

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

James A. Goodman, As Receiver For Certain Docket No. EC06-122-000
Assets of PMCC Calpine New England
Investment LLC

U.S. Bank National Association, Trustee

ORDER AUTHORIZING ACQUISITION OF FACILITIES

(Issued June 19, 2006)

1. On May 22, 2006, James A. Goodman (Receiver), as proposed receiver for certain assets of PMCC Calpine New England LLC (PMCC), and U.S. Bank National Association, as trustee for certain creditors (Trustee) (Receiver and Trustee; collectively, Applicants), filed a joint application under section 203 of the Federal Power Act (FPA)¹ requesting Commission authorization for the Receiver to acquire control over two electric generating plants and related transmission facilities (Facilities) from Rumford Power Associates Limited Partnership (Rumford) and Tiverton Power Associates Limited Partnership (Tiverton) (the Application). The Commission has reviewed the Application under the Merger Policy Statement² and will authorize it.

¹ 16 U.S.C. § 824b (2000), amended by Energy Policy Act of 2005 (EPAAct 2005), Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982-93 (2005).

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); see also *Transactions Subject to Federal Power Act Section 203*, Order No. 669, 71 Fed. Reg. 1348 (2006), FERC Stats. & Regs. ¶ 31,200 (2006), *order on reh'g*, Order No. 669-A, 71 Fed. Reg. 28,422 (2006), FERC Stats. & Regs. ¶ 31,214 (2006), *reh'g pending*.

I. Background

2. PMCC owns two 265 megawatt, gas-fired, combined cycle generating plants: the Rumford plant in Rumford, Maine and the Tiverton plant in Tiverton, Rhode Island. PMCC leases the plants to Rumford and Tiverton, who operated them until filing for bankruptcy in 2005.³ The Rumford and Tiverton plants were shut down in November 2005 and February 2006, respectively, and remain shut down without a date for their return to service.

3. Applicants state that the Debtors have defaulted with their bankruptcy filing, have failed to make payments on their leases, and have taken legal steps to reject all lease obligations. According to the Application, PMCC does not intend to “cure” the defaults by paying the debt or to resume operation of the Facilities.

4. The Trustee, a national banking organization, acts on behalf of certain creditors who loaned funds to the Debtors. To remedy the default, the Trustee reached an agreement with the Debtors to transfer control over the Facilities to James A. Goodman, as Receiver,⁴ who intends to resume operation of the Facilities (Transition Agreement).⁵ Under the Transition Agreement, the Receiver will take several steps to restore the plants to service. The Receiver will hire an asset manager to operate the Facilities.⁶ Applicants state that the proposed transaction will promote electric reliability in New England by increasing the amount of power available, especially for the 2006 summer peak season.⁷

II. Notice And Responsive Pleadings

5. Notice of the application was published in the *Federal Register*,⁸ with comments, protests, or interventions due on or before June 8, 2006. The Maine Public Utilities Commission filed a timely notice of intervention raising no issues, and National Grid

³ Calpine Corporation, Rumford and Tiverton (which are wholly-owned, indirect subsidiaries of Calpine Corporation), along with certain of their affiliates (collectively, Debtors) are all parties to the bankruptcy petition.

⁴ The United States District Court, Southern District of New York issued an order on June 6, 2006, approving James A. Goodman as Receiver.

⁵ The United States Bankruptcy Court for the Southern District of New York issued an order on June 8, 2006, approving the Transition Agreement.

⁶ The Receiver is authorized to sell power at market-based rates under an order issued by the Commission in Docket No. ER06-1030-000 on June 12, 2006, and has applied for status as an exempt wholesale generator in Docket No. EG06-52-000.

⁷ Application at 3.

⁸ 71 Fed. Reg. 32,064 (2006).

USA filed a timely motion to intervene raising no issues. ISO New England Inc. (ISO-NE), Rumford and Tiverton, and the Official Committee of Unsecured Creditors of Calpine Corporation, *et. al.* filed timely motions to intervene and comments supporting the proposed transaction.⁹ The Portland Natural Gas Transmission System (Portland Gas Transmission) filed a timely motion to intervene and protest. Central Maine Power Company filed an untimely motion to intervene raising no arguments.

6. In its protest, Portland Gas Transmission states that the transaction will undermine, rather than promote, reliability. It says that Applicants do not intend to transfer to the Receiver the firm gas transportation contract between Portland Gas Transmission and Rumford along with the Rumford generating plant, so the plant will not have a firm supply of natural gas.¹⁰ It argues that if the pipeline becomes fully subscribed, reliability will be undermined because the Rumford plant will not be able to operate at peak times, when it is needed most.¹¹ It also argues that the Receiver, Mr. Goodman, has no experience operating or managing the operation of an electric generating facility and that the Applicants' representation that they will engage an experienced asset manager is insufficient.¹²

7. Portland Gas Transmission also states that it is concerned about the effect the stranded gas transportation capacity¹³ will have on its other shippers. It states that it intends to mitigate the effect of the stranded capacity by re-selling the firm capacity, but does not believe that the amount, price, and terms of the capacity re-sold will be comparable to the contract with Rumford. Portland Gas Transmission states that if it cannot mitigate the costs of stranded capacity, or recover the costs through the bankruptcy proceeding, millions of dollars of cost responsibility will be shifted to its

⁹ ISO-NE states that it vigorously supports the Applicants' filing in this proceeding, which it says appears to be the best means of ensuring that the Rumford and Tiverton plants will be available to meet the needs of New England's electricity consumers during the summer of 2006. *See* ISO-NE Comments at 2, 9-10.

¹⁰ Portland Gas Transmission's objections relate to the transfer of the Rumford plant, it does not raise specific objections to the transfer of the Tiverton plant.

