

181 FERC ¶ 61,212  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;  
James P. Danly, Allison Clements,  
Mark C. Christie, and Willie L. Phillips.

Liberty Utilities Co.  
Kentucky Power Company  
AEP Kentucky Transmission Company, Inc.

Docket No. EC22-26-000

ORDER DENYING APPLICATION FOR AUTHORIZATION OF DISPOSITION OF  
JURISDICTIONAL FACILITIES AND ACQUISITION OF SECURITIES

(Issued December 15, 2022)

1. On December 22, 2021, Liberty Utilities Co. (Liberty), Kentucky Power Company (Kentucky Power), and AEP Kentucky Transmission Company, Inc. (Kentucky Transco, and, together with Kentucky Power, the Kentucky Companies) (collectively, Applicants) filed a joint application under section 203(a)(1) and (a)(2) of the Federal Power Act (FPA).<sup>1</sup> Applicants request authorization for the disposition of jurisdictional facilities that would result from the acquisition by Liberty of all issued and outstanding common shares of the Kentucky Companies from American Electric Power Company, Inc. (AEP) and AEP Transmission Company, LLC (AEP Transco) (Proposed Transaction).<sup>2</sup>
2. We have reviewed the Proposed Transaction under the Commission's Merger Policy Statement.<sup>3</sup> As discussed below, we deny, without prejudice, authorization for the

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

<sup>2</sup> Applicants, Joint Application for Authorization under Section 203 of the Federal Power Act for Disposition of Jurisdictional Facilities (filed Dec. 22, 2021) (Application).

<sup>3</sup> *Inquiry Concerning the Commission's Merger Policy Under the Fed. Power Act: Pol'y Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996) (cross-referenced at 77 FERC ¶ 61,263) (Merger Policy Statement), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997); *see also FPA Section 203 Supplemental Pol'y Statement*, 120 FERC ¶ 61,060 (2007) (Supplemental Policy Statement), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008); *Transactions Subject to FPA Section 203*, Order No. 669, 113 FERC ¶ 61,315 (2005), *order on reh'g*, Order No. 669-A, 115 FERC ¶ 61,097, *order on reh'g*, Order No. 669-B, 116 FERC ¶ 61,076

Proposed Transaction because Applicants have failed to demonstrate that the Proposed Transaction will not have an adverse effect on rates.

**I. Background**

**A. Description of Applicants and Relevant Parties**

**1. Liberty**

3. Applicants state that Liberty is an indirect, wholly owned subsidiary of Algonquin Power & Utilities Corp. Applicants explain that Liberty holds, indirectly and through various affiliates, interests in companies that, among other things, engage in the electric industry, including The Empire District Electric Company (Empire District), a vertically integrated public utility providing electric service in southwest Missouri, southeast Kansas, northeast Oklahoma, and northwest Arkansas.<sup>4</sup>

**2. AEP Companies**

4. Applicants state that Kentucky Power is a vertically integrated public utility owned by AEP and owns 1,075 megawatts (MWs) of generation including the 260 MW Big Sandy Power Plant and 50% of the 1,560 MW Mitchell Power Generation Facility. Applicants also state that Kentucky Power owns 1,263 miles of transmission facilities with interconnections to its affiliated operating companies and other neighboring systems. Applicants state that Kentucky Power has wholesale requirements customers.<sup>5</sup>

5. Applicants explain that Kentucky Transco is a public utility owned by AEP Transco, an indirect subsidiary of AEP, and that it owns transmission facilities located within the state of Kentucky.<sup>6</sup>

6. Applicants explain that all of the Kentucky Companies' transmission assets are within the PJM Interconnection, L.L.C. (PJM) footprint and subject to PJM's functional

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(2006); *Revised Filing Requirements Under Part 33 of the Commission's Reguls.*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000) (cross-referenced at 93 FERC ¶ 61,164), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001).

<sup>4</sup> Application at 3-4.

<sup>5</sup> *Id.* at 12-13.

<sup>6</sup> *Id.* at 13.

control. Service over the Kentucky Companies' transmission assets is provided under the PJM Open Access Transmission Tariff (Tariff).<sup>7</sup>

7. Applicants state that AEP is an investor-owned electric public utility holding company that owns, directly or indirectly, all of the common stock of its public utility operating companies, including Kentucky Power.<sup>8</sup>

8. Applicants state that AEP Transco holds a direct or indirect interest in several transmission-only entities, including Kentucky Transco.<sup>9</sup>

9. Applicants state that American Electric Power Service Corporation (AEPSC) is a service company that provides management and professional services to AEP and its subsidiaries (including the Kentucky Companies), including accounting, administrative, information systems, engineering, financial, legal, maintenance and other services at cost. Applicants further explain that AEPSC also performs various marketing, generation dispatch, outage and maintenance coordination, fuel procurement and power-related risk management and trading activities on behalf of AEP and its subsidiary operating companies, including Kentucky Power.<sup>10</sup>

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

10. Pursuant to a Stock Purchase Agreement, Liberty intends to purchase all of the outstanding common shares of Kentucky Power from AEP and all of the outstanding common shares of Kentucky Transco from AEP Transco. Upon closing of the Proposed Transaction, the Kentucky Companies would be direct subsidiaries of Liberty.<sup>11</sup>

11. Applicants explain that Liberty, AEP, and AEP Transco have agreed to a form of Transition Services Agreement (Services Agreement), which will be entered into at

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<sup>7</sup> *Id.* at 13-14.

<sup>8</sup> *Id.* at 12.

<sup>9</sup> *Id.* at 13-14. In addition to Kentucky Transco, AEP Transco holds direct or indirect interest in several transmission owning members of PJM: AEP Appalachian Transmission Company Inc., AEP Indiana Michigan Transmission Company Inc., AEP Ohio Transmission Company Inc., and AEP West Virginia Transmission Company Inc. (collectively, AEP East Transmission Companies).

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

<sup>11</sup> *Id.* at 14-15.

closing. According to Applicants, pursuant to the Services Agreement, AEPSC will provide certain services to the Kentucky Companies for up to 24 months (subject to potential extension) after closing of the Proposed Transaction.<sup>12</sup>

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

12. Notice of the Application was published in the *Federal Register*, 86 Fed. Reg. 74,411 (Dec. 30, 2021), with interventions and protests due on or before January 12, 2022.

13. On January 7, 2022, the Kentucky Public Service Commission (Kentucky Commission) filed a notice of intervention and a request for an extension of time to file protests and comments.

14. On January 11, 2022, motions to intervene were filed by American Municipal Power, Inc. (AMP); Blue Ridge Power Agency (Blue Ridge); and Wabash Valley Power Association, Inc. (Wabash Valley). PJM filed a motion to intervene and comments. On January 12, 2022, Old Dominion Electric Cooperative (Old Dominion) filed a motion to intervene.

15. On January 12, 2022, the Commission issued an errata notice extending the comment due date to February 22, 2022.

16. On February 22, 2022, protests were filed by the Kentucky Commission and Joint Customer Group, which consists of AMP, Blue Ridge, and Wabash Valley. Old Dominion filed comments. Applicants filed a motion for leave to answer and answer to the protests and comments on March 9, 2022.

17. Commission staff issued a deficiency letter on April 25, 2022, requesting additional information from Applicants. On May 5, 2022, Applicants submitted a response to the deficiency letter.<sup>13</sup> Notice of the Deficiency Response was published in the *Federal Register*, 87 Fed. Reg. 29,304 (May 13, 2022), with comments and protests due on or before May 26, 2022.

18. Joint Customer Group filed a protest to the Deficiency Response on May 26, 2022. Applicants filed a motion for leave to answer and answer on June 3, 2022.

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<sup>12</sup> *Id.* at 15.

<sup>13</sup> Applicants, Response to Deficiency Letter (filed May 5, 2022) (Deficiency Response).

