110 FERC ¶ 61,204
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

PNM Resources, Inc. Docket No. EC05-29-000
SW Acquisition, L.P.
TNP Enterprises, Inc.
Texas-New Mexico Power Company

ORDER AUTHORIZING ACQUISITION OF SECURITIES

(Issued March 2, 2005)

I. Introduction

1. On December 23, 2004, PNM Resources, Inc. (PNM Resources), SW Acquisition, L.P. (SW Acquisition), TNP Enterprises, Inc. (TNP Enterprises) and Texas-New Mexico Power Company (TNMP) (collectively, Applicants) filed an application under section 203 of the Federal Power Act (FPA)[1] requesting Commission authorization for a disposition of jurisdictional facilities by means of the sale of all of the outstanding shares of TNP Enterprises (Stock Purchase Agreement) by SW Acquisition to PNM Resources (proposed Transaction). The jurisdictional facilities include transmission lines, substations and capacitor banks. The Commission has reviewed the proposed Transaction under the Commission's Merger Policy Statement[2] and will authorize it since it will not have an adverse effect on competition, rates or regulation and is consistent with the public interest.

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[1] 16 U.S.C. § 824b (2000).

[2] *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (1996); FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); *see also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,983 (2000), FERC Stats. & Regs., Regulations Preambles July 1996-Dec. 2000 ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001) (Merger Filing Requirements).

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II. Background

A. Description of the Parties

2. PNM Resources is a public utility holding company incorporated in New Mexico. Applicants assert that PNM Resources does not own or operate any facilities subject to the Commission's jurisdiction, and does not own any significant assets other than the stock of its subsidiaries. Applicants note that, while PNM Resources is not a registered holding company under the Public Utility Holding Company Act of 1935 (PUHCA),[3] it is in the process of registering as a holding company and expects that to occur by the end of 2004. According to Applicants, PNM Resources' primary subsidiary is Public Service Company of New Mexico,[4] which is engaged in: (1) the generation, transmission and sale of electricity at wholesale, (2) the generation, transmission, distribution and sale of electricity at retail, and (3) the transmission, distribution and sale of natural gas. Public Service Company of New Mexico has received blanket authorization from the Commission to make wholesale sales of electricity at market-based rates.[5]

3. SW Acquisition is a Texas Limited Partnership and an exempt holding company under PUHCA.[6] Applicants state that SW Acquisition holds all of TNP Enterprises' common stock and has no other business activities.

4. TNP Enterprises is a public utility holding company incorporated in Texas. Applicants state that, along with certain other subsidiaries not subject to the Commission's jurisdiction, TNP Enterprises is the direct parent of TNMP and First Choice Power, L.P. (First Choice). First Choice is a Texas limited partnership with TNP Enterprises as the sole limited partner with a 99.5 percent interest and First Choice Power GP, LLC[7] as the general partner with a 0.5 percent interest. Applicants assert that

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[3] 15 U.S.C. §§ 79a *et seq.* (2000).

[4] PNM Resources also has another subsidiary, Avistar. It states that, while Avistar develops innovative technologies for the energy industry, such as proprietary hardware and software solutions to operational and reliability issues, it does not engage in any Commission-jurisdictional activities.

[5] *See Public Service Company of New Mexico*, 75 FERC ¶ 61,266 (1996); *Public Service Company of New Mexico*, 109 FERC ¶ 61,296 (2004).

[6] *See* 15 U.S.C. § 79c (2000).

[7] First Choice Power GP, LLC is a Delaware limited liability company and wholly-owned subsidiary of TNP Enterprises.

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TNP Enterprises does not directly own or operate any facilities subject to the Commission's jurisdiction and does not own any significant assets other than the stock of its subsidiaries.

