

162 FERC ¶ 61,015
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

Monongahela Power Company
Allegheny Energy Supply Company, LLC

Docket Nos. EC17-88-000

Monongahela Power Company

ES18-4-000

ORDER REJECTING DISPOSITION AND ACQUISITION OF GENERATION
FACILITIES AND DISMISSING ASSUMPTION OF LIABILITIES

(Issued January 12, 2018)

1. On March 7, 2017, as amended on April 3 and July 18, 2017, pursuant to sections 203(a)(1)(A) and (D) of the Federal Power Act (FPA)¹ and Part 33 of the Commission's regulations,² Monongahela Power Company (Mon Power) and Allegheny Energy Supply Company, LLC (AE Supply) (together, Applicants) submitted an application (Application) for authorization to permit the transfer by AE Supply of the Pleasants Power Station, an approximately 1,159 megawatt (MW) coal-fired electric generation facility (Pleasants Facility), to Mon Power (Proposed Transaction). On October 20, 2017, Mon Power also filed an application pursuant to section 204(a) of the FPA (Section 204 Application) requesting authorization to assume a \$142 million promissory note (Note) to secure a lien on AE Supply's interest in certain pollution control assets at the Pleasants Facility.³

¹ 16 U.S.C. § 824b(a)(1) (2012).

² 18 C.F.R. pt. 33 (2017).

³ 16 U.S.C. § 824c(a) (2012).

2. We have reviewed the Proposed Transaction under the Commission's Merger Policy Statement.⁴ As discussed below, we deny without prejudice authorization for the Proposed Transaction because Applicants have not demonstrated that it is consistent with the public interest. We also dismiss Mon Power's request for section 204 authorization to assume liabilities as moot.

I. Background

A. Description of Applicants

1. Monongahela Power Company

3. Applicants state that Mon Power, a wholly owned subsidiary of FirstEnergy Corp. (FirstEnergy), is an electric public utility with a service territory in northern West Virginia, providing generation, transmission, and distribution services covering an area with a population of approximately 800,000. Mon Power provides transmission service pursuant to Attachments H-11 and H-11A of the PJM Interconnection, L.L.C. (PJM) Open Access Transmission Tariff (Tariff) and makes wholesale sales of electric energy, capacity, and ancillary services at market-based rates.⁵ Applicants state that Mon Power's assets include 3,700 MW of generating capacity, 2,000 miles of transmission lines, and over 25,000 miles of distribution lines in West Virginia. Applicants state that Mon Power also provides all of the generation supply in the West Virginia service territory of its affiliate, The Potomac Edison Company (Potomac Edison), which provides

⁴ See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996) (Merger Policy Statement), reconsideration denied, Order No. 592-A, 79 FERC ¶ 61,321 (1997); see also *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008). See also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000) (cross-reference at 93 FERC ¶ 61,164), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). See also *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005) (cross-reference at 113 FERC ¶ 61,315), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

⁵ Application at 5.

electric service to approximately 140,000 customers, and as such, Mon Power is a franchised public utility with captive customers.⁶

2. AE Supply

4. Applicants state that AE Supply is a direct, wholly-owned subsidiary of FirstEnergy that develops, owns, and operates electric generation facilities and markets power in competitive markets. AE Supply is the current owner of the Pleasants Facility, a coal-fired generation facility located in Willow Island, West Virginia. Applicants state that AE Supply is not a franchised public utility with captive customers, and does not own or control any transmission or distribution facilities other than those necessary to interconnect its transmission assets to the grid. Applicants state that the Commission has authorized AE Supply to make wholesale sales of energy, capacity, and ancillary services at market-based rates.⁷

B. Description of the Proposed Transaction

5. Applicants explain that Mon Power's 2015 Integrated Resource Plan (IRP), accepted by the West Virginia Public Service Commission (West Virginia Commission) on June 3, 2016, concluded that Mon Power would have a capacity shortfall beginning in the winter peaking period of 2016 that was projected to exceed 700 MW by 2020 and 850 MW by 2027.⁸ In order to meet its projected capacity and energy needs, Mon Power determined that it would pursue the acquisition of capacity resources via a request for proposal (RFP) administered by a third-party, Charles River Associates (Charles River). Mon Power issued the RFP on December 16, 2016, seeking to acquire: (1) one or more generating facilities (existing, new, or sufficiently in-development) amounting to approximately 1,300 MW of unforced capacity,⁹ and (2) up to 100 MW of demand

⁶ *Id.* at 6.

⁷ *Id.*

⁸ *Id.* at 7.

⁹ The RFP defined Unforced Capacity as having the meaning set forth in the PJM Reliability Assurance Agreement, namely Unforced Capacity "shall mean installed capacity rated at summer conditions that is not on average experiencing a forced outage or forced derating, calculated for each Capacity Resource on the 12-month period from October to September without regard to the ownership of or the contractual rights to the capacity of the unit." *Id.*, Exhibit RJL-3 at 10.

response resources. In each case, the RFP stated that resource(s) should be located within the Allegheny Power Systems (APS) zone of PJM.¹⁰

6. Applicants state that Charles River managed the outreach to potential bidders, and identified 20 existing generating assets and eight in-development generating projects located within PJM's APS zone that could meet Mon Power's stated needs. Applicants further state that Charles River took into account the Commission's *Ameren*¹¹ guidelines when designing and administering the RFP, and evaluating the bids submitted through the RFP. Applicants explain that, on February 27, 2017, Charles River provided Mon Power an Opinion Letter recommending the acquisition of the Pleasants Facility as the winning bidder, and Mon Power selected AE Supply as the winning bidder and subsequently entered into an asset purchase agreement to acquire the Pleasants Facility.¹²

C. Section 204 Application

7. In connection with the acquisition of the Pleasants Facility from AE Supply, Mon Power requests authorization to assume the obligations of AE Supply related to pollution control revenue bonds from the Pleasants Facility. Mon Power states that The Bank of New York Trust Company, N.A. is the corporate trustee of the Note. Mon Power further states that the Note is issued pursuant to a Pollution Control Financing Agreement, dated November 1, 1977, between the Pleasants County and AE Supply (as successor to West Penn Power Company) relating to the Pleasants Facility. Mon Power also states that the Note is secured by a lien on certain pollution control assets at the Pleasants Facility, pursuant to the Security Agreement dated November 1, 1977, creating a security interest in such facilities and certain other property.¹³

8. Mon Power explains that its assumption of the Note is a component of the Proposed Transaction, and Mon Power would assume the Note only if it completes the acquisition of the Pleasants Facility.¹⁴

¹⁰ *Id.* at 9.

¹¹ *Id.* at 2-3 (citing *Ameren Energy Generating Co.*, Opinion No. 473, 108 FERC ¶ 61,081, at PP 70-84 (2004) (*Ameren*); *Allegheny Energy Supply Co., LLC*, 108 FERC ¶ 61,082, at PP 22-35 (2004)).

¹² *Id.* at 15.

¹³ Section 204 Application at 5.

¹⁴ *Id.* at 3.

II. Notice of Filings and Responsive Pleadings

9. Notice of the Application was published in the *Federal Register*, 82 Fed. Reg. 13,804 (2017), with interventions and protests due on or before May 8, 2017.¹⁵ Timely motions to intervene were filed by the Electric Power Supply Association (EPSA), Longview Power, LLC (Longview), the Consumer Advocate Division of West Virginia (Consumer Advocate), West Virginia Citizen Action Group and Community Power Network/West Virginia Solar United Neighborhoods (West Virginia Sun/Consumer Action), and the PJM Power Providers Group (P3). On May 16, 2017, Monitoring Analytics, LLC (PJM Market Monitor) filed an out-of-time motion to intervene.
10. West Virginia Sun/Consumer Action, Longview, and Consumer Advocate each filed a protest. EPSA and P3 (together, EPSA/P3) filed a joint protest. PJM Market Monitor filed out-of-time comments.
11. Mon Power filed an answer to the protests of West Virginia Sun/Consumer Action, Longview, Consumer Advocate, EPSA/P3 (Mon Power May 30 Answer), and West Virginia Sun/Consumer Action filed a reply to Mon Power's answer.
12. Mon Power also filed an answer to the out-of-time comments of PJM Market Monitor (Mon Power June 28 Answer), and PJM Market Monitor filed an answer to Mon Power's answer.
13. On June 27, 2017, Commission staff issued a deficiency letter to Applicants requesting additional information (Deficiency Letter). On July 18, 2017, Mon Power filed a response to the deficiency letter (Deficiency Response). Notice of Mon Power's response was published in the *Federal Register*, 82 Fed. Reg. 34,515 (2017), with comments due on or before August 8, 2017.
14. Longview and Consumer Advocate each filed a protest to Mon Power's Deficiency Response, and West Virginia Sun/Consumer Action and PJM Market Monitor each filed comments on Mon Power's Deficiency Response. Mon Power filed an answer to the protests and comments (Mon Power August 28 Answer). PJM Market Monitor filed an answer to Mon Power's answer. Consumer Advocate filed a response to Mon Power's answer.
15. West Virginia Sun/Consumer Action filed a reply to Mon Power's answer. On December 11, 2017, Longview filed a Notice of Withdrawal of its May 8 and August 8, 2017 protests. On December 15, 2017, Consumer Advocate filed a Motion to Lodge and Supplement the Record, and on December 18, 2017, Mon Power filed an answer to the