19. On June 17, 2022, the Commission issued an order pursuant to FPA section 203(a)(5) tolling the time for action on the Application for 180 days.<sup>14</sup>

20. On September 30, 2022, Applicants filed an informational report. Notice of the informational report was published in the *Federal Register*, 87 Fed. Reg. 61,596 (Oct. 12, 2022), with comments and protests due on or before October 21, 2022. On October 21, 2022, Joint Customer Group responded to Applicants' informational filing, indicating that the issues raised in Joint Customer Group's protests have not been resolved and requesting that the Proposed Transaction not be approved unless and until Applicants make hold harmless commitments consistent with the Commission's Hold Harmless Policy Statement<sup>15</sup> and comply in all respects thereto.

### **III. Discussion**

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

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2021), the notice of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

22. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2021), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept Applicants' answers because they have provided information that assisted us in our decision-making process.

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

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

23. FPA section 203(a)(4) requires the Commission to approve proposed dispositions, consolidations, acquisitions, or changes in control if the Commission determines that the proposed transaction will be consistent with the public interest.<sup>16</sup> The Commission's

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<sup>14</sup> *Liberty Utils. Co.*, 179 FERC ¶ 61,206 (2022).

<sup>15</sup> *Pol'y Statement on Hold Harmless Commitments*, 155 FERC ¶ 61,189 (2016).

<sup>16</sup> 16 U.S.C. § 824b(a)(4). Approval of the Proposed Transaction by other regulatory agencies pursuant to their respective statutory authorities is also required before the Proposed Transaction may be consummated. *See* Application at 29. Our findings under FPA section 203 do not affect those agencies' evaluation of the Proposed Transaction pursuant to their respective statutory authorities.

analysis of whether a proposed transaction is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.<sup>17</sup> FPA section 203(a)(4) also requires the Commission to find that the proposed transaction “will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.”<sup>18</sup> The Commission’s regulations establish verification and informational requirements for entities that seek a determination that a proposed transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.<sup>19</sup>

24. We discuss below the Proposed Transaction’s effect on rates. We do not address the other public interest factors of our section 203 analysis here because we find that Applicants have failed to show that the Proposed Transaction will not have an adverse effect on rates.

**2. Analysis of the Proposed Transaction**

**a. Effect on Rates**

**i. Applicants’ Initial Analysis**

25. Applicants assert that the Proposed Transaction will not have an adverse effect on the rates charged by either Kentucky Power or Kentucky Transco to transmission customers.<sup>20</sup> Applicants state as follows:

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<sup>17</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

<sup>18</sup> 16 U.S.C. § 824b(a)(4).

<sup>19</sup> 18 C.F.R. § 33.2(j) (2021).

<sup>20</sup> Application at 22. Applicants represent that the Proposed Transaction will not have an adverse effect on rates charged by Kentucky Power for any uncommitted generation because it will make wholesale sales solely at market-based rates. *Id.* The Commission has recognized that the effect on rates is not a concern when sales are at market-based rates “because market-based rates will not be affected by the seller’s cost of service and, thus, will not be adversely affected by the [proposed transaction].” *Cinergy Corp.*, 140 FERC ¶ 61,180, at P 41 (2012) (citing *Duquesne Light Holdings, Inc.*, 117 FERC ¶ 61,326, at P 25 (2006)). Accordingly, our analysis here focuses on the effect of the Proposed Transaction on transmission rates.

The Transaction will not have an adverse effect on the rates charged by either Kentucky Power or Kentucky TransCo to transmission customers. Kentucky Power will continue to provide service to its all requirements customers at the cost set forth in their all requirements contracts. The [Kentucky Companies] both have tariffs that contain a formula rate pursuant to which they recover their transmission rates from eligible transmission customers.<sup>21</sup> No transaction costs associated with this Transaction will be recovered through this formula rate or the all-requirements contracts. To the extent necessary, Applicants pledge to hold harmless all wholesale power and transmission customers from any costs associated with the Transaction for a five-year period. For purposes of this pledge, consistent with Commission orders, “transaction costs” in this context includes all transaction-related costs, including costs related to consummating the Transaction incurred prior and subsequent to the consummation of the Transaction.<sup>22</sup>

26. With respect to the offered hold harmless commitment, Applicants note that such commitment “is not a rate freeze” and that the Kentucky Companies would retain their rights to seek changes to their rates during the period of the hold harmless commitment, “in accordance with FPA section 205, to reflect their full costs of service.”<sup>23</sup>

**ii. Applicants’ Response to the Deficiency Letter**

27. In the deficiency letter, Commission staff requested additional information regarding the effect of the Proposed Transaction on rates.<sup>24</sup> Specifically, Commission

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<sup>21</sup> Applicants submitted a filing pursuant to FPA section 205 in Docket No. ER22-1196 to establish new stand-alone formula transmission rates for the Kentucky Companies to be included in the PJM Tariff. *See* Liberty Utilities Co., Kentucky Power Company, and AEP Kentucky Transmission Company, Inc., Filing, Docket No. ER22-1196-000 (filed Mar. 4, 2022) (Formula Rate Filing).

<sup>22</sup> Application at 22 (footnotes and citations omitted).

<sup>23</sup> *Id.* at n.62.

<sup>24</sup> In response to another request from Commission staff in the deficiency letter, Applicants identified the filings they have submitted, or anticipate submitting, to the Commission which are related to, or contingent upon, the closing of the Proposed Transaction, including the Formula Rate Filing. *See* Deficiency Response at 9 and

staff asked questions regarding the Kentucky Companies' cost of capital, other cost of service components, and transmission zones and zonal rates.

(a) **Cost of capital and reliance on current cost allowance**

28. Commission staff asked Applicants to explain whether transmission rates would be affected because the Kentucky Companies would have a different cost of capital or different return on equity (ROE) under Liberty ownership, and, if so, whether those changes would be adverse.

29. In response, Applicants state that they have proposed that the current cost allowance for the cost of capital (ROE, cost of debt, and capital structure) remain in place for the Kentucky Companies following the consummation of the Proposed Transaction.<sup>25</sup> Applicants also state that if the cost of debt changes as a result of the Kentucky Companies' change of ownership, those changes will not impact customers through the end of 2022 and would be addressed in 2023 and in the future through the formula rate projection and true-up process.<sup>26</sup> Applicants note further that the Kentucky Companies requested Commission authorization under FPA section 204 to obtain short-term financing from Liberty that would be issued upon closing of the Proposed Transaction to replace the outstanding debt of the Kentucky Companies.<sup>27</sup>

(b) **Other cost of service components**

30. Commission staff asked Applicants to explain how the Proposed Transaction will affect transmission rates, including how the transmission rates that the Kentucky Companies will charge under Liberty ownership would be different from the transmission rates currently charged by the Kentucky Companies under AEP ownership.

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Attachment 4. We note that there are numerous pending filings that Applicants have submitted to the Commission under FPA sections 204 and 205 in contemplation of the Proposed Transaction. *See infra* n.80.

<sup>25</sup> Deficiency Response at 2.

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

<sup>27</sup> *Id.* at n.1. *See also* The Kentucky Companies, Application for Authorization to Issue Short-Term Securities under Section 204 of the Federal Power Act and Request for Expedited Consideration, Docket Nos. ES22-44-000 and ES22-45-000 (filed Apr. 29, 2022).

31. In response, Applicants state that the “Proposed Transaction will have a minimal effect (higher or lower) on the transmission rates of [the Kentucky Companies],” and that the annual transmission revenue requirements of the Kentucky Companies “will not change as a result of the Proposed Transaction,” with two exceptions: Post-Employment Benefits Other Than Pensions (PBOP) and Service Company Costs, which includes “certain administrative and general (A&G) and operations and maintenance (O&M) services.”<sup>28</sup> Applicants note that upon the closing of the Proposed Transaction, AEPSC will provide certain A&G and O&M services to the Kentucky Companies on a temporary basis until Liberty has established a service company to provide similar services.<sup>29</sup> Applicants further state that, to the extent such costs change as a result of the change of ownership, those changes will not impact customers through the end of 2022 and will be addressed in 2023 and in the future through the formula rate projection and true-up process in the normal course.