5. TNMP is a wholly-owned, public utility operating company subsidiary of TNP Enterprises.[8] Applicants state that TNMP provides state-jurisdictional electric transmission and distribution services to customers in certain Texas municipalities and rural areas, but does not sell electricity to retail customers in Texas. According to Applicants, all services provided by TNMP in Texas occur are in the Electric Reliability Council of Texas (ERCOT), and, therefore, are non-jurisdictional to the Commission. Applicants note that TNMP also provides integrated electric services, including transmission, distribution, and sales of electricity to retail customers in certain New Mexico municipalities and rural areas. Applicants note that TNMP's New Mexico and Texas operations are subject to traditional cost-of-service regulation by the New Mexico Public Regulation Commission and the Public Utility Commission of Texas. Applicants state that this Commission authorized TNMP to sell power at market-based rates outside Texas;[9] however, TNMP made no Commission-jurisdictional electric sales during the past two years. According to Applicants, TNMP has on file with the Commission a tariff for open access transmission service over its New Mexico transmission system;[10] but TNMP's transmission facilities in Texas are part of ERCOT's transmission grid and, therefore, not subject to the Commission's jurisdiction.

B. <u>The Proposed Transaction</u>

6. Applicants state that the proposed Transaction is a wires-only transaction that does not involve the disposition of any generating assets. Under the Stock Purchase Agreement, SW Acquisition will sell all of TNP Enterprises' common shares to

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[8] Applicants state that TNMP has two subsidiaries, Texas Generating Company, LP, a Texas limited partnership and Texas Generating Company II, LC, a Texas limited liability company. According to Applicants, neither subsidiary owns property and neither has engaged in any activities subject to the Commission's jurisdiction.

[9] *Texas-New Mexico Power Company*, 81 FERC ¶ 61,016 (1997).

[10] Texas-New Mexico Power Company, FERC Electric Tariff, Original Volume No. 2.

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PNM Resources for approximately $189.1 million. Applicants state that TNP Enterprises and TNMP will become separate wholly-owned subsidiaries of PNM Resources, and each will operate as a separate public utility.[11]

7. Applicants assert that the proposed Transaction will not result in any increase in market concentration in any relevant market and will not cause an increase in generation market power for any entity. Applicants note the proposed Transaction will: (1) provide TNMP improved access to capital at lower cost and make it part of an enterprise with enhanced financial strength and greater diversification of cash flows; and (2) result in net synergy savings of approximately $24.9 million over the first five years and credits against the sales of New Mexico retail customers of Public Service Company of New Mexico and TNMP.

8. Applicants state that they will continue to promote development of regional wholesale markets in the Southwest and a single consolidated transmission plan for the Southwest. As part of this commitment, Applicants propose in this filing a Market Monitoring Plan that would provide for an independent expert (Market Monitor) to monitor PNM's and TNMP post-merger generation dispatch and the operations of their transmission systems. Applicants also commit to hold transmission customers harmless from any increase in Commission-jurisdictional transmission rates that results from costs related only to the proposed Transaction (e.g., acquisition premium, transaction costs) for a period of five years, to the extent that such costs exceed savings related to the proposed Transaction; and that future recovery of transaction-related costs following that period will be fully supported when requested.

III. Notice of the Filing

9. Notice of the filing was published in the *Federal Register*, 70 Fed. Reg. 1431 (2005), with comments, protests, or interventions due on or before January 28, 2005. Xcel Energy Services, Inc. filed a timely motion to intervene. El Paso Electric Company (El Paso) filed a timely motion to intervene and protest.

10. El Paso argues, among other things, that Applicants failed to show that the proposed Transaction (1) will not have an adverse effect on competition; and (2) will not have an adverse effect on rates. El Paso also seeks clarification of the Applicants' "hold harmless" commitment. According to El Paso, Applicants did not provide material facts

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[11] Applicants note that PNM and TNMP will undertake a study of the benefits of combining their New Mexico operations that will be submitted to the New Mexico Public Regulation Commission. Applicants anticipate that this submission will not occur until after January 1, 2007. Applicants commit that if PNM and TNMP combine their New Mexico operations, they will seek all necessary regulatory approvals, including any necessary prior approvals from the Commission under FPA section 203.

needed to be considered when evaluating whether the proposed Transaction meets the "public interest" standard of section 203 of the FPA. El Paso, therefore, requests the Commission to direct Applicants to supplement this filing. It asks that we set this proceeding for hearing on a conditional basis pending Applicants' submission of the supplemental information.

