

118 FERC ¶ 61,093
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Milford Power Company, LLC
Morgan Stanley & Company Incorporated

Docket No. EC07-13-000

ORDER CONDITIONALLY AUTHORIZING DISPOSITION OF JURISDICTIONAL
FACILITIES AND ACQUISITIONS OF SECURITIES

(Issued February 12, 2007)

1. Milford Power Company LLC (Milford Power) and Morgan Stanley & Company Incorporated (Morgan Stanley & Company) (collectively, Applicants) filed under section 203(a)(1) and (a)(2) of the Federal Power Act (FPA)¹ for (1) authorization for an indirect disposition of jurisdictional facilities and (2) blanket authorization for certain other transfers and acquisitions of Class A Membership interests in Milford Holdings LLC (Milford Holdings), which is Milford Power's parent company.² Milford Power is a limited liability company that owns a 544 megawatt (MW) oil and gas fired combined-cycle generating facility (Facility) in Milford, Connecticut. The Facility is within the ISO New England, Inc. (ISO-NE) market.

2. As further described below, Applicants request section 203 authorization for three groups of transactions. One group of transactions would involve transfers of equity

¹ 16 U.S.C.A. § 824b (West Supp. 2006).

² Applicants request that the Commission grant the requested authorizations without ruling on the threshold jurisdictional issue as to whether section 203 authorization is required for all of the covered transactions. Thus, jurisdiction over the proposed transactions is assumed, without making any determination that all of the covered transactions are jurisdictional. See *Ocean State Power*, 47 FERC ¶ 61,321 at 62,130 (1989); and *Ocean State Power*, 43 FERC ¶ 62,466 (1988).

interests in Milford Holdings from current owners to buyers that are specifically identified in the application (Transactions). The other two groups of transactions, for which Applicants request a two-year blanket authorization, would involve future transfers of equity interests by current and future members of Milford Holdings (Future Transactions) or their affiliates (Future Affiliate Transactions) to unidentified buyers. The Commission has reviewed the three groups of transactions under the Merger Policy Statement and Order Nos. 669, 669-A, and 669-B.³

3. We will authorize the transactions, subject to conditions. We find that the proposed transactions will not have an adverse effect on competition, rates or regulation and are thus consistent with the public interest, and that they 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. Our blanket authorization is based on Applicants' demonstration that their interests will be passive in nature and that they cannot exercise any control of jurisdictional facilities.

I. Background

A. Applicants

1. Milford Power

4. As noted above, Milford's Facility is within the ISO-NE market. Milford Power sells energy, capacity and ancillary services at market-based rates. Milford Power's jurisdictional facilities are Milford Power's interconnection facilities and market-based rate tariff. Milford Power and ISO-NE have a reliability must-run agreement.

³ 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 (January 6, 2006), FERC Stats. & Regs. ¶ 31,200 (2006), *order on reh'g*, Order No. 669-A, 71 Fed. Reg. 28,422 (May 16, 2006), FERC Stats. & Regs. ¶ 31,214 (2006), *order on reh'g*, Order No. 669-B, 71 Fed. Reg. 42,579 (July 27, 2006), FERC Stats. & Regs. ¶ 31,225 (2006).

2. Milford Holdings

5. Milford Holdings is a holding company that solely owns 95 percent of the outstanding membership interests in Milford Power.⁴ Milford Holdings has two membership classes. The Class A Membership Interests are passive, non-controlling interests; they are held by various financial institutions. The Class B Managing Member manages and controls the day-to-day operations of Milford Holdings and the Facility. Under Milford Holdings' limited liability company agreement, the Class A members have no right to direct, manage or control the operations of Milford Holdings or involve themselves in the operations or management of Milford Power or the Facility, except for limited rights to protect their economic interests, including the ability to vote on whether to remove and replace the Class B Managing Member.⁵ Applicants are requesting authorizations only for Class A Membership Interests.

3. Sellers in the Transactions

6. The Sellers are: KBC Bank N.V., New York Branch; BNP Paribas; Australia and New Zealand Banking Group; WestLB AG; Sumitomo Mitsui Banking Corporation; and NIBC Bank N.V. Applicants state that the Sellers hold, directly or indirectly, Class A Membership interests in Milford Holdings. Applicants state that no Seller has operational or managerial control over Milford Power, the Facility, or the output of the Facility. The Sellers intend to transfer all of their equity interests in Milford Holdings to certain Buyers.

7. The Buyers are: Banc of America Securities LLC (Banc of America); CMF Milford Ltd. (CMF Milford); Candlewood Capital Partners LLC (Candlewood); Credit Suisse Securities (USA) LLC (Credit Suisse Securities); Deutsche Bank Securities Inc.; DB Holdings (New York), Inc.; Grand Central Asset Trust, STK Series; Greenwich International Ltd.; Highland Crusader Offshore Partners, L.P.; Morgan Stanley & Company Incorporated (Morgan Stanley); SMA Milford Corp.(SMA Milford); and Taconic Opportunity Fund L.P (Taconic). The Buyers' post-Transaction ownership percentages are as follows, as shown in Table 2 of the November 1 Filing:

⁴ PDC Milford Power LLC (PDC Milford) owns the other five percent.

