

148 FERC ¶ 61,045
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

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

Docket No. EC14-61-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued July 17, 2014)

1. On February 27, 2014, as amended May 1, 2014, MACH Gen, LLC (MACH Gen) and certain of its wholly-owned subsidiaries¹ (collectively, Applicants) filed an application (Application) pursuant to section 203(a)(1) of the Federal Power Act (FPA)² seeking Commission authorization for a disposition of jurisdictional facilities resulting from the cessation of a voting restriction (as described below) with respect to the common voting equity securities of MACH Gen that were issued in connection with the restructuring of Applicants pursuant to a bankruptcy plan under chapter 11 of title 11 of the United States Code (Bankruptcy Plan) (Proposed Transaction).³ The restructuring of Applicants as contemplated pursuant to the Bankruptcy Plan was recently authorized by

¹ For purposes of this application, the MACH Gen subsidiaries are: Millennium Power Partners, L.P. (Millennium), New Athens Generating Company, LLC (New Athens), and New Harquahala Generating Company, LLC (New Harquahala) (collectively, Project Companies).

² 16 U.S.C. § 824b(a)(1) (2012).

³ 11 U.S.C. §§ 101-1532 (2010).

the Commission in Docket No. EC14-46-000 (Restructuring of Applicants).⁴ We will authorize the Proposed Transaction, as discussed below.

I. Background

A. MACH Gen, LLC⁵ and the Project Companies

2. MACH Gen states that the Project Companies (Millennium, New Athens, and New Harquahala) are each exempt wholesale generators (EWG) and each have market-based rate authorization.⁶

3. Millennium owns and operates the Millennium facility, which is a 326 megawatt (MW) (summer rating) natural gas-fired combined cycle generating plant located in Charlton, Massachusetts. The Millennium facility is located in the New England Power Pool market operated by ISO New England Inc. (ISO New England).

4. New Athens owns and operates the New Athens facility, which is a 945 MW (summer rating) natural gas-fired combined cycle electric generating plant located in

⁴ *MACH Generation, LLC*, 147 FERC ¶ 62,002 (2014) (delegated order). On May 6, 2014, Applicants confirmed that the Restructuring of Applicants, as authorized by the Commission in that proceeding, was consummated effective April 28, 2014.

⁵ Application, Attachment 1, Restructuring Application at section IV.A.

⁶ *New Athens Generating Co., LLC*, 103 FERC ¶ 61,145 (2003) (granting EWG status); *New Athens Generating Co., LLC*, Docket No. ER03-719-000 (June 6, 2003) (unpublished delegated order) (granting market-based rate authorization).

New Harquahala Generating Co. LLC, 103 FERC ¶ 62,146 (2003) (delegated order) (granting EWG status); *New Athens Generating Co. LLC*, Docket No. ER03-719-000 (June 6, 2003) (unpublished delegated order) (granting market-based rate authorization); *see also* New Harquahala Generating Company, LLC, Letter Order Accepting Order No. 714 Compliance Filings, Docket Nos. ER10-3310-000 and -001 (Feb. 10, 2011) (unpublished delegated order).

Millennium Power Partners L.P., 82 FERC ¶ 62,085 (1998) (granting EWG status); *Millennium Power Partners L.P.*, 82 FERC ¶ 61,024 (1998) (granting market-based rate authorization); *Millennium Power Partners L.P.*, Docket No. ER05-397-000 (Feb. 8, 2005) (unpublished delegated order) (granting authority to sell ancillary services at market-based rates, resell firm transmission rights and reassign transmission capacity).

Athens, New York. The New Athens facility is located in the New York Independent System Operator, Inc. (New York ISO) market.

5. New Harquahala owns and operates the New Harquahala facility, which is a 1,092 MW (nameplate rating)/1,054 MW (summer rating) natural gas-fired combined cycle electric generating plant near Tonopah, Arizona. Applicants state that the New Harquahala facility is interconnected through the Hassayampa Switchyard, which is owned by a consortium of utilities, operated by the Salt River Project and located in the balancing authority area of Arizona Public Service Company (APS) within the Western Electricity Coordinating Council market. New Harquahala's electric interconnection facilities consist of a 22-mile, 500 kV sole-use radial transmission line and a dedicated 500 kV switchyard.⁷

6. Additionally, the Project Companies have jurisdictional facilities consisting of interconnection facilities for the transmission of power generated by the three power facilities to the grid and paper facilities consisting of their market-based rate schedules.⁸

B. ECP Polaris, Ltd. and its Affiliates

7. Applicants state that ECP Polaris, Ltd. (ECP Polaris) is a Cayman Islands limited company and a portfolio company of Energy Capital Partners II, LLC (Energy Capital Partners II). Applicants state that Energy Capital Partners, LLC (Energy Capital Partners) and Energy Capital Partners II are focused on the development and acquisition of, and investment in, energy infrastructure assets, and related ownership, operation and management of these assets, including electric generation and inputs to electric generation in North America. Applicants state that Energy Capital Partners II indirectly controls the following public utilities that are all EWGs that have market-based rate authorization: Brayton Point Energy, LLC (1,544 MW – ISO New England Inc. (ISO New England) balancing authority area);⁹ Broad River Energy LLC (847 MW – Duke Energy Carolinas, LLC balancing authority area);¹⁰ Dighton Power, LLC (180 MW –

⁷ Application at 5-6.

