

129 FERC ¶ 61,039
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

LS Power Development, LLC
Dynergy Inc.
Dynergy Midwest Generation, Inc.
Bluegrass Generation Company, L.L.C.
Bridgeport Energy, LLC
Dynergy Arlington Valley, LLC
Griffith Energy, LLC
Renaissance Power, L.L.C.
Riverside Generating Company, L.L.C.
Rocky Road Power, LLC
Tilton Energy LLC

Docket No. EC09-103-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES AND
OTHER RELATED TRANSACTIONS UNDER SECTION 203 OF THE FEDERAL
POWER ACT

(Issued October 14, 2009)

1. On August 18, 2009, LS Power Development, LLC (LSP Development), Dynergy Inc. (Dynergy), Dynergy Midwest Generation, Inc. (Dynergy Midwest), Bluegrass Generation Company, L.L.C. (Bluegrass), Bridgeport Energy, LLC (Bridgeport), Dynergy Arlington Valley, LLC (Arlington Valley), Griffith Energy, LLC (Griffith), Renaissance Power, L.L.C. (Renaissance), Riverside Generating Company, L.L.C. (Riverside), Rocky Road Power, LLC (Rocky Road) (collectively, Applicants) filed an application¹ for authorization under section 203(a)(1) of the Federal Power Act (FPA) for a proposed transaction (Proposed Transaction) whereby: (1) Tilton Energy LLC (Tilton) will acquire an approximately 188 MW generating facility in Tilton, Illinois (Tilton Facility) from

¹ Applicants made a supplemental filing to their application on September 21, 2009.

Dynegy Midwest; (2) certain affiliates of LSP Development (LSP Buyers)² will indirectly acquire, through certain acquisition vehicles, all of the membership interests of the Project Companies,³ as well as other assets, from Dynegy Midwest and certain other wholly-owned subsidiaries of Dynegy (Dynegy Sellers);⁴ and (3) LSP Buyers will pay to Dynegy Sellers cash and 245 million shares of Dynegy's Class B Common Stock (Class B Shares) currently held by LSP Buyers. We will grant Applicants' request, as discussed below.

I. Background

A. Description of Applicants

1. LSP Development

2. LSP Development is a Delaware limited liability company wholly owned by certain members of the Segal family and associated entities. LSP Development is the general partner of LSP Associates, and the principal operating company (the employer of the majority of the staff) of the affiliated group of companies referred to collectively as the LS Power Group, which consists of LSP Development, LSP Associates, and their respective controlled subsidiaries. Applicants state that LS Power Group develops, owns, and operates independent power projects in the United States. Additionally, Applicants state that the LS Power Group indirectly owns several public utilities, as defined by section 201 of the FPA, including: (1) Las Vegas Power Company, LLC, an exempt wholesale generator (EWG) that owns and operates an approximately 540 MW natural gas-fired generating facility (the Apex Project) in Clark County, Nevada; (2) West Georgia Generating Company, L.L.C., an EWG that owns and operates an approximately

² The LSP Buyers include: LSP Associates, L.P. (LSP Associates), LSP Power Partners, L.P. (LSP Partners), LS Power Equity Partners, L.P. (LSP Equity Partners), LS Power Equity Partners PIE I, L.P. (LSP Equity PIE), LSP Gen Investors, L.P. (LSP Investors), LS Power Partners II, L.P. (LSP Partners II), LSP Power Equity Partners II, L.P. (LSP Equity Partners II), LS Power Equity Partners II PIE (LSP Equity II PIE), Port River, LLC (Port River) and Valley Road, LLC (Valley Road).

³ The Project Companies include: Bluegrass, Bridgeport, Arlington Valley, Griffith, Renaissance, Riverside, Rocky Road, and Tilton.

⁴ The Dynegy Sellers include: Dynegy Midwest, Dynegy Gen Finance Co., LLC (Dynegy Gen Finance), Southwest Power Partners, LLC (Southwest Power), Riverside Generation, Inc. (Riverside Generation), Dynegy Renaissance Power, Inc. (Dynegy Renaissance), Bluegrass Generation, Inc. (Bluegrass Generation), and RRP Company (RRP).

