

125 FERC ¶ 61,267
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

LS Power Development, LLC
Luminus Management, LLC

Docket No. EC08-126-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued December 5, 2008)

1. On September 24, 2008, LS Power Development, LLC (LS Power) and Luminus Management, LLC (Luminus Management) (collectively, Applicants) filed an application under section 203 of the Federal Power Act (FPA)¹ requesting Commission authorization under FPA section 203(a)(1) to indirectly acquire, through their subsidiaries, up to 40 percent of the common stock of Calpine Corporation (Calpine) (Transaction).² The Commission has reviewed the Application under the Merger Policy Statement.³ As

¹ 16 U.S.C. § 824b (2006).

² The Commission previously approved Applicants' request to own, collectively, up to 20 percent of Calpine. *Calpine Corporation and Its Public Utility Subsidiaries, et al.*, 122 FERC ¶ 62,238 (2008) (Calpine Order).

³ See *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 *FPA Section 203 Supplemental Policy Statement*, 72 Fed. Reg. 42,277 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008). 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 No. 642-A, 94 FERC ¶ 61,289 (2001). See also *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).

discussed below, we will authorize the Transaction under section 203(a)(1), as we find that it is consistent with the public interest.

I. Background

A. Description of the Parties

1. LS Power and its Subsidiaries

2. LS Power is a holding company that indirectly owns 10 percent or greater voting interests in various exempt wholesale generators (EWGs) and qualifying facilities (QFs), and may hereafter seek to acquire additional interests in EWGs, QFs, and foreign utility companies.⁴ Applicants describe LS Power as the principal operating company of the LS Power Group, which consists of LS Power, LS Power Associates, L.P. (LSP Associates), and LS Power's controlled subsidiaries.

3. LS Power owns LSP Associates as a general partner along with various passive limited partner investors, and in that capacity develops, owns, and operates independent power projects in the United States.

4. LS Power, LSP Associates, and various passive limited partner investors own LS Power Partners, LP (LSP Partners I) and LS Power Partners II, LP (LSP Partners II). LSP Partners I is the general partner along with various passive limited partner investors of LS Power Equity Partners, L.P. (LSP Equity Partners) and LS Power Equity Partners PIE I, L.P. (LSP Equity PIE). Applicants state that LSP Partners II is the general partner along with various passive limited partner investors of LS Power Equity Partners II, L.P. (LSP Equity Partners II) and LS Power Equity Partners PIE II, L.P. (LSP Equity PIE II).

5. LSP Partners I, LSP Equity Partners, and LSP Equity PIE (collectively, Fund I) own directly and indirectly, LSP Cal Holdings I, LLC (Cal I). They state that LSP Partners II, LSP Equity Partners II, and LSP Equity PIE II (collectively, Fund II) own directly and indirectly, LSP Cal Holdings II, LLC (Cal II). Applicants state that it is through Luminus, Cal I and Cal II that the Applicants will acquire the shares of Calpine Corporation at issue in this filing.

⁴ EWG status is granted under the Public Utility Holding Company Act of 2005, enacted by the Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1261 *et seq.*, 119 Stat. 594 (2005); 18 C.F.R. §§ 292.201 *et seq.* (2008). QF status is granted under the Public Utility Regulatory Policies Act, 16 U.S.C. § 824a-3 (2006).

2. Luminus Management and its Subsidiaries

6. Applicants state that Luminus Management is owned by certain trusts. They describe Luminus Management as the principal operating company of both Luminus Asset Partners L.P. (Luminus Asset) and Luminus Energy Partners Master Fund, LTD (LEPM) (collectively, Luminus). Applicants state that Luminus Management, and not the passive limited partner investors, has ultimate control over the day-to-day activities of Luminus.

7. Applicants state that Luminus Asset is owned directly and indirectly by Vega Energy GP, LLC, and by various passive limited partner investors. Applicants state that LEPM is owned directly and indirectly by Luminus Energy Partners QP, L.P. and Luminus Energy Partners, LTD. As mentioned above, Luminus, Cal I, and Cal II will acquire the requested interest in Calpine.