⁵ See Milford Holdings LLC, application under Section 203 in Docket No. EC04-26-000, p. 13-15.

Buyer	Post-Transaction Net or Maximum Interest (%) in Milford Holdings
Banc of America	11.428969%
Candlewood	0% to 18.55%
Credit Suisse Securities	0% to 3.55%
CMF Milford	8.996658%
Deutsche Bank Securities Inc.	5.86%
DB Holdings (New York) Inc.	7.053705%
Grand Central Asset Trust, STK Series	4.496842%
Greenwich International Ltd.	0.595752%
Highland Crusader Offshore Partners, L.P.	4.179%
Morgan Stanley	0% to 26%
SMA Milford	5.960316%
Taconic	6.992949%

4. Buyers

8. Consistent with the limitations on Class A interests, the Buyers will not have the right to control the operation or management of Milford Power or the electrical output of the Facility. The following Buyers will each hold five percent or more of the Class A interests in Milford Holdings, either individually or together with affiliates of individual Buyers: Banc of America, Candlewood, Credit Suisse Securities, CMF Milford, Deutsche Bank Securities Inc. and DB Holdings (New York) Inc. (collectively Deutsche Bank), Morgan Stanley, SMA Milford, and Taconic.⁶

9. Banc of America is a subsidiary of Bank of America Corporation (BAC) and an affiliate of Bank of America, N.A. Bank of America, N.A. is a power marketer in connection with the bank's electricity derivatives activities. BAC holds a direct approximate 0.76363 percent interest in EBG Holdings, LLC (EBG Holdings), a limited liability company formed to hold and manage Boston Generating, LLC, which has three jurisdictional subsidiaries in the ISO-NE region. Mystic I, LLC owns a 14 MW oil-fired facility and a 617 MW gas-fired facility in Everett, Massachusetts. Mystic Development,

⁶ There are three buyers that will own less than five percent equity interest (Class A Membership Interest): Grand Central Asset Trust, STK Series (4.49 percent); Greenwich International Ltd. (0.59 percent) and; Highland Crusader Offshore Partners, L.P. (4.17 percent).

LLC owns two combined cycle, gas-fired units with an aggregate capacity of 1,744 MW in Everett, Massachusetts. Fore River Development LLC owns and operates an 872 MW dual gas and oil-fired facility in Weymouth, Massachusetts. Mystic I, LLC; Mystic Development, LLC; and Fore River Development, LLC have been authorized to sell power at market-based rates. Banc of America also holds a direct interest in Lake Road Holding Company, LLC, a limited liability company that holds a 99 percent limited partnership interest in Lake Road Generating Company, L.P. (Lake Road), which directly owns a 750 MW combined cycle generating facility near Killingly, Connecticut. Banc of America holds a direct 6.66 percent interest in MACH Gen, LLC (MACH Gen), a power producer that owns four generating facilities, including Millennium Power Partners, L.P., which owns and operates a 360 MW generating facility located in Charlton, Massachusetts (MACH Gen). Applicants state that Banc of America and its affiliates do not own, operate or control any other assets for the generation, sale, distribution or transmission of electric energy, or for the production, gathering, storage, liquefaction, sale, transmission or distribution of natural gas or other inputs to electric generation in the ISO-NE market.

10. Candlewood and Credit Suisse Securities are direct subsidiaries of Credit Suisse (USA), Inc., which is a direct subsidiary of Credit Suisse Holdings (USA) Inc. (CS Holdings). Credit Suisse, a subsidiary of Credit Suisse Group, is a global investment banking securities trading, and brokerage firm. Credit Suisse owns 57 percent of the voting common stock and 100 percent of the nonvoting common stock of CS Holdings.⁷ In addition to a five percent or more interest to be acquired in Milford Power, Credit Suisse Securities owns or has the power to vote equity interests in the following power plants in the ISO-NE market, or owns or controls other entities with market-based rate authority that do business in the ISO-NE market, as follows:

- a. Credit Suisse Securities has a 6.2 percent interest in EBG Holdings. Applicants state that CS Holdings and its affiliates do not have the right to control the day-to-day operation and management of any of the generating facilities owned by EBG Holdings, or to direct the sale of the power.
- b. Credit Suisse Securities owns 17.41 percent of the voting shares and 15.02 percent of the nonvoting shares in MACH Gen. Applicants state that CS Holdings and its affiliates do not have the right to control the day-to-day operation or management of, or to direct the sale of power from, any of the generating projects owned by MACH Gen.

⁷ Credit Suisse Group, Guernsey Branch owns the remaining 43 percent of the voting common stock of CS Holdings.