¹⁵ Errata Notice Extending Comment Date, Docket No. EC17-88-000 (Mar. 17, 2018).

motion. On December 21, 2017, West Virginia Sun/Consumer Action and Consumer Advocate filed a Motion in Opposition to Longview's withdrawal of its protests, arguing that the Commission should disallow the withdrawal of Longview's protests because West Virginia Sun/Consumer Action and Consumer Advocate have relied on the information in Longview's protests and would be prejudiced by the withdrawal.

16. Notice of the Section 204 Application was published in the *Federal Register*, 82 Fed. Reg. 49,602 (2017), with interventions and protests due on or before November 13, 2017. None was filed.

III. Discussion

A. Procedural Matters

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹⁶ the timely, unopposed motions to intervene serve to make the entities that filed them parties to Docket No. EC17-88-000. In addition, pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,¹⁷ we will grant PJM Market Monitor's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

18. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure¹⁸ prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

19. Pursuant to Rule 216(c) of the Commission's Rules of Practice and Procedure,¹⁹ in order to prevent prejudice to other participants, the Commission may condition the withdrawal of any pleading upon a requirement that the withdrawing party leave material in the record or otherwise make material available to other participants. We will conditionally allow Longview to withdraw its protest and answer, as long as the material remains in the record because other parties have relied on Longview's pleadings and would be prejudiced by the withdrawal.

¹⁶ 18 C.F.R. § 385.214 (2017).

¹⁷ 18 C.F.R. § 385.214(d).

¹⁸ 18 C.F.R. § 385.213(a)(2) (2017).

¹⁹ 18 C.F.R. § 385.216(c) (2017).

B. Substantive Matters**1. FPA Section 203 Standard of Review**

20. 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.²⁰ The Commission's analysis of whether a proposed transaction is consistent with the public interest generally also involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.²¹ 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."²²

21. In *Ameren*, the Commission explained how it would evaluate a transaction that involves the acquisition of an affiliate's assets, noting that:

Acquisitions involving affiliates have an inherent potential for discriminatory treatment in favor of the affiliate. Affiliate preference when acquiring assets can have serious adverse effects on competition and may therefore not be consistent with the public interest. In determining that such acquisitions are consistent with the public interest, as section 203 requires, the Commission must assure that a public utility's acquisition of a plant from an affiliate is free from preferential treatment. The public interest requires policies that do not harm the development of vibrant, fully competitive generation markets.²³

22. Accordingly, the Commission set forth guidelines that apply four principles to different stages and aspects of the solicitation process: (1) Transparency: the competitive solicitation process should be open and fair; (2) Definition: the product or products sought through the competitive solicitation should be precisely defined; (3) Evaluation: evaluation criteria should be standardized and applied equally to all bids

²⁰ 16 U.S.C. § 824b(a)(4).

²¹ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

²² 16 U.S.C. § 824b(a)(4).

²³ *Ameren*, 108 FERC ¶ 61,081 at P 59.

and bidders; and (4) Oversight: an independent third party should design the solicitation, administer bidding, and evaluate bids prior to the company's selection.²⁴

23. The Commission has noted “that since the addition of section 203(a)(4) in 2005 and the issuance of Order No. 669 and the Supplemental Policy Statement, the Commission has addressed the kinds of concerns described in *Ameren* by focusing upon whether a transaction subject to section 203 will result in inappropriate cross-subsidization. If a section 203 applicant chooses not to include a traditional Exhibit M as part of its Application or explain why it qualifies for one of the ‘safe harbors’ described in the Supplemental Policy Statement, it can instead make an *Ameren* showing.”²⁵ As discussed below, Mon Power does not qualify for a “safe harbor” and Mon Power’s Exhibit M statement that the Proposed Transaction will not result in inappropriate cross-subsidization is not sufficient given that, based on the competitive solicitation process presented in the Application, Mon Power’s competitive solicitation does not meet the standards established in *Ameren*. Therefore, Mon Power has not demonstrated that the Proposed Transaction will not result in inappropriate cross-subsidization. Accordingly, it is not necessary to consider the Proposed Transaction’s impact on competition, rates, or regulation.

2. Analysis of the Proposed Transaction

a. Cross-Subsidization

i. Safe Harbor Analysis

(a) Applicants’ Analysis

24. Applicants explain that FPA section 203(a)(4) requires the Commission to approve an acquisition or disposition of jurisdictional assets if the Commission determines that the proposed transaction will be 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.”²⁶ Applicants state that one of three classes of transactions identified by the Commission that are unlikely to raise cross-subsidization concerns, absent issues identified by the Commission or evidence from intervenors that there is a cross-subsidy problem based on the particular circumstances

²⁴ *Id.* P 70.

²⁵ *Ohio Power Co.*, 143 FERC ¶ 61,075, at P 29 (2013).

²⁶ Application at 20-21 (citing 16 U.S.C. § 824b(a)(4)).

presented, are “transactions that are subject to review by a state commission.”²⁷ Applicants assert that the Proposed Transaction qualifies for this safe harbor because the West Virginia Commission regulates all aspects of Mon Power’s retail rates, facilities, and service in West Virginia, and the Proposed Transaction must be approved by the West Virginia Commission.²⁸ Applicants state that they filed concurrently with this Application an application for approval of the Proposed Transaction with the West Virginia Commission and that, therefore, the Proposed Transaction and any risks of cross-subsidization are subject to extensive review by the West Virginia Commission and qualify for the “safe harbor” established by the Supplemental Policy Statement for transactions subject to review by a state commission.²⁹

(b) **Protests**

25. West Virginia Sun/Consumer Action assert that because available evidence shows that the West Virginia Commission relies on the Commission to protect against inappropriate cross-subsidization, the Proposed Transaction cannot qualify for the safe harbor Applicants identify.³⁰ West Virginia Sun/Consumer Action assert that while 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, and although Applicants suggest otherwise, there is no evidence that the West Virginia Commission will review the Pleasants Facility transfer for cross-subsidization issues.³¹ West Virginia Sun/Consumer Action argue that the Applicants’ “safe harbor” argument is especially misplaced here because they have not asked the West Virginia Commission to review the Proposed Transaction for cross-subsidization concerns.³²

²⁷ *Id.* at 21 (citing Supplemental Policy Statement, FERC Stats. & Regs. 31,253 at PP 16, 18).

²⁸ *Id.* at 21.

²⁹ *Id.* at 21-22.

³⁰ West Virginia Sun/Consumer Action Protest at 7; West Virginia Sun/Consumer Action August 8 Answer at 15.

³¹ West Virginia Sun/Consumer Action Protest at 12-13.

³² *Id.* at 14.