**(c) Transmission zone and zonal rates**

32. Commission staff asked Applicants to explain Liberty’s plans for operating the Kentucky Companies after the expiration of the Services Agreement with AEPSC, including the timeframe for the Kentucky Companies to remain in the AEP East transmission rate zone in PJM.

33. In response, Applicants state that Liberty has started a review of the future transmission operations of the Kentucky Companies and is evaluating options for the operation of the Kentucky Companies, which may include “continuing with a third party provider such as, but not limited to, AEP; developing a transmission operations function within [the Kentucky Companies]; and expanding the transmission functions of [Empire District].”<sup>30</sup> Liberty also states that it has no plans to remove the Kentucky Companies from the AEP East transmission zone and explains that it committed to the Kentucky Commission to, within two years of the close of the Proposed Transaction, study the issue in an effort to identify and evaluate alternatives that benefit customers.<sup>31</sup>

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<sup>28</sup> Deficiency Response at 1.

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

<sup>30</sup> *Id.* at 2.

<sup>31</sup> *Id.* at 3.

**iii. Protests, Comments, and Responsive Pleadings**

34. The Kentucky Commission, Joint Customer Group, and Old Dominion challenge, on various grounds, Applicants' claim that the Proposed Transaction will not have an adverse effect on rates. Protestors question whether Applicants have provided adequate information regarding whether the Proposed Transaction will have any effect on the rates, terms or conditions of service provided to wholesale and transmission customers, and whether there are sufficient measures in place to protect customers from adverse impacts.<sup>32</sup> Applicants dispute those challenges, claiming that the Proposed Transaction "will have no adverse effect on rates because the [Applicants] have—consistent with Commission precedent—committed to hold harmless all wholesale power and transmission customers from any costs associated with" the Proposed Transaction.<sup>33</sup>

**(a) Cost of capital and reliance on current cost allowance****(1) Joint Customer Group's protest**

35. Joint Customer Group states that Liberty should be required to maintain the Kentucky Companies' current base ROE of 9.85% and the maximum permitted equity component of capital structure of 55%.<sup>34</sup> Joint Customer Group further states that, to the extent a future rate filing is made within the proposed five year hold harmless period that seeks to increase the ROE or equity component of the Applicants' capital structure, Applicants must demonstrate countervailing customer benefits derived from the Proposed

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<sup>32</sup> Kentucky Public Service Commission, Protest at 2, 7 (filed Feb. 22, 2022) (Kentucky Commission Protest); Joint Customer Group, Protest at 2, 6-9 (filed Feb. 22, 2022) (Joint Customer Group February 2022 Protest); Old Dominion, Comments at 3-4 (filed Feb. 22, 2022).

<sup>33</sup> Applicants, Motion for Leave to Answer and Answer at 3 (filed Mar. 9, 2022) (Applicants March 2022 Answer).

<sup>34</sup> Joint Customer Group February 2022 Protest at 10. The Kentucky Companies' base ROE and equity component maximum were established by settlement in Docket No. ER18-1202 for all of the AEP East Transmission Companies. The settlement agreement does not include a rate filing moratorium.

Transaction to justify such rate increases.<sup>35</sup> Joint Customer Group also argues that any increased cost of debt should be subject to Applicants' hold harmless commitment.<sup>36</sup>

36. Joint Customer Group also claims that it is unclear how the true-up process for the transition year (2022) formula rates will be performed and how inputs to the formula rate template will reflect partial year data.<sup>37</sup>

**(2) Applicants' answer**

37. Applicants assert that the Formula Rate Filing addresses Joint Customer Group's specific concerns, including rates in the transition year and base ROE.<sup>38</sup> Applicants explain that the Formula Rate Filing does not propose any changes to the formula rates currently used by the Kentucky Companies nor key inputs to such rates, such that "the jurisdictional rates of [the Kentucky Companies] will remain unchanged for the balance of calendar year 2022 and will be calculated based on the same return on equity and capital structure caps as are currently in place."<sup>39</sup> Applicants also state that they commit to ensuring that the Kentucky Companies' debt costs remain as low as market conditions allow.<sup>40</sup>

**(b) Other cost of service components**

**(1) Joint Customer Group's protest**

38. Joint Customer Group claims that Applicants have failed to justify the proposed PBOP costs included in the Formula Rate Filing for both Kentucky Companies and the proposed PBOP charge adjustment mechanisms.<sup>41</sup> Joint Customer Group also argues that Applicants have failed to explain how AEP's current pensions and PBOP trusts will be

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<sup>35</sup> Joint Customer Group February 2022 Protest at 10-11.

<sup>36</sup> Joint Customer Group, Protest at 9, (filed May 26, 2022) (Joint Customer Group May 2022 Protest).

<sup>37</sup> Joint Customer Group February 2022 Protest at 9.

<sup>38</sup> Applicants March 2022 Answer at 4.

<sup>39</sup> *Id.* at n.19 (quoting Formula Rate Filing, Transmittal Letter, at 2-3).

<sup>40</sup> Applicants, Motion for Leave to Answer and Answer at 7 (filed June 3, 2022) (Applicants June 2022 Answer).

<sup>41</sup> Joint Customer Group May 2022 Protest at 2-7.

impacted by the Proposed Transaction, and that Applicants have not addressed how Liberty will account for employees that will become Liberty employees after the Proposed Transaction closes.<sup>42</sup>

39. Joint Customer Group also argues that Liberty's costs of developing in-house transmission operations functions should be subject to the Applicants' proposed hold harmless commitment, as such costs are incremental transaction-related costs.<sup>43</sup> Joint Customer Group also questions whether certain costs under the proposed Services Agreement with AEPSC should be eligible for recovery through the Kentucky Companies' jurisdictional rates.<sup>44</sup>

(2) **Applicants' answer**

40. Applicants assert that the Formula Rate Filing addresses Joint Customer Group's specific concerns, including PBOP.<sup>45</sup>

41. With respect to the Services Agreement, Applicants state that the costs of providing those services are merely the cost of the same services that the Kentucky Companies' customers currently incur for such normal-course activities.<sup>46</sup> Applicants also claim that, "to the extent costs incurred for services under the [Services Agreement] are transaction costs within the meaning of the Commission's Hold Harmless Policy Statement, the Protesters' concerns with costs related to the agreement are sufficiently addressed by the [Applicants' hold harmless provision]."<sup>47</sup>

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<sup>42</sup> Joint Customer Group February 2022 Protest at 11-12.

<sup>43</sup> Joint Customer Group May 2022 Protest at 5-6.

<sup>44</sup> *Id.* at 2-4.

<sup>45</sup> Applicants March 2022 Answer at 4.

<sup>46</sup> Applicants June 2022 Answer at 5.

<sup>47</sup> Applicants March 2022 Answer at 12. However, two months later in the Deficiency Response, Applicants take the position that "[n]one of the costs of the services and assistance provided under the [Services Agreement] are transaction-related costs," but instead are administrative and support services historically and currently provided by AEPSC to all of its utility affiliates. Deficiency Response at 6.

