21, 2011) (Section 203 authorization proceeding).

[18] Transactions Subject to FPA Section 203, FERC Docket No. RM05-34-001, Order 669-A at P 135 n.112 (Apr. 24, 2006).

[19] *Ameren Energy Generating Co. & Union Elec. Co., d/b/a AmerenUE*, Opinion No. 473, Docket Nos. EC03-53-000, EC03-53-001, 108 FERC ¶ 61081 at PP 46-47 (July 29, 2004).

Although the Applicants make various attempts to rationalize the proposed transaction – claiming that Mon Power needs the generating capacity, that Pleasants was selected through a fair and open competitive solicitation, and that FERC does not need to scrutinize this transaction because it is being reviewed by the West Virginia PSC – none of those arguments hold water. As explained below, the Applicants have significantly overstated Mon Power's capacity obligation, and the RFP was heavily biased in favor of Pleasants. The Applicants' "safe harbor" argument also fails, because the West Virginia PSC looks to FERC to determine whether cross-subsidization would result from an asset transfer. Because the proposed transaction does not meet Section 203's requirements, the Application should be denied.

A. The Pleasants transfer would result in the cross-subsidization of a non-utility associate company.

The Applicants' proposal – for AE Supply to sell Pleasants to Mon Power, a public utility owned by the same parent company – falls squarely within one of the four categories of cross-subsidization identified in the Commission's regulations. As the Applicants concede,[20] the Pleasants transfer would result in a "transfer of facilities between a traditional public utility associate company that has captive customers . . . and an associate company."[21] 18 C.F.R. § 33.2(j)(1)(ii)(A). Moreover, because the proposed transaction is precisely the type of cross-

[20] Exh. M at 4.

[21] *Id.* at 1. Although Applicants fail to acknowledge it, there is a third associate company to account for in this analysis: FirstEnergy, the parent company of both Mon Power and AE Supply. An "associate company" includes any company in the same holding company system as Mon Power. *See* 42 U.S.C. § 16451(2); 18 C.F.R. § 33.1(b)(4) ("The term[] associate company . . . ha[s] the meaning given th[at] term[] in the Public Utility Holding Company Act of 2005."). This describes FirstEnergy, because a holding company system includes the holding company, together with its subsidiaries. 42 U.S.C. § 16451(9). Because Mon Power is a wholly-owned subsidiary of FirstEnergy, FirstEnergy is a holding company of Mon Power and, therefore, a member of the same holding company system as Mon Power. Application at 5, 6; 42 U.S.C. § 16451(8)(A) ("In general [t]he term 'holding company' means— any company that directly or indirectly owns, controls, or holds, with power to vote, 10 percent or more of the outstanding voting securities of a public-utility company or of a holding company of any public-utility company.").

subsidization Section 203(a)(4) was designed to guard against, the Applicants cannot meet their burden of showing that this cross-subsidy would "be consistent with the public interest." 18 C.F.R. § 33.2(j)(2).

As explained in Section I above, the evidence shows that this proposed transaction is being driven by FirstEnergy's ongoing strategy to "de-risk" its competitive generation business by shifting such risks onto Mon Power's captive customers. FirstEnergy contends that it can no longer "put investors and our company at risk" by maintaining merchant generation.[22] But rather than try to sell the Pleasants plant in the marketplace, FirstEnergy seeks to use its subsidiaries to "convert megawatts from competitive markets to a regulated or regulated-like construct"[23] by having AE Supply sell the plant to Mon Power. Through such an arrangement, FirstEnergy and AE Supply would be able to offload the market risks facing Pleasants onto captive customers, while maintaining a rate of return on the plant. In other words, by engineering the proposed transfer, FirstEnergy, AE Supply, and Mon Power are attempting to transfer "benefits from a public utility's captive customers to shareholders of the public utility's holding company" through an intra-system transaction involving the sale of a generation facility.[24] Because this transaction fails to meet 18 C.F.R. § 33.2(j)(1), and because it results in the very cross-subsidization that Section 203 aims to prevent, the Application should be denied.

Indeed, the Pleasants transfer appears to be a textbook case of a "safety net" transaction that the Commission has long recognized poses significant concerns about skewing competitive

[22] *See FirstEnergy (FE) Charles E. Jones on Q1 2016 Results – Earnings Call Transcript* (Apr. 27, 2016), *available at* http://seekingalpha.com/article/3968677-firstenergy-fe-chales-e-jones-q1-2016-results-earnings-call-transcript?part=single.

[23] *Id.*

[24] FPA Section 203 Supplemental Policy Statement, 72 Fed. Reg. at 42,280. The Commission has previously noted that acquisitions, specifically, have an "inherent potential" to fall under the sway of affiliate preference. *Ameren Energy Generating Co. & Union Elec. Co., d/b/a AmerenUE*, Opinion No. 473, Docket Nos. EC03-53-000, EC03-53-001, 108 FERC ¶ 61081 at P 59 (July 29, 2004).

