

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

La Paloma Holding Company, LLC
La Paloma Generating Company, LLC

Docket No. EC05-62-000

ORDER CONDITIONALLY AUTHORIZING DISPOSITION
OF JURISDICTIONAL FACILITIES

(Issued July 8, 2005)

I. Introduction

1. On March 24, 2005, La Paloma Holding Company LLC (HoldCo) and La Paloma Generating Company, LLC (La Paloma Gen) (collectively, Applicants) filed a joint application under section 203 of the Federal Power Act (FPA)¹ requesting Commission authorization for an indirect disposition of jurisdictional facilities that would result from certain transfers of ownership or control of equity interests in HoldCo. The jurisdictional facilities involved with the proposed transaction include a market-based rate tariff, related books and records, and interconnection facilities associated with a generating facility owned and operated by La Paloma Gen.

2. As further described below, Applicants request section 203 authorization for three groups of transactions. One group of transactions would involve transfers of equity interests in HoldCo from current owners to buyers that are specifically identified in the application (Proposed Transaction). A second group of transactions would involve transfers of equity interests from current owners or future owners to other existing owners or new buyers that have not yet been determined and thus are not identified in the application (Future Transactions). The third group of transactions would involve transfers of interests from current or future holders to direct or indirect wholly-owned subsidiaries of the ultimate parent of such current or future holders (Future Subsidiary Transactions). The Commission has reviewed the three groups of transactions under the

¹ 16 U.S.C. § 824b (2000).

Merger Policy Statement² and will authorize them as consistent with the public interest, subject to certain conditions, as discussed below. This order benefits customers because it will promote new investment in generating facilities, enhancing competition in wholesale markets.

II. Background

A. Description of the Applicants

3. La Paloma Gen owns a 1,040 megawatt (MW) generator located near McKittrick, California and certain associated interconnection facilities (Project) that connect the generator to the Pacific Gas & Electric Company (PG&E) transmission system. La Paloma Gen sells the output of the Project at market-based rates. According to Applicants, a third party provides day-to-day management services for the Project, but decision-making and control with respect to jurisdictional activities rests with La Paloma Gen.

4. HoldCo owns 100 percent of the equity interests in La Paloma Gen. In turn, a group of financial institutions (Creditors) own 100 percent of the equity interests in HoldCo. The Creditors, which provided initial financing for the Project, created HoldCo to assume ownership of the Project from the original owners when the Project went bankrupt. In a prior order issued under delegated authority, the Commission approved the disposition of jurisdictional facilities associated with the reorganization of the Project's ownership.³ The *Reorganization Order* limited the ownership by any individual Creditor to a maximum of 20 percent of the equity interests in HoldCo.

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*).

³ *La Paloma Generating Trust Ltd., et al.*, 107 FERC ¶ 62,179 (*Reorganization Order*) (2004).

B. Description of the Transactions

5. Under the Proposed Transaction, certain existing owners (Sellers)⁴ of equity interests in HoldCo seek to transfer their debt and associated equity interests to certain identified entities (Buyers)⁵ that are banks, institutional investors, financial institutions, investment companies or related entities. Applicants state that the Buyers are entities not primarily engaged in energy-related business activities, although some of them or their affiliates may hold energy-related investments and engage in jurisdictional activities. Bear Stearns is affiliated with a power marketer and some affiliates have limited investments in the electricity sector. Applicants state, however, that Bear Stearns and its affiliates do not own or control equity interests in electric facilities in California or in natural gas production, storage, transportation or distribution of natural gas. Applicants further state that the other Buyers (and their affiliates) do not own five percent or more of the voting securities of any facilities used for generation, transmission or distribution of electricity and natural gas transmission and distribution.

6. Applicants also request authorization for a two-year period without further section 203 filings for Future Transactions involving transfers of ownership or control of equity interests in HoldCo to existing owners or new buyers that are banks, institutional investors, financial institutions, investment or related entities not primarily engaged in energy-related business activities. These Future Transactions may result in the acquiring party owning or controlling an investment in HoldCo equal to an equity interest of 20 percent or less. Applicants state that they seek this additional authorization to facilitate the trading of debt in LaPaloma Gen and equity interests in HoldCo because of the liquid market that is emerging for the transfer of such interests.

7. In addition, Applicants seek authorization for Future Subsidiary Transactions, i.e., to allow any current or future holders of equity interests in HoldCo to transfer such interests to direct or indirect wholly-owned subsidiaries of the ultimate corporate parent of such current or future holder, as the case may be.

⁴ Each Seller is one of the Creditors originally authorized to assume an ownership interest in HoldCo pursuant to the *Reorganization Order*.