⁸ *Id.* at 6.

⁹ *Dominion Energy Brayton Point, LLC*, 109 FERC ¶ 62,240 (2004) (granting EWG status); *Dominion Energy New England, Inc.*, 109 FERC ¶ 61,262 (2004) (granting market-based rate authorization).

¹⁰ *Broad River Energy LLC*, 88 FERC ¶ 62,165 (1999) (granting EWG status). *Broad River Energy LLC*, 89 FERC ¶ 61,202 (1999) (granting market-based rate authorization).

ISO New England balancing authority area);¹¹ Elwood Energy LLC (1,424 MW – PJM Interconnection, L.L.C. (PJM) balancing authority area);¹² EquiPower Resources Management, LLC (does not own or operate or control any generating or transmission facilities);¹³ Kincaid Generation, L.L.C. (1,158 MW – PJM balancing authority area);¹⁴ Lake Road Generating Company, L.P. (750 MW – ISO New England balancing authority area);¹⁵ Liberty Electric Power, LLC (549 MW – PJM East submarket and PJM

¹¹ Notice of Self-Certification of BG Dighton Power, LLC of Exempt Wholesale Generator Status, Docket No. EG06-73-000 (filed Aug. 15, 2006); *see BG Dighton Power, LLC*, Docket No. ER06-1367-004 (July 14, 2009) (delegated order) (accepting updated market power analysis for Dighton, Lake Road and MASSPOWER); *BG Dighton Power, LLC*, Docket No. ER06-1367-000 (Sept. 27, 2006) (delegated order); *Dighton Power, LLC*, Docket No. ER10-1383-000 (July 8, 2010) (delegated order) (accepting filing informing the Commission that BG Dighton Power, LLC changed its name to Dighton Power, LLC); *see also Dighton Power, LLC*, Updated Market Power Analysis, Docket No. ER11-3859-000 (filed June 30, 2011) (Updated Market Power Analysis). The Updated Market Power Analysis was accepted by the Commission on January 30, 2012. *Milford Power Company, LLC*, Docket No. ER11-3857-000 (Jan. 30, 2012) (delegated order).

¹² *Elwood Energy, LLC*, 86 FERC ¶ 62,176 (1999) (granting EWG status); *see also Elwood Energy, LLC*, 97 FERC ¶ 62,062 (2001) (granting redetermination of EWG status following corporate reorganization); *Rockingham Power, LLC*, 86 FERC ¶ 61,337 (1999) (granting market-based rate authorization); *see also Elwood Energy, LLC*, Docket No. ER01-2763-000 (Sept. 18, 2001) (delegated order) (accepting amendments to Elwood's market-based rate tariff following a corporate reorganization).

¹³ *EquiPower Resources Management, LLC*, Docket No. ER10-1089-000 (Aug. 27, 2010) (delegated order); *see also* Updated Market Power Analysis.

¹⁴ *Kincaid Generation, L.L.C.*, 79 FERC ¶ 62,123 (1997) (granting EWG status); *Kincaid Generation, L.L.C.*, 78 FERC ¶ 61,082 (1997) (granting market-based rate authorization).

¹⁵ *Lake Road Generating Co., LP*, 89 FERC ¶ 62,027 (1999) (granting EWG status); *Rockingham Power, LLC*, 86 FERC ¶ 61,337 (1999) (granting market-based rate authorization); *see BG Dighton Power, LLC*, Docket No. ER06-1367-004 (Jul. 14, 2009) (delegated order) (accepting updated market power analysis for Dighton, Lake Road and MASSPOWER); *see also* Updated Market Power Analysis.

balancing authority area);¹⁶ MASSPOWER (255.6 MW – ISO New England balancing authority area);¹⁷ Milford Power Company, LLC (507 MW – ISO New England balancing authority area);¹⁸ and Richland-Stryker Generation LLC (two facilities: 432 MW and 18 MW – both in the PJM balancing authority area). Applicants state that Energy Capital Partners also has an indirect ownership interest in Empire Generating Co., LLC, which owns and operates approximately 672 MW in the New York ISO balancing authority area and has market-based rate authorization.¹⁹

8. Applicants state that ECP Polaris was formed for the sole purpose of entering into a total return swap²⁰ with Deutsche Bank AG, London Branch (Deutsche Bank) (Total

¹⁶ *Liberty Electric Power, LLC*, 89 FERC ¶ 62,252 (1999) (granting EWG status); *Liberty Electric Power, LLC*, Docket No. ER01-2398-000 (Nov. 20, 2001) (delegated order) (granting market-based rate authorization). Applicants note that on April 26, 2013, Liberty executed a Feasibility Study Agreement with PJM regarding the possibility of expanding its facility to 735 MW.