markets. For example, in the 2004 *Ameren* ruling, the Commission noted that "affiliate acquisitions by their very nature raise concerns about the potential for discriminatory treatment in favor of the affiliate's plant, which can undermine competition and harm the public interest."[25] In particular, "the ability of a franchised utility to assume its affiliated merchant's generation when market demand declines gives the affiliated merchant a 'safety net' that merchant generators not affiliated with a franchised utility lack."[26] The Commission further explained that it has "expressed concern that 'the existence of a safety net may affect the incentive of new merchant generators to invest in new facilities,' erecting a barrier to entry that harms the competitive process and raises prices to customers in the long run 'because affiliated merchant generation with a safety net option will not be subject to the price discipline of a competitive market.'"[27] Given these concerns, the Commission held that it must take steps to "assure that a public utility's acquisition of a plant from an affiliate is free from preferential treatment."[28]

This "safety net" problem is precisely what is at issue in this case. Faced with the Pleasants plant's declining market competitiveness, FirstEnergy is seeking to offload the financial risks of that plant onto captive customers, who would ensure that FirstEnergy and its shareholders continue receiving a profit from the plant. That is an option that is not available to a merchant generator that does not have regulated affiliates and, therefore, skews the competitive markets. If the Commission does not reject the Application outright, at minimum a hearing and

[25] *Ameren* at P 47; *see also id.* at P 59.

[26] *Ameren* at P 11 (quoting 102 FERC ¶ 61,128 at 61,345 (2003)).

[27] *Id*.

[28] *Id.* at P 59.

further factual investigation is needed to evaluate whether there was preferential treatment in crafting this safety net proposal.[29]

B. FirstEnergy's justifications for the proposed transaction are meritless.

Although admitting that the proposed transaction involves the transfer of a generating facility to a "traditional public utility that has captive customers" – thus failing to satisfy 18 C.F.R. 33.2(j)(1) – the Applicants offer a series of arguments for why the proposed transaction does not pose cross-subsidization concerns. First, they claim that the transaction qualifies for a "safe harbor" because the West Virginia PSC is also reviewing the proposed Pleasants transfer. Second, they argue that there can be no cross-subsidization concerns here because Pleasants was selected through a competitive solicitation process. Finally, they assert that the transaction would be in the public interest because it fulfills Mon Power's need for additional generating capacity. None of these claims have merit. Because the proposed transaction would result in inappropriate cross-subsidization, and because Applicants cannot show that such cross-sub is

[29] This is not the first instance in which the captive customers of FirstEnergy's utilities were at risk of improper cross-subsidization of a non-utility corporate affiliate. In Docket No. EL16-34-000, the Commission considered a proposal under which FirstEnergy's Ohio utilities would execute a PPA with FirstEnergy Solutions, a FirstEnergy-owned merchant generator. In its April 27, 2016 Order, the Commission found that the utilities' customers would be captive under this PPA, citing FERC's "fundamental goal . . . to protect customers served by franchised public utilities from inappropriately subsidizing the market-regulated or non-utility affiliates of the franchised public utility or otherwise being financially harmed as a result of affiliate transactions and activities." Order Granting Complaint, 155 FERC ¶ 61,101 ¶ 59 (Apr. 27, 2016) (quoting Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 198). The Commission found that the PPA, together with the non-bypassable charges that utility customers would be forced to pay under FirstEnergy's proposal, "present[ed] the potential for the inappropriate transfer of benefits from captive customers to shareholders and, thus, may frustrate the goal of the Commission's affiliate sales restrictions." *Id.* at P 64. *See also id.* at P 65 (noting that the PPA "raises the potential for cross-subsidization" from the Ohio utilities' retail customers to FirstEnergy's competitive generation affiliates). Accordingly, FERC rescinded the waiver of the affiliate power sales restriction as to the proposed PPA and prohibited any transactions under that PPA unless and until the Commission approved it. *Id.* at P 53 n.91.

consistent with the public interest or entitled to a safe harbor exemption, the Application should be rejected.

1. The Applicants' proposal does not qualify for a "safe harbor."

In their Application, AE Supply and Mon Power incorrectly claim that the proposed Pleasants transfer qualifies for a "safe harbor" from Section 203 review because the transaction is also being reviewed by the West Virginia PSC.[30] This claim should be rejected because the West Virginia PSC proceeding offers no protection against the inappropriate cross-subsidization, and the resulting harm to competitive markets, that would ensue if FirstEnergy succeeds in transferring Pleasants to Mon Power.

It is true that the Commission has found that state commission review of an affiliate transaction can sometimes provide a safe harbor from cross-subsidization concerns.[31] But the safe harbor exemption only applies if an applicant shows that the "proposed transaction complies with specific state regulatory protections against inappropriate cross-subsidization by captive customers."[32] If the state commission "does not have the authority to impose cross-subsidization protections, . . . the transaction would not qualify for this safe harbor."[33] Here, the Applicants have plainly failed to meet the requirements for a safe harbor, which is not surprising given that the available evidence shows that the West Virginia PSC looks to FERC to protect against cross-subsidization, appears to lack the authority to review transactions for cross-subsidization concerns, and has not been asked to evaluate such issues with regards to the proposed Pleasants transfer.

[30] Application at 21-22; Exh. M at 2.

[31] *See* FPA Section 203 Supplemental Policy Statement, 72 Fed. Reg. at 42,280-81.

[32] *Id.* at 42,280.

