

127 FERC ¶ 61,127
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

MACH Gen, LLC
New Athens Generating Company, LLC
New Harquahala Generating Company, LLC
Millennium Power Partners, L.P.
Strategic Value Partners, LLC

Docket No. EC09-54-000

ORDER CONDITIONALLY AUTHORIZING DISPOSITION OF
JURISDICTIONAL FACILITIES UNDER SECTION 203 OF
THE FEDERAL POWER ACT

(Issued May 8, 2009)

1. On February 4, 2009, as amended March 31, 2009, MACH Gen, LLC (MACH Gen), New Athens Generating Company, LLC (New Athens), New Harquahala Generating Company, LLC (New Harquahala), Millennium Power Partners, L.P. (Millennium) (Project Companies) and Strategic Value Partners, LLC and funds under its management (SVP) (collectively, Applicants) filed a joint application under section 203(a)(1) of the Federal Power Act (FPA)¹ requesting that the Commission grant, for a three-year period subject to certain conditions, authorization for an indirect disposition of jurisdictional facilities as a result of the proposed acquisition of up to 40 percent of the equity interests in MACH Gen by funds under the management of SVP. SVP represents to the Commission that it is a holding company solely with respect to exempt wholesale generators (EWGs), qualifying facilities or foreign utility companies.²

¹ 16 U.S.C. § 824b (2006).

² Due to the fact that it manages the funds that hold interests in holding companies that, in turn, own generating companies, SVP is a holding company within the meaning of section 203(a)(2) of the FPA, as are several of the funds under its management. To the extent any of the interests in MACH Gen are attributed to SVP itself or acquired by an SVP fund that is a holding company within the meaning of section 203(a)(2), the Commission has granted blanket authorization for such acquisitions pursuant to section 33.1(c)(8) of the Commission's Regulations.

2. The Commission has reviewed the application under the Merger Policy Statement.³ As discussed below, we will authorize the Proposed Transaction with conditions under section 203(a)(1), as we find that, with those conditions, it is consistent with the public interest.

I. Background

A. Description of the Parties

3. MACH Gen, a holding company that owns 100 percent of the interests in the three Project Companies, is owned by financial institutions. MACH Gen has expressly represented to the Commission that “none of its members can directly or indirectly control the decision-making over sales of electric energy by the Project Companies, including discretion as to how or when power generated by the Project Companies’ generation will be sold.”⁴

4. New Athens owns a 927-megawatt (MW) gas-fired, combined-cycle electric generating facility in the New York Independent System Operator market. Millennium owns a 326 MW gas-fired electric generating facility in Charlton, Massachusetts within the New England Power Pool operated by ISO New England, Inc. New Harquahala owns a 1,050 MW gas-fired, combined-cycle electric plant in the balancing authority area of Arizona Public Service Company (APS), within the Arizona-New Mexico-Southern Nevada sub-region of the Western Electricity Coordinating Council and is interconnected through the Hassayampa Switchyard that is located in the Salt River Project (SRP) control area. The three Project Companies are EWGs authorized by the Commission to make wholesale sales at market-based rates.

5. SVP is an institutional investment manager that, directly or indirectly, provides investment management services to a variety of private investment funds. Its business is

³ *Inquiry Concerning the Commission’s Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 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, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh’g*, Order 642-A, 94 FERC ¶ 61,289 (2001); *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh’g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh’g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006); *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement).

⁴ Application at 5 n.7.

the management of investments for its investors, and it is not actively engaged in day-to-day operation of businesses in which its managed funds hold investments. The application states that SVP itself will not make or hold any investments in MACH Gen. Each fund managed by SVP is a private investment fund with fiduciary obligations to owners of interests in the respective funds. Investors in the funds managed by SVP hold only limited rights, similar to those of an investor in a mutual fund.

6. The application states that none of the SVP funds are primarily focused on investments in the energy sector. The funds that are managed by SVP are themselves not engaged in the generation, trading or marketing of capacity or energy, and they do not provide management services to any entities so engaged. The application asserts that investments by the SVP funds are passive with respect to day-to-day operations, although the SVP funds retain the right to vote their equity interests on matters that are subject to shareholder voting.