¹⁷ *MASSPOWER*, Docket No. EG98-79-000 (Jun. 30, 1998) (delegated order) (granting EWG status); *MASSPOWER*, Docket No. ER06-745-000 (May 12, 2006) (delegated order) (granting market-based rate authorization); *see BG Dighton Power, LLC*, Docket No. ER06-1367-004 (Jul. 14, 2009) (delegated order) (accepting updated market power analysis for Dighton, Lake Road and MASSPOWER).

¹⁸ *Milford Power Co., LLC*, 89 FERC ¶ 62,163 (1999) (granting EWG status); *Milford Power Co., LLC*, 89 FERC ¶ 61,024 (1999); *Milford Power Co., LLC*, Docket No. ER99-4102-008 (Oct. 23, 2008) (delegated order) (accepting 2008 triennial market power update); *see also* Updated Market Power Analysis.

¹⁹ Notice of Self-Certification of Exempt Wholesale Generator Status of Besicorp-Empire Power Company, LLC, Docket No. EG07-37-000 (filed Jan. 31, 2007); *North Wind Cooperative*, Notice of Effectiveness of Exempt Wholesale Generator Status or Foreign (sic) Utility Company Status, Docket No. EG07-36-000 (May 11, 2007); *see also* Notice of Non-Material Change in Facts, Docket No. EG07-37-000 (filed Apr. 1, 2010) (informing the Commission that Besicorp-Empire Power Company, LLC changed its name to Empire Generating Co, LLC); *Empire Gen. Co., LLC*, Docket No. ER09-1099-000 (Jul. 1, 2009) (delegated order) (granting market-based rate authorization); *see also* Updated Market Power Analysis.

²⁰ Applicants state that a total return swap is a bilateral financial transaction in which the counterparties swap the total return of a single asset or basket of assets in

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Return Swap), pursuant to which ECP Polaris acquired an indirect interest in certain second lien claims that Deutsche Bank, as a second lien holder, has against MACH Gen in the bankruptcy proceeding.²¹ Applicants state that ECP Polaris is not primarily engaged in energy-related business activities, but certain affiliates of ECP Polaris²² have submitted an Appendix B Asset Table to the Commission.²³

C. Deutsche Bank

9. Deutsche Bank is organized under the laws of the Federal Republic of Germany. It is one of the largest banking and financial institutions in the world and is the ultimate parent company for its various subsidiaries and affiliates worldwide.²⁴

D. Restructuring of Applicants

10. Applicants explain that, in the Restructuring of Applicants, which, as noted, was approved by the Commission on April 1, 2014, in full satisfaction of second lien claims, MACH Gen's second lien holders will receive their pro rata share of 93.5 percent of the new common voting equity in MACH Gen (New Equity Holdings) (and the indirect equity interests in the Project Companies) and the holders of the existing equity interests in MACH Gen (Existing Equity Holders) will receive in full satisfaction of their Existing Equity Holdings²⁵ 6.5 percent of the New Equity Holdings.²⁶

exchange for periodic cash flows. May 1 Response at 1.

²¹ Second lien claims are defined as all claims against Applicants arising on account of the second lien loan made available to MACH Gen pursuant to the Second Lien Credit Agreement by and among MACH Gen, as borrower, the Project Companies, as guarantors, and certain financial institutions, as second lien lenders. Application, Attachment 1, Exhibit I, Exhibit A.

²² In this order, ECP Polaris and its affiliates are collectively referred to as ECP Entities.

²³ The ECP Polaris affiliates' Appendix B Asset Table is attached to the Application in Exhibit B. Application at 9 & n.16.

²⁴ Application, Attachment 1, Restructuring Application at section IV.A.2.

²⁵ Applicants state that "Existing Equity Holdings" means all equity interests in MACH Gen including any "equity security" as that term is defined in section 101(16) of the Bankruptcy Code, membership interest, share of common stock, preferred stock or

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11. Applicants state that the Restructuring of Applicants pursuant to the Bankruptcy Plan is fully supported by the majority of Applicants' key economic stakeholders and will eliminate approximately \$1 billion of the debt from Applicants' balance sheet, allowing them to achieve a sustainable capital structure that is better aligned with their present and expected future operating needs, and will result in the holders of the first lien claims²⁷ being converted to a new first lien credit and guaranty arrangement in connection with Applicants exiting their chapter 11 Bankruptcy Code cases. In addition, Applicants state that the holders of all other allowed claims²⁸ will be repaid in full and in cash, reinstated, or otherwise be unimpaired under the terms set forth in the Bankruptcy Plan.²⁹

12. Applicants identify three entities that will ultimately hold more than 10 percent of the New Equity Holdings: Silver Oak Capital, L.L.C. (Silver Oak); Deutsche Bank and ECP Polaris; and Solus Entities and SOL.³⁰ As relevant to the Proposed Transaction,

other instrument evidencing an ownership interest in MACH Gen, LLC, whether or not transferrable, and any option, warrant, restricted stock unit, or right, contractual or otherwise, to acquire any such interest in MACH Gen that existed immediately prior to the date, on which date all conditions have been satisfied or waived. *Id.* at 2 & n.5.