[33] *Id.*

Although Applicants suggest otherwise, there is no evidence that the West Virginia PSC will review the Pleasants transfer for cross-subsidization issues. Indeed, when FirstEnergy proposed the transfer of the Harrison plant several years ago, the PSC did not review the transaction for cross-subsidization concerns and, instead, deferred to FERC on the issue. The PSC found that one of the conditions of the transaction would benefit customers "if the FERC ruled that any portion of the Acquisition Adjustment we will allow in rate base represents cross-subsidization."[34] While relying on FERC to identify inappropriate cross-subsidization, the PSC cited no guidelines of its own, instead taking its cue instead from FERC rules.[35] Because the West Virginia PSC relies on FERC to protect against inappropriate cross-subsidization, this Application cannot qualify for the safe harbor.

The Applicants try to bolster their safe harbor argument by claiming that "any risks of cross-subsidization" would be reviewed by the West Virginia PSC.[36] But as noted above, the PSC looks to the Commission to determine whether a transaction violates Section 203's prohibition against inappropriate cross-subsidization. The safe harbor exemption is also unavailable because the Applicants have not demonstrated that West Virginia has "specific state regulatory protections against inappropriate cross-subsidization by captive customers."[37] Although the Applicants point to two West Virginia Code provisions,[38] neither of those

[34] West Virginia PSC, Case Nos. 12-1571-E-PC, 13-1272-E-PW, Order at 34 (Oct. 7, 2013); *see also id.* at 46 (requiring refund "if the FERC determines that purchase price paid by Mon Power exceeds the fair market valuation of Harrison").

[35] *Id.* at 42 (observing that "negotiations were sensitive to FERC rules regarding affiliated transactions and cross-subsidization, and carefully adhered to FERC rules"). Although the PSC shows familiarity with FERC rules, its experience applying those rules appears to occur in settings where their application is not contested. *See, e.g., id.* at 34 (making findings as to compliance with FERC rules on cross-subsidization based on the applicants' unrebutted testimony).

[36] Application at 21.

[37] FPA Section 203 Supplemental Policy Statement, 72 Fed. Reg. at 42,280.

[38] Application at 21-22 (citing W. Va. Code §§ 24-2-12(c), (f))

provisions mentions cross-subsidies or establishes specific cross-subsidization protections intended to safeguard competitive markets. The fact that the West Virginia PSC will review the retail rate impacts of FirstEnergy's proposal is not a substitute for this Commission's review of cross-subsidization issues under the Federal Power Act.

The Applicants' "safe harbor" argument is especially misplaced here because they have not asked the West Virginia PSC to review the proposed transaction for cross-subsidization concerns. Indeed, in the petition filed with the West Virginia PSC, Mon Power made clear that it expects FERC, not the PSC, to review the cross-subsidization issue. The PSC petition references this Application, and states that in this federal "filing, the applicants will demonstrate that the Transaction . . . will not result in the 'cross-subsidization of a non-utility associate company . . .' and accordingly is consistent with the public interest. FERC approval should satisfy [the PSC] as to the fairness of the Transaction as between FirstEnergy affiliates."[39] This statement, together with Mon Power's representation to the PSC that "the Transaction will be reviewed by FERC and must meet FERC's stringent guidelines for reasonableness and for affiliate transactions,"[40] cannot be squared with the safe harbor claims made in the Application. If the Commission does not carefully scrutinize review the proposed transaction for cross-subsidization concerns, no one will.

Because the West Virginia PSC looks to FERC to apply the standards of Section 203, and because the Applicants themselves have assured the West Virginia PSC that the Commission will perform that review, there is no basis for invoking the safe harbor in this case.[41]

[39] West Virginia PSC, Case No. 17-0296, Petition at 20-21 (Mar. 7, 2017);

[40] Case No. 17-0296, Direct Testimony of Holly C. Kauffman at 14:20-21.

[41] Even if the West Virginia PSC had authority to review the proposed transaction for cross-subsidization concerns, and even if the PSC had been asked to and were willing to perform such a review, the safe harbor would be still be unavailable because this case presents specific evidence that inappropriate cross-

2. Mon Power's RFP was not a true competitive solicitation.

The Applicants attempt to rationalize the proposed transaction by pointing to the RFP that preceded this filing.[42] But the evidence demonstrates that – far from being "transparent, fair, and non-discriminatory" – the RFP was designed to favor a specific resource: the Pleasants plant.

Long before the RFP's issuance in December 2016, FirstEnergy executives had repeatedly expressed their intention to transfer Pleasants to Mon Power's regulated rate base. As noted above in Section I, FirstEnergy's CEO endorsed the notion of rate-basing Pleasants in April 2016, and FirstEnergy executives confirmed these plans in subsequent investor calls.

Moreover, the RFP itself was heavily biased in favor of Pleasants. A credible RFP is one that fosters a genuine competitive bidding process.[43] In determining whether a given RFP meets this standard, the Commission looks to four principles: transparency, definition, evaluation, and oversight.[44] The Mon Power RFP failed each of these tests.

First, the RFP failed the definition principle because, rather than defining the product being sought through the RFP in a nondiscriminatory manner, Mon Power's RFP was "written to exclude products that c[ould] appropriately fill the issuing company's objectives," with the

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subsidization is likely to occur. As the Commission made clear in its 2007 guidance, if there is "evidence from interveners that there is a cross-subsidy problem based on the particular circumstances presented," then safe harbor is not available. FPA Section 203 Supplemental Policy Statement, 72 Fed. Reg. at 42,280. As discussed above, by rate-basing Pleasants, FirstEnergy seeks to shift market risks to captive West Virginia ratepayers. Because the evidence shows that the proposed transfer would result in a "cross-subsidy problem," safe harbor is unavailable.