7. Funds managed by SVP collectively own 100 percent of the equity interests of Liberty Electric Generation Holdings, LLC, which is the upstream owner of Liberty Electric Power, LLC, which in turn owns a 567.7 MW generating facility in Delaware County, Pennsylvania (Liberty Electric Project). The SVP funds have outsourced the day-to-day management of the Liberty Electric Project and, therefore, do not make day-to-day operating decisions with respect to the facility.

8. According to the application, funds managed by SVP collectively hold approximately a 17.18 percent interest in Entegra, which owns Gila River Power, L.P. (Gila River) and Union Power Partners, L.P. (Union Power) (collectively, Entegra Project Companies). Gila River is a 2,200 MW generating facility in Arizona which is interconnected to the transmission system of APS, and makes sales in the APS/SRP control area. Union Power is a 2,200 MW generating facility interconnected with the transmission system of Entergy Arkansas, Inc. The application states that neither SVP nor any funds managed by SVP exercise any control over the operations of the Entegra Project Companies.

9. According to the application, funds managed by SVP do not own five percent or more of the voting equity in any other entity subject to the Commission's jurisdiction that sells power in U.S. markets. The application also provides that the funds managed by SVP currently own less than five percent of the equity in MACH Gen. Further, the application states that the SVP funds also hold debt instruments and other non-voting interests in a variety of energy assets, including MACH Gen, but that none of these financial instruments confer any equity voting rights on SVP or its managed funds.⁵

⁵ Application at 8-9.

10. The application states that the funds managed by SVP do not: (1) exercise control over the day-to-day operations of the individual operating companies, including those owned by MACH Gen and Entegra; or (2) exercise any other right other than the right to vote their shares on matters that are subject to general shareholder voting. The application notes that neither SVP nor the funds managed by SVP are currently represented on the Board of Directors of Entegra, the Entegra Project Companies, MACH Gen, or any of the MACH Gen Project Companies.

B. Description of the Proposed Transaction

11. The Proposed Transaction involves the transfer of ownership of equity interests in MACH Gen by current and future owners of such interests (Sellers) to funds managed by SVP. Funds managed by SVP seek authorization to acquire additional ownership interests in MACH Gen from Sellers, with a cap on SVP's total holdings of 40 percent. The application states that SVP would not exercise any direct control over the day-to-day operations of MACH Gen and, in particular, any decision-making over the day-to-day sales of electric energy by the Project Companies.⁶

12. SVP states that prior approval may be required under section 203(a)(1) of the FPA for interest of 10 percent or more, even when an acquisition of equity interests falls within the blanket authorizations that the Commission created to implement section 203(a)(2) of the Act. SVP requests that the Commission act upon this application, based on the assumption that the levels of ownership that SVP would have in both MACH Gen and Entegra could constitute control of both MACH Gen and Entegra.⁷ Thus, SVP assumes that the Commission will deem it to control MACH Gen and

⁶ Applicants state that the Board of Directors of MACH Gen has a risk management committee that approves trade requests to sell power and enter into other major transactions, while certain other major transactions are submitted to the MACH Gen Board of Directors. In addition, the MACH Gen Board of Directors can appoint members to the Millennium board of control. While, according to SVP, its proposed holdings would not enable it to dictate or control such decisions, as a 40 percent shareholder, Applicants acknowledge that SVP clearly could have an influence on such decisions. However, Applicants argue that even if SVP is deemed to control MACH Gen, the conditions proposed herein will prevent it from controlling Entegra.

⁷ Applicants note that the Commission is reviewing when holdings of 10 percent or more of the equity in a jurisdictional facility will be deemed to constitute control for purposes of both sections 203 and 205 of the FPA, in Docket No. PL09-3-000. However, SVP asserts that it needs to pursue the Proposed Transaction before the outcome of the proceeding in Docket No. PL09-3-000 is known. SVP states that it reserves the right to seek relief from the proposed conditions contained in this application once the Commission provides further clarification of the meaning and parameters of "control."

therefore proposes in the instant application specific conditions that will negate any modicum of SVP control over the Entegra Project Companies⁸ so that the Proposed Transaction will not raise any horizontal competitive market issues.