(c) **Mon Power's Answer and Deficiency Response**

26. Mon Power states that West Virginia Sun/Consumer Action's assertion that the West Virginia Commission looks to the Commission to protect against cross-subsidization and that the Proposed Transaction does not qualify for the Commission's safe harbor, is without merit. Mon Power asserts that the West Virginia Commission regulates affiliate transfers of generation assets and has full authority to impose regulatory requirements to protect retail customers through both its ongoing authority over retail rates and its authority over the Proposed Transaction.³³ Mon Power argues that here the safe harbor applies because the Proposed Transaction is subject to West Virginia Commission review, and the West Virginia Commission has the authority to evaluate affiliate transactions for cross-subsidization concerns and impose any protections it deems necessary.³⁴

27. In response to questions in the Deficiency Letter regarding what, if any, ring-fencing provisions Mon Power committed to in the West Virginia Commission proceeding addressing the Proposed Transaction, and the authority of the West Virginia Commission to implement such provisions, Mon Power states that it demonstrated in the Application that the Proposed Transaction qualifies for a "safe harbor" because the West Virginia Commission also has jurisdiction over the Proposed Transaction and has the authority to protect customers against cross-subsidization, including through the adoption of ring-fencing measures to the extent necessary.³⁵ Mon Power submits that the Proposed Transaction does not raise cross-subsidization concerns, and, accordingly, has not committed to any specific "ring-fencing" provisions, but notes that the West Virginia Commission will determine in its decision whether any further conditions on the Proposed Transaction are required.³⁶ Mon Power also explains that the West Virginia Commission has broad statutory authority over jurisdictional public utilities and their relationships with affiliates to protect captive customers against inappropriate cross-subsidization through the imposition of financial protections, including the authority to

³³ Mon Power Answer at 7 (citing W.VA. CODE § 24-2-12).

³⁴ *Id.*

³⁵ Mon Power Deficiency Response at 6.

³⁶ *Id.*

impose “ring-fencing” and similar conditions and restrictions intended to address cross-subsidization concerns.³⁷

28. Mon Power explains that the Commission’s Supplemental Policy Statement provides that the safe harbor applies when the state commission “*has the authority to impose cross-subsidization protections,*” and not, contrary protestors’ assertions, only once the state commission has decided whether such protections are needed.³⁸

(d) Commission Determination

29. We reject Applicants’ contention that the Proposed Transaction falls within a safe harbor for meeting the section 203 cross-subsidization determination. In the Supplemental Policy Statement, the Commission stated that it will recognize three classes of transactions that are unlikely to raise cross-subsidization concerns, and that “[t]hese, in effect, are ‘safe harbors’ for meeting the section 203 cross-subsidization demonstration, absent concerns identified by the Commission or evidence from interveners that there is a cross-subsidy problem based on the particular circumstances presented.”³⁹ One class of transaction that qualifies as a “safe harbor” are transactions that are subject to review by a state commission:

The Commission, in the context of specific mergers or other corporate transactions, intends to defer to state commissions where the state adopts or has in place ring-fencing measures to protect customers against inappropriate cross-subsidization or the encumbrance of utility assets for the benefit of the “unregulated” affiliates. Therefore, compliance with Exhibit M could be satisfied with a showing that the proposed transaction complies with specific state regulatory protections against inappropriate cross-subsidization by captive customers. If a state does not have the authority to impose cross-subsidization protections, however, the transaction would not qualify for this safe harbor.⁴⁰

³⁷ *Id.*

³⁸ Mon Power August 28 Answer at 25 (citing Mon Power Answer at 6).

³⁹ Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 16.

⁴⁰ *Id.* P 18.

30. We agree with West Virginia Sun/Consumer Action that the Proposed Transaction does not fall within the safe harbor.⁴¹ Applicants state in their Application that the “[Proposed] Transaction qualifies for this safe harbor because the [West Virginia Commission] regulates all aspects of Mon Power’s retail rates, facilities, and service in West Virginia, and the [Proposed] Transaction must be approved by the [West Virginia Commission].”⁴² The mere fact that a state commission regulates an applicant and must approve the transaction at issue does not meet the standard established in the Supplemental Policy Statement for the safe harbor.⁴³ Applicants have not demonstrated that West Virginia has “adopt[ed] or has in place ring-fencing measures to protect customers against inappropriate cross-subsidization or the encumbrance of utility assets for the benefit of the ‘unregulated’ affiliates.”⁴⁴ Applicants have provided no evidence that any ratepayer protections regarding cross subsidies are proposed in the proceeding before the West Virginia Commission. In addition, as the Commission stated in the Supplemental Policy Statement, the Commission will recognize the safe harbor “absent concerns identified by the Commission or evidence from interveners that there is a cross-subsidy problem based on the particular circumstances presented.”⁴⁵ Because concerns have been identified here, we find that the Proposed Transaction does not fall within the safe harbor.

⁴¹ See West Virginia Sun/Consumer Action Protest at 7.

⁴² Application at 21.

⁴³ Mon Power states in its May 30 Answer that the West Virginia Commission “plainly has the authority to evaluate affiliate transactions for cross-subsidization concerns. Indeed, the Commission appears to have acknowledged the adequacy of the [West Virginia Commission] review when it approved a similar affiliate transaction in 2013.” Mon Power Answer at 7 (citing *FirstEnergy Serv. Co.*, 143 FERC ¶ 61,062, at PP 31-32 (2013)). However, the Commission made no such statement in the order cited by Mon Power.

⁴⁴ Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 18.

⁴⁵ *Id.* P 16.

31. Although Applicants also submit an Exhibit M⁴⁶ to demonstrate 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,⁴⁷ we find their Exhibit M is not sufficient to demonstrate that the Proposed Transaction will not result in inappropriate cross-subsidization given that, as discussed below, Mon Power's competitive solicitation does not meet the standards established in *Ameren*.

ii. Ameren Analysis

(a) Applicants' Analysis

32. Applicants explain that given the potential participation in the RFP by affiliates of Mon Power, Charles River took into account the Commission's guidelines in *Ameren* when designing the RFP.⁴⁸ Applicants explain that those guidelines include the following principles:

- a. Transparency – the competitive solicitation process should be open and fair;
- b. Definition – the product or products sought through the solicitation should be precisely defined;
- c. Evaluation – standardized evaluation criteria should be applied equally to all bids and bidders; and

⁴⁶ 18 C.F.R. § 33.2(j) (2017) (providing that each applicant must include in its application an explanation, with appropriate evidentiary support for such explanation (to be identified as Exhibit M to this application) “[o]f how applicants are providing assurance, *based on facts and circumstances known to them or that are reasonably foreseeable*, that the proposed transaction will not result in, *at the time of the 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....”) (emphasis in original).

⁴⁷ Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 23.

⁴⁸ Application at 10.

- d. Oversight – an independent third-party should design the solicitation, administer bidding and evaluate bids prior to the company’s selection.⁴⁹

(b) **Protests and Comments**

33. Several protestors assert that Mon Power’s RFP was heavily biased in favor of the Pleasants Facility and does not satisfy *Ameren*’s four principles. West Virginia Sun/Consumer Action argue that Mon Power’s RFP was not a true competitive solicitation and was designed to favor the Pleasants Facility.⁵⁰ West Virginia Sun/Consumer Action assert that long before the RFP’s issuance in December 2016, FirstEnergy executives had repeatedly expressed their intention to transfer the Pleasants Facility to Mon Power’s regulated rate base, and the RFP itself was heavily biased in favor of the Pleasants Facility and fails *Ameren*’s four principles.⁵¹

34. Consumer Advocate argues that Mon Power’s acquisition of the Pleasants Facility is an attempt to alleviate a burden upon AE Supply by forcing the customers of its affiliate, Mon Power, to subsidize a failing and unnecessary coal-fired facility. Consumer Advocate asserts that the Proposed Transaction is part of FirstEnergy’s announced plan to exit the competitive generation market by mid-2018, whereby FirstEnergy seeks to transfer the operation of the Pleasants Facility from AE Supply, a merchant generation subsidiary that apparently has been uncompetitive, to West Virginia, a regulated market with captive ratepayers. Consumer Advocate argues that AE Supply will transfer the facility to its affiliate, Mon Power, with the cost of that transfer, as well as the costs associated with maintaining and operating the facility, to be paid by West Virginia ratepayers. To the extent the Pleasants Facility is uncompetitive, West Virginia ratepayers will bear the costs of operating the plant as a form of subsidy in base rates.⁵² Consumer Advocate also argues that there is no evidence that AE Supply has undertaken any efforts to fulfill its fiduciary duty to shareholders by marketing the Pleasants Facility, with the goal being to obtain the best purchase price and terms possible.⁵³ Consumer Advocate also states it believes that Mon Power’s acquisition of the Pleasants Facility is

⁴⁹ *Id.* at 10-11.

⁵⁰ West Virginia Sun/Consumer Action Protest at 15.

⁵¹ *Id.*

⁵² Consumer Advocate Protest at 5.