²⁶ The Restructuring is described in the Bankruptcy Plan and in the Restructuring Support Agreement among Applicants, the Existing Equity Holders, consenting first lien holders and the second lien holders. A copy of the Restructuring Support Agreement was filed with the non-public version of the Restructuring Application in Docket No. EC14-46-000 and was also attached to the non-public version of the Application in the instant proceeding. *Id.* n.7.

²⁷ Applicants define "first lien claims" as all first lien revolver claims and first lien term loan claims. *Id.*, Attachment 1, Exhibit I, Exhibit A.

²⁸ Applicants define "allowed claims" as a claim that MACH Gen does not have the right to object to and that is not disputed or disallowed. *Id.*, Attachment 1, Exhibit I, Exhibit A.

²⁹ *Id.*, Attachment 1, Restructuring Application at section I.

³⁰ Applicants state that Solus Entities include SOLA Ltd (SOLA), Solus Core Opportunities Master Fund, Ltd, and Ultra Master Ltd. Solus Entities are Cayman Island exempt corporations and hedge funds in the business of investing and trading in a diverse set of investment opportunities, including but not limited to those in the energy sector. They are not primarily engaged in energy-related business activities. SOL is a Delaware limited liability company with Citibank N.A. as its sole member. SOL was formed for the sole purpose of entering into a total return swap with SOLA to acquire certain

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Applicants state that Deutsche Bank, as a second lien holder, is expected to acquire and hold 11.5 percent of the New Equity Holdings and that ECP Polaris has an indirect interest in the second lien claims of Deutsche Bank pursuant to the Total Return Swap agreement that it entered into with Deutsche Bank.

13. Applicants state that, under the terms of the Total Return Swap, and consistent with Applicants' representations in the Restructuring of Applicants, ECP Polaris and Deutsche Bank agreed to vote no more than 9.9 percent of the New Equity Holdings (Voting Limitation) until the Commission had favorably ruled on the Application. Applicants explain that ECP Polaris and Deutsche Bank agreed to the Voting Limitation so that the Restructuring of Applicants could be reviewed by the Commission on an expedited basis, i.e., without the need for Applicants to submit an Appendix A Analysis regarding the direct interest of Deutsche Bank and the indirect interest of ECP Polaris in the New Equity Holdings.³¹

E. Proposed Transaction

14. Applicants state that since the application was filed in Docket No. EC14-46-000 for the Restructuring of Applicants, the Total Return Swap has been, or will be, amended

Second Lien Claims. SOL is not primarily engaged in energy-related business. *Id.*, Attachment 1, Restructuring Application at 10-11; *id.* at 14. In the Restructuring of Applicants, Applicants stated that Silver Oak would hold approximately 34.2 percent of the New Equity Holdings on behalf of certain principals affiliated with Angelo, Gordon & Co., L.P. They also indicated that Solus Entities would hold approximately 10.54 percent of the New Equity Holdings. *Id.*, Attachment 1, Restructuring Application at 8, 10.

³¹ *Id.* at 2-3. We note that the Commission has not found that Deutsche Bank, solely by reason of the Voting Limitation, is not an affiliate of MACH Gen following distribution of the New Equity Holdings. A voluntary, contractual undertaking to limit the exercise of voting rights to no more than 9.9 percent of the outstanding voting securities of a company, where (as in this case) the percentage of such shares that are owned exceeds 10 percent, would not, by itself, break the upstream chain of affiliation for purposes of section 203. In this case, however, the New Equity Holdings were acquired by Deutsche Bank in full satisfaction of preexisting indebtedness and were, at the time of the distribution, already subject to an agreement with ECP Polaris that specifically contemplated the effective transfer of voting control over those shares to ECP Polaris by means of the Total Return Swap. Under these circumstances, focusing on the affiliations created between MACH Gen and the ECP Entities, rather than between MACH Gen and Deutsche Bank, is appropriate.

to become effective upon the Commission's approval of the Application in the instant proceeding, such that ECP Polaris will have the exclusive right, subject to certain limited exceptions, to request or direct Deutsche Bank to vote its share of the total New Equity Holdings.³²

15. Applicants request that the Commission grant such FPA section 203 and other approvals as may be deemed necessary to authorize the cessation of the Voting Limitation with respect to ECP Polaris only and to allow ECP Polaris to request or direct Deutsche Bank to vote all of its approximately 11.5 percent of Deutsche Bank's New Equity Holdings on behalf of ECP Polaris pursuant to the Total Return Swap in the manner set out in the Application. Applicants further request such approvals as may be deemed necessary to allow ECP Polaris, in the event of a full or partial unwind or termination of the Total Return Swap with Deutsche Bank, to own directly some or all of the New Equity Holdings expected to be held by Deutsche Bank, rather than request or direct Deutsche Bank to vote such interests pursuant to the Total Return Swap.³³

16. On April 25, 2014, Commission staff, pursuant to delegated authority, issued a deficiency letter requesting Applicants to provide additional information in order to process the Application. On May 1, 2014, Applicants filed a response (May 1 Response).