IV. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Commission Decision

12. Section 203(a) of the FPA provides that the Commission must approve a disposition of facilities if it finds that the disposition "will be consistent with the public interest." The Commission's analysis of whether a disposition 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. As discussed below, we find that the proposed Transaction is consistent with the public interest.

1. Effect on Competition

a. Horizontal Competitive Issues

i. Applicants' Analysis

13. Applicants state that the Transaction will not harm competition in any relevant geographic market. They describe the Transaction as being "wires-only" and state that an Appendix A analysis is not required because neither TNMP nor any of its affiliates own or control any generating facilities or generation capacity; they buy all the electricity needed to serve their retail customers.[12]

14. Applicants state that the possible future combination of PNM and TNMP's New Mexico electric operations would not harm competition by creating or enhancing monopsony power by the merged firm.[13] They state that although the combination of the

[12] Application at 12.

[13] *Id.* at 13.

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two utilities would reduce the number of utilities seeking power supplies to support native load requirements, a combined PNM/TNMP would continue to look to the marketplace for power supplies that are less expensive than power produced by the companies' existing resources.

ii. Protests

15. El Paso questions Applicants' characterization of the merger as a "wires-only" transaction. It argues that, while TNMP does not own any generation, it may control generation capacity through contracts. It states that Applicants have not provided any information about the sources of power that TNMP may control in order to serve its retail customers in Texas. El Paso concludes that the competitive effect of the merger cannot be assessed without Applicants providing information regarding all of the generation that is under TNMP's control and performing a horizontal screen analysis that considers any such capacity.

16. El Paso also argues that the merged firm's position as a major buyer may affect competition by changing the way the merged firm serves TNMP's native load. It states that PNM will have the incentive to use its low-cost generation resources to serve the retail native load it acquires from TNMP and that this would lower PNM's uncommitted capacity, which could change market shares. El Paso argues that the Transaction may also alter load flow patterns, which could affect import capacity into the El Paso control area, and it reiterates that the competitive effects of the merger cannot be assessed without further analysis.

17. Finally, El Paso argues that PNM may have market power in the Northern New Mexico and El Paso markets before the merger, citing the Commission's ongoing section 206 proceeding into PNM's market based rate authorization.[14] El Paso states that the Commission should consider the results of the section 206 investigation in this case as well as in the market-based rates case.

iii. Applicants' Answer

18. Regarding El Paso's concern about any contracts that might give TNMP control of generation resources, Applicants state that neither TNMP nor its affiliates have "authority to decide when generation resources are available for operation."[15]

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[14] *Public Service of New Mexico*, 109 FERC ¶ 61,296 (2005).

[15] Applicants' Response at 9.

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19. In response to El Paso's argument that PNM will have the incentive to use its low-cost generation resources to serve the retail native load it acquires from TNMP, Applicants state that PNM's dispatch will not be materially different as a result of the Transaction. They note that PNM uses economic dispatch to serve its load and argue that because PNM is not acquiring any new generation resources from TNMP and will not be serving any different loads in New Mexico than it currently serves, there will be no change in its dispatch. They further state that because the majority of TNMP's load is already part of PNM's firm requirement load, PNM's economic dispatch would not change whether TNMP's customers were served directly by PNM or indirectly through TNMP, as they are now.

20. Finally, in response to El Paso's argument that the Commission should consider here the results of the section 206 investigation into PNM's market-based rate authority, Applicants argue that the issues in the two proceedings are distinct, and should be considered separately.

iv. Commission Determination

21. We agree with El Paso that any contracts that would give operational control of generation capacity to TNMP should be considered in the analysis. If the capacity associated with any such contracts is more than a *de minimis* amount of generation in the relevant geographic market, Applicants should provide a competitive screen analysis. However, Applicants have clarified that neither TNMP nor its affiliates control any electric generation capacity. Therefore, there is no need for a competitive screen analysis.