⁵³ *Id.* at 6.

not necessary to meet its ratepayers' future energy needs, and that there is evidence that FirstEnergy has overstated the need for the energy generated by the Pleasants Facility.⁵⁴

(1) **Transparency**

35. West Virginia Sun/Consumer Action claim that the RFP process was not transparent because “Charles River and Mon Power engaged in a closed process in which the two entities designed nearly every aspect of the RFP.”⁵⁵ Thus, West Virginia Sun/Consumer Action maintain that despite the presence of an “independent” third party, Mon Power was still in control of the RFP during the critical design phase.⁵⁶ West Virginia Sun/Consumer Action also argue that the RFP fails to satisfy the Transparency principle because Mon Power, rather than an independent third party, carried out the negotiation process with AE Supply regarding the Pleasants Facility transfer.⁵⁷

36. EPSA/P3 assert that authorization for the Proposed Transaction should be denied as it does not meet the requirements for an open and transparent RFP. EPSA/P3 state that, while they appreciate that Mon Power did conduct an RFP, EPSA/P3 argue that the overall structure of the RFP does not reflect that a broad and competitively-neutral RFP occurred, and instead was heavily weighted towards an outcome favoring Mon Power's affiliate.⁵⁸ EPSA/P3 argue that the requirements and timing of the RFP made it very difficult for any proposal other than the Pleasants Facility to be conforming.⁵⁹ Specifically, EPSA/P3 assert that Mon Power issued the RFP on Friday, December 16, 2016, and required a Notice of Intent to participate and accompanying documentation by December 23, 2016, with proposals due by February 3, 2017. EPSA/P3 state that their members have previously reported that this type of unrealistic and compressed timeline for an RFP is unreasonably restrictive and all but ensures that third-party bidders will not have the requisite information together to meet the RFP proposal requirements.⁶⁰ Further, EPSA/P3 note that Mon Power previously purchased the Harrison coal fired

⁵⁴ *Id.*

⁵⁵ West Virginia Sun/Consumer Action Protest at 17.

⁵⁶ *Id.* at 17-18.

⁵⁷ *Id.* at 18, n.59.

⁵⁸ EPSA/P3 Protest at 2.

⁵⁹ *Id.* at 4.

⁶⁰ *Id.*

plant from affiliate AE Supply, and a recent study conducted by the Institute for Energy Economics & Financial Analysis has shown that the Harrison plant acquisition has resulted in \$164 million in additional costs to West Virginia electric customers since 2013.⁶¹ EPSA/P3 state that the study and other analysis has questioned whether the proposed transfer of the Pleasants Facility to Mon Power is part of a larger strategy whereby parent company FirstEnergy is attempting to continue to shift market risk to ratepayers.⁶²

(2) **Definition**

37. EPSA/P3 submit that the RFP had limiting parameters for generation supply that narrowed and edged the process toward the desired outcome of the Pleasants Facility with respect to the fuel and geographical provisions, as well as the preference for owning the plant versus owning the output. Specifically, EPSA/P3 note that the RFP was limited geographically to the APS zone with preference for generation assets and fuel sources from West Virginia. Further, the RFP specified that the generation source must be fully-dispatchable. EPSA/P3 state that their members have previously indicated that a fully-dispatchable product is a choice and not a requirement, and a load following option is more typical and a better request for the portfolio. EPSA/P3 believe that a RFP should generally allow options for all assets, regardless of technology or vintage and including agreements, so long as they meet the utility's power need.⁶³

38. West Virginia Sun/Consumer Action also argue that 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 RFP's requirements heavily biased in favor of the Pleasants Facility.⁶⁴ West Virginia Sun/Consumer Action assert that the RFP was limited to a narrow range of resources in that Mon Power did not consider bids for long-term power purchase agreements (PPAs), generators whose unforced capacity was less than 100 MW, or resources that were not fully dispatchable such as wind and solar. According to West Virginia Sun/Consumer Action, by eliminating these resource options, and refusing to consider satisfying any portion of its

⁶¹ *Id.* at 5.

⁶² *Id.*

⁶³ *Id.* at 4-5.

⁶⁴ West Virginia Sun/Consumer Action Protest at 15-16 (citing *Ameren*, 108 FERC ¶ 61,081 at PP 76-77).

purported energy and capacity needs through such resources, Mon Power excluded an array of products that could have appropriately fulfilled the RFP's stated objective.⁶⁵

39. Consumer Advocate asserts that the RFP was fatally flawed and cannot be relied upon to establish that the Proposed Transaction is the result of a transparent RFP process or a fair market value transaction. Consumer Advocate argues that the RFP was designed so that only one power plant met the criteria and the RFP improperly would not consider PPAs or any generation outside of its own zone, and that there is no reasonable explanation as to why the RFP was designed so specifically, except that it permitted the Pleasants Facility "to be thrust upon West Virginia's captive retail customers."⁶⁶

40. PJM Market Monitor argues that the RFP does not satisfy the *Ameren* Definition principle because the selection criteria were tailored to match characteristics of the facility offered by Mon Power's affiliate, and the RFP does not satisfy the Transparency requirement for the same reason.⁶⁷ PJM Market Monitor asserts that an open collaborative process or the involvement of an independent third party might have produced a product definition consistent with the interests of Mon Power customers.⁶⁸ According to PJM Market Monitor, the terms of the actual RFP also contained numerous unnecessary and limiting restrictions, including (1) specification of "ownership of a dispatchable generation facility" as opposed to a contract; (2) specification that "facilities must be located inside the APS zone;" (3) specification that a qualifying bidder must have a unit in development that has an executed Interconnection Service Agreement and an engineering, procurement and construction contract; and (4) specification of a 2017 acquisition date. PJM Market Monitor maintains that none of these restrictions are relevant to the objective of providing reliable, least cost service to customers, and each tended to favor Mon Power affiliates.⁶⁹

(3) Evaluation

41. West Virginia Sun/Consumer Action argue the RFP fails to satisfy the *Ameren* Evaluation principle. To meet this principle, an RFP "should clearly specify the price

⁶⁵ *Id.* at 16.

⁶⁶ Consumer Advocate Protest at 7-8.

⁶⁷ PJM Market Monitor Comments at 10.

⁶⁸ *Id.*

⁶⁹ *Id.* at 11.

and non-price criteria under which the bids are evaluated.”⁷⁰ West Virginia Sun/Consumer Action state that 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.⁷¹ West Virginia Sun/Consumer Action argue that 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.”⁷² West Virginia Sun/Consumer Action maintain that Mon Power’s RFP failed to meet these standards. In addition to a leveled 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).” West Virginia Sun/Consumer Action assert that 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. Applicants claimed that it was concerned with the risk of non-performance on commitments in the PJM market. Yet, the RFP provides no clear metric of “risk,” an ambiguity that biased the process in favor of existing generation plants such as the Pleasants Facility. Moreover, West Virginia Sun/Consumer Action assert that the RFP does not explain how these various non-cost factors would be weighted during Charles River’s evaluation of bids. West Virginia Sun/Consumer Action also argue that 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.” West Virginia Sun/Consumer Action argue that by favoring facilities whose employees and operations can be integrated readily, this factor clearly skewed the RFP in favor of the Pleasants Facility.⁷³

42. PJM Market Monitor states that the Proposed Transaction was not evaluated against any comparable offers in its competitive solicitation process. AE Supply offered the Pleasants Facility for \$195 million, while Applicants state that the next closest offer was for \$1.66 billion. PJM Market Monitor maintains that such a significant cost

⁷⁰ West Virginia Sun/Consumer Action Protest at 19 (citing *Ameren*, 108 FERC ¶ 61,081 at P 78).

⁷¹ *Id.* at 18-19 (citing *Ameren*, 108 FERC ¶ 61,081 at P 78).

⁷² *Id.*

⁷³ *Id.* at 20.

disparity suggests that the products were not comparable, and that no comparable offers means that the application of proper evaluation criteria cannot be demonstrated.⁷⁴

(4) **Oversight**

43. West Virginia Sun/Consumer Action assert that the RFP fails the Oversight principle because the RFP was not designed by an independent third party. As with the Transparency principle, West Virginia Sun/Consumer Action claim that because “Charles River and Mon Power engaged in a closed process in which the two entities designed nearly every aspect of the RFP,”⁷⁵ there was no true “independent” third-party oversight.⁷⁶

(c) **Mon Power’s Answer**

44. Mon Power states that in *Ameren*, the Commission has found that “in the context of affiliated generation, a competitive solicitation is the most direct and reliable way to ensure no affiliate preference.”⁷⁷ The Commission established four principles for competitive solicitations: Transparency, Definition, Evaluation, and Oversight.⁷⁸ When an RFP “complies with the Commission’s guidance in *Ameren*,” there is “no affiliate preference that raises cross-subsidization concerns.”⁷⁹ Applicants argue that Mon Power’s RFP satisfies the Commission’s *Ameren* standard for affiliate transactions.