3. Calpine

8. Applicants state that Calpine is a Delaware corporation engaged through subsidiaries in the development, financing, acquisition, ownership, and operation of independent power production facilities and the wholesale marketing of electricity in the United States and abroad. They state that according to recent Securities and Exchange Commission (SEC) filings, Calpine and its subsidiaries own or control nearly 24,000 MW of capacity, through 60 natural gas-fired power plants capable of producing approximately 23,000 megawatts (MW) and 17 geothermal facilities in the Geysers region of northern California capable of producing 725 MW.⁵ Applicants state that Calpine's power marketing and generation subsidiaries include public utilities, QFs and entities that operate exclusively within the Electric Reliability Council of Texas (ERCOT) region.

9. Applicants further state that LS Power and Luminus Management collectively own less than 20 percent of the common stock of Calpine and have no control or responsibility for the day-to-day management of Calpine or its subsidiaries. Applicants state that in spite of their position that they do not individually or collectively control Calpine (and are not, therefore, affiliates of LS Power or Luminus Management), Applicants, out of an abundance of caution and in order to ensure timely approval, attribute for the purposes of this application 100 percent of Calpine's generation assets to Applicants.

⁵ See *Calpine Corporation and Its Public Utility Subsidiaries*, Docket No. EC08-39-000, pp. 3-15 (Jan. 22, 2008) (Calpine Application) (the Calpine Application describes Calpine's marketing and generation subsidiaries).

4. Indirect Interests in Other Generation

10. Applicants state that LSP Partners I, LSP Associates, LSP Equity Partners, LSP Equity PIE, and LSP Gen Investors, L.P. (LSP Dynegy Shareholders) own all of the Class B voting securities of Dynegy Inc. (Dynegy); this is approximately 40 percent of the outstanding voting securities of Dynegy (LSP Dynegy Interest). Applicants also state that Dynegy, through various subsidiaries, provides electricity to wholesale customers throughout the United States, and owns power plants totaling more than 19,000 MW of generating capacity.

11. Applicants state that as part of the LSP Dynegy Shareholders' ownership interest in Dynegy, the LSP Dynegy Shareholders may elect up to three directors out of 11 members of Dynegy's Board of Directors. Applicants explain that the LSP Dynegy Shareholders may not vote for or seek removal of the remaining eight directors. Applicants further state that LSP Dynegy Shareholders may not act alone to remove Dynegy's management.

12. Applicants state that Dynegy's management, not any of the LSP Dynegy Shareholders, has ultimate control over the day-to-day activities of Dynegy's generation entities. They state that the LSP Dynegy Shareholders do not have a role in running Dynegy's business portfolios or its day-to-day operations, and therefore do not have any control, either directly or indirectly, over the day-to-day operations of its subsidiaries, including any generation project company directly or indirectly owned by any subsidiaries. Applicants state that it is the position of LS Power and Dynegy that the LSP Dynegy Shareholders do not individually or collectively control Dynegy. Accordingly, Applicants state that Dynegy and its subsidiaries are not affiliates of Applicants. Nevertheless, Applicants state that they submit this application out of abundance of caution and that to ensure timely approval, and solely for such purpose, they have attributed Dynegy's generation assets to LS Power in this application.

13. Applicants state that they have asked for Commission approval to acquire up to 20 percent of the common stock of TransAlta Corporation (TransAlta).⁶ Applicants state that TransAlta is a power generation and wholesale power marketing company incorporated under the laws of Canada, with two wholly-owned subsidiaries, TransAlta Utilities Corporation and TransAlta Energy Corporation (TransAlta Energy), both of which are incorporated under the laws of Canada. Applicants state that TransAlta operates a portfolio of generation assets in Canada, the United States, Mexico, and

⁶ Applicants received approval for the transaction in *LS Power Development, LLC*, 125 FERC ¶ 61,146 (2008).

Australia. They state that TransAlta Energy, through its subsidiaries, operates electric energy generation in the United States.

