

UNITED STATES OF AMERICA 111 FERC ¶ 61,162  
FEDERAL ENERGY REGULATORY COMMISSION

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

Mesquite Investors L.L.C.  
San Joaquin Cogen, L.L.C.  
Pawtucket Power Holding Company, L.L.C.  
NAPG San Joaquin L.L.C.  
NAPG Pawtucket, L.L.C.

Docket No. EC05-57-000

ORDER AUTHORIZING DISPOSITION AND ACQUISITION OF  
JURISDICTIONAL FACILITIES

(Issued May 6, 2005)

**I. Introduction**

1. On March 11, 2005, Mesquite Investors, L.L.C. (Mesquite), San Joaquin Cogen, L.L.C. (San Joaquin), Pawtucket Power Holding Company, L.L.C. (Pawtucket), NAPG San Joaquin, L.L.C. (NAPG San Joaquin) and NAPG Pawtucket, L.L.C. (NAPG Pawtucket) (collectively, Applicants) filed an application under section 203 of the Federal Power Act (FPA)<sup>1</sup> requesting Commission authorization for the disposition and acquisition of jurisdictional facilities connected with: (i) the proposed 2005 sale and transfer of Mesquite's membership interests in San Joaquin to NAPG San Joaquin and the proposed 2005 sale and transfer of Mesquite's membership interests in Pawtucket to NAPG Pawtucket (the proposed 2005 transactions); and (ii) the November 30, 2002 merger of WCAC Cogen California, L.L.C. (WCAC) into San Joaquin (the 2002 transaction). The 2002 transaction was an internal corporate reorganization that resulted in the elimination of WCAC in the ownership chain. At the same time, San Joaquin Cogen Limited (San Joaquin Limited) was dissolved, resulting in the transfer of its assets to San Joaquin. The jurisdictional facilities associated with all three transactions include San Joaquin Limited's, San Joaquin's and Pawtucket's market-based rate wholesale power tariffs, books and records, and interconnection facilities appurtenant to generating facilities.

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<sup>1</sup> 16 U.S.C. § 824b (2000).

2. The Commission has reviewed the proposed 2005 transactions and the 2002 transaction under the Commission's Merger Policy Statement.<sup>2</sup> We will authorize the proposed 2005 transactions, and will authorize the 2002 transaction on a going forward basis. We find that the transactions will not have an adverse effect on competition, rates or regulation and are consistent with the public interest.

3. We also find that the 2002 merger of WCAC into San Joaquin was a disposition of jurisdictional facilities that required prior approval under section 203. As discussed below, we take such violations seriously, and we expect public utilities that are planning transactions that may be jurisdictional to come to the Commission for guidance before consummating the transactions.

## II. Background

### A. Description of the Parties

4. Mesquite is a wholly-owned, indirect subsidiary of El Paso Corporation (El Paso). Its business is the ownership of interests in companies that own or have equity interests in certain assets, including power generation projects. Mesquite owns 100 percent of the total issued and outstanding membership interests in San Joaquin; it also holds Pawtucket as a wholly-owned subsidiary.

5. Pawtucket owns a 99 percent limited partnership interest in Pawtucket Power Associates Limited Partnership (Pawtucket Power) and 100 percent of the membership interests in Pawtucket Power Generation L.L.C. (Pawtucket Generation). Pawtucket Generation, in turn, owns a one percent general partnership interest in Pawtucket Power. Pawtucket Power owns and operates a 66.5 megawatt (MW) combined cycle, natural gas fired cogeneration facility in Pawtucket, Rhode Island.

6. San Joaquin, a Delaware limited liability company, is also a wholly-owned subsidiary of Mesquite. San Joaquin owns and operates a 48 MW natural gas fired cogeneration facility in Lathrop, California (San Joaquin facility). San Joaquin is also authorized to engage in wholesale electric power and energy transactions at market-based rates.

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<sup>2</sup> See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (Dec. 18, 1996), FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 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 (Nov. 28, 2000), FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001) (Merger Filing Requirements).

7. NAPG San Joaquin and NAPG Pawtucket are wholly-owned subsidiaries of North American Power Group, Ltd. (NAPG). They were created to own membership interests in San Joaquin and Pawtucket. NAPG is a privately held company that owns, operates and manages energy-related projects.

### **B. The 2002 Transaction**

8. Before the 2002 transaction, San Joaquin was a wholly-owned subsidiary of WCAC, which, in turn, was wholly-owned by Mesquite. At that time, WCAC owned a 99 percent limited partnership interest and San Joaquin owned a one percent general partnership interest in a Texas limited partnership, San Joaquin Cogen Limited (San Joaquin Limited). San Joaquin Limited owned and operated the San Joaquin facility. On November 30, 2002, WCAC merged into San Joaquin, eliminating WCAC in the ownership chain. Concurrently, San Joaquin Limited was dissolved, and San Joaquin acquired direct ownership of the San Joaquin facility, along with San Joaquin Limited's jurisdictional assets.

### **C. The Proposed 2005 Transactions**

9. Under a Purchase and Sale Agreement dated February 4, 2005, Mesquite will sell 100 percent of its membership interests in San Joaquin to NAPG San Joaquin and 100 percent of its membership interests in Pawtucket to NAPG Pawtucket. Applicants note that the proposed transactions will not affect San Joaquin and Pawtucket's control of their respective facilities.