- c. Credit Suisse Securities holds a 0.11 percent interest in Lake Road. Applicants state that CS Securities is in the process of selling that.
- d. Credit Suisse Management LLC, an indirect subsidiary of CS Holdings, owns Credit Suisse First Boston Merchant Bank, Inc., which owns Merchant Holding, Inc., which owns Credit Suisse First Boston Alternate Energy Corporation, which owns indirectly less than 3 MWs of generating capacity in the ISO-NE market. The capacity is sold under long-term contracts.
- e. Boralex Industries, a wholly-owned subsidiary of CS Holdings, will acquire a below one percent indirect equity ownership interest in five generating facilities. Applicants state that Boralex Industries will not acquire day-to-day control of the operation or management of the facilities.
- f. DLJ Merchant Banking Partners II, L.P. (DLJ Partners II), a subsidiary of Credit Suisse First Boston Private Equity, Inc., an indirect subsidiary of CS Holdings, owns through a voting trust a 7.5 percent interest in the New Power Company. DLJ Partners II is a private equity investment fund. The New Power Company is an energy services company serving residential and small customers in retail natural gas and electricity markets in the United States, including New England. The New Power Company has been authorized by the Commission to sell power at market-based rates, but has no wholesale power sales or unbundled transmission customers. Applicants state that The New Power Company does not own generation, electric, gas transmission facilities or other inputs to electric generation. Applicants state that it is in bankruptcy and that its assets are being liquidated.
- g. Credit Suisse Energy, LLC, an indirect subsidiary of CS Holdings, is authorized to sell energy, capacity and ancillary services at market-based rates. Applicants state that Credit Suisse Energy, LLC owns no generation, electric or gas transmission facilities or other inputs to electric generation in the United States.
- h. CS Holdings, through its affiliates, owns interests in various funds, which in turn invest in energy-related companies, including public utilities. CS Holdings owns interests in the form of depository receipts in the Utilities Holders Trust, which provides CS Holdings and its affiliates an undivided beneficial ownership in the common stock of a group of companies that are involved in various segments of the utilities industry. Applicants state:

In no case does CS Holding's investment in these funds and in the Utilities Holders Trust constitute the ownership in principal of greater than 5% of the voting securities of a public utility, and the ownership of such interests does not confer on CS Holdings or its affiliates the right to control the management or operations of any public utility.⁸

11. CMF Milford is a subsidiary of Camulos Master Fund LP (Camulos). Applicants state that Camulos is a multi-strategy credit and special situations fund that is not primarily engaged in energy-related business activities. Camulos intends to acquire a 1.21 percent interest in Lake Road, and owns approximately 2.05 percent of the voting shares and approximately 1.92 percent of the non-voting interests in MACH Gen. Camulos and its affiliates do not own, operate or control any other assets for the generation, sale, distribution or transmission of electric energy, or for the production, gathering, storage, liquefaction, sale, transmission or distribution of natural gas and other inputs to electric generation in the ISO-NE market.

12. Deutsche Bank Securities Inc. and DB Holdings (New York), Inc. are subsidiaries of Taunus Corporation, which is a subsidiary of Deutsche Bank AG. Deutsche Bank AG directly or through its affiliates in the United States, Canada or Mexico engages in: (i) trading of financially settled gas derivatives and other energy derivatives, (ii) trading of natural gas and other fuels, and (iii) trading of electric energy, capacity and ancillary services, and in connection with that, may obtain rights to transmission or transportation of energy. Deutsche Bank AG has been authorized by the Commission to sell power at market-based rates. Deutsche Bank AG also indirectly owns DB Energy Trading, LLC (DB Energy), a power marketer authorized by the Commission to sell power at market-based rates. DB Energy does not have any interests in or control over any generation facilities, transmission facilities or other jurisdictional assets. Applicants further state that in addition to the five percent or more interests to be acquired in Milford Holdings, Deutsche Bank AG and its affiliates owns equity interests in or have the power to vote equity interests in two power plants in the ISO-NE markets: 7.0 percent in Lake Road and 4.4 percent in EBG Holdings. Deutsche Bank AG and its affiliates do not own, operate or control any other assets for the generation, sale, distribution or transmission of electric energy, or for the production, gathering, storage, liquefaction, sale, transmission or distribution of natural gas or other inputs to electric generation in the ISO-NE market.