14. Applicants state that, at the time of this Application, Applicants and their affiliates owned or controlled less than 10 percent of the common stock of TransAlta, and that Applicants have no control, directly or indirectly, over the day-to-day activities of TransAlta's generation entities, which are under the control of TransAlta's management. Applicants state that TransAlta and its subsidiaries are not, therefore, affiliates of LS Power or Luminus Management. Nonetheless, Applicants state that they have filed this application out of an abundance of caution and that in order to ensure timely approval of this application, and solely for that purpose, have attributed 100 percent of TransAlta's assets to LS Power in this application. Applicants submit that because the assumptions (e.g., attribution of 100 percent of TransAlta and Calpine assets to LS Power) and analysis in the TransAlta transaction and this Transaction are identical, this application should not affect the review of the TransAlta application, or vice versa.

B. Description of the Transaction

15. Applicants describe the Transaction as the acquisition of up to 40 percent of the common stock of Calpine through Luminus, Cal I, and Cal II. Applicants do not believe that the Transaction requires section 203 approval, but note that the Commission has stated that public utilities that are planning transactions that may be jurisdictional should come to the Commission for guidance before consummating those transactions.⁷ Applicants state that they believe they may use the blanket authorization granted in section 33.1(c)(8)⁸ for the Transaction, but out of an abundance of caution, they seek authorization under section 203(a)(1) to acquire up to 40 percent of Calpine's common stock.

16. Applicants state that the Transaction is consistent with the public interest because it 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. Applicants also state that they will not be able to control decision-making over Calpine's sales of electric energy as a result of the Transaction.

⁷ *PDI Stoneman, Inc.*, 104 FERC ¶ 61,270, at P 2 (2003).

⁸ Section 33.1(c)(8) provides that holding companies that are holding companies only by virtue of holding EWG, QF, or Foreign Utility Company (FUCO) assets have blanket authority under section 203(a)(2) "to acquire the securities of additional EWGs, QFs, and FUCOs." 18 C.F.R. § 33.1(c)(8) (2008).

II. Notice of Filing and Responsive Pleadings

17. Notice of Applicants' filing was published in the *Federal Register*, 73 Fed. Reg. 64,610 (2008), with interventions and protests due on or before October 16, 2008. Calpine filed a timely motion to intervene and comments. Dynegy filed a motion to intervene out-of-time.

18. Calpine does not oppose the Transaction, but reiterates its position from the TransAlta section 203 proceeding⁹ that Applicants' assumption about control made to facilitate expeditious processing of a section 203 filing should not be deemed an admission that such control actually exists. Calpine asks the Commission to make an affirmative finding that the Transaction will not adversely affect Calpine's market-based rate authorizations.

III. Discussion

A. Procedural Matters

19. 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 serves to make the entity that filed it a party to this proceeding. We grant the motion to intervene out-of-time filed by Dynegy, as this late intervention will not prejudice or burden any of the parties to the proceeding.

B. Analysis

1. Standard of Review under Section 203

20. Section 203(a)(4) of the FPA requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest.¹⁰ Under the Commission's regulations, its analysis 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.¹¹ 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

⁹ See Motion To Intervene And Conditional Protest Of Calpine Corporation, Docket No. EC08-67-000 (April 30, 2008).

¹⁰ 16 U.S.C. § 824b (2006).

¹¹ See Order No. 592, FERC Stats. & Regs. ¶ 31,044, at 30,111.

benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.”¹² The Commission’s regulations establish verification and informational requirements for applicants that seek determinations that a transaction will not result in inappropriate cross-subsidization or an inappropriate pledge or encumbrance of utility assets.¹³

2. Effect on Competition

a. Horizontal Market Power

21. Applicants submitted an affidavit as Attachment 1 to their application. The affidavit concludes that even assuming *arguendo* a worst-case scenario – which the Transaction will result in LS Power acquiring control over Calpine, and that control over Dynegy’s generation assets and TransAlta’s generation assets should be attributed to LS Power – the Transaction poses no horizontal market power concerns.¹⁴ Applicants state that the Commission previously approved Applicants’ request to own, collectively, up to 20 percent of Calpine’s common stock.¹⁵ Applicants argue that the Transaction does not require any detailed analysis above and beyond that accepted by the Commission in the Calpine Order because Applicants conservatively assumed (hypothetically) that in acquiring 20 percent of Calpine’s common stock, LS Power and Luminus were, in effect, acquiring control of Calpine. Applicants argue that any increase in their investment in Calpine has, in effect, already been taken into account in the previous analysis. Applicants conclude that since the prior analysis assumed a transaction that resulted in their being attributed 100 percent of Calpine’s generation, there is no material change resulting from this Transaction.¹⁶

¹² 16 U.S.C. § 824b(a)(4) (2006), *amended by* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982-83 (2005).

