

149 FERC ¶ 61,126
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Brayton Point Energy, LLC	Docket Nos. ER13-2477-003
Broad River Energy, LLC	ER10-1946-006
Dighton Power, LLC	ER11-3859-008
Elwood Energy LLC	ER13-2476-003
Empire Generating Co, LLC	ER11-3861-007
EquiPower Resources Management, LLC	ER11-3864-008
Kincaid Generation, L.L.C.	ER13-2475-003
Lake Road Generating Company, L.P.	ER11-3866-008
Liberty Electric Power, LLC	ER12-192-006
MASSPOWER	ER11-3867-008
Milford Power Company, LLC	ER11-3857-008
Red Oak Power, LLC	ER12-1725-004
Richland-Stryker Generation LLC	ER11-4266-007

ORDER DISMISSING MOTION TO SUSPEND MARKET-BASED
RATE AUTHORITY

(Issued November 14, 2014)

1. In this order, the Commission dismisses a motion to suspend the market-based rate authority of Energy Capital Partners,¹ filed by Public Citizen, Inc. (Public Citizen).

¹ Energy Capital Partners includes: Brayton Point Energy, LLC; Broad River Energy LLC; Dighton Power, LLC; Elwood Energy LLC; Empire Generating Co, LLC; EquiPower Resources Management, LLC; Kincaid Generation, L.L.C.; Lake Road Generating Company, L.P.; Liberty Electric Power, LLC; MASSPOWER; Milford Power Company, LLC; and Richland-Stryker Generation LLC.

I. Background

2. On May 12, 2014, Public Citizen filed a motion requesting that the Commission temporarily suspend Energy Capital Partners' market-based rate authority until Energy Capital Partners submits an updated market power analysis. Public Citizen contends that a market power analysis submitted by Energy Capital Partners on September 30, 2013 was incomplete and invalid because it did not disclose certain generation facilities that Energy Capital Partners controls.
3. On September 30, 2013, Energy Capital Partners submitted a market power analysis as part of a change in status filing, which was subsequently accepted.² The order accepting the filing noted Energy Capital Partners' representation that the Commission-approved market monitoring and mitigation rules administered by ISO New England Inc. (ISO-NE) are sufficient to address any market power concerns with respect to Energy Capital Partners' presence in the ISO-NE market. The order also stated that the Commission has previously found that the ISO-NE market monitoring and mitigation rules are sufficient to address market power concerns.
4. Public Citizen, in its May 12, 2014 motion, states that the September 30, 2013 market power analysis filed by Energy Capital Partners did not disclose a total return swap executed with Deutsche Bank that provided Energy Capital Partners with an interest in three power plants, including the Millennium facility in ISO-NE.³ Public Citizen states that Energy Capital Partners' failure to disclose the total return swaps rendered the analysis incomplete and invalid, and that until Energy Capital Partners updates its market power analyses for all markets to include the use of total return swaps, the Commission must temporarily suspend Energy Capital Partners' market-based rate authority.
5. Public Citizen also contends that the Commission must temporarily suspend Energy Capital Partners' market-based rate authority until ISO-NE certifies that its market monitoring and mitigation rules can effectively regulate total return swaps. Public Citizen states that because total return swaps are not currently regulated or tracked by either ISO-NE or the Commission, there is a chance that Energy Capital Partners has

² *Brayton Point Energy*, Docket No. ER13-2477-001 (Nov. 22, 2013) (delegated letter order). We note that the captioned entities in this order differ slightly from the captioned entities in that order. ECP Energy I, LLC was included in that proceeding and is not included here. This difference does not impact our analysis and, therefore, for simplicity, we will refer to the entities in both proceedings as "Energy Capital Partners."

³ Public Citizen also notes that the updated market power analysis filed by Energy Capital Partners on January 16, 2014 does not incorporate control over additional generation in ISO-NE through a total return swap. Filing at 2. *See also Brayton Point Energy, LLC*, Docket No. ER13-2477-002 (Apr. 16, 2014) (delegated letter order).

utilized additional total return swaps to obtain control over more generation in ISO-NE and elsewhere.