## **III. Notice of Filing**

10. Notice of the filing was published in the *Federal Register*, 70 Fed. Reg. 13,494 (2005), with interventions or protests due on or before April 1, 2005. None was filed.

## **IV. Discussion**

### **A. The 2002 Transaction**

11. Mesquite and San Joaquin request retroactive approval for the 2002 transaction, which has already been consummated. However, they also state that the merger was not subject to the Commission's jurisdiction under section 203 of the FPA. They argue that there was no change in control of jurisdictional facilities because the ultimate ownership and control of San Joaquin rested with Mesquite at every point before, during, and immediately after the 2002 transaction. Nonetheless, they also state that there was no intent to avoid the Commission's jurisdiction or to avoid complying with all applicable requirements. They say that the 2002 transaction happened inadvertently during an internal corporate reorganization.

12. Section 203 of the FPA requires *prior* Commission approval for a disposition or a direct or indirect merger or consolidation by a public utility of the whole or any part of facilities subject to the jurisdiction of the Commission.<sup>3</sup> Commission approval is required if the transaction directly or indirectly would result in a change of control of the facilities. Here, control over the facilities changed, as WCAC gave up its indirect ownership interest and San Joaquin gained a 100 percent ownership interest. Section 203 clearly requires prior approval.

13. However, in this circumstance, it has been demonstrated that the disposition of jurisdictional facilities is consistent with the public interest. As the transaction was an internal corporate restructuring, it had no adverse impact on competition, rates, or regulation. The Commission will prospectively approve the resulting ownership existing as of the date of this order.

## **B. The Proposed 2005 Transactions**

### **1. Consistency with Public Interest**

14. 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 prior 2002 transaction and the proposed 2005 transaction are consistent with the public interest and will not adversely affect competition, rates, or regulation.

#### **a. Effect on Competition**

15. Applicants state that the transactions are consistent with the public interest and will not adversely affect competition. Applicants state that the transfer of San Joaquin will have a *de minimis* impact on the California Independent System Operator (CAISO) market. They note that San Joaquin is currently indirectly owned by El Paso, and that the sale of San Joaquin will eliminate El Paso’s market share in generation in CAISO. Regarding NAPG, Applicants state that the combination of NAPG San Joaquin’s and its affiliates’ share of the CAISO market will amount to only 181.4 MW of capacity, or approximately 0.4 percent of the approximate 45,000 MW of peak load in the CAISO, a *de minimis* share. Applicants note that competition in the New England Independent System Operator’s (ISO-NE) control area will actually increase, because NAPG owns no generating assets in it, while El Paso does. Applicants further state that none of NAPG San Joaquin’s, NAPG Pawtucket’s, or any of their affiliates own or control any inputs

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<sup>3</sup> This applies if the facilities have a value greater than \$50,000.

into the production of electricity. They state that none of NAPG San Joaquin's and NAPG Pawtucket's affiliates own or control jurisdictional electric transmission facilities, a natural gas pipeline or supplier of any other input into electricity production. We find that the transactions will not adversely affect competition.

**b. Effect on Rates**

16. Applicants state that the transactions will not adversely affect the rates for the wholesale sale of power to any customer. The power from the facilities at issue here will be sold through a power marketer into the ISO-NE and CAISO markets. Applicants state that because the price of power sold from the two facilities will be dictated by market forces and the market rules of the CAISO and ISO-NE, the transactions will have no adverse impact on rates. We agree with the Applicants that the transactions will not adversely affect rates.

**c. Effect on Regulation**

17. As explained in the Merger Policy Statement and the Merger Filing Requirements, the Commission's primary concern with the effect on regulation of a transaction 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. Applicants state that the transactions will have no adverse effect on regulation, and that the transactions will not result in the creation of a new registered holding company under the Public Utility Holding Company Act of 1935.<sup>4</sup> They state that the Commission's jurisdiction will be unaffected by the transactions, and that the transactions have no impact on state regulatory jurisdiction.

18. We note that no party has raised concerns about the transactions' effect on state or federal regulation. No one has stated that the transactions will result in the formation of a registered holding company, and no state has indicated that it lacks jurisdiction to consider the transactions' effect on retail rates. Accordingly, we conclude that federal and state regulations would not be impaired.

**C. Conclusion**

19. Mesquite and San Joaquin did not timely obtain Commission authorization for the 2002 transaction. We note that section 203 of the FPA requires Commission approval of such dispositions before they are implemented. Implementing such dispositions without prior Commission approval is directly contrary to statutory requirements. We take non-compliance with section 203 requirements very seriously and expect public utilities to do

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<sup>4</sup> 15 U.S.C. §§ 79a *et seq.* (2000).

the same. To remedy non-compliance, the Commission may, among other things, impose a term or condition on its approval of a disposition under section 203. In addition, a public utility that implements a disposition without the Commission's prior authorization faces the obvious risk that an affected party may seek to void that disposition in court. Further, while the Commission does not have civil penalty authority, we note that Mesquite and San Joaquin's failure to obtain prior Commission approval for these transactions is the type of violation for which the imposition of a penalty would be appropriate.

The Commission orders:

- (A) The ownership existing as of the date of this order is hereby approved.
- (B) Applicant's request for retroactive approval is hereby denied.
- (C) The 2005 transactions are authorized upon the terms and conditions and for the purposes set forth in the application .
- (D) 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.
- (E) 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.
- (F) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.
- (G) Applicants shall notify the Commission within 10 days of the date that the disposition and acquisition of jurisdictional facilities has been consummated.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.