¹³ 18 C.F.R. § 33.2 (2008).

¹⁴ Application at 12.

¹⁵ Calpine Order, 122 FERC ¶ 62,238 at 64,496. Applicants state that they currently own, directly or indirectly, approximately 15.9 percent of the common stock in Calpine (Application at 1).

¹⁶ Application Attachment 1 at 3. Applicants state that to the best of their knowledge, there have been no material changes in the market facts on which they relied in conducting the analysis for the Calpine Order, other than LS Power and Luminus receiving approval to acquire up to 20 percent of the common stock of TransAlta

(continued)

22. Applicants state that after the Commission approved the acquisition of Calpine securities, LS Power and Luminus filed an application seeking approval to acquire up to 20 percent of the common stock of TransAlta. In seeking such approval, Applicants again assumed for purposes of the market power acquisition that they were affiliated with Calpine (i.e., they were under common control) and that the acquisition of common stock in TransAlta put TransAlta's generation under common control with LS Power, Calpine, Harbinger, and Dynegy. Applicants state that their analysis in the TransAlta transaction shows that the affiliation of TransAlta with LS Power does not raise market power concerns because the horizontal effect of the addition of generation owned by TransAlta is *de minimis*. Applicants explain that TransAlta's and Applicants' generation overlaps in only the Bonneville Power Administration, the New York Independent System Operator, Inc., and the California Independent System Operator Corporation markets, and that these market overlaps are all *de minimis*. Applicants add that the analysis relevant to the proposed acquisition of TransAlta stock does not change as a result of this Application.¹⁷

23. With regard to Applicants' statement that they believe they may use the blanket authorization granted in section 33.1(c)(8) for the Transaction, as a preliminary matter, that blanket authorization grants authorization under section 203(a)(2) for LS Power to acquire shares in Calpine. The blanket authorization permits a person that is a holding company solely with respect to one or more EWGs, FUCOs, or QFs to acquire under FPA section 203(a)(2) "the securities of additional EWGs, FUCOs, or QFs." Because the blanket authorization permits the acquisition of securities of additional EWGs, FUCOs, or QFs, it also is reasonable to interpret it to permit a qualifying holding company to increase its investment in EWGs, FUCOs, or QFs whose securities it has already acquired.

24. Nevertheless, as the Commission stated in Order No. 669-B, even when the blanket authorization in 18 C.F.R. § 33.1(c)(8) applies to the holding company's acquisition under FPA section 203(a)(2), FPA section 203(a)(1) requires Commission approval if a transaction results in a change of control of an EWG that is a public utility owned by the holding company whose securities are being acquired.¹⁸ The Transaction

(TransAlta Order). Applicants state that there have been three other changes in Applicants' affiliated owned or controlled generation, but those other changes involve the sale of generation or the sale of output of generators, reducing the generation portfolio assumed to be under Applicants' common ownership. *Id.* at 4-5.

¹⁷ Application Attachment 1 at 3, 5-6.

¹⁸ Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 at P 44.

would result in the disposition of up to 40 percent of the common stock of Calpine. Because the disposition of 10 percent or more of voting interests could result in a change of control of a public utility, we will assert jurisdiction over the Transaction under section 203(a)(1).

25. Having found that the Transaction could result in a change in control over Calpine, we turn to whether there will be an adverse effect on competition in terms of horizontal market power as a result of the Transaction. Even if Applicants also control Dynegy and TransAlta, we find there would not be an adverse effect on competition. In making this finding, we rely on (1) Applicants' representation in this application that there have been no material changes in the market facts on which they relied in conducting the analysis we relied on in the Calpine Order, other than Applicants' acquisition of TransAlta stock, which we approved in the TransAlta Order; and (2) Applicants' market power analysis in the TransAlta proceeding, which showed that, even assuming that Applicants controlled TransAlta and that 100 percent of Dynegy's and Calpine's assets were attributed to LS Power, the combination of assets in that case produced changes in market concentration that increased the Herfindahl-Hirschman Index (HHI) by less than 50 points in all seasons/load conditions, indicating no failure of the Commission's Competitive Analysis Screen.¹⁹ Based on these representations, we find that the Transaction will not have an adverse effect on competition in terms of horizontal market power.