[42] Exh. M at 6-7; Application at 2-3, 9-14; Ruberto Testimony at 12-17; Lee Testimony at 3-11.

[43] *See Allegheny Energy Supply Company, LLC*, Docket No. ER04-730-000, 108 FERC ¶ 61082, at P 18 (July 29, 2004). When presented with such an RFP, the Commission has "assurance" that: "(1) a competitive solicitation process was designed and implemented without undue preference for an affiliate; (2) the analysis of bids did not favor affiliates, particularly with respect to nonprice factors; and (3) the affiliate was selected based on some reasonable combination of price and non-price factors." *Id.*

[44] *Ameren* at P 22.

RFP's requirements heavily biased in favor of Pleasants.[45] The stated rationale for the RFP was Mon Power's purported need for additional generating capacity.[46] Even assuming, for the sake of argument, that this rationale was legitimate,[47] the RFP was designed so narrowly that it heavily favored Pleasants. Under the RFP, which sought 1300 MW of generating capacity, bids were generally limited to generation facilities within the Allegheny Power Systems ("APS") transmission zone.[48] This meant that power plants located in the southern half of Western Virginia, as well as in the Wheeling-Moundsville area and other areas, were discouraged from submitting proposals. The RFP was also limited to a narrow range of resources. Mon Power did not consider bids for long-term power purchase agreements ("PPAs"),[49] generators whose unforced capacity was less than 100 MW,[50] or renewable resources such as wind and solar.[51] By eliminating these resource options, and refusing to consider satisfying any portion of its purported energy and capacity needs through such resources, Mon Power excluded an array of product that could have appropriately fulfilled the RFP's stated objective.[52]

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[45] *Ameren* at PP 76-77.

[46] Exh. M at 5-6; *see also* Ruberto Testimony at 4-7.

[47] As explained *infra* in Section III.B.3, this rationale is not credible, because Mon Power does not, in fact, need additional capacity.

[48] Lee Testimony, Exh. RJL-3, Monongahela Power Company Request for Proposals (Dec. 16, 2016) ("Mon Power RFP") at 12. The RFP states that bids to sell a facility outside the APS zone "may" be considered if Mon Power does not receive at least three qualified bids from within the zone. *Id.*

[49] Mon Power RFP Q&A, GEN 00004 (Dec. 27, 2016) ("Question: Would Mon Power consider a long term fixed price power purchase agreement instead of an acquisition (for both energy and capacity), where the fixed price would be significantly below the long term cost of an acquisition? Answer: MonPower is looking to acquire a physical asset and, at this stage, is not considering contractual agreements."), *available at* http://monpower-rfp.com/FAQ. *See also* Ruberto Testimony at 11.

[50] Mon Power RFP at 12.

[51] *Id.* (limiting RFP process to generation facilities that are "fully dispatchable," thereby eliminating wind and solar).

[52] *Allegheny*, at P 28. The reasons offered by Applicants fail to justify the pre-qualifying criteria they instituted. Applicants claim that they restricted bids to the APS zone in order to "minimize overall Capacity Performance penalty risk." Ruberto Testimony at 10. But no explanation has been provided for

Second, the Mon Power RFP also failed the oversight and transparency principles, because, *inter alia*, the RFP was not designed by an independent third party.[53] The design phase is critical, because the designers of the RFP set forth the pre-qualifying criteria, the evaluation criteria, and all other aspects of the RFP, each of which must be kept free of affiliate preference.[54] There are multiple approaches that the Commission has endorsed for ensuring independency during the process of designing an RFP. For example, the design process might involve the participation of various stakeholders representing diverse interests.[55] Alternatively, the state commission can provide oversight of the process.[56] But Mon Power rejected such approaches, and instead assumed much of the responsibility for the RFP's design. The RFP was administered by Charles River Associates ("CRA"), a private consulting firm, which failed to exercise independence in the crucial design phase of the RFP. Rather than conducting a transparent design process, CRA and Mon Power engaged in a closed process in which the two entities designed nearly every aspect of the RFP.[57] Mon Power participated in creating the pre-

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how they calculated such risk or applied it to alternative scenarios. The rest of Applicants' explanations are even vaguer. The Applicants contend that the RFP did not invite bids for PPAs because they provide less "control" and less ability to "modify facility operations." *Id.* at 11. But by excluding PPAs from even bidding, no opportunity was provided to determine whether the potential cost savings and reduced risk that may have been available through PPAs could offset the purported downsides of PPAs. As for renewables, the Applicants claim that they were not eligible in the RFP because they represent "operational risk and exposure." *Id.* at 9. Applicants' assertion that renewables drive up "overall capacity acquisition costs" because of their low capacity factor attribution means little in the absence of an analysis of costs under different scenarios. *Id.* Without more information, it is impossible to evaluate Applicants' decision to impose these pre-qualifying requirements. In short, Applicants fail to show that the pre-qualifying requirements were warranted.

[53] *Cf. Ameren* at P 70 ("an independent third party should design the solicitation, administer bidding, and evaluate bids prior to the company's selection").

[54] *See* Lee Testimony, at 3-4 (describing the tasks involved in the design process).

[55] *See Allegheny* at P 26; *see also Ameren* at PP 74, 83.