661 MW natural gas- and oil-fired generating facility in Thomaston, Georgia; and (3) LS Power Marketing, LLC, a power marketer that is not currently engaged in any business activities.⁵

3. Applicants state that, in addition to the investment in Dynegy proposed in this application, LSP Development has been authorized to acquire with Luminus Management, LLC and certain of its affiliates (collectively, Luminus), up to 40 percent of the outstanding voting securities of Calpine Corporation (Calpine)⁶ and up to 20 percent of the outstanding voting securities of TransAlta Corporation (TransAlta).⁷

2. LSP Buyers

4. LSP Associates is owned by LSP Development, as its general partner, and LS Power Holdings, LLC, Doren Holdings, LLC, and Joseph Cogen Trust, as its limited partners. LS Power Holdings, LLC is owned by current and former employees of LS Power Development, their family members, and associated entities. Doren Holdings is owned by the Liebelson family and associated entities.

5. Applicants state that LSP Development, as general partner, and LSP Associates, as a limited partner, together with various other limited partners, own LSP Partners. LSP Partners, through limited partnerships in which it is the general partner (specifically, LSP Equity Partners, LSP Equity PIE, and LSP Investors) and certain wholly-owned intermediate holding companies, indirectly controls Valley Road, through which the LSP Buyers are proposing to acquire all of the membership interests of the Arlington Valley, Griffith, Rocky Road and Tilton Project Companies. Applicants further state that LSP Development, as general partner, and LSP Associates, as limited partner, together with various other limited partners, owns LSP Partners II. LSP Partners II, through limited partnerships in which it is the general partner (specifically, LSP Equity Partners II and LSP Equity II PIE) and certain wholly-owned intermediate holding companies, indirectly controls Port River, through which the LSP Buyers are proposing to acquire all of the membership interests of the Bluegrass, Bridgeport, Renaissance and Riverside Project Companies.⁸

⁵ See *LS Power Marketing, LLC*, Docket No. ER96-1947-000 (Aug. 5, 1996) (unpublished delegated letter order) (granting market-based rate authorization).

⁶ *LS Power Dev., LLC*, 125 FERC ¶ 61,267 (2008).

⁷ *LS Power Dev., LLC*, 125 FERC ¶ 61,146 (2008).

⁸ Applicants state that LSP Equity Partners, LSP Equity PIE, LSP Equity Partners II and LSP Equity II PIE are all private equity funds over which LSP Partners (in the case
(continued...))

3. Dynegy

6. Dynegy, through its subsidiaries, produces and sells electric energy, capacity, and ancillary services in multiple U.S. markets. Dynegy's power generation portfolio, including the portion of that portfolio that would be sold to the LS Buyers as part of the Proposed Transaction, currently consists of approximately 17,700 MW of baseload, intermediate, and peaking power plants fueled by a mix of natural gas, coal, and fuel oil.

7. The LSP Buyers currently own all 350,000,000 Class B Shares, or about 40 percent of Dynegy's outstanding voting securities. Additionally, LSP Buyers are entitled to elect up to three Class B directors out of eleven of Dynegy's Board of Directors.⁹

4. Dynegy Sellers

8. Dynegy Midwest is a direct subsidiary of Dynegy Power Corporation (Dynegy Power). Dynegy Power is a direct subsidiary of DMT Holdings, Inc., which is a direct subsidiary of Dynegy Holdings Inc. (Dynegy Holdings). Dynegy Holdings is a direct subsidiary of Dynegy. Therefore, Dynegy Midwest is an indirect subsidiary of Dynegy.

9. Dynegy Midwest is an EWG that currently owns and operates eight fossil-fueled generating facilities in Illinois with a total capacity of 3,750 MW, and is authorized to sell energy, capacity, and certain ancillary services at market-based rates.¹⁰ Dynegy Midwest also has a rate schedule for cost-based reactive power compensation, and a cost-based rate agreement with Illinois Power Company to provide black start service. Additionally, Dynegy Midwest owns 100 percent of the membership interests of Tilton.