II. Notice of Filings and Responsive Pleadings

17. Notice of the Application was published in the *Federal Register*, 79 Fed. Reg. 13,049 (2014) with interventions and protests due on or before April 28, 2014. Public Citizen, Inc. (Public Citizen) filed a timely motion to intervene and protest. Applicants filed an answer. On April 15, 2014, Public Citizen filed a motion to amend protest.

18. Notice of the May 1 Response was published in the *Federal Register*, 79 Fed. Reg. 26,423 (2014) with interventions and protests due on or before May 8, 2014. Public Citizen filed comments on the May 1 Response. Applicants filed an answer.

³² Applicants explain that the Proposed Transaction has no effect on Silver Oak's or the Solus Entities' interests in Applicants. *Id.* at 15.

³³ *Id.* at 3-4.

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 (2013), Public Citizen's timely, unopposed motion to intervene serves to make it a party to this proceeding. We also grant Public Citizen's motion to amend its protest.

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Applicants' answers because they have provided information that assisted us in our decision-making process.

B. Analysis under Section 203

21. Section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest.³⁴ The Commission's 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.³⁵ Section 203(a)(4) also requires the Commission, before it approves a transaction, 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."³⁶ 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 a pledge or encumbrance of utility assets.³⁷

³⁴ 16 U.S.C. § 824b(a)(4) (2012).

³⁵ See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

³⁶ 16 U.S.C. § 824b(a)(4) (2012).

³⁷ 18 C.F.R. § 33.2(j) (2013).

1. **Effect on Competition**
 - a. **Horizontal Market Power**
 - i. **Applicants' Analysis**

22. Applicants state that the Proposed Transaction will not have an adverse effect on competition. Applicants examined the competitive effect of the combination of the energy-related assets owned and/or operated by the ECP Entities on the one hand, and those of Applicants on the other hand. Applicants state that the relevant markets that are potentially affected by the Proposed Transaction are the ISO New England and New York ISO markets.³⁸ Applicants state that the combination of generation in ISO New England due to the Proposed Transaction is not a concern because the generation being acquired represents only approximately 1.1 percent of installed capacity in that market.³⁹ Applicants performed a delivered price test and explain that the ISO New England market is unconcentrated in all season/loads and the Herfindahl-Hirschman Index (HHI)⁴⁰ changes are below 50 points for each of the time periods studied under the

³⁸ Application at 16. Applicants state that the ECP Entities do not own or control any energy-related assets in the APS market.

³⁹ *Id.*

⁴⁰ Applicants performed an Appendix A analysis, also referred to as a delivered price test or Competitive Analysis Screen, to determine the pre- and post-transaction market shares from which the market concentration or HHI change can be derived. 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 to be unconcentrated; markets in which the HHI is greater than or equal to 1,000 but less than 1,800 points are considered to be moderately concentrated; and markets in which the HHI is greater than or equal to 1,800 points are considered to be highly concentrated. In a horizontal merger, an increase of more than 50 HHI points in a highly concentrated market or an increase of 100 HHI points in a moderately concentrated market fails its screen and warrants further review. Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,129; *see also Analysis of Horizontal Market Power under the Federal Power Act*, 138 FERC ¶ 61,109 (2012) (affirming the Commission's use of the thresholds adopted in the Merger Policy Statement).

economic capacity measure.⁴¹ Applicants explain that the Millennium facility is not located within any Commission recognized submarket within the ISO New England market.⁴² Applicants also state that the Proposed Transaction will increase market concentration in the ancillary services and capacity markets in ISO New England by only 11 HHI points.

23. Applicants state that there is no adverse horizontal effect of the Proposed Transaction resulting from the combination of generation in the New York ISO market because the generation being acquired represents only approximately 2.5 percent of installed capacity.⁴³ The New York ISO market is unconcentrated and the HHI changes are below 25 points for each of the time periods under the delivered price test using the economic capacity measure.⁴⁴ Applicants state that the New Athens facility is not located within any of the recognized submarkets within the New York ISO.⁴⁵ Applicants state that the Proposed Transaction raises no concerns in the New York ISO capacity or ancillary services markets.

24. Applicants state that because New York ISO and ISO New England are markets that have been substantially restructured such that traditional suppliers generally do not own generation and do not have load serving responsibility, economic capacity is the appropriate measure on which to focus the competitive analysis. However, Applicants also provide analysis using the available economic capacity measure for both the ISO New England and New York ISO markets and show that there are no screen failures in either geographic market.⁴⁶

⁴¹ Application at 17.

⁴² The relevant geographic markets in ISO New England are Connecticut and Southwest Connecticut and the Northeast Massachusetts/Boston zone.

⁴³ Application at 17-18.

⁴⁴ *Id.* at 18.

⁴⁵ The relevant geographic markets in New York ISO are New York City and Long Island.

⁴⁶ Application at 18.

ii. Commission Determination

25. We find that the Proposed Transaction raises no horizontal market power concerns. Although Applicants conducted a delivered price test that did not comply with established Commission policy in all respects, with some adjustments, we were able to determine that Applicants pass the Commission's screens in both markets where Applicants and the ECP Entities own generation capacity, ISO New England and New York ISO. Applicants examined both economic capacity and available economic capacity measures and included price sensitivities in those markets +/- 10 percent.

