

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

EIF Berkshire Holdings, LLC  
Berkshire Power Company, LLC

Docket No. EC06-150-000

ORDER AUTHORIZING DISPOSITION OF  
JURISDICTIONAL FACILITIES

(Issued September 21, 2006)

1. On August 8, 2006, EIF Berkshire Holdings, LLC (EIF Berkshire) and Berkshire Power Company, LLC (Berkshire Power) (collectively, Applicants) filed an application under section 203 of the Federal Power Act (FPA),<sup>1</sup> requesting Commission authorization for an acquisition and disposition of the ownership interest in Berkshire Power (transaction). The Commission has reviewed the transaction under the Commission's Merger Policy Statement.<sup>2</sup> The Commission finds that the transaction is consistent with

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

<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 (1996), FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC ¶ 61,321 (1997) (*Merger Policy Statement*); see also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,983 (2000), FERC Stats. & Regs., Regulations Preambles July 1996-Dec. 2000 ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001); see also *Transactions Subject to Federal Power Act Section 203*, Order No. 669, 71 Fed. Reg. 1348 (2006), FERC Stats. & Regs. ¶ 31,200 (2006), *order on reh'g*, Order No. 669-A, 71 Fed. Reg. 28,422 (2006), FERC Stats. & Regs. ¶ 31,214 (2006), *order on reh'g*, Order No. 669-B, 71 Fed. Reg. 42,579 (July 27, 2006) (to be codified at 18 C.F.R. pt. 33).

the public interest, will not have an adverse effect on competition, rates or regulation, and 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.

## **I. Background**

### **A. Description of the Parties**

2. Berkshire Power is a Massachusetts limited liability company that owns and operates a 245 MW natural-gas fired, combined-cycle generating facility in Agawan, Massachusetts (the Facility). The Facility is located in the transmission grid controlled by ISO-New England, Inc. (ISO-NE), and Berkshire Power has entered into a cost-of-service agreement with ISO-NE (RMR Agreement).
3. EIF Berkshire is a limited liability company and was created for the sole purpose of owning Berkshire Power. It will be jointly owned by USPF II, USPF II-IF, and John Hancock. At this time, it does not have any energy related assets.
4. USPF II and USPF II-IF, limited partnerships, are private equity investment funds that invest in power projects in the United States. They are managed by Energy Investment Funds Group, LLC (EIF). Neither USPF II nor USPF II-IF directly own or control any retail electric facilities or distribution services or have any captive customers. The interests of USPF II are in generation facilities, most of which are Qualifying Facilities (QFs) or Exempt Wholesale Generators. USPF II-IF's interests are in generation facilities, most of which are QFs. Neither EIF, USPF II, nor USPF II-IF is primarily engaged in the business as a franchised public utility. EIF does hold passive non-managerial interests in independent transmission companies that do not have retail franchises.
5. John Hancock is a wholly owned subsidiary of John Hancock Financial Services, which in turn is a wholly owned subsidiary of Manulife Financial Corporation, a publicly traded Canadian company. John Hancock only has passive investments within the ISO-NE control area and does not directly own or control any retail facilities or distribution services or have any captive customers.
6. Berkshire Capitol I and Berkshire Capitol II are limited liability companies that respectively own a 1.6 percent and a 32 percent interest in Berkshire Power. Project Finance Fund III owns 76 percent of the equity interest in Berkshire Capital I and Berkshire Capitol II. It invests in power projects in the United States, but is not a franchised public utility.
7. El Paso Berkshire, a limited liability company, was created to own an interest in Berkshire Power. It is a subsidiary of El Paso Corporation, which is a publicly-held

corporation, and it holds ownership interests in a number of energy-related subsidiaries that engage in power marketing, interstate and interstate transportation and storage of natural gas, natural gas gathering, processing and marketing, and the worldwide development and ownership of energy projects. El Paso Berkshire currently owns a 56.4 percent interest in Berkshire Power.

8. PDC Berkshire, a limited liability company, was created to develop the Facility and own an interest in Berkshire Power. PDC Berkshire is 99 percent owned by Power Development Company, a limited liability company that is primarily engaged in the development of power projects. PDC Berkshire currently owns a 10 percent interest in Berkshire Power.

### **B. The Proposed Transaction**

9. Applicants request authorization for EIF Berkshire to acquire all of the equity interests in Berkshire Power from El Paso Berkshire, Berkshire Capital I, Berkshire Capital II, and PDC Berkshire, indirectly acquiring the Facility. Applicants state that the acquisition is part of the financial restructuring of Berkshire Power.

## **II. Notice and Responsive Pleadings**

10. Notice of the filing was published in the *Federal Register*, 71 Fed. Reg. 47,197 (2006), with comments, protests, or interventions due on or before August 29, 2006. The Massachusetts Municipal Wholesale Electric Company, South Hadley Electric Light Department, and Chicopee Municipal Lighting Plant (collectively, Public Systems) filed a timely motion to intervene and protest. On August 31, 2006, Applicants filed an answer to Public System's protest. On September 15, 2006, Applicants filed a supplemental answer, and Public Systems sought leave to answer and answered on September 19, 2006.

## **III. Discussion**

### **A. Procedural Matters**

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motion to intervene serves to make the entities that filed it parties to this proceeding.

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedures, 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 Applicants' answer and supplemental answer because they have provided information that assisted us in our decision-making process.

However, we are not persuaded to accept Public Systems' answer and will, therefore, reject it.

**B. Preliminary Issues**

13. Public Systems states that Applicants did not give interested parties the requisite notice and opportunity to review the terms and conditions of the transaction because Applicants sought privileged treatment for Application Exhibit I.<sup>3</sup> Public Systems argues that Applicants' proposal for a protective order prevents interested parties from evaluating the material terms and conditions of the transaction to assess whether the transaction will be in the public interest. Finally, Public Systems contends that Applicants' description of Exhibit I as a "draft of a term sheet" raises significant questions regarding whether the Application is premature.