13. Morgan Stanley & Company is a subsidiary of Morgan Stanley and provides investment banking services to business customers. Morgan Stanley & Company and its

⁸ November 1 Filing at 17.

affiliates owns the following equity interests in or have the power to vote equity interests in power plants in the ISO-NE markets, as follows: (i) less than 10 percent in MACH Gen, (ii) less than five percent in Lake Road, and (iii) up to 20 percent in EBG Holdings. Morgan Stanley Capital Group Inc. (Morgan Stanley Capital), a subsidiary of Morgan Stanley, and Morgan Stanley Capital's wholly-owned subsidiaries -- Power Contract Finance, LLC; Power Contract Finance II, Inc.; Power Contract Finance II, LLC; Utility Contract Funding II, LLC; and MS Retail Development Corp. -- are power marketers authorized by the Commission to sell power at market-based rates. Morgan Stanley Capital and its power marketing subsidiaries operate in a number of geographic markets, including the ISO-NE market. Applicants state that none of these entities own or control electric generation or transmission facilities in the ISO-NE market. Applicants also state that Morgan Stanley & Company and its affiliates do not own, operate or control any other assets for the generation, sale, distribution or transmission of electric energy, or for the production, gathering, storage, liquefaction, sale, transmission or distribution of natural gas and other inputs to electric generation in the ISO-NE market.

14. Ore Hill Hub Fund Ltd. (Ore Hill) is a hedge fund that is not primarily engaged in energy-related business activities. It owns the outstanding shares of Anya Holdings Corp., which owns the outstanding shares of SMA Milford Corp. A subsidiary of Ore Hill owns warrants to purchase less than a one percent interest in EBG Holdings. Applicants state that Ore Hill and its affiliates do not own or control any other assets for the generation, sale, distribution or transmission of electric energy, or for the production, gathering, storage, liquefaction, sale, transmission or distribution of natural gas and other inputs to electric generation in the ISO-NE market.

15. Taconic is a private investment company that is not primarily engaged in energy-related business activities. Taconic and its affiliates own, in the aggregate, 4.5 percent of Lake Road and 1.41 percent of EBG Holdings. Applicants state that Taconic and its affiliates do not own, operate or control any other assets for the generation, sale, distribution or transmission of electric energy, or for the production, gathering, storage, liquefaction, sale, transmission or distribution of natural gas or other inputs to electric generation in the ISO-NE market.⁹

⁹ The November 1 Filing does not describe some of the Buyers who are listed in Table 2 of the filing: Grand Central Asset Trust, STK Series; Greenwich International Ltd.; and Highland Crusader Offshore Partners, L.P.

B. The Proposed Transactions

16. Applicants request authorization under sections 203(a)(1) (which covers a disposition of jurisdictional facilities by a public utility) and 203(a)(2) (which covers, among other things, the acquisition of securities of a transmitting utility, an electric utility company or a holding company in a holding company system by a holding company in a holding company system that includes a transmitting utility or electric utility) for an indirect disposition of jurisdictional facilities resulting from certain transfers of ownership and/or control of Class A Membership Interests in Milford Holdings.

17. In the proposed Transactions, the current owners of Milford Holdings (Sellers) will transfer all of their Class A Membership Interests in Milford Holdings to various Buyers. The various Buyers seek to then transfer some or all of their Class A Membership Interests in Milford Holdings to various other buyers. Applicants state that the Transactions and the interim transactions would occur within approximately the same timeframe. They further state that there will be no changes to the limited liability company structures of Milford Power or Milford Holdings.¹⁰

¹⁰ Applicants explain that Table 2 of their filing (discussed above) reflects the Buyers' respective net or maximum Class A Membership Interests in Milford Holdings that will result after all transactions among the Buyers and Sellers, which are intended to close within the same approximate timeframe. For example, Seller A enters into an agreement to sell its equity interests to Buyer B. Applicants have not included information about Buyers acquiring equity interest in Milford Holdings that are in the situation of Buyer B in their analysis because the ownership interests of such Buyers are transient, and such Buyers ultimately will hold no equity interest in Milford Holdings. Applicants state that these transient Buyers "include: Bear Stearns Investment Products, Inc., Brencourt and King Street." (November 1 Filing at 24, n.30.) Before that transfer closes, Buyer B agrees to sell such equity interests to Buyers C and D. These two transactions are intended to close within the same approximate timeframe, so the net effect is that Buyer B will not own or control any equity interest in Milford Holdings. To avoid any jurisdictional difficulties that may arise if the interim transactions do not close on the same day, Applicants request that the Commission authorize these interim transactions, provided that all sales by Buyers in the position of Buyer B close within 31 days of their purchases.

For other Buyers, a range of percentage ownership interests is provided to account for the possibility that certain planned transactions might not be consummated. But Applicants seek section 203 authorization for each transaction, whether interim or final, and for the maximum amount of Class A Membership Interests stated for each Buyer in

(continued)

18. Applicants also request a two-year blanket authorization under sections 203(a)(1) and 203(a)(2) for certain future transfers of ownership and/or control of Class A Membership Interests in Milford Holdings (Future Transactions and Future Affiliate Transactions).¹¹ According to Applicants, the requested blanket authorizations are consistent with the Commission's precedent.¹² They state that they will comply with the notification conditions and filing requirements that the Commission has established when granting blanket authorization for transactions under section 203 of the FPA.¹³