⁵ The Buyers are: Bear, Stearns & Co. Inc., Scottwood Partners, LP., Basso Multi-Strategy Holding Fund Ltd., Longacre Master Fund, Ltd., Longacre Capital Partners (QP), L.P., Silver Oak Capital, LLC, and TRS Callisto LLC.

III. Notice, Interventions and Protests

8. Notice of the filing was published in the *Federal Register*, 70 Fed. Reg. 17,440 (2005), with comments, protests or interventions due on or before April 14, 2005. None were received.

IV. Discussion

A. Standard of Review

9. Section 203(a) of the FPA provides that the Commission must approve a proposed disposition if it finds that the disposition “will be consistent with the public interest.”⁶ The Commission generally takes account of three factors in analyzing proposed dispositions of facilities: (a) the effect on competition; (b) the effect on rates; and (c) the effect on regulation. As discussed below, we will approve the Proposed Transaction as consistent with the public interest. In addition, we will also grant authorization for Future Transactions and Future Subsidiary Transactions without further section 203 application, subject to certain conditions, as discussed below, because these transactions are also consistent with the public interest.

B. Proposed Transaction

1. Effect on Competition

10. Applicants state that the Proposed Transaction will not adversely affect competition. Applicants state that the amount of generation that is to be transferred (1,040 MW) is *de minimis*, in comparison to the total generating capacity of 55,000 MW within the California Independent System Operator (CA-ISO) market where the Project is located. Applicants also assert that the extent of interests held in other generating facilities by any of the Buyers or their affiliates is also a *de minimis* share of the CA-ISO market. They thus conclude that the transaction does not raise horizontal market power concerns.

11. With respect to vertical market power, Applicants state that although some of the Buyers own investment interests in companies that own natural gas pipelines and other inputs into electric generation, these interests are of a limited, passive and non-controlling nature and are not associated with assets located in California. Thus, Applicants conclude that the Proposed Transaction does not present vertical market power concerns.

⁶ 16 U.S.C. § 824b(a) (2000).

12. Based on the facts represented in the application and in the absence of any information to the contrary, the Commission finds that the Proposed Transaction will not adversely affect competition.

2. Effect on Rates

13. Applicants state that rates will not be adversely affected because all sales of energy from the Project will continue to be made at market-based rates. Applicants state that they do not provide unbundled transmission service.

14. We note that nothing in the application indicates that rates to customers will increase as a result of the proposed transaction, and no customer argues otherwise. For these reasons, we are satisfied that the Proposed Transaction will not adversely affect rates.

3. Effect on Regulation

15. Applicants assert that neither Commission nor state regulation will be adversely affected. They note that the Proposed Transaction does not involve the formation of a registered holding company under the Public Utility Holding Company Act of 1935 and that the sales of energy from the Project are not subject to state regulation.

16. We note that no party has raised concerns about the Proposed Transaction's effect on state or federal regulation, and no state has indicated that it lacks jurisdiction to consider the transaction's effect on retail rates. Thus, we conclude that the Proposed Transaction will not adversely affect state or federal regulation.

C. Future Transactions

17. The Commission will grant authorization for Future Transactions for the proposed two-year period without further section 203 applications, subject to the conditions proposed by Applicants and to additional conditions that we believe are necessary to insure that such Future Transactions will be consistent with the public interest. Applicants proposed that acquiring entities must be financial institutions or related entities that are not primarily engaged in energy-related activities and that no owner may have more than 20 percent of the equity interest in HoldCo. The maximum of 20 percent ownership in the Project and the prohibition on energy-related activities as the primary business of the buyer limits the amount of consolidation of generating assets involved and thus alleviates any competitive concerns posed by a Future Transaction. Nevertheless, the Commission finds the phrase "not primarily engaged in energy-related activities" too vague to justify blanket authorization, without additional section 203 filing, of transactions that would consolidate unknown amounts of generating and transmission assets owned by acquiring entities with their partial ownership interest in the

1,040 MW La Paloma facility. Applicants themselves note that some acquiring entities may be affiliated with public utilities, though these will probably be power marketers, rather than traditional franchised public utilities with defined service areas at retail and wholesale. Applicants' proposal would leave the determination of what constitutes "not primarily engaged in energy-related activities" in the hands of the transacting parties without clearly defining that phrase. The Commission believes it is necessary to limit the potential for harm to the public interest, particularly competitive harm, resulting from blanket authorization of Future Transactions. Accordingly, the Future Transactions shall be permitted during the two-year period without further section 203 application only if the buyer and its affiliates do not collectively own or control five percent or more voting interest in any public utility that has interests in any generation facilities or engages in jurisdictional activities within the CA-ISO, where the La Paloma generating plant is located. The Commission believes that such action will serve the public interest by helping these owners of financially distressed assets to keep them in operation.