II. Notice of Filing and Responsive Pleadings

6. Notice of Public Citizen's filing was published in the *Federal Register*,⁴ with interventions and protests due on or before June 2, 2014. On June 2, 2014, Energy Capital Partners filed an answer.

7. Energy Capital Partners states that the Commission should deny Public Citizen's motion because, among other things, Public Citizen's motion does not comply with the Commission's rules and requirements and it is procedurally defective.⁵ Energy Capital Partners states that, pursuant to Rule 212 of the Commission's Rules of Practice and Procedure,⁶ a motion may only be filed by a person who has filed a timely motion to intervene that has not been denied; Public Citizen has not intervened in any of the above-captioned dockets and, thus, is precluded from filing a motion in any of these dockets. Energy Capital Partners also notes that there are no pending filings or open comment periods before the Commission in these dockets.

8. Energy Capital Partners states that it has complied with all applicable Commission requirements. As further discussed below, Energy Capital Partners states that it disclosed the total return swap in applications submitted to the Commission pursuant to section 203 of the Federal Power Act (FPA)⁷ in Docket No. EC14-46-000 (the First Application) and Docket No. EC14-61-000 (the Second Application). Energy Capital Partners maintains that it does not need to submit a filing pursuant to section 205 of the FPA⁸ until the Commission approves the Second Application.⁹

⁴ 79 Fed. Reg. 30,116 (2014).

⁵ Energy Capital Partners states that the Public Citizen motion was mistakenly filed in Docket No. ER12-1725-004, which relates to Red Oak Power, LLC (Red Oak). Energy Capital Partners states that it ceased being affiliated with Red Oak on November 5, 2013 (citing Notice of Non-Material Change in Status of Red Oak Power, LLC, Docket No. ER12-1725-003 (filed Dec. 5, 2013)).

⁶ 18 C.F.R. § 385.212 (2014).

⁷ 16 U.S.C. § 824b (2012).

⁸ 16 U.S.C. § 824d (2012).

⁹ The First Application was approved in *MACH Generation, LLC*, 147 FERC ¶ 62,002 (2014).

9. Energy Capital Partners contends that Public Citizen misstates the nature of the total return swap between Energy Capital Partners' affiliate, ECP Polaris, Ltd. (ECP Polaris), and Deutsche Bank, which was undertaken with respect to Deutsche Bank's interests in the debt of an owner of MACH Gen, LLC (MACH Gen). Energy Capital Partners explains that the total return swap is a bilateral financial transaction where the counterparties swap the total return of a single asset in exchange for periodic cash flows. Energy Capital Partners states that, as a result, one party obtains the economic benefits of the asset owned by the other party without owning the asset itself. Energy Capital Partners states that, in this case, the asset for the total return swap was the debt of MACH Gen, which is an indirect owner of generating assets in the ISO-NE and New York Independent System Operator, Inc. markets and the Arizona Public Service Company balancing authority area. Energy Capital Partners states that Deutsche Bank owned a portion of the loans made to MACH Gen and swapped the economic benefits of the debt in exchange for payments.

10. Energy Capital Partners explains that, pursuant to a restructuring agreement and plan of reorganization in connection with MACH Gen's bankruptcy, the second lien debt holders, including Deutsche Bank, agreed to have their debt interests in MACH Gen converted into equity interests. Energy Capital Partners states that prior to the conversion of the debt interest to equity interests, MACH Gen and certain of its affiliates filed the First and Second Applications pursuant to section 203 of the FPA, seeking approval of the indirect transfer of jurisdictional assets pursuant to the restructuring. Energy Capital Partners notes that for the purposes of the First and Second Applications, it assumed that, following approval of the First and Second Applications, the total return swap would allow ECP Polaris effectively to control Deutsche Bank's approximately 11.5 percent equity interest in MACH Gen (and the corresponding indirect interests in entities that own and operate generating facilities) because ECP Polaris would, except under extremely limited circumstances, have the right to direct Deutsche Bank to vote its approximately 11.5 percent equity interests. Energy Capital Partners further states, however, that in order for MACH Gen to be able to emerge from bankruptcy as quickly as possible, in the First Application, ECP Polaris and Deutsche Bank agreed to a voting limitation such that no more than 9.9 percent of Deutsche Bank's equity interests would be voted by ECP Polaris and/or Deutsche Bank before the Commission approved the Second Application.