19. Applicants request that the Commission grant blanket authorization for the following categories of transfers without additional filings under sections 203(a)(1) and 203(a)(2) of the FPA:

- (a) for a two-year period beginning on the date of a Commission order in this proceeding, transfers of Class A Membership Interests in Milford Holdings by any Class A member to an acquiring party that is a bank, institutional investor, financial institution, investment company, investment fund or related entity that: (a) is not primarily engaged in energy-related business activities and is not affiliated with a traditional utility with captive customers; (b) does not individually, or together with its affiliates, own 5 percent or more of the voting interests in any public utility that has interests in any generating facilities or otherwise engages in jurisdictional activities within the ISO-NE market; and (c) individually, or together with its affiliates, will hold 20

Table 2 of the application. Applicants state that if a Buyer or Seller contemplates a particular transfer of equity interests in Milford Holdings that is not described in their application (*i.e.*, such transfer is not used to determine the net equity interest of each Buyer as listed in Table 2), such transfer will either (1) be consummated pursuant to the requested blanket authorization or (2) be the subject of a separate section 203 application to the extent required. November 1 Filing at 23, n.29.

¹¹ Applicants state that, out of an abundance of caution, they request blanket authorizations, on behalf of future Class A Members of Milford Holding or their affiliates that may be considered holding companies under section 203(a)(2) of the FPA.

¹² See *Entegra Power Group, LLC, et al.*, 115 FERC ¶ 62,038 (2006); *MACH Gen, LLC*, 113 FERC ¶ 61,138 (2005); *La Paloma Holding Co., LLC and La Paloma Generating Co., LLC*, 112 FERC ¶ 61,052(2005) (*La Paloma*); *Lake Road Holding Co., LLC and Lake Road Generating Co., L.P.*, 112 FERC ¶ 61,051 (2005) (*Lake Road*); and *Boston Generating, LLC*, 113 FERC ¶ 61,109 (2005) (*Boston Generating*).

¹³ *Id.*

percent or less of Milford Holdings' Class A Membership Interests (Future section 203(a)(1) Transactions); and

(b) transfers of Milford Holdings' Class A Membership Interests by current or future owners of those interests to direct or indirect, wholly-owned subsidiaries of the ultimate parent, or the parent itself of such current or future owners of Class A membership interests (Future Affiliate Transactions).

20. Applicants commit to complying with the following requirements for any Future Transactions:

- (i) Transferor of interests will report any transfer within 10 days and include a statement of other generating or power marketing interests directly or indirectly owned by the buyer or its affiliates, irrespective of the market or region of the country in which such interests are operated;
- (ii) Applicants will 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 Milford Holding;
 - Any power purchase agreements, energy management services agreements, asset management services agreements, and any fuel supply services agreements related to the Facility, or summaries thereof, including the contract counterparty and any affiliation between that counterparty and post-transaction equity holders; and
 - The identity of any parties that acquire equity interests that are subject to the Commission's Code of Conduct rules as a result of acquiring these interests.

21. In addition, Applicants assert that any acquisition by a holding company of up to 20 percent of Milford Holdings' Class A Membership Interests would be subject to the reporting requirements in Order No. 669. In particular, any holding company that is required to file schedules 13D, 13G and form 13F with the Securities and Exchange Commission will file copies of such documents with the Commission within 45 days of such acquisition. Finally, Applicants pledge to identify the affiliate that directly owns Milford Holdings Class A membership interests within 10 days of any Future Affiliate Transaction.

II. Notice and Responsive Pleadings

22. Notice of the filing was published in the *Federal Register*, 71 Fed. Reg. 66,767 (2006), with comments, protests or interventions due on or before November 22, 2006. On November 21, 2006, PDC Milford Power, LLC (PDC Milford) filed a motion to delay action, motion to intervene, and protest. On December 1, 2006, Milford Power filed an answer.

A. PDC Milford's Protest

23. PDC Milford, which owns a five percent interest in Milford Power, contends that it was not properly notified of the transactions proposed in the application. Further, PDC Milford is challenging the legality of the proposed transactions before the Supreme Court of New York (New York court). It argues that the proposed transactions would violate a New York court order in a foreclosure proceeding that forbids the piecemeal sale of Milford Power (the owner of the Facility, and a subsidiary of Milford Holdings) and requires that all of the interests in Milford Power be sold together by a certain date. PDC Milford asserts that the transfer of interests in Milford Holdings is an attempt by Applicants to circumvent the New York court's order. If the Applicants are allowed to sell off their membership interests in Milford Holdings, which PDC Milford equates to a sale of their interests in Milford Power, they will no longer have the control to sell Milford Power. If PDC Milford's five percent interest in Milford Power is split off from the other membership interests, its interest will be devalued. PDC Milford requests that the Commission delay action on the section 203 application until the New York court determines the legality of the proposed transactions.