II. Notice of Filing and Responsive Pleadings

13. Notice of Applicants' February 4, 2009, filing was published in the *Federal Register*, 74 Fed. Reg. 7421 (2009), with comments, protests, or interventions due on or before February 25, 2009. Entegra filed a timely motion to intervene and comments. On February 27, 2009, SVP filed an answer.

14. On March 19, 2009, Commission Staff issued a deficiency letter requesting that Applicants provide more information to assist us in our evaluation of their application. The deficiency letter requested a study showing and analyzing the amount of MACH Gen and Entegra Power Group LLC's (Entegra) overlap of generation owned or controlled by firms in which SVP holds an interest, including the proposed additional 40 percent interest in MACH Gen. The deficiency letter also requested a detailed explanation of why SVP's possible representation on MACH Gen Board of Directors would not potentially result in SVP controlling MACH Gen or influencing MACH Gen's day-to-day operation decisions. In response to the deficiency letter, Applicants submitted a market power analysis for the APS relevant geographic market on March 31, 2009. Notice of Applicants' March 31, 2009, deficiency response was published in the *Federal Register*, 74 Fed. Reg. 17189 (2009), with interventions, comments, or protests due on or before April 10, 2009. None was filed.

⁸ SVP states that it is not seeking to acquire additional interests in Entegra, and the interests it acquired in Entegra were acquired when the funds managed by SVP met the conditions of the "5-and-20 authorization" approved by the Commission, so Entegra was acting consistently with the terms of the authorization under section 203 of the FPA in effect from time to time when it effectuated transfers of equity interests to the SVP funds. *See, e.g., Entegra Power Group, LLC*, 115 FERC ¶ 62,038 (2006). SVP submits that because Entegra has already recorded on its books the transfer of equity interests in Entegra to SVP, no further actions by Entegra or approval of actions by Entegra are required. The commitments that SVP makes herein are made directly to the Commission and do not require any action on the part of Entegra or the Entegra Project Companies. Therefore, SVP explains that Entegra and the two Entegra Project Companies are not parties to this application, although Entegra and Gila River have an interest in maintaining the ability of Gila River to charge market-based rates.

15. While Entegra does not object to the Proposed Transaction, Entegra provides comments to clarify certain representations attributed to Entegra in the application. Entegra requests that the Commission clarify that, solely with respect to any interest in MACH Gen acquired by SVP or funds managed by SVP pursuant to such approval, the Entegra Project Companies will be deemed for the purposes of the Commission's market power analysis under sections 203 and 205 of the FPA not to be affiliated with any entity owned by MACH Gen that owns or controls generation facilities or inputs to electric power production. In addition, Entegra clarifies that, while it currently is true that Entegra members do not exercise control over the day-to-day sales of electric energy by the Entegra Project Companies, Entegra has not explicitly made such representations to the Commission.

16. In Applicants' answer, SVP reaffirms that: (1) it acquired its interest in Entegra pursuant to the authorization issued in Docket No. EC06-78-000; and (2) SVP currently holds less than 20 percent of the outstanding interests in Entegra. SVP states that SVP's current holdings fall within the representation of Entegra that no member of Entegra acquiring units in Entegra pursuant to the blanket authorization in Docket No. EC06-78-000 will be able to "obtain operational or commercial control over the Gila River or the Union Power facilities, or any portion of the output of these facilities, by virtue of its acquisition of Entegra...Units since no Entegra member will acquire more than 20 percent of such units" pursuant to such blanket authorization.

III. Discussion

A. Procedural Issues

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the timely, unopposed motion to intervene of Entegra serves to make it a party to this proceeding.

18. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept SVP's answer because it has provided information that assisted us in our decision-making process.

B. Standard of Review Under Section 203

19. Section 203(a)(1) requires a public utility to obtain prior authorization for a disposition of its jurisdictional facilities effected through a direct sale of its assets or a change in control over jurisdictional facilities resulting from a disposition or acquisition of securities. Section 203(a)(4) requires the Commission to approve a transaction if it determines that it will be consistent with the public interest.⁹ The Commission's analysis

⁹ 16 U.S.C. § 824b.

of whether a transaction will be 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.¹⁰ Section 203 also requires the Commission to find 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.”¹¹ The Commission’s regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.¹²

C. Analysis Under Section 203

1. Effect on Competition – Horizontal Market Power

a. Applicants’ Analysis

20. Applicants state that the Proposed Transaction is consistent with the public interest and will have no adverse effect on competition, rates, or regulation, nor will it result in any cross-subsidization or the pledge or encumbrance of utility assets to any associated company. With respect to the effect on competition, Applicants request that the Commission approve the transaction without requiring the filing of a horizontal competitive screen analysis for two of the markets of the MACH Gen Project Companies (Millennium in New England and New Athens in New York) because SVP does not hold any interests in other relevant assets in those markets.