(1) **Transparency**

45. Mon Power argues that the complaints of EPSA/P3 regarding the schedule and timing of the RFP are misguided, and asserts that no potential bidder complained or

⁷⁴ PJM Market Monitor Comments at 12 (citing *Monongahela Power Company and Potomac Edison Company*, Petition for Approval of Generation Resource Transaction, Case No. 17-0296-E-PC at 3 (W.V. P.S.C. March 7, 2017)).

⁷⁵ West Virginia Sun/Consumer Action Protest at 17.

⁷⁶ *Id.* at 17-18.

⁷⁷ Mon Power May 30 Answer at 7 (citing *Ameren*, 108 FERC ¶ 61,081, at P 67).

⁷⁸ *Id.* at 8 (citing *Ameren*, 108 FERC ¶ 61,081 at PP 70-85).

⁷⁹ *Id.* (citing *DTE Elec. Co.*, 152 FERC ¶ 61,036, at P 19 (2015) (citing *Ameren* 108 FERC ¶ 61,081 at P 67)).

asked questions about the RFP schedule.⁸⁰ Mon Power also disagrees with EPSA/P3's assertion that the overall timeline of the RFP "made it difficult for any proposal other than Pleasants to be conforming" because the RFP provided bidders a full seven weeks from the date of issuance to submit proposals, which exceeds that in many other RFPs approved by the Commission.⁸¹

46. In response to West Virginia Sun/Consumer Action's allegations that certain public statements made by FirstEnergy CEO Charles E. Jones show that the Pleasants Facility was the intended target of the RFP, Mon Power notes that Mr. Jones never stated that the Pleasants Facility would win the RFP, or that Mon Power would purchase the Pleasants Facility. Rather, Mr. Jones addressed the process for potential future transactions by Mon Power to acquire needed generation capacity.⁸²

47. Mon Power characterizes as unfounded West Virginia Sun/Consumer Action's claim that the RFP process was not transparent because "[Charles River] and Mon Power engaged in a closed process in which the two entities designed nearly every aspect of the RFP," and argues that the claim reflects a fundamental misunderstanding of what is required by the *Ameren* Transparency principle.⁸³ Mon Power argues that the *Ameren* principles do not mandate a specific RFP development process, such as those preferred by West Virginia Sun/Consumer Action. Mon Power points out that there are numerous examples of industry RFPs that were developed differently, many of which concerned transactions that have been approved by the Commission.⁸⁴

(2) Definition

48. Mon Power also disagrees with protestors' arguments that the RFP's requirement that generation resources be located in the APS zone favored the Pleasants Facility. Mon Power points to the Direct Testimony of Mr. Ruberto, which explains that the requirement does not limit the competitiveness of the RFP, as there were 25 existing and

⁸⁰ *Id.* at 12.

⁸¹ *Id.* (citing EPSA/P3 Protest at 4).

⁸² *Id.* at 13-14.

⁸³ *Id.* at 18 (citing West Virginia Sun/Consumer Action Protest at 17).

⁸⁴ *Id.* at 18.

new resources under development located in the APS zone that could fill Mon Power's projected capacity shortfall.⁸⁵

49. Mon Power also dismisses West Virginia Sun/Consumer Action's questions about whether the decision to limit the RFP to resources larger than 100 MW "excluded an array of product[s] that could have appropriately fulfilled the RFP's stated objective," stating that Mon Power imposed a minimum capacity requirement not to limit competition in the RFP process, but to place reasonable limits on the number of generation resources Mon Power would need to operate and manage in connection with its addition of generation capacity.⁸⁶

50. Mon Power takes issue with West Virginia Sun/Consumer Action's and EPSA/P3's arguments that the decision to limit eligibility in the RFP to dispatchable resources also excluded products that could have fulfilled the RFP's objective.⁸⁷ Mon Power argues that the dispatchability requirement is consistent with other RFPs in the industry (including those approved by the Commission) and did not limit the competitiveness of the RFP.⁸⁸

51. Mon Power dismisses protestors' claims that Mon Power's decision to exclude PPAs was discriminatory and "would have greatly limited the number of potential respondents."⁸⁹ Mon Power states that its business objective was to procure generation capacity, in part for economic reasons, but also because of the increased control and flexibility asset ownership affords Mon Power relative to a PPA—including greater control over operations, maintenance, fuel procurement, and capital improvements, as well as the flexibility to modify facility operations. Moreover, Mon Power argues that

⁸⁵ *Id.* at 20-21 (citing Application, Prepared Testimony of Jay A. Ruberto at 11 (Ruberto Direct Testimony)).

⁸⁶ *Id.* at 22.

⁸⁷ *Id.* at 23 (citing West Virginia Sun/Consumer Action Protest at 16 and EPSA/P3 Protest at 4-5).

⁸⁸ *Id.*

⁸⁹ *Id.* at 24 (citing West Virginia Sun/Consumer Action Protest at 16; Consumer Advocate Protest at 7-8).

the Commission has previously approved transactions resulting from RFPs seeking a physical resource.⁹⁰

52. Mon Power defends the RFP's collateral requirements, saying the collateral requirements only applied to certain resources (i.e., generating facilities under development and demand resources), and were developed using an objective third-party methodology—specifically, PJM's Base Residual Auction Capacity Performance Pre-Auction Credit Calculator.⁹¹ Mon Power also argues that collateral requirements are common in RFPs that have resulted in transactions approved by the Commission.⁹²

(3) Evaluation

53. Mon Power disagrees with West Virginia Sun/Consumer Action's allegations that the non-price criteria, including the developmental risk and ease of integration criteria, were so vague as to be essentially meaningless. While West Virginia Sun/Consumer Action alleges that the "RFP provides no clear metric of 'risk'" with regard to the developmental risk non-cost-factor, Mon Power states that the RFP was open to both existing resources and new resources, including resources that are still under development.⁹³ Mon Power also argues that the allegations of preference advanced by West Virginia Sun/Consumer Action regarding the ease of integration criteria are without merit. Mon Power explains that the "ease of integration" non-cost factor was designed to address Mon Power's legitimate concerns related to integrating new facilities, personnel, technologies/software, and contracts into its operations. Mon Power argues that the RFP detailed in a clear and concise manner the types of information that interested parties were required to submit to be evaluated on the "ease of integration" criteria and, thus, no party can objectively claim to have been at an informational disadvantage.⁹⁴ Mon Power states that the ease of integration non-cost factor was not designed to favor the Pleasants Facility or dampen interest in the RFP process, and all three conforming bids to the RFP received the same score for the ease of integration factor.⁹⁵ As such, Mon Power argues

⁹⁰ *Id.*

⁹¹ *Id.* at 25.

⁹² *Id.* at 26.

⁹³ *Id.* at 27.

⁹⁴ *Id.* at 11.

⁹⁵ *Id.*

that the allegations regarding the ease of integration criteria are without merit and can be disregarded.

54. Mon Power argues that PJM Market Monitor's suggestion that disparities in purchase price show that offers were not capable of comparison is both unsupported and illogical for several reasons. First, Mon Power asserts that it explained in detail in both its Application and in its May 30 Answer how the independent RFP administrator developed and administered an evaluation formula using a net present value approach that allowed it to assess the relative value of different offers, allowing different offers to be objectively compared against one another. Second, Mon Power asserts that PJM Market Monitor's argument is inconsistent with its other claims in that PJM Market Monitor cannot, on the one hand, claim that the RFP's product definition was too narrow, yet on the other hand claim that multiple offers that met that same purportedly narrow definition cannot be compared. Third, Mon Power argues that the logical fallacy of PJM Market Monitor's claim is illustrated by the fact that, had the Pleasants Facility been offered for a higher price (to the detriment of Mon Power and its customers), PJM Market Monitor apparently would have had less concern since the offer price would have been closer to the cost of more expensive facilities offered into the RFP.⁹⁶

(4) **Oversight**

55. Mon Power asserts that Charles River is independent from Mon Power, and that to ensure independence from Mon Power, Charles River retained control over all facets of the RFP process, including maintaining the informational website and communicating with bidders, performing outreach with potential bidders, collecting documentation and proposals from bidders, and evaluating the bids. As such, Mon Power maintains that the RFP satisfies the Oversight principle.⁹⁷

(d) **West Virginia Sun/Consumer Action Answer**

56. In its answer, West Virginia Sun/Consumer Action again point out that FirstEnergy's public pronouncements that it intends to "de-risk" its competitive generation assets, such as the Pleasants Facility, by transferring them into regulated constructs, and that Mon Power would conduct an RFP into which its affiliate AE Supply was expected to offer the Pleasants plant, sows a "clear preference for its corporate

⁹⁶ Mon Power June 28 Answer at 12-13.