24. In addition, PDC Milford argues that Applicants' filing is deficient in that it fails to provide the contractual documents, instead providing only representative form contracts. Applicants have not stated what exactly each Buyer is buying, instead providing only a range of percentage ownership interests. Applicants also do not identify the transient parties in the transactions¹⁴ or set forth the consideration for the proposed transactions. PDC Milford also opposes the request for blanket authorizations because of the alleged potential illegality of the proposed transactions.

¹⁴ We note that Applicants' the November 1 Filing states that the transient buyers "include" Bear Stearns Investment Products, Inc., Brencourt and King Street but provides no additional information.

B. Milford Power's Answer

25. Milford Power argues that it was not required to provide PDC Milford with notice of the application because PDC Milford's interest in Milford Power does not provide it with any rights with respect to the governance or ownership of Milford Power or Milford Holdings. Milford Power further argues that the New York court's order is limited to the sale of Milford Holdings' interests in Milford Power, the subsidiary, and places no restrictions on sales of interests in Milford Holdings, the parent holding company. Further, Milford Power argues that the Commission has consistently rejected attempts to consider extraneous matters in section 203 cases, including other required approvals, consents or judicial proceedings. Milford Power argues that it is outside the scope of the Commission's section 203 review to consider whether the New York court order forbids the transactions before us.

26. Milford Power further argues that the application is not deficient because: the Commission allows applicants to provide the material terms of the transaction in a form rather than the final contractual documents; the application provides a comprehensive description of the various transactions; the application identifies the intermediate transacting parties at page 24, note 30; and the consideration for the transactions will reflect arms length negotiation between the seller and buyers when they negotiate the individual transactions.

III. Discussion**A. Procedural Matters**

27. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), PDC Milford's timely, unopposed motion to intervene serves to make it a party to this proceeding.

28. Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Milford Power's answer because it has provided information that assisted us in our decision-making process.

B. PDC Milford's Request to Delay Action on the Application

29. We deny PDC Milford's request that we delay action on the application until after the New York court acts on PDC Milford's challenge there. Applicants here request a Commission finding that the proposed Transactions, Future Transactions and Future Affiliate Transactions meet the standards of section 203 of the FPA. Our approval does not affect any other necessary approvals or disputes between the parties. PDC Milford's

concerns are beyond the scope of this proceeding and are more appropriately addressed by the New York court.¹⁵

C. Standard of Review

30. Section 203(a) of the FPA provides that the Commission must approve a transaction if it finds that the transaction “will be consistent with the public interest.”¹⁶ The Commission’s analysis of whether a transaction 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. The Energy Policy Act of 2005 (EPAc 2005) amended section 203 to specifically require that the Commission also determine that the 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.¹⁷

D. Analysis of Specific Transactions

1. Effect on Competition

a. Transactions

31. Applicants argue that the proposed Transactions will not have an adverse effect on competition. Applicants assert that there are no horizontal market power issues because after the transactions are consummated, Buyers and their affiliates acquiring five percent or more interests in Milford Holdings will have *de minimis* interests in generating capacity in the ISO-NE market. They state that the Facility represents approximately 1.77 percent of the total installed capacity in the ISO-NE market.

32. Applicants state that no Buyers will be able to control the Facility because they are Class A members that hold passive, non-controlling membership interests. Applicants state that the Class A members have no right to direct, manage, or control the operations

¹⁵ See, e.g., *American Electric Power Service Corp.*, 107 FERC ¶ 61,209, at P 17 (2004). We also find that Applicants’ filing substantially complies with the threshold filing requirements of the Commission’s regulations and therefore deny PDC Milford’s request that we find the filing deficient.

¹⁶ 16 U.S.C. § 824b (2000).

¹⁷ EPAc 2005 § 1289, 119 Stat. 982-83, *to be codified at* 16 U.S.C. § 824b(a)(4).

of Milford Holdings, or to involve themselves in the operations of Milford Power or the Facility.

33. Applicants state that there are five Buyers that may hold five percent or more interests in Milford Holdings or that are affiliated with entities that may have interests of five percent or more in other generating assets in the ISO-NE market: (i) BAC; (ii) Candlewood; (iii) Deutsche Bank; (iv) Morgan Stanley & Company; and (v) Taconic. Applicants state that Morgan Stanley & Company and its affiliates own approximately 864 MWs of generating capacity in the ISO-NE market, which represents 2.9 percent of the installed capacity in the relevant market.¹⁸ The other Buyers will individually hold beneficial interests in generation that represent less than 2.9 percent of ISO-NE's installed capacity. Applicants assert that none of these Buyers will be able to exercise managerial or operational control over Milford Holdings or the Facility, or any portion of the output of the Facility, because they will hold Class A Membership Interests in Milford Holdings, not the Class B Managing Member Interest.¹⁹

34. Applicants state that the transactions do not present any vertical market power issues because no Buyer or its affiliates acquiring a five percent or more Class A Membership Interest in Milford Holding, or any affiliate of such Buyer, will have an ownership interest of five percent or more in any electric transmission company in the ISO-NE market, except the limited interconnection facilities that are necessary to connect generating units. Applicants state that no such entity or any of its affiliates has any ownership interest in fuel resources, fuel transportation systems or other inputs to electricity products in the ISO-NE market.