21. Applicants state that MACH Gen and Entegra own assets in one overlapping market area – New Harquahala, a MACH Gen Project Company and Gila River,¹³ an Entegra Project Company located in the APS/SRP balancing authority area. Applicants assert that these overlapping markets do not raise competitive concerns because both MACH Gen and Entegra have specifically stated to the Commission that their members do not exercise control over their operating companies. In addition, SVP has specifically committed to the Commission that it will not exercise such control. Applicants argue that these commitments, made under verification to the Commission, are enforceable and should be dispositive of the control issue.

¹⁰ See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

¹¹ 16 U.S.C. § 824b(a)(4).

¹² 18 C.F.R. § 33.2(j) (2008).

¹³ *Pinnacle West Capital Corp.*, 120 FERC ¶ 61,153 (2007).

22. SVP has made specific commitments to the Commission with respect to its holdings in Entegra that would ensure that: (1) Entegra is not under the control of the SVP funds; and (2) the New Harquahala and Gila River facilities are not, as a result of common indirect ownership by the SVP funds, operated on a joint basis. Applicants state that these specific commitments are based upon, but do not precisely parallel, the conditions imposed in the Commission's recent Entegra order.¹⁴

23. In order to ensure that acquisition of up to 40 percent of equity interests of MACH Gen by SVP, when SVP's existing holdings of Entegra are considered, does not adversely impact competition in the market area in which MACH Gen and Entegra overlap, and to enable the Commission to find that the SVP fund holdings in Entegra do not constitute control, for purposes of either section 203 or section 205, SVP proposes the following commitments to the Commission. SVP states that it will seek express authorization from the Commission with respect to deviations from these conditions even if the issue of "control" is clarified in Docket No. PL09-3-000, so that there is no confusion about when the conditions are revised or terminated and on what basis.

24. First, the funds managed by SVP will take no action that directly or indirectly exerts decision-making over the sale of electric energy by the Entegra Project Companies, including any discretion as to how or when power generated by such companies will be sold.¹⁵

25. Second, absent express prior authorization from the Commission, SVP will not increase its holdings in Entegra above the 17.18 percent it held on February 4, 2009.

26. Third, SVP will not seek or hold representation on Entegra's Board of Directors or on the Boards of Directors of the Entegra Project Companies.¹⁶

¹⁴ In *Entegra Power Group, LLC*, 125 FERC ¶ 61,143 (2008) (*Entegra*), the Commission imposed certain conditions on Harbinger Capital Master Funds I, Ltd. and Harbinger Capital Partners Special Situations Fund, L.P. (collectively, "Harbinger") to prevent Harbinger from exercising control over Entegra due to Harbinger's presumed control of another entity with jurisdictional assets in the same market.

¹⁵ See *Entegra Power Group, LLC*, 115 FERC ¶ 62,038.

¹⁶ SVP states that it proposes this condition in the interests of expedited action, even though the Commission has, in other cases, indicated that limited, non-majority Board membership does not create control over a company. See, e.g., *LS Power Development, LLC*, 125 FERC ¶ 61,146 (2008).

27. Fourth, SVP will be able to represent that it has not acquired the shares of Entegra with any purpose of, or with the effect of, changing or influencing the control of the Entegra Project Companies with respect to their sales of power.

28. Fifth, SVP will not seek to circumvent these commitments by acting in concert with other holders of Entegra equity. SVP would be allowed to consult with other Entegra equity holders with respect to matters that are subject to voting, such as asset sales or Board elections, but it could take no actions that determine how the Entegra Project Companies sell power.