⁹⁷ Mon Power May 30 Answer at 32.

affiliate” which “almost certainly chilled the participation of potential bidders.”⁹⁸ West Virginia Sun/Consumer Action repeat their argument that that the plain terms of the RFP strongly favored the Pleasants Facility and that the RFP fails *Ameren’s* four principles.⁹⁹

(e) **Deficiency Response**

57. The Deficiency Letter requested additional information regarding, among other things, how the RFP met the Transparency and Evaluation *Ameren* principles. With regard to the Transparency principle, Commission staff asked Mon Power to explain its rationale for procuring the entire amount of capacity it will need by 2027 in a single RFP. Mon Power states that its RFP did not obligate Mon Power to procure the entire projected capacity shortfall. The RFP sought up to 1,300 MW of generation capacity and up to 100 MW of demand response resources to address a projected capacity shortfall. Mon Power states that a single bidder was not required to satisfy Mon Power’s entire capacity need, and that it could have accepted multiple offers, or no offers at all.¹⁰⁰ Mon Power explains that the RFP was open to offers from a range of generation resources with respect to size, fuel source, and age of asset, but did not include intermittent resources such as wind and solar resources, because they are not fully dispatchable, have lower capacity factors, and carry increased non-performance and penalty risk. Mon Power states that it determined that procuring generation capacity would be a more prudent option than pursuing PPAs due to long-term cost factors and the operational control and efficiency benefits associated with asset ownership.¹⁰¹

58. With regard to the Evaluation principle, Commission staff asked Mon Power to explain how each of the non-price factors were scored and how they were weighed in evaluating among the three conforming bids Mon Power received. Mon Power explains that Charles River awarded each conforming proposal points based on a combination of price and non-price factors up to a maximum score of 1,000 points. The categories and point allocations were: net present value (NPV) of revenue requirements (500); in-state fuel benefits (100); in-state generation benefits (100); fuel risk (100); development risk (50); ease of integration (50); and proposal-specific risks (100).¹⁰²

⁹⁸ West Virginia Sun/Consumer Action June 26 Answer at 22.

⁹⁹ *Id.*

¹⁰⁰ Deficiency Response at 1.

¹⁰¹ *Id.* at 2.

¹⁰² *Id.* at 3.

(f) Answers to Deficiency Response

(1) Protestors' Answers

59. West Virginia Sun/Consumer Action maintain that Mon Power's RFP failed to meet *Ameren's* Transparency principle because the RFP inappropriately excluded resource options that could have met Mon Power's purported capacity shortfall, and the Deficiency Response did not provide additional information on this issue.¹⁰³ West Virginia Sun/Consumer Action also repeat their arguments that the RFP failed the Evaluation principle, adding that the NPV calculation favored the Pleasants Facility, as all RFP generation bids were subjected to a limited 15-year NPV analysis that would have favored older depreciated plants such as the Pleasants Facility, to the detriment of bids from newer plants or those still in development.¹⁰⁴

60. PJM Market Monitor takes issue with Mon Power's response that it sought only a "fully dispatchable generation capacity resource," because Mon Power does not explain why it did not consider relying on the PJM Capacity Market. Mon Power argues that the Pleasants Facility is in the APS zone and therefore could be used as replacement capacity while a unit outside the zone could not be used as replacement capacity, but PJM Market Monitor explains that Mon Power did not state the rule clearly. PJM Market Monitor explains that if a capacity resource is deficient prior to the start of a delivery year, capacity located within the same or more constrained "child" Locational Deliverability Area (LDA) may serve as replacement capacity for the deficient resource. The APS zone is located in the Rest-of-RTO LDA. Therefore, PJM Market Monitor states that capacity resources located in the Rest-of-RTO could serve as replacement capacity for a deficient capacity resource located in the APS zone.¹⁰⁵

61. Consumer Advocate repeats its arguments that Mon Power's acquisition of the Pleasants Facility is not necessary to meet its ratepayers' future energy needs and that the Proposed Transaction will result in cross-subsidies for AE Supply.¹⁰⁶ Consumer Advocate argues that Mon Power has not demonstrated that its RFP complies with *Ameren's* four principles. First, Consumer Advocate argues that the RFP process was not transparent because Mon Power limited participation by issuing its RFP during the holiday season when staff availability would likely be limited, and by indicating its intent

¹⁰³ West Virginia Sun/Consumer Action August 8 Answer at 8.

¹⁰⁴ *Id.* at 11.

¹⁰⁵ PJM Market Monitor August 8 Comments at 2.

¹⁰⁶ Consumer Advocate August 8 Protest at 5.

to use the RFP to cover the entire capacity shortfall that it will experience a full decade from now, in 2027. Consumer Advocate argues that using the RFP to cover the entire capacity shortfall discouraged bidders that could only offer substantially lower levels of capacity.¹⁰⁷ Second, Consumer Advocate argues that the product definition was too restrictive because it gave AE Supply an undue advantage by excluding resources outside the APS zone and excluding all PPAs.¹⁰⁸ Third, Consumer Advocate states that Mon Power did not properly evaluate competing proposals, arguing that the NPV of revenue requirements evaluation was skewed in favor of the Pleasants Facility, the in-state fuel benefit criteria also overstated the value of AE Supply's offer, and that Charles River ignored other important financial factors that weighed against the Pleasants Facility.¹⁰⁹ Fourth, Consumer Advocate argues that Mon Power relies on inapposite oversight precedent to justify Charles River's oversight.¹¹⁰ Finally, Consumer Advocate emphasizes that Mon Power has not demonstrated that the Proposed Transaction will not have an adverse impact on captive customer rates.¹¹¹

(2) Mon Power's Answer

62. Mon Power dismisses protestors' critiques of Charles River's NPV analysis. Mon Power explains that the 15-year NPV analysis was reasonable and reduced uncertainty regarding speculative long-term costs and revenues. Mon Power explains that Charles River chose to use a 15-year period for two reasons. First, assumptions regarding performance factors become more speculative beyond 15 years, thereby leading to evaluation results that are less reliable, and second, cost factors beyond 15 years have a comparatively smaller impact on NPV due to discounting.¹¹² Mon Power maintains that a longer customer impact period would not have changed the outcome of the RFP.¹¹³ Mon Power also explains that the RFP price forecast data was developed by a leading

¹⁰⁷ *Id.* at 11-12.

¹⁰⁸ *Id.* at 11-13.

¹⁰⁹ *Id.* 14-24.

¹¹⁰ *Id.* at 24.

¹¹¹ *Id.* at 28.

¹¹² Mon Power August 28 Answer at 5.

¹¹³ *Id.* at 6.

market forecast firm and represents a reasonable assessment of future market prices.¹¹⁴ Mon Power asserts that Charles River's evaluation of the non-price criteria was consistent with the *Ameren* Evaluation principle and the criteria provided in the RFP. Mon Power explains that the in-state fuel usage non-price criterion was included in the RFP because West Virginia law requires the West Virginia Commission to "consider and promote the use of in-state fuel and generation benefits in its decisions regarding the procurement of capacity resources."¹¹⁵

63. Mon Power disagrees with protestors' arguments that the RFP was not "open and fair" in violation of *Ameren's* Transparency principle. Mon Power states that no party has put forth any evidence that the RFP's design had a "chilling effect" on participation, and that protestors have submitted no evidence that potential bidders declined to participate due to the timing of the bidding window, the "ease of integration" factor, or the "up to 1,300 MW" size criterion.¹¹⁶ Mon Power dismisses Consumer Advocate's argument that the RFP's design discouraged small resource participation as reflecting a mischaracterization of the RFP, which sought "a generation facility or facilities" comprising "up to" 1,300 MW of generation capacity and up to 100 MW of demand response resources.¹¹⁷ Mon Power also argues that protestors' complaints about the December deadline and the holiday season are unpersuasive because the deadline in question only involved the submission of minimal, perfunctory information such as the bidder's name and phone number, the facility name, and the location of the plant(s).¹¹⁸

64. Mon Power argues that its RFP satisfied the *Ameren* Definition principle. Mon Power states that protestors mischaracterize PJM's Capacity Performance rules and misunderstand the risks Mon Power was seeking to manage by acquiring resources in the APS zone. Mon Power asserts that protestors mistakenly suggest that the zones modeled in PJM's capacity market auctions are the relevant zones for purposes of retroactive capacity replacement. Mon Power explains that this is not what PJM's capacity market rules provide. Section 8.9 of PJM Manual 18 allows for "retroactive replacement" of

¹¹⁴ *Id.*

¹¹⁵ Mon Power August 28 Answer at 12 (citing Application, Ruberto Direct Testimony at 14).