35. Based on the facts and safeguards as presented in the application, and on a commitment by Applicants that Class A members will have no right, directly or indirectly, to direct, manage or control the management, policies or operations of Milford Holdings, or to involve themselves in the management or operations of Milford Power or

¹⁸ The 864 MW of capacity is based on an a 26 percent share of Milford Power's Facility, a 10 percent share of the 360 MW Millennium facility owned by MACH Gen, a five percent share of the 750 MW Lake Road facility, and a 20 percent share of the 3,247 MW in EBG Holdings.

¹⁹ November 1 Filing at 5, citing a previous section 203 application involving Milford Holdings in Docket No. EC04-26-000. *See Milford Holdings, LLC*, 102 FERC ¶ 62,200 (2003) (Letter Order authorizing disposition of jurisdictional facilities). The powers of Class A interests are enumerated in §§ 6.01 and 6.03 of the Milford Holdings limited liability company agreement that was attached to that application.

the Facility,²⁰ the Commission is satisfied that the consolidation of the additional ownership interests proposed here with the Buyers and their affiliates' existing ownership of generation does not raise competitive issues. We note that, according to Applicants, the amount of generation that will be owned or controlled by the Buyers or their affiliates in the ISO-NE market is extremely small compared to the total ISO-NE generating capacity of 30,895 MW. The Buyers and their affiliates will not control generation in the ISO-NE market.²¹ The Commission noted in *Duke Energy Corporation*²² that without control of capacity, competition in wholesale energy markets cannot be harmed. Accordingly, we find that the proposed Transactions will not adversely affect competition.

b. Future Transactions and Future Affiliate Transactions

36. Applicants state that the Future Transactions and Future Affiliate Transactions will have no adverse effect on competition. According to Applicants, the condition they propose for Future Transactions (that no acquiring party may hold either individually or together with its affiliates, five percent or more of the voting interests in any generating facility or engage in jurisdictional activities within the relevant market) ensures that no Milford Holdings member will be able to exercise horizontal or vertical market power in the relevant market. In addition, Applicants state that the Future Affiliate Transactions will not raise any competitive concerns, as there will be no new combination of facilities in connection with such transactions.

²⁰ Our interpretation of Applicants' commitments regarding Class A members here is based on Applicants' representations in their application and on the limits on Class A members under the Milford Holdings limited liability company agreement discussed in the application approved in Docket No. EC04-26-000, which Applicants cite.

²¹ Because the Buyers, who are financial institutions, will be passive investors, with no control over day-to-day operations of Milford Holdings, their proposed percentages of ownership do not raise concerns in this case. *See, e.g., R.W. Beck Plant Management, Ltd.*, 109 FERC ¶ 61,315 (2004) (finding jurisdiction over manager/operator with day-to-day control but not over the bank that was a passive investor with no role in operation of the facility); *Bechtel Power Corporation*, 60 FERC ¶ 61,156 (1992) (disclaiming jurisdiction over operator who, as agent for the owner of a facility, lacked control or decision-making authority over the operations of the facility).

²² 113 FERC ¶ 61,297, at P 15 (2005).

37. The Commission finds that the Future Transactions and Future Affiliate Transactions will not have an adverse effect on competition. These transactions are similar to those in *Lake Road* and *La Paloma*,²³ where the Commission placed conditions on the transactions to prevent harm to competition and ensure that the transactions are consistent with the public interest. Applicants incorporated these conditions in the Future Transactions and Future Affiliate Transactions; therefore, we find that these transactions are consistent with the public interest.

2. Effect on Rates

a. Transactions

38. Applicants state that the Transactions involve upstream ownership of Milford Power, and will not have an adverse effect on rates. Applicants also state that Milford Power has no transmission customers.

39. Based upon these representations, we find that the Transactions will have no adverse effect on rates.

b. Future Transactions and Future Affiliate Transactions

40. Applicants state that the Future Transactions and Future Affiliate Transactions will not have an adverse effect on rates. They state that all sales of electric energy from the Facility will continue to be made at previously authorized market-based rates²⁴ and that these transactions will not have any effect on the rates, terms or conditions of wholesale power sales agreements. Applicants state that Milford Power does not provide any unbundled transmission services.

41. Based upon these representations, we find that the Future Transactions and Future Affiliate Transactions will have no adverse effect on rates.

²³ *Supra* note 12.

²⁴ *See Milford Power Company, LLC*, Letter Order, FERC Docket No. ER99-4102-000 (October 13, 1999), as amended, Letter Order, FERC Docket No. ER04-628-000 (April 14, 2004).