29. Sixth, SVP recognizes that the conditions proposed herein do not precisely track the conditions imposed by the Commission in *Entegra*. Therefore, to provide the Commission with additional assurances, SVP commits that it will not provide to Entegra any non-public information on the operations and plans of the MACH Gen Project Companies and it will not provide to MACH Gen any non-public information on the operations and plans of the Entegra Project Companies. In particular, SVP will not provide any information on: (a) planned maintenance windows, (b) outages, (c) marketing strategies, (d) contracts, (e) volumes, (f) prices, or (g) other operational data.

30. Seventh, SVP proposes that these conditions remain in place until such time, if any, as its holdings in Entegra are reduced to below 10 percent.

31. Finally, SVP proposes to report to the Commission, no later than 45 days after the end of each calendar quarter: (a) the level of SVP holdings in MACH Gen for the three-year period for which authorization to acquire MACH Gen interests is effective; and (b) its continued compliance with the conditions proposed herein for as long as SVP funds hold 10 percent or more of the interest in Entegra.

32. Applicants conclude that while those commitments are enforceable and should suffice to demonstrate a lack of common control, the additional commitments made by SVP and its managed funds clearly demonstrate that Entegra will not be under SVP's control and, therefore, the proposed acquisition of up to 40 percent of the equity in MACH Gen by Sellers does not raise any horizontal competitive issues.

33. Applicants' deficiency response states that SVP may seek representation on MACH Gen's Board of Directors in order to vote on issues of strategic importance to its investments, such as the sale of assets, refinancing, disposal of assets, approval of budgets, initiation of certain bankruptcy events, and general risk management guidelines. Once risk management guidelines are adopted and contracts approved, the day-to-day operations of the MACH Gen Project Companies will be handled by a management committee selected by MACH Gen, not by the Board members. Thus, any Board member nominated by MACH Gen will not determine whether or not a Project Company

is dispatched on any day.¹⁷ However, to assure the Commission that SVP funds will act consistently with the 40 percent limit on equity holding in MACH Gen, SVP further commits that, absent Commission approval, it will: (a) not nominate candidates for more than three of the seven seats on the MACH Gen Board of Directors, and (b) not nominate a candidate for more than one seat on the risk management committee. Therefore, according to Applicants, SVP, acting alone on the Board of Directors, will not be able to force action by the MACH Gen Board of Directors.

b. Commission Determination

34. Applicants' market power analysis identifies the APS/SRP balancing authority area as the relevant geographic market where SVP has overlapping sales. SVP has ownership interests in MACH Gen's New Harquahala 1,050 MW facility and Entegra's Gila River 2,200 MW facility located in the APS/SRP balancing authority area.¹⁸ The combined capacity of Gila River and New Harquahala could create issues under the Commission's Appendix A analysis for section 203 proceedings.¹⁹ SVP does not perform a full Appendix A analysis. However, based on the data provided by SVP, a combination of Gila River and New Harquahala would not pass the Competitive Analysis Screen, as combining their 2740 MWs in the APS/SRP combined areas would significantly increase market concentration in all seasons. SVP also acknowledges that on a *pro forma* basis, using the market power analysis submitted by Entegra in Docket No. ER09-838-000,²⁰ a combination of Gila River and New Harquahala would not pass the Wholesale Market Share Screen in the Commission's market-based rate analysis, as their combined market share in the APS/SRP combined areas would exceed 20 percent in all seasons.²¹ Therefore, Applicants request that Entegra and MACH Gen be deemed to not be under common control so that market power analysis will not be necessary or relevant and Entegra and MACH Gen not be treated as affiliates. Applicants state that SVP does not have overlapping ownership interests in power plants in any other balancing authority area.

¹⁷ Response to Deficiency Letter at 14.

¹⁸ *Pinnacle West Capital Corp.*, 120 FERC ¶ 61,153 (2007).

¹⁹ Application at 13.

²⁰ SVP uses data submitted by Entegra in its "Request for Acceptance of Initial Market-Based Rate Tariff, Waivers and Blanket Authority Under Section 205 of the FPA" in Docket No. ER09-838-000 for the Gila River Project's market power analysis.

²¹ Response to Deficiency Letter at 10.

35. We find that SVP's acquisition of up to 40 percent of MACH Gen's equity interests and SVP's ability to nominate individuals to MACH Gen's Board of Directors is evidence that SVP would have the ability to take action to control MACH Gen.