¹¹⁶ *Id.* at 15.

¹¹⁷ *Id.* at 16.

¹¹⁸ *Id.*

capacity resources during Performance Assessment Hours.¹¹⁹ Mon Power argues that in other words, the underperformance of a capacity resource during a Penalty Assessment Hour may be “replaced” by over-performance of another resource for purposes of calculating overall penalty exposure. An over-performing resource can only “replace” an underperforming resource subject to the same penalty assessment hour event. Mon Power states that this aspect of the rule is important because the APS zone frequently separates as a standalone area for emergency events. Mon Power states that on at least 13 occasions between 2005 and 2015, the APS zone would have constituted a stand-alone zone for capacity performance penalties.¹²⁰ Accordingly, when determining its capacity needs, Mon Power states that it appropriately considered the risk that Performance Assessment Hours can occur in a more localized area than the Rest-of-RTO zone, including in the APS zone. Mon Power states that its decision to procure a resource in the APS zone was a reasonable and appropriate means of managing penalty risk, and an RFP open to all resources in the Rest-of-RTO zone unquestionably would not have served the same objective.¹²¹

65. Mon Power also disagrees with protestors’ arguments that it did not meet the Evaluation principle. Mon Power restates its explanations in response to protestors’ repeated arguments that the non-price criteria in the RFP were too vague and at times appeared to favor the Pleasants Facility, and why Charles River’s practice is not to disclose precise weighing formulas prior to scoring bids.¹²² Lastly, Mon Power states that it has repeatedly demonstrated how Charles River satisfied the Oversight principle in carrying out the RFP.¹²³

66. Mon Power argues that while the RFP satisfies cross-subsidization concerns, the Proposed Transaction separately qualifies for the Commission’s safe harbor for cross-subsidization because the West Virginia Commission is reviewing the Proposed Transaction and has authority to impose cross-subsidization protections.¹²⁴ Mon Power explains that the Commission’s Supplemental Policy Statement provides that the safe

¹¹⁹ *Id.* at 18 (citing PJM Manual 18, § 8.9).

¹²⁰ *Id.* at 18-19.

¹²¹ *Id.* at 19.

¹²² *Id.* at 21-22 (citing Mon Power May 30 Answer at 27, Lee Answering Testimony at 22).

¹²³ *Id.* at 22 (citing Application at 14-15; Mon Power May 30 Answer at 31-34).

¹²⁴ *Id.* at 24.

harbor applies when the state commission “*has the authority* to impose cross-subsidization protections,” and not, contrary protestors’ assertions, only once the state commission has decided whether such protections are needed.¹²⁵

(3) **Protestors’ Responses to Mon Power’s Answer**

67. In response to Mon Power’s answer, PJM Market Monitor states that Mon Power misunderstands PJM’s rules for replacement capacity. Mon Power alleges that it is trying to manage the risk of the underperformance of a capacity resource during a Performance Assessment Hour with an overperforming resource in the same hour. PJM Market Monitor states that the resources that can be used as retroactive replacement capacity for resources that underperform during an emergency event must be in the same location where the emergency event is declared.¹²⁶ PJM Market Monitor states that Mon Power incorrectly claims that the APS zone frequently separates as a standalone area for emergency events, when in fact, 10 of the 13 historical emergency events that Mon Power provided are incorrectly shown as APS zonal emergency events.¹²⁷

68. Consumer Advocate repeats its earlier arguments that Mon Power does not demonstrate that there are no cross subsidy concerns associated with the Proposed Transaction,¹²⁸ does not demonstrate compliance with the Definition criterion,¹²⁹ provides an undue advantage to AE Supply’s offer though the evaluation of the NPV of competing proposals,¹³⁰ and provides no credible evidence supporting its evaluation of in-state fuel non-price criterion.¹³¹

69. West Virginia Sun/Consumer Action repeat their arguments that the Proposed Transaction does not qualify for a safe harbor,¹³² and that Applicants’ rationale for the

¹²⁵ *Id.* at 25 (citing Mon Power May 30 Answer at 6).

¹²⁶ PJM Market Monitor September 12 Answer at 2.

¹²⁷ *Id.* at 3.

¹²⁸ Consumer Advocate September 13 Answer at 2-8.

¹²⁹ *Id.* at 9-12.

¹³⁰ *Id.* at 12-15.

¹³¹ *Id.* at 15-16.

¹³² West Virginia Sun/Consumer Action September 18 Answer at 22.

Proposed Transaction is baseless because Mon Power does not face a capacity shortfall.¹³³ West Virginia Sun/Consumer Action reject Mon Power's statement in its August 28 Answer that the Pleasants Facility was offered at a lower price than the two other bids, because given recent valuations of other coal-fired power plants in western PJM, there is strong reason to think that the Pleasants Facility purchase price is inflated.¹³⁴ West Virginia Sun/Consumer Action echo earlier arguments that Mon Power's RFP failed to meet *Ameren's* Transparency principle because the RFP inappropriately excluded resource options that could have met Mon Power's projected capacity shortfall.¹³⁵ West Virginia Sun/Consumer Action again argue that the "ease of integration" non-cost criterion explicitly favored the Pleasants Facility and likely deterred potential bidders from participating in the RFP process,¹³⁶ and that the NPV calculation suffered from flawed assumptions that favored the Pleasants Facility.¹³⁷

(g) **Consumer Advocate's Motion to Lodge and Supplement the Record and Mon Power's Answer**

70. Consumer Advocate submitted supplemental comments, as well as several pages from transcripts of the public hearings held by the West Virginia Commission regarding Mon Power's application for state approval of the Proposed Transaction. Consumer Advocate argues that the RFP does not meet the Oversight principle because Charles River has a number of other engagements with FirstEnergy and its affiliates, Charles River knew that the Pleasants Facility planned to participate in the RFP, and Mon Power helped develop the RFP, including the decision to limit the RFP to capacity physically located in the APS Zone.¹³⁸ Consumer Advocate also repeats its arguments that the RFP process was not transparent because Mon Power limited participation by issuing its RFP during the holiday season.¹³⁹

¹³³ *Id.* at 5.

¹³⁴ *Id.* at 9

¹³⁵ *Id.* at 11-12.

¹³⁶ *Id.* at 13.

¹³⁷ *Id.* at 15.

¹³⁸ Consumer Advocate December 15 Comments at 4-6.

¹³⁹ *Id.* at 9.

71. In response to Consumer Advocate's supplemental comments, Mon Power asserts that the information Consumer Advocate provides is already in the record in this proceeding, and that Consumer Advocate fails to explain why it waited nearly three months after the testimony occurred to submit this information.¹⁴⁰

(h) Commission Determination

72. As discussed below, we conclude that Mon Power's competitive solicitation does not meet the standards established in *Ameren*. Therefore, Applicants have not demonstrated that the Proposed Transaction will not result in inappropriate cross-subsidization. Accordingly, we deny authorization for the Proposed Transaction. However, this finding is without prejudice to a future application resulting from a new competitive solicitation by Mon Power.

(1) Definition Principle

73. We find the Proposed Transaction does not meet the Definition principle because the product sought was overly narrow. In *Ameren*, with regard to the Definition principle, the Commission stated:

The RFP should state all relevant aspects of the product or products sought. At a minimum, these aspects include capacity and term, but other characteristics are usually necessary, among them fuel type, plant technology (e.g., simple cycle gas turbine), and transmission requirements.¹⁴¹

The Commission further stated:

An RFP should not be written to exclude products that can appropriately fill the issuing company's objectives. This is particularly important if such exclusions tend to favor affiliates.¹⁴²

74. According to the RFP, Mon Power's objective was to:

satisfy a capacity shortfall through a combination of an approximately 1,300 MW [unforced capacity] of generation capacity and up to 100 MW of demand resources. In order to manage its capacity needs and ensure an adequate level of

¹⁴⁰ Mon Power December 18 Answer at 1.