[56] *See Allegheny* at P 26; *Ameren* at P 82 ("Independence can also be satisfied if the state commission has approved the selection of a third party on the basis of established independence criteria.")

[57] *See* Lee Testimony at 3-4.

qualifying criteria, the evaluation criteria, and the timetables and deadlines for administration of the RFP.[58] Thus, despite the presence of an "independent" third party, Mon Power was still in control of the RFP during the critical design phase. Mon Power's involvement in the RFP design, and the absence of any independent third-party oversight, demonstrate that *Ameren*'s standards for transparency and oversight were not satisfied.[59]

Mon Power's resistance to third-party oversight was underscored by its vigorous opposition to an August 2016 motion of the West Virginia PSC Staff and Consumer Advocate Division, which sought to require a PSC-administered RFP process if Mon Power acquired more than 100 MW of capacity.[60] When Mon Power issued its RFP several months later, it did so without any input from the West Virginia PSC.

This was a far cry from the independent oversight that the Commission found sufficient in *Allegheny*. There, the Commission noted that the "RFP was monitored by an independent consultant," and stressed that "this consultant was selected by the Maryland Commission," "the

[58] *Id.*

[59] The RFP also fails to satisfy the transparency standard set forth in *Ameren* because Mon Power, rather than an independent third party, carried out the negotiation process with AE Supply regarding the Pleasants transfer. *See* Application at 3. As the Commission explained in *Ameren* with regards to negotiations that occur after the bidding, "[i]f the affiliate is on the shortlist or wins, it is important to ensure that the affiliate has no undue advantage resulting from its affiliate relationship. One way to prevent such an advantage from occurring is for the independent third party to be the RFP issuer's agent in the negotiation with the affiliate." *Ameren* at P 75. Mon Power's failure to take such a step here further undermines Applicants' claim that the RFP process somehow insulates the proposed transaction from cross-subsidization concerns.

[60] *See* West Virginia PSC, Case No. 16-1074-E-P, Companies' Response and Motion to Dismiss at 2 (Sept. 6, 2016). The PSC Staff and CAD filed the motion to enforce a requirement included in a stipulation concerning the Harrison Power Station's transfer in Case No. 12-1571. Notably, Mon Power's principal objection was that the stipulation requirement had not been triggered because it faced a capacity *surplus*. Mon Power also, however, raised questions about the value of RFPs more generally. *Id.* at 4 ("RFPs can at times be helpful in procuring various commodities and items. However, RFPs can result in limited participation, higher prices, more limited offering arrangements, and suppliers who cannot or will not deliver on their contractual obligations. Solicitations and private negotiations with third parties often result in better prices, more available options not limited by an RFP, and higher performance levels on contracts. The Commission should not tie or bind itself or utilities to one particular procurement methodology.").

consultant's compensation was determined by the Maryland Commission before the issuance of the RFP," and "[t]his consultant reported its findings directly to the Maryland Commission."[61] Due to "the presence of this independent third party, as well as the involvement of the Maryland Commission," FERC concluded that there was "sufficient independent third-party oversight of the design, administration, and bid evaluation stages of Potomac's RFP."[62] Here, where (i) the RFP was not monitored by the West Virginia PSC or otherwise subject to public scrutiny, (ii) Mon Power actively resisted PSC oversight, and (iii) Mon Power actively participated in the RFP's design, the oversight principle has not been met.

Finally, the Mon Power RFP fails to fulfill the *Allegheny/Ameren* evaluation principle. To meet this principle, an RFP "should clearly specify the price and nonprice criteria under which the bids are evaluated."[63] The Commission has stressed that "all criteria should be specific and detailed so that all bidders can effectively respond to the RFP," and noted that "[c]lear evaluation criteria will ensure that the RFP does not give an advantage to the affiliate."[64]

Here, Mon Power's RFP failed to meet these standards. In addition to a levelized cost tool, the RFP states that bids would be judged on five non-cost factors: "in-state location and fuel use," "fuel risk," "development risk," "ease of integration," and "specific risk factor(s)."[65] Many of these factors are so vague as to be essentially meaningless. For example, the "development risk" factor sought to evaluate the risk associated with facilities that are still in development.[66] Applicants claimed that it was concerned with the risk of non-performance on commitments in

[61] *Allegheny* at P 39.

[62] *Id.*

[63] *Ameren* at P 78.

[64] *Ameren* at P 78.

[65] Ruberto Testimony at 14-15; Exh. RLJ-3, Mon Power RFP at 23-26.

[66] Ruberto Testimony at 15.

the PJM market. *Id.* Yet, the RFP provides no clear metric of "risk," an ambiguity that biased the process in favor of existing generation plants such as Pleasants. Moreover, the RFP does not explain how these various non-cost factors would be weighted during CRA's evaluation of bids.

Worse, one of the factors – "ease of integration" – establishes a clear preference for Mon Power's corporate affiliates. The RFP expresses a preference for "generation facilities that . . . can be cost-effectively and efficiently incorporated into [Mon Power's] operating and corporate frameworks."[67] By favoring facilities whose employees and operations can be readily integrated, this factor clearly skewed the RFP in favor of Pleasants – a plant owned by Mon Power's corporate affiliate.

In short, the available evidence shows that rather than an independent and objective attempt to identify and compare resource options, the RFP process was designed to reach the result that FirstEnergy had already selected. As such, it is no surprise that Mon Power's corporate affiliate "won" the process.