¹¹ Portland Gas Transmission Protest at 2-3.

¹² *Id.* at 11.

¹³ Portland Gas Transmission states that over the term of Rumford's firm gas transportation contract, based on current tariff rates, the reservation charges associated with the stranded capacity are approximately \$200 million. *Id.* at 3.

remaining shippers.¹⁴ Portland Gas Transmission states that Applicants also are required under section 7(b) of the Natural Gas Act (NGA)¹⁵ to file with the Commission for a determination as to whether abandoning the contract is appropriate.¹⁶

8. Portland Gas Transmission requests that the Commission condition approval of the proposed transaction on Debtors transferring to Applicants the firm gas transportation contract between Rumford and Portland Gas Transmission, or set the matter for hearing.¹⁷

9. On June 9, 2006, Applicants and Rumford and Tiverton filed answers to Portland Gas Transmission's protest, and on June 12, 2006, Portland Gas Transmission filed a response to these answers. On June 13, 2006, the Applicants filed a letter with the Commission requesting, among other things, that the Commission act in this proceeding no later than June 19, 2006.

III. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will also grant Central Maine Power Company's untimely, unopposed motion to intervene, given its interest in this proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay.

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits answers to protests and answers to answers unless otherwise ordered by the decisional authority. We are not persuaded to accept the Applicants' and Rumford and Tiverton's answers to Portland Gas Transmission's protest, nor Portland Gas Transmission's response to those answers, and will therefore reject them.

B. Standard of Review Under Section 203

12. Section 203(a) of the FPA provides that the Commission must approve an acquisition of jurisdictional facilities or certain generating facilities if it finds that the

¹⁴ Portland Gas Transmission Protest at 3.

¹⁵ 15 U.S.C. 717f.

¹⁶ Portland Gas Transmission Protest at 4.

¹⁷ *Id.* at 16.

transaction “will be consistent with the public interest.”¹⁸ The Commission’s analysis of whether an acquisition 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.¹⁹ EAct 2005 amended section 203 to specifically require that the Commission also determine that a 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.²⁰ As discussed below, we will approve the proposed transaction as consistent with the public interest.

13. As an initial matter, we reject Portland Gas Transmission’s reliability concerns related to the Applicants’ decision not to transfer the firm gas transportation contract along with the Rumford plant as speculative. Our approval of the transaction is consistent with the public interest, as it will allow both the Rumford and Tiverton plants to become operational. Our view is consistent with that of ISO-NE, the transmission grid operator in the New England region, which vigorously supports the transaction. Moreover, the Commission does not require that gas-powered generators have firm gas transportation service, and we reject the suggestion that we use this section 203 proceeding to manage the Applicants’ gas transportation and supply decisions.²¹

14. Additionally, the potential stranding of Rumford’s firm gas transportation contract with Portland Gas Transmission is not relevant to the Commission’s consideration of the Application. The Commission has made clear that it “will not condition its Section 203 approval . . . on matters that should be addressed in another proceeding or forum” and that it “will deny the relief requested in interventions in a Section 203 proceeding where such interventions are based solely on contract disputes.”²² Accordingly, the Commission will not condition its section 203 approval in this proceeding on transfer of the firm gas transportation contract to the Applicants as requested by Portland Gas Transmission, nor will we set this issue for hearing. We believe that the stranded contract issues raised by Portland Gas Transmission are more appropriately left to other proceedings.

¹⁸ 16 U.S.C. § 824b(a)(4) (2005).

¹⁹ *See supra* note 2.

²⁰ EAct 2005 § 1289, 119 Stat. 982-83, to be codified at 16 U.S.C. § 824b(a)(4).

²¹ We also do not find Portland Gas Transmission’s arguments regarding Mr. Goodman’s credentials to be persuasive. The Applicants have made clear that an experienced asset manager will operate the Facilities.

²² *LenderCo*, 110 FERC ¶ 61,044 at P 21 (2005) (citation omitted).

1. Effect on Competition

15. Applicants state that the proposed transaction is consistent with the public interest and will not have an adverse effect on competition, rates, or regulation. With respect to competition, Applicants state that the Receiver does not own any other generation in the ISO-NE market and that restoring the use of the Facilities will in fact further competition.²³ We agree that the proposed transaction will not have an adverse effect on competition.

2. Effect on Rates

16. With regard to rates, Applicants state that returning the Facilities to service will increase the supply of available electricity, which should stabilize or lower rates. Applicants state that the output from the Facilities will be sold at market-based rates and that the Facilities will continue to operate under the requirements of ISO-NE.²⁴ We agree that the proposed transaction will not have an adverse effect on rates.

3. Effect on Regulation

17. Applicants state that regulation by the Commission of the wholesale output from the Facilities will not change as a result of the transaction.²⁵ Applicants have also shown that the proposed transaction will not impair the ability of any state commission to regulate,²⁶ and we note that no state commission protested the proposed transaction. We agree that the proposed transaction will not have an adverse effect on federal or state regulation.

4. Cross-subsidization

18. Further, Applicants verify 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.²⁷ We find that Applicants have provided adequate assurance that the transaction will not result in cross-subsidization.

²³ Application at 18.

²⁴ *Id.*

²⁵ *Id.* at 19.

²⁶ *Id.*

²⁷ *Id.*

The Commission orders:

(A) Applicants' proposed transaction 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.

(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 transaction.

(F) If the transaction results in changes in the status or the upstream ownership of Applicants' affiliated qualifying facilities, if any, an appropriate filing for recertification pursuant to 18 C.F.R. § 292.207 shall be made.

(G) Applicants shall notify the Commission within 10 days of the date that the transaction has been consummated.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.