26. As noted above, Calpine argues that an assumption here that Calpine is controlled by LS Power may have adverse implications for Calpine's market-based rate authorization now, and/or their corporate authorization in a future section 203 proceeding. We appreciate these concerns, and in response we offer the following points. First, we note that the issue of what constitutes control for FPA section 203 and market-

¹⁹ The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are considered unconcentrated; markets in which the HHI is greater than or equal to 1,000 but less than 1,800 points are considered moderately concentrated; and markets where the HHI is greater than or equal to 1,800 points are considered highly concentrated. The Commission has adopted the Federal Trade Commission/Department of Justice Horizontal Merger Guidelines, which state that in a horizontal merger, an increase of less than 50 points, even in highly concentrated markets post-merger, are unlikely to have adverse competitive consequences and ordinarily require no further analysis. U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, 57 Fed. Reg. 41,552 (1992).

based rate purposes is the subject of a petition for guidance filed by the Electric Power Supply Association on September 2, 2008 in Docket No. PL09-3-000 (originally docketed as Docket No. EL08-87-000). This is an issue of significance to the industry that the Commission intends to address in Docket No. PL09-3-000. Second, we will relieve Calpine of its obligation to make a market-based rate change of status filing pertaining to the Transaction, pending the outcome of Docket No. PL09-3-000 or any other proceeding the Commission may initiate to address the issues raised in Docket No. PL09-3-000. By taking this approach, the Commission is able to process LS Power's application at this time without imposing an additional reporting burden on Calpine.

27. We accept Applicants' commitment noted above that they will not attempt to control Dynegy, TransAlta, or Calpine in the future.²⁰ In addition, we will require Applicants to file with the Commission, no later than 45 days after the end of each quarter, a report listing their holdings of the outstanding shares of Calpine, stated in terms of the number of shares held as a percentage of the outstanding shares.

b. Vertical Market Power

28. Applicants also contend that the Transaction presents no vertical market power concerns. They state that neither they nor their affiliates own or control any electric transmission facilities, except for facilities used to interconnect generating facilities with the transmission grid, or any inputs to electricity production in any relevant market that would allow them to erect barriers to entry by new generation in that market. Applicants maintain that, even assuming that the Transaction would result in Applicants acquiring control over Calpine, the Transaction presents no vertical market power concerns, and no vertical Appendix A analysis is required.²¹ Applicants state that the Commission confirmed this lack of vertical market power in its March 2008 order authorizing Applicants to acquire up to 20 percent of Calpine's common stock.²²

29. Based on the facts as presented in the application, we find that the Transaction does not raise vertical market power concerns.

²⁰ We note that Applicants reserved, in Amendment No. 12 to Schedule 13D recently filed with the SEC and in this proceeding, the right to submit a future offer to acquire part or all of TransAlta and presume that Applicants will make any appropriate filings under section 203 with this Commission for prior authorization in connection with such an offer.

²¹ Application at 13-14, citing 18 C.F.R. § 33.4(a)(2)(i) (2007).

²² Application at 14, citing Calpine Order, 122 FERC ¶ 62,238 at 64,496.

3. Effect on Rates

30. Applicants argue that the Transaction will not adversely affect rates because wholesale sales of electric energy, capacity and ancillary services will continue to be made at market-based rates or pursuant to the terms of other rate schedules on file with the Commission, and the Transaction will have no effect on the rates for such sales. They also state that none of the public utility subsidiaries of LS Power, Calpine, Dynegy, or TransAlta is a traditional utility with captive retail or wholesale customers or provides unbundled transmission service.²³

31. Applicants argue that they do not control the activities or operations of Calpine, Dynegy, or TransAlta, and thus they are not in a position to identify any cost-based rate schedules applicable to the utility subsidiaries of Calpine, Dynegy, or TransAlta. Nonetheless, Applicants commit that neither they nor their controlled subsidiaries will seek to recover any transaction-related costs through their cost-based wholesale sales or transmission service – if service should exist – for a period of five years after the Transaction is consummated, except to the extent that there are offsetting Transaction-related savings. Applicants submit that the Commission has approved this type of commitment in its Merger Policy Statement and in a number of subsequent cases.²⁴