22. We are also not persuaded by El Paso's other arguments regarding the effect of the horizontal aspects of the proposed Transaction on competition. El Paso's concern that the merged firm will use PNM's low cost generation to serve the TNMP native load, thus removing that capacity from wholesale competition, is not related to the Transaction. PNM resources are already being used to serve the TNMP load as part of PNM's economic dispatch and nothing in the Transaction would change that arrangement.

23. In addition, El Paso's argument regarding the ongoing section 206 proceeding on PNM's market-based rate authority is not relevant here. The issue before us is here is whether the proposed Transaction would adversely affect competition, not whether PNM already has market power. Applicants have shown that the Transaction will not increase market concentration or eliminate a competitor because TNMP does not own or control any generation resources. Therefore, we conclude that the Transaction will not harm competition by any horizontal consolidation of generation resources.

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b. Vertical Competitive Issues

i. Applicants' Analysis

24. Applicants state that the Commission's concern with vertical market power generally arises in cases where the combined entity has the ability to restrict potential downstream competitors' access to upstream supply markets or to increase potential competitors' costs. They state that the combination of PNM and TNMP does not present such circumstances because the electric transmission facilities owned by both PNM and TNMP are subject to Commission-approved open access transmission tariffs (OATTs). They say that in previous cases the Commission has said that this assures that applicants cannot use control of their transmission facilities to harm competition.[16]

25. Regarding the combination of natural gas and electric generation assets, Applicants argue that because TNMP neither owns nor controls any natural gas pipeline capacity and PNM's natural gas assets do not interconnect with any generating facilities interconnected with TNMP's transmission lines, the Transaction will not increase the ability or incentive for the merged firm to use control of upstream assets to harm competition in relevant wholesale electricity markets. In addition, Applicants note that PNM is required by state law to provide open access over its gas transmission facilities.

26. Applicants state that they do not control such a quantity of sites for potential electric generation that the Transaction could enhance the ability of the merged firm to erect barriers to entry by competition. Applicants further assert that the open access to PNM's gas transportation facilities prevents the merged firm from having the ability to erect barriers to the entry of gas-fired electric generators.

ii. Protests

27. El Paso states that it has insufficient generation in its service territory to meet native load and that it depends on transmission to meet that load. El Paso argues that the Transaction may reduce the availability of transmission service into its service territory and create increased market power for PNM and TNMP as transmission providers and potential suppliers in the El Paso market. El Paso states that it depends on importing power from its remote base-load generation at the Palo Verde Nuclear Generating Station (Palo Verde) and Four Corners Generating Station (Four Corners) over two paths: Path 47 and the Eddy County tie. It contends that the Transaction will reduce the number of potential transmission suppliers from three to two and that competition from TNMP presently provides a "second line of defense" against the exercise of vertical market

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[16] Application at 14, *citing, e.g., TECO Wholesale Generation Inc.*, 107 FERC ¶ 62,208 (2004).

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power by PNM. [17] El Paso concludes that without the backstop of competition from TNMP, it will be highly dependent on PNM (which, it asserts, will control a far greater share of the Path 47 capacity than Tri-State) administering its OATT in a fair and non-discriminatory manner.

28. El Paso also argues that redispatch of the PNM system could affect the merged entities' use of Path 47 and Eddy County for native load and reduce available transmission capacity, limiting the access of other potential suppliers to the El Paso control area. It states that a load flow analysis would be necessary to assess the effect of the merged and redispatched PNM/TNMP system on El Paso's control area and other Southwest markets.

