

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

Proposed Policy Statement on  
Hold Harmless Commitments

) Docket No. PL15-3-000  
)

**COMMENTS OF THE ELECTRIC POWER SUPPLY ASSOCIATION**

The Electric Power Supply Association (“EPSA”)<sup>1</sup> respectfully submits the following comments in response to the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) January 27, 2015 Proposed Policy Statement on Hold Harmless Commitments (“Proposed Policy Statement”).<sup>2</sup> The Proposed Policy Statement would modify the Commission’s policy regarding hold harmless commitments made to demonstrate that a transaction for which approval is required under Section 203 of the Federal Power Act (the “FPA”) will not have an adverse effect on rates. Specifically, the Proposed Policy Statement would clarify that when hold harmless commitments are required, those hold harmless commitments not be time limited and that applicants offering hold harmless commitments must implement appropriate internal controls and procedures to track transaction-related costs.

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<sup>1</sup> EPSA is the national trade association representing competitive power suppliers, including generators and marketers. Competitive suppliers, which, collectively, account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers. The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

<sup>2</sup> *Policy Statement on Hold Harmless Commitments*, 150 FERC ¶ 61,031 (2015). 80 *Fed. Reg.* 4231 (Jan. 27, 2015).

As discussed in more detail herein, EPSA appreciates the Commission's effort to provide greater clarity to market participants, but has some concerns and requests some clarifications of the Proposed Policy Statement.

## **I. COMMUNICATIONS**

All pleadings, correspondence and other communications concerning this proceeding should be directed to:

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## **II. COMMENTS**

EPSA requests several discrete clarifications to the Proposed Policy Statement.

### **A. Applicability of Hold Harmless Commitments**

In the Proposed Policy Statement, the Commission notes that it has not been concerned about any adverse impact on rates or required hold harmless commitments where "an applicant's only customers are wholesale power sales customers served under market-based rates,"<sup>3</sup> and it also proposes to recognize additional categories of transactions in which no hold harmless commitments would be required. Specifically, the Commission proposes that no hold harmless requirement would be required for a transaction involving the purchase of an existing generating plant or transmission facility needed to serve the company's

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<sup>3</sup> Proposed Policy Statement at P 4.

customers or forecasted load in order to comply with a resource planning process or to meet specific NERC reliability standards.<sup>4</sup>

EPSA appreciates the Commission’s effort to identify circumstances in which no hold harmless commitment is needed. In keeping with that effort, EPSA requests that the Commission make clear that its discussion in the Proposed Policy Statement of circumstances in which no hold harmless commitment is required was not meant to be comprehensive or exclusive. In particular, EPSA respectfully requests that the Commission reaffirm its longstanding policy that there is no adverse effect on rates and that no hold harmless commitment will be required where an applicant’s only cost-based rate sales are made under rate schedules that do not allow for automatic passthrough of transaction-related costs.<sup>5</sup> Ratepayers are fully protected under such circumstances, because the applicant could only unilaterally seek to recover transaction-related costs through a filing pursuant to Section 205 of the Federal Power Act, which filing would only take effect subject to Commission review.

In addition, EPSA urges the Commission to recognize particular types of cost-based rate schedules that do not allow for automatic pass-through of transaction-related costs. In particular, EPSA would ask the Commission to recognize that reliability must-run rate schedules and agreements, rate

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<sup>4</sup> See *id.* at P 41.

<sup>5</sup> See *Entergy Gulf States, Inc.*, 121 FERC ¶ 61,182 at P 83 (2007) (finding no adverse effect on rates where the acquiring utility’s “wholesale requirements customers all have fixed, cost-based rate agreements”); *The AES Corp.*, 94 FERC ¶ 61,240 at 61,850 (2001) (finding no adverse effect on rates where the one wholesale requirements contract affected by the transaction “ha[d] fixed demand and energy rates during the term of the contract”); *Potomac Elec. Power Co.*, 93 FERC ¶ 61,240 at 61,778 (2000) (finding no adverse effect on rates, “because the rates [seller] charges its two wholesale requirements customers will not be affected by the proposed transaction”). See also, e.g., *NRG Energy Holdings, Inc.*, 146 FERC ¶ 61,196 at P 87 (2014); *Icahn Partners LP*, 134 FERC ¶ 61,093 at P 34 (2011); *Sierra Pac. Power Co.*, 133 FERC ¶ 61,017 (2010).

schedules for reactive power/voltage support compensation, and rate schedules and agreements relating to black start/system restoration services do not allow for automatic pass through of transaction costs and thus present no issues of concern for ratepayers.