10. Dynegy Gen Finance is a direct subsidiary of Dynegy Power Generation, LLC (Dynegy Power Generation). Dynegy Power Generation is a direct subsidiary of Dynegy Falcon Holdings, Inc. (Dynegy Falcon), which is a direct subsidiary of Dynegy Holdings.

of LSP Equity Partners and LSP Equity PIE) and LSP Partners II (in the case of LSP Equity Partners II and LSP Equity II PIE) have ultimate control, and that LSP Investors is a co-investment partnership over which LSP Partners has ultimate control.

Flow charts of LSP Development and the LSP Buyers after the proposed transaction are attached as Appendix 1 to this order.

⁹ The acquisition of Dynegy's voting securities, giving the LSP Buyers the right to elect up to three of Dynegy's board members, was approved by the Commission in *Dynegy Inc.*, 117 FERC ¶ 62,257 (2006).

¹⁰ *Dynegy Midwest Generation, Inc.*, Docket No. ER00-1895-000 (May 4, 2000) (unpublished delegated letter order).

Therefore, Dynegy Gen Finance is an indirect subsidiary of Dynegy. Also, Dynegy Gen Finance owns 100 percent of the membership interests of Bridgeport and Arlington Valley.

11. Southwest Power is a direct subsidiary of Griffith Holdings, LLC (Griffith), which is a direct subsidiary of Dynegy Power Generation. Therefore, Southwest Power is an indirect subsidiary of Dynegy. Southwest Power owns 100 percent of the membership interests of Griffith.

12. Riverside Generation, Dynegy Renaissance, Bluegrass Generation, and RRP are subsidiaries of Dynegy Power. Therefore, they are indirect subsidiaries of Dynegy, and each owns 100 percent of the membership interests in their corresponding Project Companies (Riverside, Renaissance, Bluegrass, and Rocky Road).

5. The Project Companies

13. Bluegrass is a direct subsidiary of Bluegrass Generation and an indirect subsidiary of Dynegy. It is an EWG that leases, operates, and has the right to output from, an approximately 576 MW generation facility (Bluegrass Project) in Oldham County, Kentucky. The Bluegrass Project is interconnected with the transmission grid owned by E.ON US L.L.C. (E.ON). Also, Bluegrass has market-based rate authorization.¹¹

14. Bridgeport is a direct subsidiary of Dynegy Gen Finance, an indirect subsidiary of Dynegy. It is an EWG that owns and operates an approximately 527 MW generating facility (Bridgeport Project) in Bridgeport, Connecticut. The Bridgeport Project is interconnected with the transmission grid controlled by ISO New England Inc. (ISO-NE). Additionally, Bridgeport has market-based rate authorization.¹²

15. Arlington Valley is a direct subsidiary of Dynegy Gen Finance and an indirect subsidiary of Dynegy. It is an EWG that owns and operates an approximately 570 MW generating facility (Arlington Valley Project) in Maricopa County, Arizona. The Arlington Valley Project is interconnected with the transmission grid owned by the Salt River Project, but resides in its own balancing authority area. Also, Arlington Valley has market-based rate authorization.¹³

¹¹ *Bluegrass Generation Co., L.L.C.*, Docket No. ER02-506-000 (Feb. 1, 2002) (unpublished delegated letter order).

¹² *Bridgeport Energy L.L.C.*, 83 FERC ¶ 61,307 (1998).

¹³ *Duke Energy Arlington Valley, LLC*, Docket No. ER02-443-000 (Jan. 28, 2002) (unpublished delegated letter order).