26. The delivered price test results show no screen failures during any season/load period and there is no indication that would otherwise trigger a more in-depth review of potential horizontal market power issues. Both the New York ISO and the ISO New England markets will remain unconcentrated during all season/load periods following the completion of the Proposed Transaction. Additionally, Applicants pass the Commission's screens when the destination market prices are increased and decreased by 10 percent. The assumed control by ECP Polaris that creates new affiliations between Applicants and the ECP Entities does not increase market concentration enough to have an adverse effect on competition. Therefore, we find that the Proposed Transaction does not raise horizontal market power concerns in the New York ISO or the ISO New England markets.

b. Effect on Vertical Competition

i. Applicants' Analysis

27. Applicants state that the Proposed Transaction presents no vertical market power concerns. Applicants explain that none of the Applicants or their affiliates or the New Equity Holders or their affiliates own or control electric transmission facilities in the relevant geographic markets or the rest of the United States, other than in respect of the discrete and limited facilities necessary to interconnect each of the Project Companies' facilities to their relevant transmission grids. Applicants state that none of the Applicants or the New Equity Holders has dominant control over generating sites that could raise barriers to entry in the relevant geographic markets. Applicants conclude that there are no vertical market power concerns and no adverse effect on competition.⁴⁷

⁴⁷ *Id.* at 19.

ii. Commission Determination

28. We find that the Proposed Transaction raises no vertical market power concerns. In analyzing whether a transaction presents vertical market power concerns, the Commission considers the vertical combination of upstream inputs, such as transmission or natural gas, with downstream generating capacity. Because the ECP Entities do not own or control any transmission or natural gas interstate pipeline assets in any relevant market or any other assets that would allow them to control inputs to electric power generation, we find that the Proposed Transaction will not have an adverse effect on vertical competition.

2. Effect on Rates

a. Applicants' Analysis

29. Applicants state that the Proposed Transaction will have no adverse effect on rates charged by Applicants with respect to the Project Companies' facilities. Applicants state that the Project Companies' rates are pursuant to market-based rate authorizations, and are not cost-based, and that all sales of electric energy from those facilities will continue to be made at market-based rates authorized by the Commission. Applicants also state that they have no captive wholesale or retail customers.

b. Commission Determination

30. We agree that the Proposed Transaction will not have an adverse effect on rates as Applicants do not make sales at cost-based rates and they will continue to only make sales of electric energy pursuant to their market-based rate authorizations.⁴⁸ In addition, Applicants do not have captive customers. We also note that no customer has argued that consummation of the Proposed Transaction would have an adverse effect on rates.

⁴⁸ See *Union Electric Co.*, 114 FERC ¶ 61,255, at P 45 (2006) (finding wholesale customers will not be adversely affected where Applicant provides wholesale service at market-based rates); *NorAm Energy Servs., Inc.*, 80 FERC ¶ 61,120, at 61,382-83 (1997) (stating that the Commission's ratepayer protection concerns do not apply to customers charged market-based rates).

3. Effect on Regulation

a. Applicants' Analysis

31. Applicants state that the Proposed Transaction will not diminish or affect in any way the manner or extent to which the Commission, any state, or any other federal agency may regulate Applicants because Applicants will remain public utilities subject to the jurisdiction of the Commission under the FPA. Furthermore, Applicants confirm the Proposed Transaction will have no effect on state commission regulation.

b. Commission Determination

32. We find no evidence that either state or federal regulation will be impaired by the Proposed Transaction. The Commission's review of the Proposed Transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap at the federal or state level.⁴⁹ We find that the Proposed Transaction will not create a regulatory gap at the federal level because the Commission will retain its regulatory authority over Applicants after the Proposed Transaction is consummated. As to the state level, no state commission has intervened or raised concerns about the effect of the Proposed Transaction on state regulation; no party has raised such concerns; nor do we find any. Consequently, we conclude that the Proposed Transaction will have no adverse effect on regulation.

4. Cross-Subsidization

a. Applicants' Analysis

33. Applicants state that, based on facts and circumstances known to them or that are reasonably foreseeable, there are no pledges or encumbrances of utility assets involved in the Proposed Transaction other than the first lien claims and second lien claims described in the Application. Specifically, Applicants verify that, based on the facts and circumstances known to them or that are reasonably foreseeable, the Proposed Transaction will not result in, at the time of the Proposed Transaction or in the future: (1) any 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

⁴⁹ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional 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. Applicants state that none of the Applicants is a traditional public utility with captive customers.⁵⁰

b. Commission Determination

34. Based on the representations in the Application, we find that the Proposed Transaction will not result in an inappropriate cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company.

35. When a controlling interest in a public utility is acquired by another company, whether a domestic company or a foreign company, the Commission's ability to adequately protect public utility customers against inappropriate cross-subsidization may be impaired absent access to the parent company's books and records. Section 301(c) of the FPA gives the Commission authority to examine the books and records of any person who controls, directly or indirectly, a jurisdictional public utility insofar as the books and records relate to transactions with or the business of such public utility.⁵¹ The approval of this transaction is based on such examination ability.