iii. Applicants' Answer

29. Applicants argue that, contrary to El Paso's claims, the proposed Transaction will not affect El Paso's transmission rights over Path 47 and the Eddy County tie because those rights are established by ownership and contracts that will be unaffected by the Transaction.[18] Applicants first note that El Paso is the control area operator for the three 345kV lines that define Path 47 in the southern New Mexico transmission system. They further state that El Paso controls rights to 645 MW of the 932 MW of firm transmission capacity on Path 47, while TNMP and PNM have a combined 185 MW of rights on Path 47. They say that El Paso, as the path operator, establishes the transfer capability for Path 47 pursuant to Western Electricity Coordinating Council guidelines. Furthermore, they state that, as the control area operator, El Paso has the authority to determine when these curtailments in use of Path 47 are required and directs allocation of those curtailments among the four transmission rights holders. Regarding the 200 MW Eddy County tie line, Applicants state that El Paso will keep its majority control over the transfer capability, holding rights for 133 MW of transfer capability over the line.

30. Applicants challenge El Paso's claim that redispatch of PNM's system could reduce Available Transmission Capacity (ATC) in a manner that limits other suppliers' access to the El Paso control area. They state that the transmission capability of each of the four southern New Mexico transmission owners is fully committed and that no ATC exists that could be reduced by any redispatch of the system. Finally, they argue that the transmission capability controlled by El Paso will not be affected by the Transaction, regardless of how generation resources are dispatched.

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[17] El Paso Protest at 7. The other potential transmission service provider is Tri-State Generation and Transmission Association, Inc. (Tri-State).

[18] Applicants' Response at 14.

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iv. Commission Determination

31. In general, we are concerned when a transmission-owning utility acquires generation capacity because the merger or acquisition may increase the utility's ability and/or incentive to use its control of transmission to harm competition in wholesale electricity markets by foreclosing competitors or raising rival competitors' costs. El Paso notes that, in *OG&E*, we stated we were not convinced that the OATT would fully mitigate the increase in OG&E's vertical market power related to control of transmission and generation assets.[19] We agree with El Paso that when a vertically-integrated utility increases its control of generation, competition can be harmed; the OATT may not sufficiently mitigate transmission market power and thus may not mitigate a vertically-integrated utility's vertical market power. Here, however, the circumstances are quite different from *OG&E*. As argued by Applicants, the Transaction will not result in a vertically integrated utility increasing its control of electric generation capacity in any relevant market.

32. In response to El Paso's concern that the proposed Transaction would limit its access to its remote generation, Applicants have shown that El Paso's rights to transfer capability from that generation to its customers will not be affected by the transaction. El Paso has not raised any specific contrary evidence, merely concerns that such transfer capability could be reduced.

33. With respect to the issues raised by El Paso regarding the joint use of transmission facilities, we note that Applicants have committed to promote development of a single, consolidated transmission plan for the Southwest. We accept Applicants' commitment. Accordingly, Applicants should file with the Commission the single consolidated transmission plan for the Southwest and in the interim until such a plan has been completed, Applicants should inform the Commission on a six month basis of the progress in developing the plan.

34. Finally, as described below, Applicants' proposed Market Monitoring Plan includes provisions for the Market Monitor to identify any anticompetitive behavior regarding PNM's and TNMP's operation of their transmission facilities. We rely on PNM's and TNMP's commitment to continue to participate in regional transmission planning. We note that groups such as Southwest Area Transmission (SWAT) and Southwest Transmission Expansion Plan (STEP) are engaged in such efforts, and we will direct the Market Monitor to monitor and report on participation by PNM and TNMP in regional transmission planning endeavors such as SWAT and STEP. The Market Monitor must also report as to the efficacy of these groups in achieving transmission

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[19] El Paso Protest at 7, *citing Oklahoma Gas and Electric Co.*, 105 FERC ¶ 61,297 (2003) (*OG&E*).