16. Griffith is a direct subsidiary of Southwest Power and an indirect subsidiary of Dynegy. It is an EWG that owns and operates an approximately 570 MW generating facility (Griffith Project) in Mohave County, Arizona. The Griffith Project is interconnected with the transmission grid owned by the Western Area Power Administration – Lower Colorado, but resides in its own balancing authority area. Also, Griffith has market-based rate authorization.¹⁴

17. Renaissance is a direct subsidiary of Dynegy Renaissance and an indirect subsidiary of Dynegy. It is an EWG that owns and operates an approximately 776 MW generating facility (Renaissance Project) in Carson City, Michigan. The Renaissance Project is interconnected with the transmission grid controlled by the Midwest Independent Transmission System Operator, Inc. (Midwest ISO). Renaissance also has market-based rate authorization¹⁵ and has a rate schedule for cost-based reactive power compensation.¹⁶

18. Riverside is a direct subsidiary of Riverside Generation and an indirect subsidiary of Dynegy. It is an EWG that leases and operates and has the right to the output from an approximately 960 MW generating facility (Riverside Project) in Lawrence County, Kentucky. The Riverside Project is interconnected with the transmission grid controlled by PJM Interconnection, L.L.C. (PJM). Riverside has market-based rate authorization¹⁷ and has a rate schedule for cost-based reactive power compensation.¹⁸

19. Rocky Road is a direct subsidiary of RRP and an indirect subsidiary of Dynegy. It is an EWG that owns and operates an approximately 330 MW generating facility (Rocky Road Project) in East Dundee, Illinois. The Rocky Road Project is interconnected with the PJM transmission grid. Additionally, Rocky Road has market-based rate authorization¹⁹ and has a rate schedule for emergency redispatch service.²⁰

¹⁴ *Griffith Energy LLC*, Docket No. ER00-3696-000 (Oct. 25, 2000) (unpublished delegated letter order).

¹⁵ *Renaissance Power, L.L.C.*, Docket Nos. ER01-3109-000, *et al.* (Jan. 29, 2002) (unpublished delegated letter order).

¹⁶ *Renaissance Power, L.L.C.*, 110 FERC ¶ 61,357 (2005).

¹⁷ *Riverside Generating Co., L.L.C.*, 91 FERC ¶ 62,101 (2000).

¹⁸ *Riverside Generating Co., L.L.C.*, Docket No. ER01-1044-000 (Feb. 20, 2001) (unpublished delegated letter order).

¹⁹ *Rocky Road Power, LLC*, 87 FERC ¶ 61,163 (1999).

20. Tilton is a direct subsidiary of Dynegy Midwest and an indirect subsidiary of Dynegy. It has a pending notice of self-certification of EWG status²¹ and a pending application for market-based rate authorization.²² Tilton does not own or control any generating assets, but Dynegy Midwest would transfer the Tilton Facility to Tilton as part of the Proposed Transaction. The Tilton Facility is interconnected with the Midwest ISO transmission grid.

B. Proposed Transaction

21. The terms of the Proposed Transaction are set forth in the Purchase and Sale Agreement, dated August 9, 2009, among LSP Partners, LSP Associates, LSP Equity Partners, LSP Equity PIE, LSP Investors, Port River, Valley Road, Dos Rios, LLC, Dynegy, the Dynegy Sellers, Dynegy Power Services, Inc. and Dynegy Falcon, and in the New Shareholder Agreement, dated as of August 9, 2009 (New Shareholder Agreement), among Dynegy, LSP Partners, LSP Associates, LSP Equity Partners, LSP Equity PIE, and LSP Investors. The Purchase and Sale Agreement and New Shareholder Agreement are filed as Exhibit I to the application.

22. Applicants state that under the Purchase and Sale Agreement, the LSP Buyers agree to purchase from Dynegy all of the membership interests of the Project Companies, as well as certain interests relating to the proposed Sandy Creek Project, which is an approximately 890 MW generating facility to be located in McLennan County, Texas. In exchange, Dynegy will receive cash, 245 million of Dynegy's Class B Shares held by the LSP Buyers, and other consideration. Applicants state that the LSP Buyers will acquire the membership interests of the Project Companies through Port River and Valley Road. Specifically, Port River will acquire all of the membership interests of Bluegrass, Bridgeport, Renaissance, and Riverside from the relevant Dynegy Sellers (Bluegrass Generation, Dynegy Gen Finance, Dynegy Renaissance, and Riverside Generation), and Valley Road will acquire all of the membership interests of Arlington Valley, Griffith, Rocky Road, and Tilton from the relevant Dynegy Sellers (Dynegy Gen Finance,

²⁰ *Rocky Road Power, LLC*, Docket No. ER00-1586-000 (Mar. 15, 2000) (unpublished delegated letter order).