¹⁴¹ *Ameren*, 108 FERC 61,081 at P 76.

¹⁴² *Id.* P 77.

reliable generation supply for its customers, Mon Power hereby issues this RFP to: (1) acquire a generation facility or facilities that, at a minimum, meet established industry-wide reliability and performance criteria, or certain developmental requirements for new or planned electric generation facilities.¹⁴³

75. We find that the product sought was overly narrow because the stated objective could have been achieved if the RFP considered PPAs and resources that were outside of the APS zone. First, the Commission agrees with protestors that, by excluding PPAs, the RFP limited the number of potential respondents and thus products that could have met the RFP's stated objective.¹⁴⁴ Mon Power's justification for the need to acquire facilities, rather than meeting its needs through PPAs, is because of the "increased control and flexibility asset ownership affords Mon Power relative to a PPA – including greater control over operations, maintenance, fuel procurement, and capital improvements, as well as the flexibility to modify facility operations."¹⁴⁵ We believe that this justification could have instead been a factor in the evaluation of offers, similar to the score for development risk, rather than eliminating from consideration an entire class of offers that could have been used to meet the capacity shortfall identified in the IRP. The desire of bidders to offer PPAs as an option is evidenced by the two non-conforming bids for PPAs that were received but not evaluated by Charles River.¹⁴⁶

76. We also find that the APS zone limitation in the RFP improperly excluded resources that otherwise could meet Mon Power's stated objective. Mon Power justifies the limitation on bids to only those within the APS zone because of the need to minimize Capacity Performance penalty risk. Mon Power explains that, because PJM allows capacity resource owners during a Performance Assessment Hour to net performance over multiple units within the same PJM load zone, the risk of penalty to Mon Power's portfolio units is eliminated if the units are located within the APS zone.¹⁴⁷ However, as PJM Market Monitor states, a capacity resource in the APS zone will not always qualify

¹⁴³ Application, Exhibit RJL-3 at 4-5.

¹⁴⁴ EPSA/P3 Protest at 5; West Virginia Sun/Consumer Action Protest at 16; Consumer Advocate Protest at 8.

¹⁴⁵ Mon Power May 30 Answer at 24.

¹⁴⁶ Application at 14, n.50.

¹⁴⁷ Mon Power August 28 Answer, Supplemental Answering Testimony of Jay Ruberto at 2 (Ruberto Supplemental Testimony).

to be a retroactive replacement capacity resource for another resource in the APS zone.¹⁴⁸ Mon Power also states that during a Performance Assessment Hour, the resources must be subject to the *same penalty assessment hour event* in order for the overperformance of one to substitute for the underperformance of another such that on 13 occasions between 2005 and 2015, the resource in the APS zone would have been needed to replace other resource in the APS zone.¹⁴⁹ However, PJM Market Monitor states that of these 13 emergency events identified by Mon Power, for only three of those events, resources located within the APS Zone alone would be substitutable and eligible as retroactive replacement resources.¹⁵⁰ Based on this information, we believe that the risk of penalty during a Performance Assessment Hour is quantifiable, but rare. Therefore, we find that this APS zone limitation in the RFP was overly restrictive.

(2) **Evaluation Principle**

77. We find the RFP does not meet the Evaluation principle. We agree with West Virginia Sun/Consumer Action that the use of a 15-year NPV calculation excessively favors existing, older generation resources with low upfront costs but potentially high maintenance costs in subsequent years.¹⁵¹ Mon Power states that a 15-year NPV analysis was reasonable because: (1) assumptions and projections regarding performance factors become more speculative beyond 15 years, leading to less reliable evaluation results; and (2) due to discounting, cost factors occurring beyond 15 years have a comparatively smaller impact on NPV figures than cost factors recognized earlier in a project's performance timeline.¹⁵² While we acknowledge that the estimates of future expenses and revenues become more uncertain the further into the future that they are projected, and that the NPV contribution of the years beyond 15 is less important than those within the evaluation period due to discounting, ignoring those future years nevertheless would

¹⁴⁸ PJM Market Monitor September 12 Answer at 2. PJM Market Monitor explains: "If the emergency is region wide, then all resources in the Rest of RTO LDA can be retroactive replacements for a resource in APS Zone. If the emergency is zonal, then only resources in the zone can be retroactive replacements. If the emergency is subzonal (local) then only resources in the same location can be retroactive replacements." *Id.*

¹⁴⁹ Mon Power August 28 Answer at 18 (citing Ruberto Supplemental Testimony at 6-7).

¹⁵⁰ PJM Market Monitor September 12 Answer at 5.

¹⁵¹ West Virginia Sun/Consumer Action August 8 Answer at 11.

¹⁵² Mon Power August 28 Answer at 5 (citing Lee Answering Testimony at 20).

give advantage to a facility with a low purchase price and higher future costs, such as the affiliated Pleasants Facility. We find that, by only taking into account 15 years of operations in calculating the NPV of the facilities considered, the RFP favored facilities that may have more limited remaining lives instead of those that may be able to fulfill Mon Power's identified need into the future. An NPV calculation that calculates the total value of the proposal, including a terminal value,¹⁵³ would more closely capture the comparable economics of each proposal in order to satisfy the Evaluation principle.

78. Further, we believe that the "ease of integration" non-cost factor used in the RFP may have reduced participation by other bidders. The RFP expresses a preference for "generation facilities that . . . can be cost-effectively and efficiently incorporated into [Mon Power's] operating and corporate frameworks."¹⁵⁴ Mon Power argues that the ease of integration non-cost factor was not designed to favor the Pleasants Facility or dampen interest in the RFP process, and all three conforming bids to the RFP received the same score for the ease of integration factor.¹⁵⁵ However, we agree with West Virginia Sun/Consumer Action that ease of integration establishes a preference for Mon Power's corporate affiliates.¹⁵⁶

79. Finally, we find that the RFP did not properly disclose the scoring criteria upfront. The Evaluation principle requires that "RFPs should clearly specify the price and non-price criteria under which the bids are evaluated. Price criteria should specify the relative importance of each item as well as the discount rate to be used in the evaluation."¹⁵⁷ While the RFP explained what the price and non-price criteria were, the weights of the criteria were not clearly articulated. Charles River should have allowed all parties to see how each price and non-price factor would be weighted in scoring the bids, including what discount rate would apply to the NPV calculation.

(3) Other Considerations

80. While we appreciate and recognize Mon Power's legitimate need to address a potential capacity shortfall and to provide for its future capacity and energy needs, it should do so in a way that provides non-affiliate competing suppliers with the same

¹⁵³ Terminal Value is a financial term that captures the expected value of the project beyond the projection period.

¹⁵⁴ Application, Exhibit RJL-3 at 25.

¹⁵⁵ Mon Power May 30 Answer at 11 (citing Lee Answering Testimony at 5).

¹⁵⁶ West Virginia Sun/Consumer Action Protest at 20.

¹⁵⁷ *Ameren*, 108 FERC ¶ 61,081 at P 78.

opportunity as an affiliate to meet the utility's needs. In the interest of providing guidance for a future competitive solicitation by Mon Power, we note that we disagree with arguments questioning the need for generation or the accuracy of the load forecasts in Mon Power's 2015 IRP, as it is the role of the West Virginia Commission to make such determinations. We also disagree with challenges to Charles River's independence from Mon Power, as a repeated business relationship does not by itself indicate a lack of independence. While we agree that the timeline to submit pre-qualification paperwork may have been restrictive and could have resulted in limiting participation of potential bidders, the week before the December holidays is a working week like any other, and nine potential bidders submitted pre-qualification documents.

81. Because we have determined that Applicants do not meet the *Ameren* principles for Definition and Evaluation, we will not make a determination regarding whether Applicants meet the remaining principles. As noted above, our determination is without prejudice, and Applicants may submit an application in the future based on a new competitive solicitation by Mon Power that corrects for the shortcomings identified above.

82. Because authorization for the Proposed Transaction is denied without prejudice, we dismiss Mon Power's Section 204 Application as moot.

The Commission orders:

(A) Authorization for the Proposed Transaction is hereby denied, without prejudice, as discussed in the body of this order.

(B) Authorization to assume the Note is hereby dismissed as moot, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.