C. Protest and Answer

1. Public Citizen's Protest

36. Public Citizen asks the Commission to make two separate determinations. The first is to find that the Total Return Swap grants ECP Polaris control over Deutsche Bank's 11.5 percent interest in the voting securities of MACH Gen to ECP Polaris.⁵² The second is that Applicants' motion for confidential treatment of the Restructuring Support Agreement, filed as Exhibit I, and the horizontal market power study should be denied.⁵³

⁵⁰ See Application at Exh. M.

⁵¹ 16 U.S.C. § 825(c) (2012).

⁵² Public Citizen Protest at 2.

⁵³ *Id.* at 3.

Public Citizen later amended its protest to note that, in a filing it had recently made in a separate proceeding (Docket No. ER14-1409-000), Public Citizen had alleged that Energy Capital Partners is orchestrating a capacity market manipulation scheme involving intentional withholding of capacity (its Brayton Point power plant in ISO New England) to skew the capacity auction results, thereby enriching financial returns from Energy Capital Partners' other power plants in ISO New England. Public Citizen asserts that the Total Return Swap between Energy Capital Partners and Deutsche Bank provides Energy Capital Partners with additional equity ownership in the ISO New England market, and thereby further enriches Energy Capital Partners through the alleged manipulation scheme.⁵⁴ Public Citizen requests that the Commission "halt" the Proposed Transaction and conduct an investigation into whether Energy Capital Partners has violated the Commission's prohibitions against unjust and unreasonable rates that Public Citizen has raised in Docket No. ER14-1409-000.⁵⁵

37. In its comments on Applicants' May 1 Response, Public Citizen also notes that, on November 22, 2013, the Commission's Office of Energy Market Regulation issued a letter order in Docket No. ER13-2477-000 accepting Energy Capital Partners' request for Category 1 seller status concluding that Energy Capital Partners had market power in ISO New England.⁵⁶ Public Citizen argues that the finding in that case did not include the additional control over generation in ISO New England through the Total Return Swap. Public Citizen further argues that Energy Capital Partners' updated market-based rate authority submission filed on January 16, 2014, does not disclose the Total Return Swap used to acquire even more control over generation in ISO New England.⁵⁷

⁵⁴ Public Citizen Amended Protest at 1-2. Public Citizen goes on to state that it "has reason to believe" that ISO New England does not include total return swaps in its documentation of affiliate ownership and alleges that Energy Capital Partners may have additional equity ownership through other total return swaps throughout ISO New England. We note that Public Citizen has raised similar arguments with respect to total return swaps in the pending proceeding in Docket Nos. ER13-2477-000 (motion to suspend market-based rate authority of Energy Capital Partners).

⁵⁵ *Id.* at 2.

⁵⁶ The letter order in Docket No. ER13-2477-000 found the ISO New England market monitoring and mitigation rules sufficient to address market power concerns raised in that docket.

⁵⁷ Public Citizen Comments on May 1 Response at 2-3.

38. Public Citizen also asserts that Applicants' failure to include a copy of the Total Return Swap as part of the record in the instant proceeding "omits critical details," such as the length of the contract.⁵⁸ Further, Public Citizen requests the public disclosure, by MACH Gen, of a total return swap between SOLA (one of the Solus Entities) and Citigroup N.A.⁵⁹ Public Citizen further requests that the Commission obtain more information about ECP Polaris since it is a Cayman Islands affiliate of Energy Capital Partners, therefore potentially limiting the Commission's ability to effectively regulate.⁶⁰

2. Applicants' Response

39. Applicants respond that no finding of control is necessary because MACH Gen has made no argument that ECP Entities lack control in this proceeding. Applicants state that they expressly assume that ECP Polaris will have control over Deutsche Bank's approximately 11.5 percent of the New Equity Holdings of MACH Gen through the Total Return Swap for the purpose of the Application.⁶¹

40. Applicants further explain that the Restructuring Support Agreement was only required to be confidential in the period prior to its filing with the bankruptcy court as its disclosure may have prejudiced the bankruptcy proceedings.⁶² Applicants also state that all of the inputs and outputs used in the workpapers supporting the horizontal competition analysis are included in the public version of the Application. Applicants explain that the only information for which confidential treatment is sought is the proprietary model because confidential treatment is "essential to protect ... competitively sensitive and valuable intellectual property [of Applicants' witness]."⁶³

41. Applicants further point out that they have made the Restructuring Support Agreement and the Bankruptcy Plan publicly available. However, they state that the Total Return Swap is not relevant to the Commission's analysis because it is a pre-existing commercial agreement between Deutsche Bank and ECP Polaris and Applicants

⁵⁸ *Id.* at 3.

⁵⁹ *See supra* note 30.

⁶⁰ Public Citizen Comments on May 1 Response at 4.

⁶¹ Applicants Answer at 4.

⁶² *Id.* at 5.