²¹ Tilton Energy LLC, Notice of Self-Certification of Exempt Wholesale Generator Status, Docket No. EG09-78-000 (filed July 27, 2009). After the application was filed, Tilton's Notice of Self-Certification was deemed to have been granted 60 days from the date of filing.

²² After the application was filed, the Commission granted Tilton's request for market-based rate authorization. Tilton Energy LLC, Docket No. ER09-1491-000 (Sept. 18, 2009) (unpublished delegated letter order).

Southwest Power, RRP, and Dynegy Midwest). Applicants state that, among other things, the Purchase and Sale Agreement provides that the LSP Buyers' remaining Class B Shares in Dynegy will be converted to Class A Shares, which, unlike Class B Shares, convey no special rights.²³

23. Applicants state that the New Shareholder Agreement provides for the termination of an existing shareholder agreement relating to the LSP Buyers' interests in Dynegy. It also sets forth certain agreements relating to the LSP Buyers' ownership of Class A Shares prospectively from closing of the Proposed Transaction. Additionally, Applicants state that the New Shareholder Agreement provides that, for a period of 30 months following consummation of the Proposed Transaction, the LSP Buyers shall not seek directly or indirectly, to place representatives on Dynegy's Board of Directors or seek the removal of, or addition of, any Director. Additionally, the New Shareholder Agreement states that LSP Buyers shall not make, or become a participant in, any "solicitation" of "proxies" or otherwise seek to influence, direct or advise any person with respect to the voting of any voting securities of Dynegy or any of its subsidiaries. Finally, Applicants state that the New Shareholder Agreement provides that the LSP Buyers shall not otherwise act, along, or in concert with others, to seek to control or influence or advise the management, Board of Directors, or policies of Dynegy or its subsidiaries, or take any action to prevent or challenge any transaction to which Dynegy or any of its subsidiaries is a party.

24. Applicants request that the Commission approve their application on or before October 14, 2009 in order for the Proposed Transaction to close on a timely basis consistent with Applicants' business objectives.

II. Notice of Filings

25. Notice of Applicants' initial filing was published in the *Federal Register*, 74 Fed. Reg. 45,197 (2009), with interventions and protests due on or before September 8, 2009. Consumers Energy Company filed an untimely motion to intervene.

26. Notice of Applicants' supplemental filing was published in the *Federal Register*, 74 Fed. Reg. 49,372 (2009), with interventions and protests due on or before October 1, 2009. None was filed.

²³ Applicants state that the remaining Class B Shares of Dynegy that will be converted to Class A shares will represent approximately 15 percent of Dynegy's outstanding voting securities. Application at 18.

III. Discussion

A. Procedural Matters

27. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,²⁴ the Commission will grant Consumers Energy Company's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

B. Analysis

28. As discussed below, we will grant Applicants' request for authorization under section 203(a)(1) for disposition of Dynegy's Class B shares and the disposition of the Project Companies' jurisdictional facilities, as discussed in this order.

1. Standard of Review under Section 203

29. 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."²⁵ Under the Commission's regulations, its 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.²⁶ In addition, the Energy Policy Act of 2005 (EPA 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-

²⁴ 18 C.F.R § 385.214(d) (2009).

²⁵ 16 U.S.C. § 824b (2006).