**B. Hold Harmless Commitments Should Be of Limited Duration**

The Commission seeks comment on a proposal to eliminate the time-limitation for hold harmless commitments in order to reduce any risk that transaction-related costs could be included in future formula rate billings without applicants making a showing of offsetting savings. EPSA opposes this proposal and argues that hold harmless commitments should not continue on indefinitely. As with the proposal to require tracking of transaction-related costs prior to announcement of a transaction, requiring tracking of transaction-related costs into perpetuity would become unreasonably difficult and time consuming to accomplish accurately. At some point after the completion of a transaction, it becomes unreasonably costly and burdensome to track the costs and such a requirement would end up imposing unreasonable regulatory obligations on market participants and lead to increased consumer costs. Furthermore, the costs and burdens associated with such unlimited hold harmless commitments would serve as a deterrent to necessary and beneficial transactions, which could harm consumers by depriving them of the savings and efficiencies associated with such transactions. Companies that undergo corporate restructuring or merger transactions seek to make the process as seamless as possible, including folding the acquired company into the existing corporate structure as

smoothly and harmoniously as possible. Such a requirement that companies maintain a hold harmless commitment and track any transaction-related costs indefinitely would undermine the goal of the transaction to meld two entities into one seamless, efficient corporation, and impede the realization of the transactions synergies, resulting in increased consumer costs. For the reasons stated above, the Commission should not adopt the proposal to eliminate the time limitation for hold harmless commitments.

### **C. Proposed Rules On Tracking Transaction-Related Costs**

The Commission also seeks specific comments on the proposed controls and procedures to track and record costs related to the hold harmless commitments, including a requirement that applicants should implement appropriate internal controls and procedures to ensure proper identification, accounting, and rate treatment of all transaction-related costs incurred prior to and subsequent to the announcement of a proposed transaction.<sup>6</sup>

While the Commission recognizes that “attempts to precisely articulate all such costs are not feasible” and that many costs “may be more difficult to classify”<sup>7</sup>, the Commission seeks to require applicants to track and record costs that may be incurred even prior to a public announcement of any proposed transaction. EPSA is confused how the Commission can recognize that even within one company, it can be challenging to accurately track, record, and categorize all transaction-related costs, but then expect two separate companies to be able to keep an accurate accounting of such information, particularly in

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<sup>6</sup> Proposed Policy Statement at P 30.

<sup>7</sup> Proposed Policy Statement at P 21.

such early stages of a negotiation. The proposed requirement is not only premature, but extremely difficult, administratively burdensome, and costly for two companies to track. This requirement is more appropriate after a public announcement of a transaction, but to require such actions even before a public announcement is made, which could mean even during the very preliminary efforts where two companies may just be exploring the idea of a possible transaction, is unnecessary and premature. Such a requirement is tantamount to asking a couple who are only on a second date to pick out their wedding china pattern. As such, EPSA requests that the Commission amend the requirement in the Proposed Policy Statement to not require tracking of transaction-related costs incurred prior to the announcement of a proposed transaction.

#### **D. Prospective Application of New Policy**

Finally, the Commission states that it intends to apply any changes to the hold harmless commitments policy on a prospective basis and does not intend to alter any existing hold harmless commitments accepted by the Commission.<sup>8</sup> EPSA seeks clarification that such prospective treatment will extend to all section 205 filings related to any section 203 transactions or hold harmless commitments that pre-exist any Final Policy Statement approved by the Commission. EPSA members and other market participants seeks clarity and certainty that any section 205 filings related to any transactions that were approved by the Commission under section 205 prior to Commission approval of a Final Policy Statement would not be evaluated against any new requirements or policies

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<sup>8</sup> Proposed Policy Statement at P 20.

implemented in a Final Policy Statement, but under the policies in existence at the time the relevant transaction was approved.

### **III. CONCLUSION**

Wherefore, EPSA respectfully requests that the Commission clarify the issues and questions discussed above prior to approving the Proposed Policy Statement.

Respectfully Submitted,



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March 30, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the comments via email upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. March 30, 2015.



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Nancy Bagot, VP of Regulatory Affairs