⁶³ *Id.*

“have already conservatively assumed...that the [Total Return Swap] would give ECP Polaris control over MACH Gen.”⁶⁴ They further contend that no filing under section 205 of the FPA or updated market power analysis is required to be submitted by ECP Polaris’s affiliates with market-based rate authority until the Commission approves the Application and the Voting Limitation is lifted with respect to ECP Polaris.⁶⁵

42. Additionally, Applicants respond to Public Citizen’s request that the Commission obtain more information on ECP Polaris by pointing out that Public Citizen did not specify what information is being sought or point to any specific deficiency in the Application. They further contend that they have provided all of the required information regarding ECP Polaris in both the Application and the May 1 Response and assert that no further information would assist the Commission in this proceeding.⁶⁶

3. Commission Determination

43. We find that the request to make a determination as to whether the Total Return Swap conveys control over the voting shares of MACH Gen to ECP Polaris is unnecessary. Applicants have assumed, for purposes of the filing, that, once the Voting Limitation is lifted, ECP Polaris’ interest in Deutsche Bank’s 11.5 percent interest in the New Equity Holdings under the Total Return Swap conveys control over those shares to ECP Polaris and, therefore, will create an affiliation between Applicants and the ECP Entities for purposes of evaluating the Proposed Transaction. Applicants have provided the Commission with the information to evaluate the Proposed Transaction on the basis of this assumption.

44. We note that, while the Restructuring Support Agreement was not filed initially with the public version of the Application, it was subsequently filed as part of the May 1 Response. Therefore, Public Citizen’s request for public disclosure of the Restructuring Support Agreement is now moot.

45. We reject Public Citizen’s request for disclosure and disallowance of the Total Return Swap (as well as the total return swap between SOLA and a Citibank, N.A. affiliate) as unnecessary. The Total Return Swap is relevant to this proceeding only because, as we have already noted, once the Voting Limitation is removed, ECP Polaris will have voting control (subject to certain limitations) over Deutsche Bank’s

⁶⁴ Applicants May 23 Answer at 4.

⁶⁵ *Id.* at 3-4.

⁶⁶ *Id.* at 5.

11.5 percent interest in the New Equity Holdings, and Energy Capital Partners and its affiliates will be considered affiliates of Applicants. Otherwise, the commercial terms of the Total Return Swap, including its duration (which, for purposes of the Application, was not assumed to be limited in any way), are not relevant to any finding we are making under section 203. Thus, public disclosure of the Total Return Swap is unnecessary to enable us to evaluate the impact on competition of the new affiliations between Applicants and Energy Capital Partners and its affiliates. We also find that Public Citizen's arguments regarding control and market manipulation and market-based rate analysis through the Total Return Swap are beyond the scope of this proceeding. Public Citizen has made these same arguments in other proceedings. As we have previously held, we have no basis for withholding approval for a transaction that otherwise satisfies the standards for approval under section 203 and our regulations based upon vague and unsubstantiated allegations of future conduct by the applicants that may or may not implicate other provisions of the FPA.⁶⁷ Likewise, ECP Polaris' status as a foreign entity is not relevant to any finding that the Commission is required to make under section 203. Moreover, as we note above, section 301(c) of the FPA gives the Commission authority to examine the books and records of any person who controls, directly or indirectly, a jurisdictional public utility insofar as the books and records relate to transactions with or the business of such public utility.

46. We find it appropriate to treat the horizontal competition analysis as confidential as requested by Applicants. We note that Applicants filed a Proposed Protective Order as part of their Application which, when executed, would allow interested parties to view the confidential versions and lodge any disputes with the Commission. If Public Citizen wishes to gain access to the delivered price test calculations, it must sign the Proposed Protective Order.

D. Additional Issues

47. Order No. 652 requires that sellers with market-based rate authority timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.⁶⁸ To

⁶⁷ See *The AES Corp.*, 137 FERC ¶ 61,122, at P 43 (2011) (finding that protestors' arguments about increased fuel costs on firm power rates and of any possible divestitures are speculative, unsupported, and unrelated to the proposed FPA section 203 transaction).

⁶⁸ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005). See 18 C.F.R. § 35.42 (2013).

the extent that the foregoing authorization results in a change in status, Applicants are advised that they must comply with the requirements of Order No. 652. In addition, Applicants shall make any appropriate filings under section 205 of the FPA to implement the Proposed Transaction.

48. Information and/or systems connected to the bulk power system involved in this Proposed Transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to FPA section 215. Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information databases, and operating systems. If affiliates, personnel or investors are not authorized for access to such information and/or systems connected to the bulk power system, a public utility is obligated to take the appropriate measures to deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, and the like, must comply with all applicable reliability and cyber security standards. The Commission, North American Electric Reliability Corporation, or the relevant regional entity may audit compliance with reliability and cyber security standards.

The Commission orders:

(A) The Proposed Transaction is hereby authorized, as discussed in the body of this order.

(B) Applicants must inform the Commission within 30 days of any material change in circumstances that departs from the facts the Commission relied upon in authorizing the Proposed Transaction.

(C) 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.

(D) 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.

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

(F) Applicants, to the extent that they have not already done so, shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction.

(G) Applicants shall notify the Commission within 10 days of the date on which the Proposed Transaction is consummated.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.