(c) **Transmission zone and zonal rates**

(1) **Kentucky Commission's protest**

42. The Kentucky Commission argues that Applicants do not state whether the Kentucky Companies will remain in the AEP transmission zone in PJM or potentially will create a new transmission zone in PJM, and what effect that decision will have on the Kentucky Companies' transmission costs and rates.<sup>48</sup> The Kentucky Commission states it remains especially concerned about rising transmission costs in the AEP transmission zone. The Kentucky Commission states that Applicants have not addressed what impact the Proposed Transaction will have on zonal transmission rates in PJM following consummation of the Proposed Transaction.<sup>49</sup>

(2) **Applicants' answer**

43. Applicants claim that they are not required to demonstrate the effects of the Proposed Transaction on zonal transmission rates, and that, in any case, the Proposed Transaction will not result in an increase in the zonal transmission rate.<sup>50</sup> Applicants assert that “[a]ny changes to zonal rates after 2022 will be based upon the cost of service of the companies within the AEP East zone, which can be reviewed by [parties] pursuant to the companies’ formula rate protocols.”<sup>51</sup>

iv. **Commission Determination**

44. As discussed in further detail below, we deny, without prejudice, Applicants’ request for authorization of the Proposed Transaction. We emphasize at the outset that our analysis of rate effects under FPA section 203 differs from the analysis we apply to determine whether rates are just and reasonable under FPA section 205.<sup>52</sup> Our focus here is on the effect that the Proposed Transaction will have on rates; whether that effect is adverse; and whether any adverse effect will be mitigated or offset by benefits that are

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<sup>48</sup> Kentucky Commission Protest at 2-6.

<sup>49</sup> *Id.*

<sup>50</sup> Applicants March 2022 Answer at 5-6.

<sup>51</sup> *Id.* at 6.

<sup>52</sup> See *Silver Merger Sub, Inc.*, 145 FERC ¶ 61,261, at P 65 (2013) (*Silver Merger Sub*); *ITC Holdings Corp.*, 143 FERC ¶ 61,256, at P 118 (2013) (*ITC Holdings*); *ALLETE, Inc.*, 129 FERC ¶ 61,174, at P 19 (2009) (*ALLETE*).

likely to result from the Proposed Transaction.<sup>53</sup> Where applicants expect an effect on rates, applicants typically disclose and discuss that effect in their section 203 applications and attempt to demonstrate that an adverse effect on rates will be mitigated or offset by benefits.<sup>54</sup>

45. Based on our review of Applicants' representations and the record in this proceeding, we conclude that Applicants have failed to provide adequate information to demonstrate what, if any, effect the Proposed Transaction will have on rates. Applicants have asserted that the Proposed Transaction will not result in an adverse effect on rates, but they have not demonstrated that will be the case.

46. We also note that Applicants' commitment to hold their customers harmless from costs related to the Proposed Transaction is not a substitute for identifying the effects of the Proposed Transaction on rates and demonstrating that such effects are not adverse. As the Commission noted in the *Hold Harmless Policy Statement*, an increase in rates that results from a transaction is *not* the equivalent of a transaction-related cost.<sup>55</sup> Accordingly, an applicant's commitment to hold customers harmless from transaction-related costs does not satisfy the Commission's inquiry into whether a proposed transaction may have an adverse effect on rates and whether those adverse effects are mitigated or offset.<sup>56</sup>

47. As in prior cases, although we deny the Proposed Transaction, our denial is without prejudice to Applicants making a new filing that demonstrates the effect the Proposed Transaction will have on rates, and whether that effect is adverse. If that effect

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<sup>53</sup> See, e.g., Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,123 (noting that an increase in rates "can be consistent with the public interest if there are countervailing benefits that derive from the transaction"); see also *Silver Merger Sub*, 145 FERC ¶ 61,261 at P 65.

<sup>54</sup> See *Emera Me.*, 155 FERC ¶ 61,233, at P 35 & n.62 (2016), *order denying reh'g and accepting compliance filing*, 158 FERC ¶ 61,012 (2017) (addressing section 205 filing requesting a change in rates resulting from a previously authorized transaction that had closed, but where the rate increase was not disclosed in the underlying section 203 application).

<sup>55</sup> *Pol'y Statement on Hold Harmless Commitments*, 155 FERC ¶ 61,189 at P 47.

<sup>56</sup> See *NextEra Energy, Inc.*, 173 FERC ¶ 61,029, at PP 27-28, 29 (2020) (separately considering proposed ratepayer protection mechanisms addressing cost shifts due to the averaging of costs in merged systems and changes related to transmission pricing zones, and hold harmless commitment for transaction-related costs).

is adverse, Applicants should either propose adequate ratepayer protection or demonstrate specific benefits related to the Proposed Transaction that offset such effect.<sup>57</sup>

(a) **Cost of capital and reliance on current cost allowance.**

48. Applicants fail to explain whether the Kentucky Companies' jurisdictional rates will be affected by the Proposed Transaction because they will have different costs of capital under Liberty ownership. Applicants instead state that the change in ownership of the Kentucky Companies will have no rate impact on customers because Applicants have proposed that the current allowance for the cost of capital (ROE, cost of debt, and capital structure) remain in place for the Kentucky Companies through the balance of 2022. Applicants maintain, however, that the Kentucky Companies retain their rights to seek rate changes under section 205 to reflect their "full costs of service,"<sup>58</sup> and Applicants contemplate changes to the Kentucky Companies' cost of debt, stating that, "to the extent that the cost of debt changes as a result of the change in ownership, those changes will not impact customers through the end of 2022 and will be addressed in 2023 and in the future through the formula rate projection and true-up process in the normal course."<sup>59</sup>

49. Applicants' statements are insufficient for two reasons. First, Applicants' representations do not provide complete information upon which to evaluate the effect of the Proposed Transaction on rates. To support their position Applicants could have, for example, included a comparison of rates currently in effect to a projection of rates once the Proposed Transaction is consummated. We note that, in prior section 203 proceedings, applicants identified and analyzed potential changes to their costs of capital, including ROE, cost of debt, and capital structure.<sup>60</sup> Those analyses, among other things, provided support for the Commission's determinations in those proceedings that the proposed transactions would not have adverse effects on rates.

50. Second, Applicants' statements are incongruous: Applicants assert that there will be no rate impacts while simultaneously acknowledging potential changes to the Kentucky Companies' cost of debt that would impact rates. These seemingly

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<sup>57</sup> See *Elec. Energy, Inc.*, 168 FERC ¶ 61,130, at P 72 (2019) (*Electric Energy*); *GridLiance High Plains, LLC*, 166 FERC ¶ 61,171, at P 48 (2019).

<sup>58</sup> Application at n.62.

<sup>59</sup> Deficiency Response at 2.

<sup>60</sup> See, e.g., *ALLETE*, 129 FERC ¶ 61,174; *ITC Holdings*, 143 FERC ¶ 61,256.

contradictory statements undermine Applicants' claim that the Proposed Transaction will not have an adverse effect on rates.

51. We also find that Applicants have not demonstrated that their proposal for the current allowance for costs of capital to remain in place for the Kentucky Companies after the Proposed Transaction closes will adequately protect ratepayers. The proposal appears to have limited effect given that Applicants recognize, in the Deficiency Response and the Formula Rate Filing, that the Kentucky Companies will seek to recover potential changes in their costs.<sup>61</sup> Although Applicants propose to maintain the status quo for rates for the remainder of calendar year 2022,<sup>62</sup> in the Formula Rate Filing, the Applicants state that the annual procedures under the formula rate protocols "will capture all changes in costs resulting from the change in upstream ownership of [the Kentucky Companies] as of the closing date and continuing into the future."<sup>63</sup>

52. Taken at face value, Applicants' statements mean that the formula rate process will, in fact, capture cost changes for 2022 and future years that result from the Proposed Transaction. This, in turn, suggests that Applicants' statement that the Kentucky Companies' rates "will remain unchanged for the balance of calendar year 2022 and will be calculated based on the same return on equity and capital structure caps as are

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<sup>61</sup> See Deficiency Response at 2; Formula Rate Filing, Transmittal Letter at 4-5.

<sup>62</sup> See Deficiency Response at 2.