3. The cross-subsidization that would result from the Pleasants transfer is not consistent with the public interest.

Because the proposed transaction would result in Mon Power's captive customers cross-subsidizing non-utility corporate affiliates (FirstEnergy and AE Supply), the transaction would only be permissible if the Applicants could show that such cross-subsidization is consistent with the public interest.[68] But the Applicants have not, and cannot, make such a showing, because FirstEnergy's scheme to shift the Pleasants plant's market risks onto captive ratepayers is harmful to the public interest.

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[67] Mon Power RFP at 25; *see also* Ruberto Testimony at 15 (stating that this criterion measures how easily a plant would be integrated into Mon Power's "existing systems and corporate framework").

[68] 16 U.S.C. § 824b(a)(4); 18 C.F.R. § 33.2(j)(2).

Applicants cite three reasons why this transaction would purportedly be in the public interest: they claim the transaction (i) "is the most cost-effective means of reliably fulfilling Mon Power's identified energy and capacity needs," (ii) "is the result of a competitive solicitation process that ensured there was no affiliate preference," and (iii) "will not adversely impact wholesale competition, rates, or regulation."[69] None of these arguments withstand scrutiny. As explained above in Section III.A above, FirstEnergy's proposal is a "safety net" transaction would harm competition and wholesale rates. And, because Mon Power's RFP was designed to specifically favor Pleasants, the RFP was marred by an improper affiliate preference.[70]

The Applicants' flagship argument – that the Pleasants transfer is needed to address a looming capacity shortfall – is also without merit. The Applicants' claim is based on a series of faulty assumptions that appear to be aimed at concocting a purported need for acquiring Pleasants rather than on identifying legitimate capacity needs. Contrary to Applicants' assertions, the public's "energy and capacity needs" do not require the acquisition of a large generating facility, and the proposed transaction is certainly not "the most cost-effective means" of meeting those needs.[71]

The Applicants claim that Mon Power will face a capacity shortfall of 1005 MW by 2020 and 1439 MW by 2027.[72] In making this claim, Applicants repeat an error that Mon Power and Potomac Edison (collectively, "MP/PE") made in their 2015 IRP, where they departed from

[69] Exh. M at 5.

[70] That affiliate preference, in turn, discourages wholesale competition. *See Ameren* at P 61 (non-affiliated generators that perceive an advantage to affiliated generators "may be discouraged from entering the market").

[71] Exh. M at 5.

[72] *Id.* at 5-6.

PJM's methodology and significantly overstated future capacity needs.[73] As load serving entities within PJM, MP/PE's capacity obligations are established by PJM using a specific methodology. Under PJM rules, future capacity needs are based on summer peak load coincident with the PJM peaks, not winter peak load.[74] In the IRP, however, MP/PE improperly inflated their capacity obligation. Instead of relying on summer peak load, which the PJM capacity obligation is based on, the IRP calculated MP/PE's capacity needs using winter peak load, a value which is greater than summer peak load within MP/PE's service territory.[75] By using these higher winter peaks, and departing from the PJM rules, the IRP presented an improperly inflated projection of MP/PE's capacity needs.[76] And in their Application to the Commission, the Applicants have

[73] 2015 IRP, available at http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=441858&NotType=%27WebDocket%27. The 2015 IRP was filed jointly by Mon Power and Potomac Edison, another FirstEnergy utility in West Virginia. Potomac Edison does not own generation capacity, and customers of both utilities bear financial responsibility for Mon Power's generation fleet.

[74] PJM Manual 19: Load Forecasting and Analysis, Revision 30, at 23 (Dec. 1, 2015), available at https://www.pjm.com/~/media/documents/manuals/m19.ashx. Specifically, PJM determines capacity obligation by, first, considering zonal weather-normalized summer peak loads and then calculating the contribution of each wholesale and retail customer to those peaks. *Id.* The resulting Peak Load Contribution serves as the basis for determining the capacity obligation of each load serving entity, including MP/PE. This methodology makes sense, even for winter-peaking service territories such as the MP/PE's, because PJM's determination of capacity obligation for an individual LSE takes into account capacity and demand across the entire grid. As the IRP itself acknowledged, "PJM determines what constitutes sufficient capacity to maintain overall reliability for each zone through its annual load forecast and reserve margin guidelines." 2015 IRP at 18.

[75] 2015 IRP at 16; *see also* Ruberto Testimony at 5-6.

[76] In his testimony, Mr. Ruberto correctly notes that the West Virginia PSC accepted the IRP in June 2016. Ruberto Testimony at 5. It is important to recognize, however, that the PSC's *acceptance* of the filing did not represent the *approval* of the claims made by MP/PE. As the PSC stated in its Order, "the Legislature did not confer on the [PSC] the authority to approve – or disapprove – IRPs." Case No. 15-2002-E-IRP, Commission Order at 5 (June 3, 2016), available at http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=451975&NotType=%27WebDocket%27. The PSC further "reiterate[d] that this acceptance does not constitute, and should not be viewed or interpreted as, approval of any future projects or other filings that otherwise require Commission approval, including without limitation cost recovery. To the contrary, because the West Virginia Legislature did not empower the Commission to approve IRPs, the Commission considers this and all IRP filings to be simply informational." *Id.* at 6.

repeated this fundamental error, by once again using winter peaks to claim that Mon Power faces a capacity shortfall.[77]