14. In response, Applicants state that counsel for the Applicants agreed to provide the confidential information to Public Systems' counsel upon receipt of an executed Non-Disclosure Certificate, without waiting for the Commission to issue a Protective Order. Applicants assert that the confidential term sheet does not add materially to the substantive information necessary for the Commission's review and approval of the Application, and that there is no reason to extend the comment period and delay the issuance of the order.

15. Applicants' supplemental answer states that counsel for Public Systems received the confidential information on September 1, 2006. Applicants ask the Commission to act expeditiously to authorize the proposed transaction without condition on or before September 21, 2006. They explain that Berkshire Power is in default under its loan agreements and has received a notice of acceleration of its debt from its lenders and state that action on the Application by that date will allow the transaction to close in September.<sup>4</sup>

16. Public Systems has received the information sought with ample time before this Commission's action on the filing, so its concerns about adequate notice and opportunity for hearing have been satisfied.

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<sup>3</sup> Exhibit I consists of a draft term sheet describing the transaction.

<sup>4</sup> Applicants note that the lenders filed their own application for section 203 authorization on September 13, 2006, to assume control of the Facility as a protective measure in the event that there is any delay in the financial restructuring. They state that the lenders' filing will be moot if the Commission grants this Application.

17. Regarding the adequacy of the data Applicants submitted in Exhibit I, Order No. 642 provides that, if contracts have not been finalized at the time of filing,

applicants may submit a draft contract, a term sheet, a letter of intent or a memorandum of understanding to satisfy the . . . filing requirement. However, in such instances, we will require that in the transmittal letter accompanying the application, counsel for applicants certify that, to the best of their knowledge, the final agreements will reflect the terms and conditions contained in the draft agreements in all material respects.<sup>[5]</sup>

Applicants' transmittal letter states concerning Exhibit I, "[t]o the best of Applicants' knowledge, this documents [sic] contains all the material terms and conditions under which the transaction will occur."<sup>6</sup> We disagree that Order No. 642 requires submission of a final, as opposed to a draft, term sheet, as Public Systems argue. Applicants' statement satisfies the Commission's filing requirements. Nevertheless, we approve this Application, as discussed below, with the understanding that the executed term sheet will not depart substantively from the version that was filed with the Application.

### **C. Standard of Review**

18. 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."<sup>7</sup> 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.<sup>8</sup> In addition, EPAAct 2005 amended section 203 to specifically require that the Commission also determine that the disposition 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.<sup>9</sup> As discussed below, we will approve the proposed disposition of jurisdictional facilities because it meets these statutory standards.

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<sup>5</sup> Order No. 642, Stats. & Regs. ¶ 31,111 at 31,876-77.

<sup>6</sup> Application at 11.

<sup>7</sup> 16 U.S.C. § 824b (2000).

<sup>8</sup> *See supra* note 2.

<sup>9</sup> EPAAct 2005 § 1289, 119 Stat. 982-83, to be codified at 16 U.S.C. § 824b(a)(4).

### 1. Effect on Competition

19. Applicants state that the proposed transaction will not have an adverse effect on competition. Applicants note that neither EIF Berkshire nor its upstream owners, either horizontal or vertical, own any generation or transmission facilities in the ISO-NE control area. They argue that the acquisition does not result in any new combination of generating assets that could have any effect on the competitive situation in any relevant geographic or product market. Applicants further state that neither EIF Berkshire, USPF II, USPF II-IF, nor John Hancock can erect entry barriers.

20. We agree with Applicants' analysis of the horizontal and vertical market power effects of the proposed transaction. We note further that no party in this proceeding claims that the proposed transaction will have an adverse effect on competition. Accordingly, we find that the proposed transaction will not adversely affect competition.

### 2. Effect on Rates

21. Applicants state that the proposed transaction will not have an adverse effect on rates because the Facility does not have captive wholesale or retail ratepayers. They note that the Facility is required to sell its output into ISO-NE markets pursuant to the RMR Agreement. Furthermore, Applicants argue that there will be no effect on transmission rates, since none of the parties to the transaction provide transmission service.

22. As noted in the Commission's Merger Policy Statement,<sup>10</sup> the Commission primarily examines a transaction's effect on rates in order to protect wholesale power and transmission service customers. We note that nothing in the application indicates that rates to customers will increase as a result of the proposed transaction, and no customer argues otherwise. For this reason, we are satisfied that the proposed transaction will not adversely affect rates.

### 3. Effect on Regulation

23. Applicants state that the transaction will not affect the manner or extent to which the Commission, any state, or any federal agency may regulate Berkshire Power, whose status will not change as a result of the transaction.

24. We find that neither state nor federal regulation would be impaired. We note that no party alleges that regulation would be impaired by the proposed transaction.

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<sup>10</sup> *Merger Policy Statement*, FERC Stats. & Regs. ¶ 31,044 at 30,126.

#### 4. Cross-subsidization

25. Applicants state that the proposed transaction will not result in the cross-subsidization of a non-utility associate company or in the pledge or encumbrance of utility assets for the benefit of an associate company. Applicants confirm that the transaction will not result in: (1) transfers 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) new issuances 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 service over jurisdictional transmission facilities, for the benefit of an associate company; or (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.

26. We find that Applicants have provided adequate assurance that the transaction will not result in cross-subsidization.

#### The Commission orders:

(1) The proposed disposition of jurisdictional facilities is hereby approved, as discussed in the body of this order.

(2) 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.

(3) 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.

(4) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.