<sup>63</sup> Formula Rate Filing, Transmittal Letter at 5. The Formula Rate Filing explains that the formula rate protocols' true-up process for 2022 will capture "all material cost differences resulting from the change of upstream ownership" of the Kentucky Companies because this process will "reconcile differences between the projected and actual Net Revenue Requirement for year 2022" so that "any differences in the cost profile of AEP captured in the projected Net Revenue Requirement and the cost profile of Liberty in the actual Net Revenue Requirement will be identified, explained and reconciled." *Id.* at 4-5. Accordingly, based on the description in the Formula Rate Filing, we conclude that the formula rate process would capture differences between the Kentucky Companies' projected costs and actual costs that will occur in the normal course, as well as differences that would occur after the Proposed Transaction closes, notwithstanding Applicants' proposal that the current cost allowance for the Kentucky Companies' cost of capital "remain in place for both Kentucky Power and Kentucky Transco following the consummation of the Proposed Transaction such that there will be no rate impact on customers as a result of the change in ownership." Deficiency Response at 2.

currently in place,”<sup>64</sup> applies only until the formula rate true-up process for the 2022 rate year takes place in 2023, with differences in the projected and actual cost of service for 2022 reflected in 2024 rates. Although the rates paid would not change during 2022, any changes to the Kentucky Companies’ costs that occur in 2022 and later would be reflected in future rate years. Accordingly, Applicants’ proposed ratepayer protection is insufficient because of the foreseeable rate changes.<sup>65</sup> Moreover, Applicants must account for these rate changes here in their analysis of the Proposed Transaction under section 203.

**(b) Other cost of service components**

53. Applicants’ representations with respect to other cost of service components are also unclear and lack specificity. Applicants claim that the “Proposed Transaction will have a minimal effect (higher or lower) on the transmission rates of [the Kentucky Companies],” and that the annual transmission revenue requirements of the Kentucky Companies “will not change as a result of the Proposed Transaction,” with two exceptions: PBOPs and Service Company Costs, which includes A&G and O&M services that will be provided on a temporary basis (up to 24 months, subject to extension) to the Kentucky Companies by AEPSC.<sup>66</sup> Applicants, however, do not explain what the post-Proposed Transaction changes to PBOPs and A&G and O&M-type

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<sup>64</sup> Applicants March 2022 Answer at 3-4 (quoting Formula Rate Filing, Transmittal Letter at 2-3). As noted above, the Deficiency Response contemplates a change to the Kentucky Companies’ cost of debt but does not quantify it.

<sup>65</sup> We note that that in prior section 203 applications authorized by the Commission, applicants identified expected rate increases and offered rate mitigation proposals of meaningful duration to address the potential adverse effects on rates. *See, e.g., NextEra Energy, Inc.*, 165 FERC ¶ 61,263 (2018) (conditionally authorizing acquisition of Gulf Power where applicants offered a rate cap such that Gulf Power’s transmission rates for a five-year period would be the lower of Gulf Power’s pre-transaction rate or its rate under NextEra ownership, and applicants committed to maintain “de-pancaked rates” with respect to Gulf Power’s transmission facilities becoming separated from its former affiliated transmission systems); *Elec. Energy, Inc.*, 170 FERC ¶ 61,072, *order on reh’g*, 171 FERC ¶ 61,197 (2020) (conditionally authorizing acquisition of transmission facilities where applicants proposed rate mitigation credits to reduce the revenue requirements by an amount corresponding to the projected difference in rates, and requiring the rate mitigation to provide a full five years of protection).

<sup>66</sup> Deficiency Response at 1.

costs will be; do not explain how or why the effect of the changes to these costs on the Kentucky Companies' cost of service will be "minimal"; and do not provide any estimates of the changes to these costs. We note that in prior section 203 proceedings, applicants anticipating a change in operating expenses as a result of a proposed transaction have performed illustrative calculations and disclosed the projected difference in revenue requirements (between the existing and proposed ownership) such that the Commission was able to evaluate the effect of the proposed transaction on rates.<sup>67</sup>

54. With respect to A&G and O&M-type costs, Applicants state that they "do[] not anticipate significant changes,"<sup>68</sup> but Applicants acknowledge that they are currently unaware of who will perform or provide such services after the Services Agreement with AEPSC is no longer in effect.<sup>69</sup> Applicants do not provide an estimate of the Kentucky Companies' post-closing A&G and O&M costs or the effect that changes to these costs will have on rates. Instead, Applicants claim that such "changes will not impact customers through the end of 2022 and will be addressed in 2023 and in the future through the formula rate projection and true up process in the normal course."<sup>70</sup> As with their representations regarding the costs of capital, Applicants' representation that any effect on rates related to these costs will be minimal is not supported, particularly where

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<sup>67</sup> See, e.g., *Electric Energy*, 168 FERC ¶ 61,130 at P 76 (denying application and explaining that, in applicants' calculation, the primary difference between the projected revenue requirements of the transmission assets was in operating expenses); *Elec. Energy*, 170 FERC ¶ 61,072 at PP 47-54 (conditionally authorizing a previously-denied transaction when supported by customer mitigation proposal to address the identified difference in revenue requirements and demonstration of offsetting benefits); see also *GridLiance High Plains*, 166 FERC ¶ 61,171 at P 35 (denying application and noting that the applicant provided an illustrative effect on rates calculation that showed that the annual transmission revenue requirement for the assets would be higher after the proposed acquisition).

<sup>68</sup> Deficiency Response at 1. The Formula Rate Filing states that a new Note AA is added to the Kentucky Power Blank Formula Rate Template to provide notice to customers that the projected A&G and O&M cost components in place for calendar year 2022 will remain in effect after the closing subject to reconciliation during the 2023 annual update. See Formula Rate Filing, Transmittal Letter at 6. Thus, changes to these costs that will occur during 2022 will be captured and will impact customers during the 2024 rate year.

<sup>69</sup> *Id.* at 2.

<sup>70</sup> *Id.* at 1.

Applicants acknowledge that Liberty has not yet determined how the Kentucky Companies will be operated post-closing or who will perform A&G and O&M services.<sup>71</sup>

(c) **Transmission zone and zonal rates**

55. We similarly find that Applicants have not demonstrated that there will be no adverse effect on transmission rates for the AEP East transmission zone in PJM. Applicants assert that they are not required to examine the effects of the Proposed Transaction on zonal transmission rates because Commission precedent does not require consideration of broader zonal rate impacts unrelated to a proposed transaction.<sup>72</sup> Applicants nevertheless also claim that the Proposed Transaction will not result in an increase in the zonal transmission rate<sup>73</sup> and that “[a]ny changes to zonal rates after 2022 will be based upon the cost of service of the companies within the AEP East zone, which can be reviewed by [parties] pursuant to the companies’ formula rate protocols.”<sup>74</sup>

56. For the same reasons discussed above, we are unable to determine what effect the Proposed Transaction will have on zonal rates. While Applicants assert that the Proposed Transaction will not have an adverse effect on rates, they do not support that claim with any evidence or analysis of current and future rates. Applicants further reserve the right to seek rate changes in the future, under section 205, to reflect their full costs of service but where those changes will result from the change in ownership resulting from the Proposed Transaction they must be accounted for and examined here, in this proceeding, under section 203.

57. We also disagree with Applicants’ claim that the Commission has not considered broader zonal rate impacts arising from proposed transactions under section 203. First, Applicants state that the Commission did not consider zonal rate impacts in *Electric Energy*. This conclusion is not supported by the Commission’s order. While the Commission did focus on the increased revenue requirement for the facilities that would be transferred in the proposed transaction, the Commission also explained that the

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<sup>71</sup> To the extent there would be an increase in costs resulting in an increase in rates, Applicants would be expected to propose rate mitigation or demonstrate offsetting benefits. See *Electric Energy*, 168 FERC ¶ 61,130 at P 76. The Commission found that applicants in *Electric Energy* had not demonstrated benefits to offset the increase in rates. *Id.* PP 78-88.

<sup>72</sup> Applicants March 2022 Answer at 6.

<sup>73</sup> *Id.* at 5-6.