36. Based on the analysis provided by Applicants, the Proposed Transaction raises horizontal market power concerns in the relevant market, therefore, we will authorize the Proposed Transaction subject to certain conditions, which are designed to guard against the harm to competition that would otherwise result from SVP's proposed acquisition of up to 40 percent of the equity interests in MACH Gen in light of its existing holdings in Entegra. We condition approval of the Proposed Transaction on the restrictions set forth below governing SVP's dealings with Entegra and with MACH Gen. We find that, as conditioned, the Proposed Transaction will have no adverse effect on competition in terms of horizontal market power because it will preclude SVP's control of Entegra's generating assets, and therefore will not result in the consolidation of generation assets that would increase concentration in any relevant geographic market.

37. Therefore, we accept SVP's commitments and interpret them as the following conditions to our approval of the Proposed Transaction:

1. Funds managed by SVP will take no action that directly or indirectly exerts decision-making over the sale of electric energy by the Entegra Project Companies, including any discretion as to how or when power generated by such companies will be sold.
2. Absent prior authorization from the Commission, SVP will not increase its holdings in Entegra above the 17.18 percent it held on February 4, 2009.
3. SVP will not seek or hold representation on Entegra's Board of Directors or on the Board of Directors of the Entegra Project Companies.
4. SVP will be able to represent that it has not acquired the shares of Entegra with any purpose of, or with the effect of, changing or influencing the control of the Entegra Project Companies.
5. SVP will not circumvent these commitments by acting in concert with other holders of Entegra equity.²²

²² SVP would be allowed to consult with other Entegra equity holders with respect to certain matters that are subject to voting, such as asset sales or board elections, but it could take no actions that determine how the Entegra Project Companies sell power.

6. SVP will not provide to Entegra any non-public information on the operations and plans of the MACH Gen Project Companies and it will not provide to MACH Gen any non-public information on the operations and plans of the Entegra Project Companies. In particular, SVP will not provide any information on: (a) planned maintenance windows, (b) outages, (c) marketing strategies, (d) contracts, (e) volumes, (f) prices, or (g) other operational data.²³
 7. These conditions remain in place until such time, if any, as SVP's holdings in Entegra are reduced to, and remain, below 10 percent.
 8. SVP shall report to the Commission, no later than 45 days after the end of each calendar quarter: (a) the level of SVP holdings in MACH Gen for the three-year period for which authorization to acquire MACH Gen interests is effective, and (b) its continued compliance with the conditions proposed herein for as long as SVP funds hold 10 percent or more of the interest in Entegra.
38. We will require SVP to file with the Commission, no later than 45 days after the end of each calendar quarter, a report certifying that SVP is complying with each of the commitments stated above. The report must be verified by a duly authorized corporate official in accordance with the provisions on subscription and verification found in 18 C.F.R. § 385.2005 (2008).
39. In addition, we will also require SVP to file with the Commission, no later than 45 days after the end of each quarter, a report listing its holdings of the outstanding shares of MACH Gen, stated in terms of the number of shares held as a percentage of the outstanding shares.
40. With regard to Entegra's request for clarification that consummation of the Proposed Transaction will not deem Entegra to be affiliated with any entity owned by MACH Gen that owns or controls generation facilities or inputs to electric power production in the relevant market, we find that, because our approval of the Proposed Transaction is conditioned on our acceptance of the additional commitments made by SVP to prevent SVP's ability to control Entegra's generating assets, the Proposed Transaction will not result in a consolidation of generation assets that would increase concentration in any relevant market. Further, because of the conditions we impose on SVP with regard to its holdings of Entegra, the Proposed Transaction does not affect the

²³ The Commission interprets this condition to mean that SVP will not take such actions as enumerated and will also have documented procedures in place to prevent such information sharing.

circumstances the Commission relied upon when granting the Entegra Project Companies market-based rate authority.²⁴

2. Effect on Competition – Vertical Market Power

a. Applicants' Analysis

41. With respect to vertical market power concerns, Applicants state that neither they nor their affiliates own or control electric transmission facilities in the relevant markets other than discrete and limited facilities necessary to interconnect generating facilities to the transmission grid. To the extent that funds under the management of SVP own interests in fuel resources, fuel transportation system, and other inputs into electricity products, Applicants state that such interests are *de minimis*, and they do not have ownership or operational control of these facilities. As such, Applicants conclude that there is no need to submit a vertical competitive screen analysis in connection with the Proposed Transaction.

b. Commission Determination

42. Based on the facts presented, we agree that the Proposed Transaction does not raise any vertical market power concerns. The limited transmission facilities involved in the Proposed Transaction, Applicants' lack of control over fuel resources, and the lack of operational control of these facilities, demonstrate that the Proposed Transaction will not result in the Applicants' ability to exert vertical market power in wholesale power markets.