²⁶ 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*, 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).

subsidization, pledge, or encumbrance will be consistent with the public interest.”²⁷ 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.²⁸

2. Effect on Competition

a. Horizontal Market Power

30. Applicants submitted an affidavit as Attachment 1 to the application to support their assertion that the Proposed Transaction does not raise any horizontal market power concerns. Applicants state that in the context of previous section 203 proceedings, it has been assumed that all of the facilities controlled by LSP Development and Dynegy as well as the facilities controlled by Calpine and TransAlta are under common control to analyze market power concerns.²⁹ Relying on this previous assumption, Applicants conclude that the Proposed Transaction does not entail any new combination of assets, but a reconfiguring of ownership within a family of affiliates.³⁰ Applicants argue that the Proposed Transaction does not require detailed analysis under section 33.3(a)(1)³¹ of the Commission’s regulations because the Proposed Transaction does not entail a single corporate entity obtaining ownership or control over the generating facilities of a previously unaffiliated merging entity. Applicants state that the Proposed Transaction could be treated as an internal corporate reorganization unlikely to cause any anticompetitive effects.³²

31. Applicants state that if one does not assume affiliation to exist between and among LSP Development, Dynegy, Calpine, and TransAlta, and views the Proposed Transaction as a stand-alone transaction between non-affiliates there is no geographic overlap

²⁷ 16 U.S.C. § 824b(a)(4) (2006).

²⁸ 18 C.F.R. § 33.2(j) (2009).

²⁹ Applicants state that notwithstanding the assumptions about control that have been made in various filings (e.g., LS Power Group’s acquisition of securities of Calpine and TransAlta), it has long been the position of the LS Power Group, Dynegy, Calpine, and TransAlta, that LSP Development does not control Dynegy, Calpine, or TransAlta for purposes of the Commission’s market power analysis. Application at n.50.

³⁰ Application at 16.

³¹ 18 C.F.R. § 33.1 (2009).

³² Application at 17.

between LSP Development's owned generation assets and those owned or controlled by the Project Companies. Applicants state that the relevant geographic markets for the generation assets currently owned by LSP Development are the Nevada Power Company and Southern Company Services, Inc. balancing authority areas. The relevant geographic markets for the Project Companies' generation are the E.ON, ISO-NE, Arlington Valley, Griffith, Midwest ISO, and PJM balancing authority areas.³³

b. Vertical Market Power

32. Applicants also contend that the Proposed Transaction presents no vertical market power concerns because the facilities owned or controlled by LSP Development have been assumed to be under common control with those owned or controlled by Dynegy. Accordingly, Applicants argue that the Proposed Transaction does not require detailed analysis under section 33.4(a)(1) of the Commission's regulations³⁴ because the Proposed Transaction does not entail a single corporate entity obtaining ownership or control over the generating facilities of a previously unaffiliated merging entity. 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.³⁵

c. Commission Determination

33. In the recent past, the Commission has found no adverse effects on horizontal market power or vertical market power in any market after making the assumption that all generation assets in which LSP Development has a partial or total ownership stake are under common control.³⁶ In this Proposed Transaction, LSP Development is acquiring full ownership of the Project Companies, which have been assumed to be under LSP Development's control for purposes of analyzing market power.³⁷

³³ Application at 18.

³⁴ 18 C.F.R. § 33.1 (2009).

³⁵ Application at 20.

³⁶ See *Calpine Corp.*, 122 FERC ¶ 62,238 (2008), *LS Power Development, LLC*, 125 FERC ¶ 61,146 (2008), *LS Power Development, LLC*, 125 FERC ¶ 61,267 (2008).

³⁷ Applicants state that by virtue of the LSP Buyers' ownership of all of Dynegy's Class B Shares, board representation, and other rights existing prior to the Proposed Transaction, the generating projects owned by the Project Companies have consistently
(continued...)

34. To facilitate analysis of this Proposed Transaction, the Commission will continue to view the Proposed Transaction under Applicants' assumption that Dynegy and LSP Development are affiliates. Therefore, we find the Proposed Transaction will not result in a new combination of generating assets and will not adversely impact horizontal market power or vertical market power in any market.