<sup>74</sup> *Id.* at 6.

increased revenue requirement from the proposed transaction would “result in an increase in rates for customers in MISO Zone 3A.”<sup>75</sup> We note also that the Commission has previously denied section 203 applications where transmission zone rates would be higher as a result of a proposed transaction involving a sub-set of zonal transmission facilities, but the proposed transaction did not provide offsetting benefits to zonal customers.<sup>76</sup>

58. Second, we disagree with Applicants’ reliance on *ITC Holdings*.<sup>77</sup> According to Applicants, in that decision the Commission rejected protestors’ requests to consider the impact of a proposed transaction on the rates of four transmission pricing zones because the rate impacts on the transmission pricing zones were not due to the proposed transaction. While that is true, the facts of that case are not analogous or comparable to the Proposed Transaction: in *ITC Holdings*, the Commission simultaneously evaluated the transfer of the transmission systems of the Entergy operating companies to ITC Holdings Corp. and its subsidiaries (the proposed transaction) *and* the integration of the Entergy operating companies into MISO. The Commission concluded that the impacts on zonal transmission rates were a consequence of the latter.<sup>78</sup> Any potential changes to zonal rates discussed in this proceeding, however, are not unrelated to the Proposed Transaction; to the contrary, the Proposed Transaction *is* the source of such changes and the only Commission jurisdictional event before us.

#### (d) Conclusion

59. Applicants have failed to show that the Proposed Transaction will not have an adverse effect on rates. Accordingly, we deny, without prejudice, authorization of the

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<sup>75</sup> *Electric Energy*, 168 FERC ¶ 61,130 at P 71.

<sup>76</sup> *GridLiance High Plains*, 166 FERC ¶ 61,171 at P 44 (explaining that the proposal to include the acquired assets in existing transmission zones would mean that “existing customers in those zones would face a rate increase, but [applicant] has made no showing that the existing customers would receive any material benefit as a result of adding the [transmission facilities] to their zone); *see also Electric Energy*, 168 FERC ¶ 61,130 at PP 71, 76 (finding that zonal rate increase would be due only to the proposed acquiring company’s higher operating costs).

<sup>77</sup> *ITC Holdings*, 143 FERC ¶ 61,256.

<sup>78</sup> *Id.* P 122 (“...the Commission finds that the four transmission pricing zones construct is a consequence of Entergy's integration into MISO, not the Proposed Transaction, and is therefore being addressed in the companion order on Applicants' FPA section 205 filings and requests and under the FPA section 205 standard of review.”).

Proposed Transaction. Applicants may file a new application pursuant to section 203 that provides adequate information to demonstrate what, if any, effect the Proposed Transaction will have on rates. If the effect of the Proposed Transaction on rates is adverse, Applicants should propose adequate ratepayer protection or mitigation to address that adverse effect, or otherwise demonstrate specific benefits due to the Proposed Transaction that offset such effect.

60. We note that there are a number of pending filings before the Commission that are related to, or contingent upon, the closing of the Proposed Transaction. The Commission directs that Applicants file informational filings<sup>79</sup> in the pending proceedings within 30 days of this order. Those informational filings should inform the Commission of how the Applicants propose to proceed with the various pending filings related to the Proposed Transaction submitted under FPA sections 204 and 205.<sup>80</sup> The informational filings should indicate whether Applicants will withdraw the pending filings, whether the filings have become moot and should be dismissed, or whether Applicants request that the Commission hold the filings and proceedings in abeyance pending the submission of a new application under section 203.<sup>81</sup> If Applicants seek to withdraw or dismiss any filing, Applicants should take steps to do so in further Commission filings, as appropriate. If Applicants request that the Commission hold the pending proceedings in abeyance, Applicants must inform the Commission when the new section 203 application is filed, through appropriate filings in the applicable proceedings, whether any of the information in those filings has become stale, moot, or otherwise needs to be updated, and provide such updated information. Finally, if Applicants submit a new section 203 application before the due date of the 30-day informational filings, Applicants should provide this information regarding these pending filings in its new section 203 filing.

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<sup>79</sup> These 30-day informational filings will not be noticed for comment or require Commission action.

<sup>80</sup> These proceedings include the pending section 205 filings in Docket Nos. ER22-1195, ER22-1196, ER22-1423, ER22-1429, ER22-1855, ER22-1858, ER22-1939, ER22-1940, ER22-2027, ER22-2145, and ER22-2146, and pending section 204 filings in Docket Nos. ES22-44 and ES22-45. If there are other pending filings contingent on the closing of the Proposed Transaction, Applicants should submit informational filings in those proceedings, as appropriate.

<sup>81</sup> Applicants may propose alternative procedures for these pending filings and proceedings.

The Commission orders:

The Application is hereby denied, without prejudice, as discussed in the body of this order.

By the Commission. Commissioner Danly is concurring with a separate statement attached.

Commissioner Phillips is concurring with a separate statement attached.

( S E A L )

Debbie-Anne A. Reese,  
Deputy Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Liberty Utilities Co.  
Kentucky Power Company  
AEP Kentucky Transmission Company, Inc.

Docket No. EC22-26-000

(Issued December 15, 2022)

DANLY, Commissioner, *concurring*:

1. On December 22, 2021, Liberty Utilities Co. (Liberty), Kentucky Power Company (Kentucky Power), and AEP Kentucky Transmission Company, Inc. (Kentucky Transco, and, together with Kentucky Power, the Kentucky Companies) (collectively, Applicants) filed a joint application under section 203(a)(1) and (a)(2) of the Federal Power Act (FPA),<sup>1</sup> requesting authorization for the disposition of jurisdictional facilities that would result from the acquisition by Liberty of all issued and outstanding common shares of the Kentucky Companies from American Electric Power Company, Inc. and AEP Transmission Company, LLC (Proposed Transaction).<sup>2</sup> One year later, after having done nothing for the last six months, the Commission now denies the merger.

2. I concur with the Commission's decision because I agree that Applicants have failed to satisfy the requirement that they demonstrate that the Proposed Transaction will have no adverse effect on rates. I concur despite the fact that I am embarrassed that the Commission has waited almost a year to issue its order. Such an order might have been acceptable had the Commission issued it six months ago. But the Commission has failed to act responsibly by delaying its decision until now, especially when it could have explored options such as further data requests or soliciting a submission of a proposal to mitigate the transaction's rate effects in order to afford the Commission the opportunity to consider approving the transaction conditioned upon the implementation of that proposal. This could easily have been done and it appears, by the plain language of section 203 of the FPA, to be a permissible option.<sup>3</sup>

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

<sup>2</sup> Applicants, Joint Application for Authorization under Section 203 of the Federal Power Act for Disposition of Jurisdictional Facilities (filed Dec. 22, 2021) (Application).

<sup>3</sup> See 16 U.S.C. § 824b(b) ("The Commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds

3. Applicants requested in a filing on June 3, 2022 that the Commission “issue an order authorizing the Transaction no later than June 21, 2022 to allow the Transaction to close in mid-2022 as scheduled.”<sup>4</sup> Instead, on June 17, 2022, the Commission issued an Order Tolling Time for Action Under FPA Section 203.<sup>5</sup> In that order, the Commission stated, that it required “additional time to fully analyze the application as supplemented on May 5, 2022,” found “based on good cause, that further consideration [was] required to determine whether the proposed transaction meets the standards of section 203(a)(4) of the FPA,” and therefore tolled the time to act on the Application for an additional 180 days.<sup>6</sup> While I voted for that order, in hindsight, that was the wrong course of action. The Commission received Applicants’ response to the Commission’s April 25, 2022 deficiency letter on May 5, 2022. The statutory deadline for the Commission to act on the application was June 20, 2022. Therefore, the Commission had 46 days to review the Applicants’ response to its April 25, 2022 deficiency letter and to issue a decision on the merits.