By using this improper methodology, the Applicants have manufactured a "capacity shortfall" that does not actually exist. Whereas Applicants claim that Mon Power will face a substantial capacity shortfall by 2020, MP/PE have separately admitted that, according to PJM's methodology, they will have a capacity *surplus* at least through May 2020. As they stated:

> The BRA [Base Residual Auction] conducted for the 2018/2019 delivery year resulted in an estimated capacity obligation of 3,067 MW with capacity resources of 3,355 MW. *The most recent BRA conducted for the 2019/2020 delivery year resulted in an estimated capacity obligation of 3,229 MW with capacity resources of 3,399 MW.*[78]

Thus, far from facing an imminent capacity shortfall, MP/PE are facing the opposite situation. This massive discrepancy demonstrates the degree to which Mon Power's improper methodology overstates its capacity obligations.[79]

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[77] Although the Application does not explicitly state that Mon Power's latest forecast is based on the winter peak, Mon Power's continued use of this inflated metric was confirmed in Mr. Ruberto's testimony in the West Virginia PSC filing. *See* Case No. 17-0296, Direct Testimony of Jay Ruberto at 4-5, 20 (filed Mar. 7, 2017) (discussing MP/PE's use of the winter peak in determining capacity needs, and projecting Mon Power's capacity position in relation to winter peaks), available at http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=468091&NotType=%27WebDocket%27.

[78] Case No. 16-1074-E-P, Companies' Response and Motion to Dismiss at 2 (Sept. 6, 2016) (emphasis added), available at http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=457920&NotType=%27WebDocket%27.

[79] The Applicant's claim that MP/PE face an even greater shortfall than estimated in the IRP is also questionable given that PJM's most recent load forecast shows reduced demand within MP/PE's transmission zone. *Compare* Ruberto Testimony at 7-8 (claiming a future capacity shortfall greater than asserted on page 4 in the 2015 IRP, even when accounting for Mon Power's planned sale of the Bath County Pumped Storage Project) *with* PJM Load Forecast Report: January 2017, Table A-1 on p. 48 and Table A-2 on p. 50, *available at* http://www.pjm.com/~/media/library/reports-notices/load-forecast/2017-load-forecast-report.ashx (showing in comparison to PJM's 2016 load forecast a 5.5% decrease in both the summer and winter peak load forecast for 2027 for the Allegheny Power Systems ("APS") transmission zone).

Indeed, if the Applicants' claim were taken at face value, then Mon Power itself recently exacerbated this purported capacity shortfall by trying to sell its 16.25% ownership share of the Bath County Pumped Storage Project,[80] which would provide an estimated 220 MW of capacity under PJM's Capacity Performance rules.[81] Although Mon Power has since abandoned this effort,[82] the fact that Mon Power attempt to sell off capacity at the same time it claims to need 1300 MW more underscores the emptiness of the purported rationale for the RFP. The Applicants are simply wrong in claiming that the proposed transaction is needed to meet MP/PE's capacity needs.

The Applicants also err in claiming that the purchase of this aging coal-fired power plant is "the most cost-effective means" of meeting these purported capacity needs.[83] In the IRP, MP/PE presented a skewed analysis of potential resources that improperly favored existing generation assets, excluded viable resource options, and erroneously concluded that the least-cost option would be the purchase of an existing coal plant.[84] Among other errors, in concluding that existing coal units are cheaper than any other alternative, MP/PE relied on unreasonably high energy and capacity price forecasts, which they used in eschewing consideration of market purchases.[85]

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[80] Exh. M at 5; Application at 8 n.23.

[81] West Virginia PSC, Case No. 17-0296, Ruberto Testimony at 7:12-14.

[82] *See* Letter of MP/PE to West Virginia PSC, Case No. 17-0296-E-PC (Apr. 3, 2017), available at http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=469610&NotType=%27WebDocket%27.

[83] Exh. M at 5.

[84] IRP at 5, 55, 57-58. Among other deficiencies, MP/PE's "evaluation of resource options," IRP at 52-58, failed to seriously consider many potential resources, including demand response, energy efficiency, renewables such as wind and solar, and market purchases.

[85] WVSUN/CAG discussed the IRP's inflated price forecasts in comments filed with the West Virginia PSC. *See* Case No. 15-2002-E-IRP, WVSUN/CAG Comments at 23-25 (filed April 28, 2016), *available at*

The Applicants' "cost-effective" claim rings especially hollow given FirstEnergy's warnings about the financial challenges facing its competitive assets (such as Pleasants). In statements to investors, FirstEnergy has noted such challenges as "weak power prices, the low capacity auction outcome in May [2016], and an anemic demand forecast."[86] Faced with such challenges, and not wanting to "put investors and our company at risk," FirstEnergy began an effort last year to "de-risk" the business by "convert[ing] megawatts from competitive markets to a regulated or regulated-like construct." FirstEnergy's stated desire to shed the market risks of Pleasants and other merchant plants runs directly counter to the Applicants' optimistic claim that this acquisition would be "cost-effective" for the captive customers of Mon Power and Potomac Edison.

In sum, the proposed transaction is not consistent with the public interest. As explained above, the purported rationale for this acquisition is based on an inflated forecast of MP/PE's future capacity needs. Moreover, the RFP was compromised by affiliate preference; and wholesale competition is harmed by the influence of affiliate preference. Therefore, the cross-subsidization that would result from the proposed transaction is not consistent with the public interest.