3. Effect on Rates

a. Applicants' Analysis

35. Applicants argue that the Proposed 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 Proposed Transaction will have no effect on the rates for such sales. They also state that none of the Project Companies is a traditional utility with captive retail or wholesale customers or provides unbundled transmission service.³⁸

36. Applicants state that certain of the Project Companies make sales under cost-based rate schedules. However, none of the rate schedules contains any mechanism that would allow for the pass through of costs associated with the Proposed Transaction.³⁹ Applicants also state that "none of Applicants or any subsidiary controlled by Applicants, will seek to recover any Transaction-related costs through their costs-based wholesale sales or transmission service for a period of five years after the Transaction is consummated, except to the extent that there are offsetting Transaction-related savings, equal to, or in excess of, the Transaction-related costs."⁴⁰ Additionally, Applicants "commit that, to the extent that any Applicant (or any entity or entities affiliated with an Applicant) has the ability, or acquires the ability, to transfer or to "push down" any Transaction-related costs onto the books of entities (or any affiliates of such entities) which Applicants do not control but in which they hold, or may hold, an investment

been assumed to be under common control for purposes of market power analyses submitted in section 203 and section 205 proceedings. Application at 16. Nevertheless, Applicants note that notwithstanding the assumptions about control made in various filings, it has long been the position of the LS Power Group, Dynegy, Calpine, and TransAlta that LSP Development does not control Dynegy, Calpine or TransAlta in any sense relevant to the Commission's market Power Analysis. *Id.* n.50.

³⁸ Application at 20-21.

³⁹ *Id.* at 21.

⁴⁰ We note that this hold harmless commitment will extend to future section 205 rate filings made during the period specified.

position, none of Applicants (or their affiliates) will seek to do so for a period of five years after the Transaction is consummated.”⁴¹

b. Commission Determination

37. We agree that the Proposed Transaction will not adversely affect rates because wholesale sales will be made at market-based rates or because customers are protected by Applicants’ hold harmless commitments. We accept Applicants’ commitment to hold transmission customers harmless from merger-related costs.⁴² Additionally, the Commission will be able to monitor the implementation of Applicants’ hold harmless clause through its authority to review Applicants’ books and records.⁴³ 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. Therefore, we find that the Proposed Transaction will not have an adverse effect on rates.

4. Effect on Regulation

a. Applicants’ Analysis

38. Applicants state that the Proposed Transaction will not have any adverse effect on the effectiveness of federal or state regulation. Applicants maintain that the Proposed Transaction will not impair the ability of the Commission to regulate rates for wholesale sales or of state regulators to regulate retail sales.⁴⁴

b. Commission Determination

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

⁴¹ Supplemental Filing at 1-2. Applicants further note that none of the public utilities involved in the Transaction has any cost-based rate schedules that would allow for the pass through of costs associated with the Transaction. Application at 21.

⁴² Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

⁴³ 16 U.S.C. § 825 (2006) (section 301 of the FPA provides the Commission access to books and records).

⁴⁴ Application at 20-21.

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

a. Applicants' Analysis

40. Applicants contend that the Proposed 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 Proposed 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.⁴⁵

41. Applicants state that the Proposed Transaction falls into one of the three classes of “safe harbor” transactions that the Commission recognizes are unlikely to present cross-subsidization concerns.⁴⁶ They contend that the Proposed 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.⁴⁷

b. Commission Determination

42. Because the Proposed Transaction does not involve a franchised public utility with captive customers and Applicants are not, nor are they affiliated with, a franchised utility with captive customers, 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.

⁴⁵ Application, Exhibit M.

⁴⁶ Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 16.

⁴⁷ Application at 22.

The Commission orders:

(A) We hereby grant authorization under section 203(a)(1) for the disposition of Dynegy's Class B shares and the disposition of the Project Companies' jurisdictional facilities, 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 Proposed 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 (2009) shall be made.

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

(G) Applicants must inform the Commission within 30 days of any material change in circumstances that would reflect a departure from the facts, policies, and procedures the Commission relied upon in authorizing the transaction.