4. We should have simply denied the application without prejudice within the statutory deadline or explored the possibility of approving subject the conditions necessary to allay our concerns regarding the transaction’s rate effects. There was no reason to have taken any other course of action. Why did we need the tolling period to determine that we were unable to assess the transaction’s effect on rates? Why did the Commission not request further information during the tolling period in order to assist with that assessment? Had we denied the application by the original 180-day deadline, perhaps the applicants would have been able to file a new application with the information that the Commission needed and obtained our approval.

5. Instead, having waited six months to reach the same conclusion we had come to before—that we did not have enough information—we have merely impeded the actions that the Applicants could have taken to move ahead with the proposed transaction, such as filing a new application with needed information, perhaps after consultation with Commission staff.

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necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission.”).

<sup>4</sup> Applicants June 3, 2022 Motion to Leave & Answer Joint Customer Group’s Protest, at 2.

<sup>5</sup> *Liberty Utils. Co.*, 179 FERC ¶ 61,206 (2022).

<sup>6</sup> *Id.* P 2.

6. Delays and uncertainty when discharging our duties under section 203 can have profound consequences, perhaps even more so than under the other statutes we administer.<sup>7</sup> It is nearly impossible to rationally allocate capital and conduct business responsibly when it is unclear who will own that business or when the decision regarding the disposition of jurisdictional assets will be made. When we delay these decisions employees and leadership of both entities live under a cloud of uncertainty. Shareholders are unable to properly determine the value of their shares.

7. If we had conditioned our approval of the Proposed Transaction upon a proposed rate mitigation commitment, an appropriate commitment could have been submitted, examined, and, if appropriate, approved. Section 203 of the FPA explicitly gives us the power to grant approvals “upon such terms and conditions as it finds necessary or appropriate.”<sup>8</sup> Rejection of the Proposed Transaction without prejudice will do nothing more than require Applicants to develop the exact same rate mitigation commitment, but

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<sup>7</sup> Cf. *Golden Pass LNG Terminal LLC*, 180 FERC ¶ 61,058 (2022) (Danly, Comm’r, concurring in the judgment at P 11) (discussing the costs associated with delay in Commission action in Natural Gas Act section 7 proceedings); *Adelphia Gateway, LLC*, Withdrawal of Prior Notice, Docket No. CP21-14-000, at 2 (Oct. 12, 2021) (withdrawing a request to install and operate an additional electric-motor driven compressor unit at its already authorized Marcus Hook Compressor Unit because “as a result of the extension of the environmental review through the supplemental EIS process and a prolonged Commission review process, the Project has been delayed well beyond Adelphia’s expectations and, more specifically, there is significant uncertainty regarding when an order will issue in this docket” and “[i]n light of this, Adelphia has decided not to continue the development of the Project”); *Eastern Gas Transmission & Storage*, Letter Withdrawing its Applications for the Mid-Atlantic Cooler Project, Docket No. CP21-97-000, at 1 (Sept. 20, 2021) (withdrawing an application for an NGA section 7 certificate—which had been filed nearly six months prior and had requested permission to build minor upgrades to three compressor stations in Pennsylvania and Virginia—because, “despite [the project’s] limited scope, the Commission has not taken action to prepare an Environmental Assessment”); *Dominion Energy Transmission Inc.*, Withdrawal of Certificate Application for Sweden Valley Project, Docket No. CP18-45-000 (June 28, 2019) (withdrawing an application for a project that “involved limited facilities, including modification of an existing compressor station and the construction of two measuring stations, approximately five miles of pipeline and related ancillary facilities” because “the Project has been adversely impacted” and “[t]he Project customer has opted to terminate the requested transportation service” as a result of the Commission’s inaction on the application nearly ten months after the issuance of an environmental assessment).

<sup>8</sup> 16 U.S.C. § 824b(b).

also to prepare all of the other information required for an application, including detailed competition modeling and analysis. The bottom line is that preparation and approval of a new application likely will take nine months to a year, or longer, if the Commission acts at the same pace that it has allowed itself in this docket. All to get essentially the same rate commitment that could have been obtained in one or two months had the Commission requested further information or a proposal to mitigate the transaction's rate effects.

8. And if the Applicants decide that they would rather terminate the Proposed Transaction rather than go through the same process for another year, then there is an additional adverse consequence. As Commissioner Phillips has pointed out, ratepayers in Kentucky will lose \$30 million in rate benefits that Applicants have committed to provide in the state proceeding in which the Kentucky Public Service Commission has already approved the Proposed Transaction.<sup>9</sup> And Liberty could be liable for a \$65 million termination fee because of us.<sup>10</sup>

9. The Commission has failed in its responsibilities. We should do better.

For these reasons, I respectfully concur.

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James P. Danly  
Commissioner

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<sup>9</sup> *Liberty Utils. Co.*, 181 FERC ¶ 61,212 (2022) (Phillips, Comm'r, concurring at P 3) (citing *See Case No. 2021-00481, Electronic Joint Application of American Electric Power Company, Inc., Kentucky Power Company, and Liberty Utilities Co. for Approval of the Transfer of Ownership and Control of Kentucky Power Company*, Order at 49 (Ky. PSC May 4, 2022)).

<sup>10</sup> *See* Stock Purchase Agreement at Art. VIII, § 8.3.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Liberty Utilities Co.  
Kentucky Power Company  
AEP Kentucky Transmission Company, Inc.

Docket No. EC22-26-000

(Issued December 15, 2022)

PHILLIPS, Commissioner, *concurring*:

1. Today, I concur because I would have preferred that the Commission conditionally approve the joint application.
2. The Commission typically approves applications under Federal Power Act section 203, and by my count, in the last 10 years, the Commission has denied only 5 applications of an approximately 1,976 orders issued. Moreover, the Commission has conditionally authorized section 203 applications subject to the Commission approving market power mitigation measures where the Commission concluded that applicants had not demonstrated that the proposed transaction would not have an adverse effect on horizontal competition.<sup>1</sup> I recognize those cases may be distinguishable in certain respects, but would have preferred to have taken that approach here by providing joint applicants with clear guidance on possible mitigation strategies such as a hold harmless commitment on rates, not just transaction costs, or a rate freeze that assures the Commission that transmission customers will not feel adverse effects from this transaction.

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<sup>1</sup> See *El Paso Elec. Co.*, 170 FERC ¶ 61,280 (2020) (authorizing transaction subject to the condition that applicants propose mitigation to address market power screen failures identified in one of the horizontal market power analyses submitted with the application); *Duke Energy Corp.*, 136 FERC ¶ 61,245 (conditionally authorizing proposed transaction subject to Commission approval of market power mitigation measures, including, but not limited to, measures specifically identified by the Commission); *Oklahoma Gas and Elec. Co.*, 124 FERC ¶ 61,239 (2008) (authorizing transaction on the condition that applicants construct mitigation transmission upgrades to address horizontal competition concerns); *Sierra Pacific Power Co.*, 87 FERC ¶ 61,077 (1999) (approving merger based on the understanding that applicants would divest their generation as required by the Public Utilities Commission of Nevada).

3. Given that, in approving this transaction, the Kentucky Public Service Commission required that Kentucky Power ratepayers receive a \$30 million payment,<sup>2</sup> I would have preferred to approve this transaction on the condition that Joint Applicants specifically address any rate effect and possible mitigation strategies.

For those reasons, I respectfully concur.

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Willie L. Phillips  
Commissioner

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<sup>2</sup> See Case No. 2021-00481, *Electronic Joint Application of American Electric Power Company, Inc., Kentucky Power Company, and Liberty Utilities Co. for Approval of the Transfer of Ownership and Control of Kentucky Power Company*, Order at 49 (Ky. PSC May 4, 2022).