11. Energy Capital Partners maintains that it will not own or control 10 percent or more of MACH Gen until after the voting limitation is lifted, and therefore, no section 205 filing with the Commission was required. Energy Capital Partners commits that following the Commission's approval of the Second Application and the lifting of

the voting limitation with respect to MACH Gen, Energy Capital Partners will make all filings required by the Commission to reflect its new affiliation with MACH Gen.¹⁰

III. Discussion

12. As an initial matter, we dismiss Public Citizen's motion on procedural grounds. Public Citizen has not filed a motion to intervene. Pursuant to Rule 212 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.212 (2014), only participants or persons who have filed timely motions to intervene which have not been denied may file a motion. Because Public Citizen is neither a party nor a participant, its motion is not properly before the Commission, and we hereby dismiss it.¹¹ In any event, as discussed below, we do not believe that this is the appropriate proceeding in which to examine Energy Capital Partners' potential market power relating to its affiliation with MACH Gen.

13. As noted above, Energy Capital Partners has committed to make all required filings to reflect its new affiliation with MACH Gen if the voting limitation was lifted. The Commission issued an order approving the Second Application, noting that 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.¹² The Commission stated that to the extent that the authorization approved in Docket No. EC14-61-000 results in a change in status, the applicants must comply with the requirements of Order No. 652. A reportable change in status includes "[a]ffiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation facilities or inputs to electric power production . . . [or] owns, operates or controls transmission facilities, or affiliation with any entity that has a franchised service

¹⁰ Additionally, Energy Capital Partners notes that neither it nor any of its affiliates is a party to any other total return swaps or other arrangements that provide control over jurisdictional assets for the purposes of the Commission's analyses under section 205 of the FPA.

¹¹ See, e.g., *Niagara Mohawk Power Corp. v. Huntley Power LLC*, 109 FERC ¶ 61,169, at P 19 (2004), *reh'g denied*, 111 FERC ¶ 61,120 (2005) ("Because [the filer] is neither a party nor a participant, its motion is not properly before the Commission, and we will dismiss it."). A participant is defined as either a party or Commission trial staff. See 18 C.F.R. § 385.102(b) (2014).

¹² *MACH Gen, LLC*, 148 FERC ¶ 61,045, at P 47 (2014) (citing *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005); 18 C.F.R. § 35.42 (2014)).

area.”¹³ As relevant here, for purposes of market-based rates, the Commission defines an affiliate as “[a]ny person that directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of the specified company.”¹⁴

14. On August 18, 2014, Energy Capital Partners submitted a notice of change in status in Docket No. ER13-2477-005 reflecting the lifting of the voting limitation as of July 17, 2014 and stating that an affiliate of Energy Capital Partners now has voting control over 11.5 percent of the common voting equity securities of MACH Gen. Energy Capital Partners states that, as a result, it is now affiliated with subsidiaries of MACH Gen that own and operate electric generating facilities. Energy Capital Partners’ change in status filing also includes an updated market power analysis.¹⁵

15. Given that Energy Capital Partners has submitted the notice of change in status notifying the Commission of the new affiliation, which includes an updated market power analysis, we do not believe it would be appropriate to examine Energy Capital Partners’ potential market power in this proceeding. Such issues are best addressed in the change in status proceeding.

16. For the foregoing reasons, we dismiss Public Citizen’s motion to suspend the market-based rate authority of Energy Capital Partners.

The Commission orders:

Public Citizen’s motion is hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹³ 18 C.F.R. § 35.42(a)(2) (2014).

¹⁴ 18 C.F.R. § 35.36(a)(9)(i).

¹⁵ Brayton Point Energy, LLC, Notice of Change in Status, Docket No. ER13-2477-005 (filed Aug. 18, 2014).