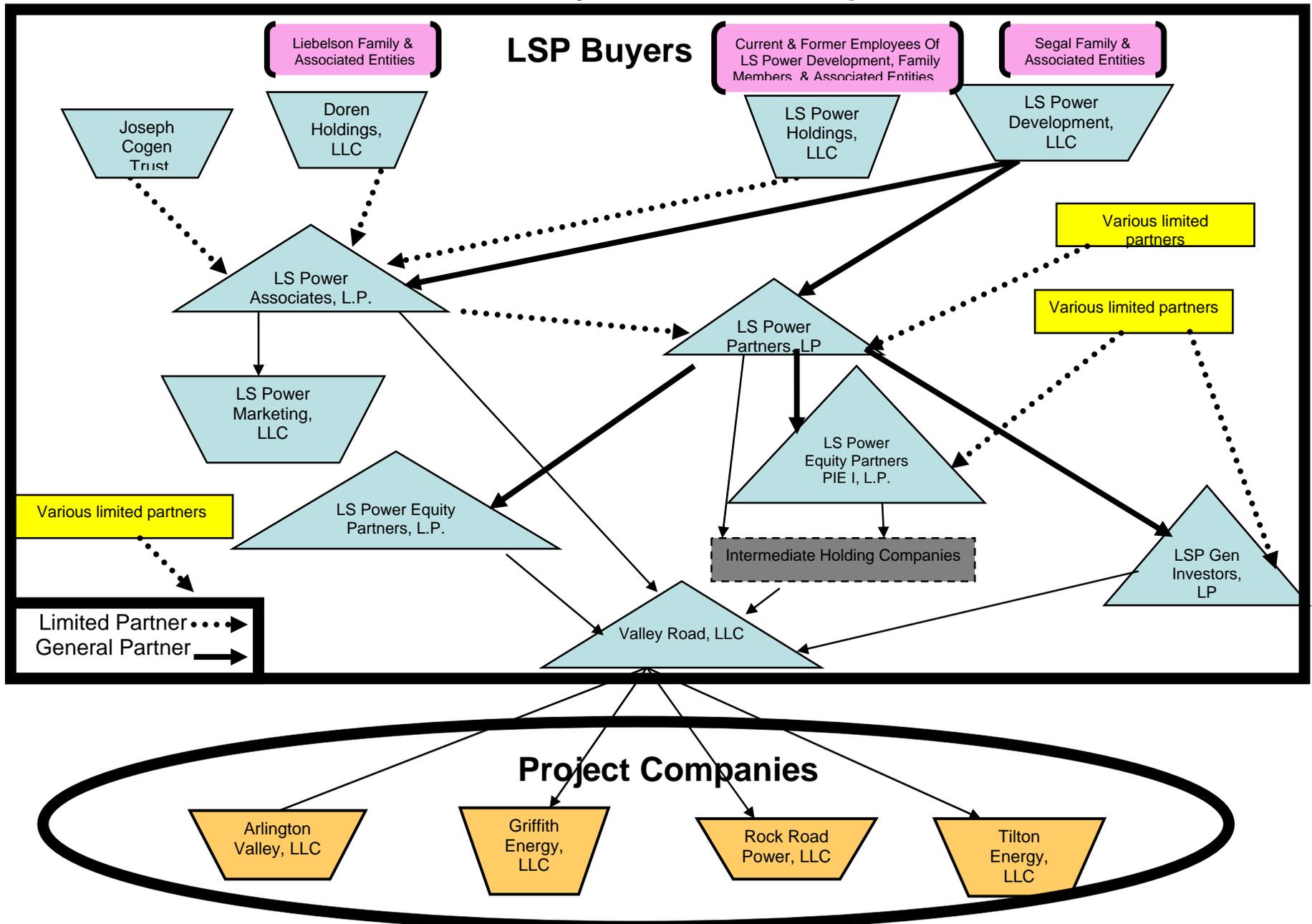
(H) Applicants shall notify the Commission within 10 days of the date that the disposition of the jurisdictional facilities has been consummated.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Valley Road Ownership



Port River Ownership