3. Effect on Rates

a. Applicants' Analysis

43. Applicants state that the Proposed Transaction will not have any adverse effect on rates because all sales of electric energy from the Project Companies will continue at market-based rates previously authorized by the Commission. In addition, Applicants state that they do not have any transmission customers whose rates could be affected by the Proposed Transaction.

b. Commission Determination

44. We agree that the Proposed Transaction will not have an adverse effect on rates as Applicants will continue to make sales at market-based rates.²⁵ We also note that no

²⁴ See *Entegra*, 125 FERC ¶ 61,143 at P 44.

²⁵ See *Union Electric Co. d/b/a Ameren UE*, 114 FERC ¶ 61,255, at P 45 (2006).

customer has argued that consummation of the Proposed Transaction would have an adverse effect on rates.

4. Effect on Regulation

a. Applicants' Analysis

45. With respect to regulation, Applicants state that the Proposed Transaction will not diminish the Commission's regulatory authority because each of the Project Companies will remain a public utility subject to the jurisdiction of the Commission. Applicants assert that the transaction also will not result in a merger of public utilities and, because each of the Project Companies is an exempt wholesale generator which makes sales only at wholesale and not subject to state commission regulation, the Proposed Transaction will not have any adverse effect on state commission regulation.

b. Commission Determination

46. Based on the facts presented, we find that the Proposed Transaction will not adversely effect regulation because each of the Project Companies remains subject to the Commission's jurisdiction following the Proposed Transaction. We note that no state commission has intervened in this proceeding.

5. Cross-Subsidization

a. Applicants' Analysis

47. Applicants assert that the Proposed Transaction will not result in the cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company. Applicants further state that the Proposed Transaction will not result in, now or in the future: (1) any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) any 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) any new pledge or encumbrance of assets of 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; and (4) any new affiliate contract 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. In addition to providing the four specific showings described in Order No. 669,²⁶ Applicants verify that, based on the facts and circumstances known to them that are reasonably foreseeable, the Proposed Transaction will not result in, at the time of the Proposed Transaction or in the future, any form of cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company.

b. Commission Determination

49. Based on the facts presented, we find that the Proposed Transaction will not result in cross-subsidization, or the pledge or encumbrance of utility assets for the benefit of an associate company as the Proposed Transaction does not involve a public utility with franchised customers. We note that no party has argued otherwise.

The Commission orders:

(A) We hereby grant authorization under section 203(a)(1) for the disposition of up to 40 percent of the equity interests in MACH Gen, subject to 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) SVP will comply with the commitments as interpreted and conditioned by the Commission in the body of this order.

(F) SVP must notify the Commission, within 15 days of the issuance of this order, whether it accepts each of the conditions stated in the body of this order.

(G) SVP must file with the Commission, for informational purposes, within 45 days after the end of each calendar quarter, a report certifying that SVP is in compliance with each of the conditions stated in the body of this order, and such report

²⁶ Order No. 669, FERC Stats. & Regs. ¶ 31,200.

must be verified by a duly authorized corporate official under 18 C.F.R. § 385.2005 (2008).

(H) Applicants shall make the appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction.

(I) SVP shall file with the Commission, on a quarterly basis, within 45 days of the end of the quarter, a quarterly report listing their holdings of the outstanding shares of Entegra, stated in terms of the number of shares held as a percentage of the outstanding shares.

(J) Applicants are subject to audit to determine whether they are in compliance with the representations, conditions and requirements based upon which the authorizations are granted and with Commission Rules, Regulations and Policies. In the event of a violation, the Commission may take action within the scope of its oversight and enforcement authority.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.