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expansion and compare these efforts with the additional efforts that Applicants will undertake as a condition of our approval here. Finally, we note that the Market Monitor will review PNM's and TNMP's calculation of Total Transfer Capability on their systems; wesTTrans' calculation of Available Transfer Capability, and report the results of that review to the Commission. Given the discrepancies between Applicants' and El Paso's assessments of the actual transmission availability and the effect of the Transaction on transmission availability, we will also direct the Market Monitor to monitor use of the PNM and TNMP transmission systems for under use and to review Applicants' report to the Commission on system usage.

c. Market Monitoring Plan

i. Applicants' Proposal

35. Applicants propose a Market Monitoring Plan (MMP), which would have an independent Market Monitor to oversee Commission-jurisdictional operations of PNM and TNM in order to mitigate any competitive harm resulting from the merger and to promote competition in the region. Applicants propose to hire Potomac Economics, Ltd. (Potomac Economics) as the Market Monitor. They note that Potomac Economics is the Independent Market Monitor for the Midwest Independent Transmission System Operator (ISO) and the Independent Market Advisor for the New York ISO and ISO New England. Applicants state that the MMP will be implemented at the closing of the proposed Transaction and will continue until a Commission-approved Regional Market Monitoring entity with a Commission-approved MMP becomes operational.

36. According to the Applicants, the Market Monitor will identify market events and/or rules that result in significant increases in wholesale electricity prices or the foreclosure of competition by rival suppliers through the operation of generation or transmission facilities owned or controlled by PNM and TNMP. In addition to providing quarterly reports to the Commission, Applicants state that the Market Monitor will report on any anticompetitive conduct, respond to requests from the Commission for additional data and analysis, and respond to complaints from customers and competitors.

ii. Commission Determination

37. We accept Applicants' commitment to establish an independent Market Monitor. The MMP is consistent with previous market monitoring plans accepted by the Commission and provides further assurance that the Transaction will not adversely affect competition.[20]

[20] *See, e.g., UniSource Energy Corporation*, 109 FERC ¶ 61,047 (2004).

2. Effect on Rates

a. Applicants' Analysis

38. Applicants argue there will be no adverse impact on the rates charged to wholesale power and transmission customers. They note that the rates under existing contracts will be unaffected by the proposed Transaction. According to the Applicants, PNM Resources' wholesale customers are shielded from any rate effects because the contracts under which these customers take service contain either fixed rates or formula rates that will be unaffected by the proposed Transaction. With regard to TNMP, Applicants argue that, although TNMP has market-based rate authority, it has not made any wholesale power sales for the previous two years, and it is not the seller under any Commission-jurisdictional power sales contracts. Applicants add that both PNM and TNMP are unable to pass through the costs related to the proposed Transaction to their transmission customers, and are unable to change their transmission service rates without the Commission's approval under section 205 of the FPA.

39. PNM and TNMP commit to hold transmission customers harmless from any increase in Commission-jurisdictional transmission rates that results from costs related only to the proposed Transaction (e.g., acquisition premium, transaction costs) for a period of five years, to the extent that such costs exceed savings related to the proposed Transaction.

40. Applicants commit that PNM and TNMP will file with the Commission, at least 60 days before consummation of the proposed Transaction, a common Open Access Transmission Tariff (Joint OATT) that includes the same the non-rate terms and conditions of PNM's and TNMP's OATTs. Applicants assert that PNM and TNMP will maintain separate transmission rates pending guidance from the New Mexico Public Regulation Commission on whether or not PNM and TNM's New Mexico's operations should be combined.[21] Applicants argue that transmission customers will not be harmed by the companies' maintaining separate rates and state that they will not charge pancaked rates to customers scheduling transmission service across both companies' operating systems.

b. Protests

41. In its protest, El Paso argues that the Applicants do not provide any details regarding how they will implement their ratepayer protection proposals and commitments. El Paso is concerned that the after the five-year expiration of the

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[21] Applicants note that this determination will not be made until after expiration of the current New Mexico rate moratorium, *i.e.*, December 31, 2007.