18. Also, as a condition for blanket approval, Applicants must revise their proposed notification condition (that transferors of interests report the transfers within 10 days) to require that a statement of other generating or power marketing interests directly or indirectly owned by buyer or its affiliates be submitted within 10 days of the transaction, irrespective of the market or region of the country in which such interests are operated. In addition, Applicants must submit, both in a compliance filing within 30 days of the closing of the initial sale transaction, and in any subsequent notification of a holding company equity sales transaction, the following information:

- the identity of both pre- and post-transaction equity holders (and percentage ownership) of the holding company (the format used in Table I of the application is acceptable);
- any contracts for (or a summary thereof) power purchase agreements, energy management services, asset management services, and any fuel supply services provided to the facility, each of which should identify the contract counterparty, and any affiliation between that counterparty and post-transaction equity holders; and
- the identity of any parties acquiring equity interests that are subject to the Commission's Code of Conduct rules as a result of acquiring these equity interests.

19. These requirements do not relieve the buyer or its affiliates from complying with the Commission's other reporting requirements, in particular those associated with market-based rate authorizations, including the need to make applicable notifications of change in status filings or electronic quarterly reports.

20. As requested by Applicants, this order does not address the jurisdictional question of whether the transfer of a specific amount of ownership is a change of control and thus a disposition of jurisdictional facilities. The conditional blanket authorization of Future Transactions without further section 203 application granted herein is limited to the specific facts and circumstances in this application. We find that the limited scope of the proposal together with the conditions imposed in this order should fully protect electric customers. However, if the Commission finds that the public interest requires that we impose additional or different conditions or that we should remove certain conditions on these types of transactions, we will do so.

D. Future Subsidiary Transactions

21. Applicants request blanket authorization for all current and future owners of equity interests to transfer their interests to wholly-owned direct or indirect subsidiaries of their ultimate parent company without making further section 203 applications. Consistent with the authorization granted with respect to the transfer of interests to the initial Creditors in the *Reorganization Order*,⁷ the Commission will grant similar authorization to all current or future owners of HoldCo. As was required in the *Reorganization Order*, Applicants are required to identify the direct or indirect subsidiaries that will hold the equity interests.

The Commission orders:

(A) Applicants' proposed disposition of jurisdictional facilities is authorized, subject to certain conditions, 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.

(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 of the FPA, as necessary, to implement the transactions;

⁷ 107 FERC ¶ 62,179, ordering paragraph no. 7.

(F) This order does not relieve acquirers of securities in this transaction from the necessity of making appropriate filings under section 203 of the FPA, as required;

(G) None of the buyers shall acquire HoldCo ownership interests in excess of 20 percent without prior Commission approval under section 203 of the FPA and;

(H) Applicants shall notify the Commission within 10 days of the date that the Proposed Transaction, Future Transactions, and Future Subsidiary Transactions have been consummated and shall identify the subsidiaries of the ultimate parent of the buyer in which the equity interests in HoldCo are to be held.

By the Commission. Commissioner Kelliher dissenting in part with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

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Joseph T. KELLIHER, Commissioner *dissenting in part*:

This order conditionally authorizes indirect disposition of jurisdictional facilities under section 203 for three groups of transactions. First, transfers of equity interests in HoldCo from current owners to buyers that are specifically identified in the application. Second, transfers of equity interests from current owners or future owners to other existing owners or new buyers that have not yet been determined. Third, transfers of interests from current or future holders to direct or indirect wholly-owned subsidiaries of the ultimate parent of such current or future holders. I support the authorization under section 203 for transfers of equity interests in HoldCo from current owners to buyers who are specifically identified in the application. However, I do not believe that it is consistent with the public interest for the Commission to grant blanket approval to all Future Transactions and Future Subsidiary Transactions since these speculative transactions are void of specific details, including the identity of the buyers or sellers that would allow the Commission to examine any affiliate relationships. I find inadequate the condition the order imposes that the Applicants must simply inform the Commission of important transaction details after competitive harm may have already occurred.

The Applicants argue that a blanket authorization is necessary to facilitate the trading of debt and equity interests. However, it is important to note that in the past the Commission has acted expeditiously on section 203 approvals. I see no reason why the Commission will not continue this practice. Furthermore, in the absence of a blanket authorization, the conditions concerning the limitations on ownership that the Commission imposes in this order would have provided strong guidance to entities interested in expedited approval. Based on these facts, I believe that the potential for competitive harm outweighs any benefit an Applicant may receive through a blanket authorization. In my view, the granting of a blanket authorization is inconsistent with the Commission's

statutory responsibility to determine whether each proposed transaction is consistent with the public interest. Accordingly, I dissent on the blanket authorizations granted for the speculative Future Transactions and Future Subsidiary Transactions.

Joseph T. Kelliher