## STATEMENTS

# Item E-22: Commissioner James Danly Concurrence Regarding Liberty Utilities Co., et al.

*December 15, 2022*

### **Commissioner James Danly Statement**

**December 15, 2022**

**EC22-26-000**

On December 22, 2021, Liberty Utilities Co. (Liberty), Kentucky Power Company (Kentucky Power), and AEP Kentucky Transmission Company, Inc. (Kentucky Transco, and, together with Kentucky Power, the Kentucky Companies) (collectively, Applicants) filed a joint application under section 203(a)(1) and (a)(2) of the Federal Power Act (FPA),<sup>[1]</sup> requesting authorization for the disposition of jurisdictional facilities that would result from the acquisition by Liberty of all issued and outstanding common shares of the Kentucky Companies from American Electric Power Company, Inc. and AEP Transmission Company, LLC (Proposed Transaction).<sup>[2]</sup> One year later, after having done nothing for the last six months, the Commission now denies the merger.

I concur with the Commission's decision because I agree that Applicants have failed to satisfy the requirement that they demonstrate that the Proposed Transaction will have no adverse effect on rates. I concur despite the fact that I am embarrassed that the Commission has waited almost a year to issue its order. Such an order might have been acceptable had the Commission issued it six months ago. But the Commission has failed to act responsibly by delaying its decision until now, especially when it could have explored options such as further data requests or soliciting a submission of a proposal to mitigate the transaction's rate effects in order to afford the Commission the opportunity to consider approving the transaction conditioned upon the implementation of that proposal. This could easily have been done and it appears, by the plain language of section 203 of the FPA, to be a permissible option.<sup>[3]</sup>

Applicants requested in a filing on June 3, 2022 that the Commission "issue an order authorizing the Transaction no later than June 21, 2022 to allow the Transaction to close in mid-2022 as scheduled."<sup>[4]</sup> Instead, on June 17, 2022, the Commission issued an Order Tolling Time for Action Under FPA Section 203.<sup>[5]</sup> In that order, the Commission stated, that it required "additional time to fully analyze the application as supplemented on May 5, 2022," found "based on good cause, that further consideration [was] required to determine whether the proposed transaction meets the standards of section 203(a)(4) of the FPA," and therefore tolled the time to act on the Application for an additional 180 days.<sup>[6]</sup> While I voted for that order, in hindsight, that was the wrong course of action. The Commission received Applicants' response to the Commission's April 25, 2022 deficiency letter on May 5, 2022. The statutory deadline for the Commission to act on the application was June 20, 2022. Therefore, the Commission had 46 days to review the Applicants' response to its April 25, 2022 deficiency letter and to issue a decision on the merits.

We should have simply denied the application without prejudice within the statutory deadline or explored the possibility of approving subject the conditions necessary to allay our concerns regarding the transaction's rate effects. There was no reason to have taken any other course of action. Why did we need the tolling period to determine that we were unable to assess the transaction's effect on rates? Why did the Commission not request further information during the tolling period in order to assist with that assessment? Had we denied the application by the original 180-day deadline, perhaps the applicants would have been able to file a new application with the information that the Commission needed and obtained our approval.

Instead, having waited six months to reach the same conclusion we had come to before—that we did not have enough information—we have merely impeded the actions that the Applicants could have taken to move ahead with the proposed transaction, such as filing a new application with needed information, perhaps after consultation with Commission staff.

Delays and uncertainty when discharging our duties under section 203 can have profound consequences, perhaps even more so than under the other statutes we administer.<sup>[7]</sup> It is nearly impossible to rationally allocate capital and conduct business responsibly when it is unclear who will own that business or when the decision regarding the disposition of jurisdictional assets will be made. When we delay these decisions employees and leadership of both entities live under a cloud of uncertainty. Shareholders are unable to properly determine the value of their shares.

If we had conditioned our approval of the Proposed Transaction upon a proposed rate mitigation commitment, an appropriate commitment could have been submitted, examined, and, if appropriate, approved. Section 203 of the FPA explicitly gives us the power to grant approvals “upon such terms and conditions as it finds necessary or appropriate.”<sup>[8]</sup> Rejection of the Proposed Transaction without prejudice will do nothing more than require Applicants to develop the exact same rate mitigation commitment, but also to prepare all of the other information required for an application, including detailed competition modeling and analysis. The bottom line is that preparation and approval of a new application likely will take nine months to a year, or longer, if the Commission acts at the same pace that it has allowed itself in this docket. All to get essentially the same rate commitment that could have been obtained in one or two months had the Commission requested further information or a proposal to mitigate the transaction’s rate effects.

And if the Applicants decide that they would rather terminate the Proposed Transaction rather than go through the same process for another year, then there is an additional adverse consequence. As Commissioner Phillips has pointed out, ratepayers in Kentucky will lose \$30 million in rate benefits that Applicants have committed to provide in the state proceeding in which the Kentucky Public Service Commission has already approved the Proposed Transaction.<sup>[9]</sup> And Liberty could be liable for a \$65 million termination fee because of us.<sup>[10]</sup>

The Commission has failed in its responsibilities. We should do better.

For these reasons, I respectfully concur.

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

<sup>[2]</sup> Applicants, Joint Application for Authorization under Section 203 of the Federal Power Act for Disposition of Jurisdictional Facilities (filed Dec. 22, 2021) (Application).

<sup>[3]</sup> See 16 U.S.C. § 824b(b) (“The Commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission.”).

<sup>[4]</sup> Applicants June 3, 2022 Motion to Leave & Answer Joint Customer Group’s Protest, at 2.

<sup>[5]</sup> *Liberty Utils. Co.*, 179 FERC ¶ 61,206 (2022).

<sup>[6]</sup> *Id.* P 2.

<sup>[7]</sup> *Cf. Golden Pass LNG Terminal LLC*, 180 FERC ¶ 61,058 (2022) (Danly, Comm’r, concurring in the judgment at P 11) (discussing the costs associated with delay in Commission action in Natural Gas Act section 7 proceedings); *Adelphia*

Gateway, LLC, Withdrawal of Prior Notice, Docket No. CP21-14-000, at 2 (Oct. 12, 2021) (withdrawing a request to install and operate an additional electric-motor driven compressor unit at its already authorized Marcus Hook Compressor Unit because “as a result of the extension of the environmental review through the supplemental EIS process and a prolonged Commission review process, the Project has been delayed well beyond Adelphia’s expectations and, more specifically, there is significant uncertainty regarding when an order will issue in this docket” and “[i]n light of this, Adelphia has decided not to continue the development of the Project”); Eastern Gas Transmission & Storage, Letter Withdrawing its Applications for the Mid-Atlantic Cooler Project, Docket No. CP21-97-000, at 1 (Sept. 20, 2021) (withdrawing an application for an NGA section 7 certificate—which had been filed nearly six months prior and had requested permission to build minor upgrades to three compressor stations in Pennsylvania and Virginia—because, “despite [the project’s] limited scope, the Commission has not taken action to prepare an Environmental Assessment”); Dominion Energy Transmission Inc., Withdrawal of Certificate Application for Sweden Valley Project, Docket No. CP18-45-000 (June 28, 2019) (withdrawing an application for a project that “involved limited facilities, including modification of an existing compressor station and the construction of two measuring stations, approximately five miles of pipeline and related ancillary facilities” because “the Project has been adversely impacted” and “[t]he Project customer has opted to terminate the requested transportation service” as a result of the Commission’s inaction on the application nearly ten months after the issuance of an environmental assessment).

[8] 16 U.S.C. § 824b(b).

[9] *Liberty Utils. Co.*, 181 FERC ¶ 61,212 (2022) (Phillips, Comm’r, concurring at P 3) (citing *See Case No. 2021-00481, Electronic Joint Application of American Electric Power Company, Inc., Kentucky Power Company, and Liberty Utilities Co. for Approval of the Transfer of Ownership and Control of Kentucky Power Company*, Order at 49 (Ky. PSC May 4, 2022)).

[10] See Stock Purchase Agreement at Art. VIII, § 8.3.

## Contact Information

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