IV. Request for Relief

Because the proposed transaction would result in inappropriate cross-subsidization, and the Applicants have failed to satisfy their burden of demonstrating otherwise, the Commission

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http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=449590&NotType=%27WebDocket%27 .

[86] *FirstEnergy (FE) Charles E. Jones on Q2 2016 Results - Earnings Call Transcript* (July 29, 2016), *available at* https://seekingalpha.com/article/3993404-firstenergy-fe-charles-e-jones-q2-2016-results-earnings-call-transcript?part=single.

should deny the Application. In the alternative, if the Commission is not inclined to deny the Application on the current record, discovery and a hearing are necessary to further explore the cross-subsidization concerns raised by the proposed transfer.[87] A hearing is appropriate in instances where there are issues of material fact that cannot be resolved based on the record before the Commission.[88] In this case, if the Commission does not deny the Application on the current record, a hearing would be needed to investigate at least two key matters of material importance that are inadequately addressed in the testimony submitted by Applicants.

First, in the event that the Commission does not reject the Application outright, there should be further factual development regarding the objectiveness – or lack thereof – of Mon Power's RFP. The factual issues that would need to be developed include (i) Mon Power and CRA's design of the RFP, including the manner by which the pre-qualifying criteria and the non-price evaluation criteria were devised and who was responsible for drafting them; (ii) CRA's application of the RFP's non-cost factors, which would help demonstrate how these criteria were applied with respect to each bid; (iii) communications between the parties that responded to the RFP and either CRA or Mon Power, which help test whether any party benefited from an informational advantage over its competitors; and (iv) communications between FirstEnergy,[89] Mon Power, and AE Supply, as these, too, would shed light on whether AE Supply received any form of advance notice or other information that would have furnished an advantage over its

[87] *See* 18 C.F.R. § 385.501 (the Commission has discretion to order a hearing); 18 C.F.R. § 385.401(a) (in proceedings that are set for a hearing, discovery is generally available).

[88] *See ISO New England Inc. NSTAR Elec. Co. the Conn. Light & Power Co. Pub. Serv. Co. of N.H. W. Mass. Elec. Co.*, Docket Nos. ER16-1023-000, ER16-1023-001, 155 FERC ¶ 61136 (May 3, 2016). A hearing is also appropriate when there are issues of credibility. *See City of Tacoma, Washington*, Project No. 460-000, 102 FERC ¶ 61029, 61058 (Jan. 15, 2003).

[89] It is important to note that FirstEnergy Service Company, which employs the Applicant's witness Jay Ruberto, should be included in the universe of FirstEnergy subsidiaries from which potentially relevant information regarding the proposed Pleasants transfer should be sought.

competitors. These categories of information would enable the parties, and the Commission, to further explore whether the RFP satisfies the *Allegheny/Ameren* principles, and to test Applicants' claim that the transaction was arrived at through a fair and open competitive solicitation.[90]

Second, further factual development would be needed to evaluate the Applicants' claim that the acquisition of Pleasants is the most cost-effective option to satisfy future capacity needs.[91] Among the issues that would benefit from factual development are (i) any analyses of the economics of the Pleasants plant, financial and other risks facing the plant, and the asset transfer's financial impact on AE Supply and FirstEnergy; (ii) FirstEnergy, AE Supply, or Mon Power communications or approvals relating to the transfer of the plant; and (iii) CRA's analysis of the economics of the qualifying responses to the RFP. These categories of information would enable the parties to assess the accuracy and reasonableness of the economic claims underpinning the Applicants' public interest argument.[92] This information would also enable the parties, and the Commission, to further explore any factual dispute over the extent to which FirstEnergy's proposal is an improper "safety net" transaction.

Finally, if the Commission is unable to issue a decision in this matter within 180 days of the Application's filing, WVSUN/CAG respectfully request that the Commission extend the deadline by an additional 180 days pursuant to 16 U.S.C. § 824b(a)(5). Given the transaction's potential impact on competitive markets, and the harm to captive customers that would result from cross-subsidization, this transaction should not be approved without the Commission's

[90] Exh. M, at 5-6, 6-7; Application, at 16-17.

[91] *See* Exh. M at 5; *see also* Ruberto Testimony at 8 ("'[t]he lowest [cost] evaluated option to address Mon Power's needs appears to be the purchase of existing generating facilities.'" (quoting IRP at 57))

[92] Exh. M at 5.

scrutiny. Accordingly, there would be good cause for extending the 180-day timeline. Such an extension would be consistent with the Commission's goal of "ensur[ing] that staff has authority to prevent . . . filings from going into effect by operation of law during the period in which the Commission lacks a quorum."[93]

V. Conclusion

For the foregoing reasons, WVSUN/CAG respectfully request that the Commission deny Mon Power and AE Supply's Application for Section 203 authorization. If the Commission does not deny the Application on this record, then the Commission should, at a minimum, set this matter for a hearing and order a discovery schedule so the parties can further investigate Applicants' claims.

Date: May 8, 2017

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[93] *Order Delegating Further Authority to Staff in Absence of Quorum*, Docket No. AD17-10-000, 158 FERC ¶ 61,135 (Feb. 3, 2017).

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CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing *Protest of WV SUN and West Virginia Citizen Action Group* upon the following parties via e-mail.

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