3. Effect on Regulation

a. Transactions

42. Applicants state that the Future Transactions and Future Affiliate Transactions will not impair the Commission's jurisdiction over Milford Power because it will remain a public utility subject to regulation by the Commission. They also state no state regulatory commission has any jurisdiction over these transactions.

43. We find that the Transactions will have no adverse effect on regulation.

b. Future Transactions and Future Affiliate Transactions

44. Applicants state that the Future Transactions and Future Affiliate Transactions will not diminish the Commission's regulatory authority. In addition, they state that all sales from the Facility will continue to be made at wholesale rates and are not subject to state regulation.

45. We find that the Future Transactions and Future Affiliate Transactions will have no adverse effect on regulation.

4. Cross-Subsidization

46. FPA section 203(a)(4)²⁵ requires that the Commission find that a transaction will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company, unless that cross-subsidization, pledge or encumbrance will be consistent with the public interest. In Order Nos. 669, 669-A, and 669-B, the Commission established specific filing requirements requiring applicants to demonstrate whether or not the prohibited activities will occur. This information is to be in Exhibit M of applications.

a. Transactions

47. Applicants state that the Transactions will not result in a cross-subsidization of a non-utility associate company or a pledge, or encumbrance of utility assets for the benefit of an associate company. They state that Milford Power is not a traditional public utility and has no captive ratepayers and that there is thus no potential for cross-subsidization. Applicants state that the proposed transactions will not result in, at the time of the transactions or in the future: (1) transfers of facilities between a traditional public utility

²⁵ *To be codified at* 16 U.S.C. § 824b(a)(4).

associate company that has captive ratepayers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) new issuance of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) new pledges or encumbrances of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission services over jurisdictional transmission facilities for the benefit of an associate company; (4) new affiliate contracts between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA.

48. Based on these statements and the facts as presented in the application, and on a commitment by Applicants that Class A members will have no right, directly or indirectly, to direct, manage or control the management, policies or operations of Milford Holdings, or to involve themselves in the management or operations of Milford Power or the Facility, we find that the Transactions will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company.²⁶

b. Future Transactions and Future Affiliate Transactions

49. Applicants state that the Future Transactions and Future Affiliate Transactions will not result in cross-subsidization or the pledge or encumbrance for the benefit of an associate company. Applicants state that the concern is not applicable here, as one of the criteria for Future Transactions is that the acquiring party not be affiliated with a traditional utility with captive customers. They also state that the concern is not applicable to Future Affiliate Transactions because such transactions will not result in any affiliation with a traditional utility with captive customers.

50. Based on the facts as presented in the application, and on a commitment by Applicants that Class A members will have no right, directly or indirectly, to direct, manage or control the management, policies or operations of Milford Holdings, or to involve themselves in the management or operations of Milford Power or the Facility, we find that the Future Transactions and Future Affiliate Transactions will not result in

²⁶ See, e.g., *EIF Berkshire Holdings, LLC and Berkshire Power Company, LLC*, 116 FERC ¶ 61,273, at P 25-26 (2006); *ITC Holdings Corp.*, 116 FERC ¶ 61,271, at P 70 (2006).

cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company.

5. Reporting Changes in Status

51. Order No. 652 requires that sellers with market-based rate authorization timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. The foregoing authorization of disposition of jurisdictional facilities may result in a change in status for certain entities that are involved in the Transactions at issue that have market-based rate authority.²⁷ Accordingly, such entities are advised that they must comply with the requirements of Order No. 652. In addition, they shall make appropriate filings under section 205 of the FPA to implement the transactions authorized by this order.

6. Limit on Authorization for Transactions Involving “Transient” Buyers

52. Finally, our authorization of the Transactions involving what Applicants describe as “transient” Buyers is limited to the two-year period covered by the blanket authorization granted herein.

7. Additional Reporting Requirement Concerning Transmission

53. In addition to the aforementioned requirement to report generating or power marketing interests related to Future Transactions and Future Affiliate Transactions, we will require for all the transactions – the Transactions, Future Transactions and Future Affiliate Transactions – that the Buyers submit reports within 10 days from closing, stating the transmission interests owned by the Buyers or their affiliates. The reporting of such information will facilitate effective monitoring of competition in the ISO-NE market by the Commission.

The Commission orders:

(A) Applicants' proposed Transactions, Future Transactions and Future Affiliate Transactions are hereby authorized, subject to conditions and reporting requirements, as discussed in the body of this order. The blanket authorization of Future

²⁷ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh’g*, 111 FERC ¶ 61,413 (2005).

Transactions and Future Affiliate Transactions granted herein expires two years after the date 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 appropriate filings under section 205 of the FPA, as necessary, to implement the Transactions, Future Transactions and Future Affiliate Transactions.

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

(G) Applicants shall notify the Commission that Future Transactions and Future Affiliate Transactions have been consummated in accordance with the discussion in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.