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Applicants' "hold harmless" commitment, certain acquisition costs could be included in transmission rates as a result of the Commission's authorization of the transaction. El Paso also asserts that because Applicants have not filed the Joint OATT, it has had no opportunity to consider the terms and conditions of the Joint OATT, including the implementation of the "no pancaking" commitment. Lastly, El Paso argues that Applicants have not provided information on how the proposed Transaction will affect the use of the Eddy County tie, which is critical to El Paso's ability to import power to serve its native load customers.

c. Applicants' Answer

42. With regard to their hold harmless commitment, Applicants state they agree to the clarification requested by El Paso, *i.e.*, any future recovery of transaction-related costs following the five-year hold harmless period must be fully supported when it is requested. Applicants state that their "no pancaking" commitment will be reflected in a section 205 filing under PNM's and TNMP's OATTs and that El Paso should instead intervene in that proceeding once the Joint OATT is submitted to the Commission.

d. Commission Determination

43. In accordance with El Paso's requested clarification and Applicant's concurrence, we agree that future recovery of any acquisition costs must be justified by Applicants at the time recovery is requested. We also agree with Applicants that El Paso's concern over pancaked rates and the Joint OATT is best addressed when PNM and TNMP file their Joint OATT, and not at this time. Finally, because El Paso raises no specific evidence with regard to the proposed Transaction's effect on the use of the Eddy County tie, we will reject this aspect of El Paso's protest.

3. Effect on Regulation

44. As explained in the Merger Policy Statement and the Merger Filing Requirements, the Commission's concern with the effect of a transaction on regulation involves possible changes in the Commission's jurisdiction when a registered holding company is formed, thus invoking the jurisdiction of the Securities and Exchange Commission, or when affected state commissions do not have authority to act on a proposed transaction.

a. Applicants' Analysis

45. Applicants state that the proposed Transaction will not adversely affect federal or state regulation. TNMP and PNM commit to follow the Commission's polices on the pricing of non-power goods and services between affiliates.[22] They further state that the New Mexico Public Regulation Commission and the Public Utility Commission of Texas will review the merger and will retain jurisdiction over the merged companies.

b. Commission Determination

46. We find that the proposed Transaction will not adversely affect Commission or state regulation. On December 30, 2004, PNM Resources filed for registration under PUHCA, and has committed to follow the Commission's *Ohio Power* policy. Applicants have shown that the Transaction will not harm any state's ability to regulate any or the merging parties. The New Mexico Public Regulation Commission must review and approve the Transaction and the Public Utility Commission of Texas must determine that the merger is in the public interest in order for the proposed Transaction to close. Furthermore, the New Mexico Public Regulation Commission and the Public Utility Commission of Texas will retain regulatory authority over the merged company. We note that neither the New Mexico Public Regulation Commission nor the Public Utility Commission of Texas intervened in this proceeding.

The Commission orders:

(A) Applicants' proposed acquisition of securities is hereby authorized, as discussed in the body of this order.

(B) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

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[22] *See, Ohio Power Co. v. FERC*, 954 F.2d 779 (D.C. Cir. 1992) (*Ohio Power*). In the Merger Policy Statement, we explained that the formation of a new holding company could lead to a shift in jurisdiction from this Commission to the Securities and Exchange Commission (SEC), in which case we could lose the authority to review for rate purposes all costs the companies incurred. If an inter-affiliate transaction were approved by the SEC, we would lose authority to review those costs. We said that by agreeing to our policies regarding all intra-system transactions, applicants can avoid a hearing on the effect of a merger on regulation, unless there are special factual circumstances that indicate a problem. *Merger Policy Statement* 61 Fed. Reg. at 30,125.

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

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

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

(F) Applicants must submit their proposed final accounting within six months of the consummation of the merger. The accounting submission should provide all merger-related accounting entries made to the books and records of TNMP, along with appropriate narrative explanations describing the basis for the entries.

(G) Applicants shall make a compliance filing to the Commission within 60 days of the issuance of this order of their consolidated transmission plan for the Southwest and inform the Commission on a six-month basis thereafter of their progress in developing the plan.

(H) Applicants shall notify the Commission within 10 days of the date that the acquisition of securities has occurred.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.