32. Applicants state that given their non-controlling status with respect to the utility subsidiaries of Calpine, Dynegy, and TransAlta, Applicants are unable to make any commitments on behalf of such utilities with regard to the inclusion of Transaction-related costs in their rates. However, Applicants commit that if they (or any of their controlled affiliates) have the ability, or acquire the ability, to transfer or to “push down” any Transaction-related costs onto the books of entities (or affiliates of such entities) that Applicants do not control but in which they hold, or may hold, an investment position, neither Applicants nor their controlled affiliates will seek to do so for a period of five years after the Transaction is consummated. Applicants argue that this commitment accomplishes the same purposes as a hold harmless provision because it protects captive ratepayers from any adverse rate effects that could result from the Transaction or other actions within the control of the Applicants.²⁵

²³ Application at 14.

²⁴ *Id.*, citing *PNM Resources, Inc.*, 110 FERC ¶ 61,204 (2005) (approving a 5-year hold harmless commitment).

²⁵ Application at 15.

33. We accept Applicants' commitment to hold transmission and wholesale customers harmless from costs related to the Transaction. We note that nothing in the application indicates that rates to customers will increase as a result of the Transaction, and no customer argues otherwise. Therefore, we find that the Transaction will not have an adverse effect on rates

4. Effect on Regulation

34. Applicants state that the Transaction will not have any adverse effect on the effectiveness of federal or state regulation. Applicants maintain that the Transaction will not impair the ability of the Commission to regulate rates for wholesale sales or of state regulators to regulate retail sales.²⁶

35. We note that no party alleges that regulation would be impaired by the Transaction. Based on the facts presented in the application, we find that the Transaction will not have an adverse effect on federal or state regulation.

5. Cross-Subsidization or Pledge or Encumbrance of Utility Assets

36. Applicants contend that the Transaction raises no concerns with respect to cross-subsidization of a non-utility associate company or any pledge or encumbrance of utility assets for the benefit of an associate company. Applicants verify that based on known or reasonably foreseeable information, the Transaction will not result in, at the time of the transaction or in the future: (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) any 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) 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; or (4) any 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.²⁷

²⁶ *Id.*

²⁷ Application Exhibit M at 1-2.

37. Applicants state that the Transaction falls into one of the three classes of “safe harbor” transactions that the Commission recognizes are unlikely to present cross-subsidization concerns.²⁸ They contend that the Transaction does not involve a franchised public utility with captive customers. Applicants maintain that they are not, nor are they affiliated with, a franchised public utility with captive customers.

38. Based on the facts as presented in the application, we find that the Transaction will not result in cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company.

The Commission orders:

(A) We hereby grant authorization under section 203(a)(1) for the disposition of up to 40 percent of the outstanding voting shares of Calpine, as discussed in 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 cost, 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) If the Transaction results in changes in the status or the upstream ownership of Applicants’ affiliated qualifying facilities, if any, an appropriate filing for recertification pursuant to 18 C.F.R. § 292.207 (2008) shall be made.

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

(G) Applicants must inform the Commission of any change in circumstances that would reflect a departure from the facts the Commission relied upon in authorizing the Transaction.

(H) Applicants shall file with the Commission, for informational purposes, within 45 days of the end of the quarter, a quarterly report listing their holdings of the

²⁸ *Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 at P 16.

outstanding shares of Calpine stated in terms of the number of the shares held at the end of the quarter, and as a percentage of the outstanding shares.

(I) Applicants shall file with the Commission, for informational purposes, any filing they make at the SEC pertaining to Calpine on Schedule 13G or Schedule 13D and shall file these documents with the Commission at the same time they file them with the SEC. Any changes in the information provided on the initial Schedule 13G or 13D must be reflected in an annual amended filing due within 45 days of the end of each calendar year. Applicants shall file with the Commission any comment or deficiency letters received from the SEC that concerns Schedule 13G- or 13D-related compliance audits conducted by the SEC. Such filings shall be made in this docket or in appropriate sub-dockets of this docket.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.