

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suede G. Kelly.

LenderCo  
Panda Gila River I, LLC  
Panda Gila River II, LLC  
Union Power I, LLC  
Union Power II, LLC

Docket No. EC04-163-000

ORDER AUTHORIZING DISPOSITION OF  
JURISDICTIONAL FACILITIES

(Issued January 24, 2005)

**I. Introduction**

1. On September 30, 2004, Panda Gila River I, LLC (Panda Gila I), Panda Gila River II, LLC (Panda Gila II), Union Power I, LLC (Union Power I), Union Power II, LLC (Union Power II) (TECO Applicants), and LenderCo (LenderCo)<sup>1</sup> (collectively, Applicants) filed a joint application pursuant to section 203 of the Federal Power Act (FPA)<sup>2</sup> requesting Commission authorization to dispose of jurisdictional facilities in connection with the transfer of partnership interests in two subsidiaries of the TECO Applicants to LenderCo.<sup>3</sup> In this order, we authorize the disposition of the jurisdictional facilities, as discussed below. This order benefits customers because it will enable the

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<sup>1</sup> Applicants note that, at the time of this filing, LenderCo had not yet been formed, and when formed, likely will be given a different name. Applicants state that they are using the name LenderCo solely for purposes of this application.

<sup>2</sup> 16 U.S.C. § 824b (2000).

<sup>3</sup> The jurisdictional facilities include market-based rate schedules and related wholesale power purchase agreements, books, records and accounts, and facilities necessary to interconnect the Union Power Facility and the Gila River Facility to their respective transmission grids.

financially distressed companies to relinquish control of the generating facilities to certain financial institutions in lieu of foreclosure while allowing the companies to continue to operate.

## II. Background

### A. Description of the Parties

2. Union Power owns, and operates through an affiliate, the Union Power Facility, and Gila River owns, and operates through an affiliate, the Gila River Facility (Project Companies). The Union Power Facility is a merchant power plant interconnected to the transmission system owned and operated by Entergy Arkansas, Inc., an operating company of Entergy Corporation (Entergy). Electric energy from it is sold to wholesale customers in the Entergy control area. The Gila River Facility is a merchant power plant interconnected to the Arizona Public Service Company's (APSC) transmission system, and electric energy from it is sold to wholesale customers in the Western Electricity Coordinating Council (WECC) control area.

3. The Project Companies are authorized by the Commission to sell power from their respective facilities at market-based rates. Each Project Company is a Delaware limited partnership and is an indirect, wholly-owned subsidiary of TECO Energy. Union Power I holds a one percent general partnership interest and Union Power II holds a 99 percent limited partnership in the Union Power Facility. Panda Gila I holds a one percent general partnership interest and Panda Gila II holds a 99 percent limited partnership interest in the Gila River Facility.

4. While the specific structure of the proposed transfer has yet to be determined, Applicants state that LenderCo will be a Delaware limited liability company, wholly-owned by certain Lenders.<sup>4</sup> Each Lender is a financial institution that is not primarily

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<sup>4</sup> The Lenders are: Artex LLC; Bank of Montreal; Scotiabanc Inc.; Barclays Bank PLC; Bayerische Hypo-und Vereinsbank AG, New York Branch; The Bear Stearns Companies, Inc.; BNP Paribas; Clayton New York Branch; Cargill, Incorporated; CDC Finance-CDC Ixix; Citibank N.A.; CoBank, ACB; Credit Suisse First Boston; Dexia Credit Local, New York Agency; DZ BANK AG Deutsche Zentral – Genossenschaftsbank, Frankfurt am Main, New York Branch; Franklin Mutual Advisers, LLC; HSH Nordbank AG; ING Capital LLC; JP Morgan Chase Bank; KBC Bank N.V., New York Branch; Landesbank Rheinland – Pfalz; Lehman Brothers Holdings Inc.; Merrill Lynch Credit Products, LLC; Natexis Banque Populaires; Norddeutsche

(continued)

engaged in energy-related business activities. Applicants state that each Lender will directly or indirectly hold from zero to 15 percent equity interest in LenderCo and zero to 15 percent voting interest in LenderCo. Applicants note that LenderCo will provide that no Lender may have more than a 15 percent interest in LenderCo at any time. In addition, according to Applicants, LenderCo will be structured to have two classes of membership: Lenders holding Class A units in LenderCo will have full voting rights (attributes of an active owner), and Lenders holding Class B units in LenderCo will have limited voting rights (attributes of a passive owner). Before the proposed transaction, each Lender will choose between Class A or Class B membership interest. Applicants note that no holder of Class A units will be able to obtain more than a 15 percent voting share in LenderCo at any time.<sup>5</sup>

5. With the exception of Stonehill Institutional Partners, L.P.<sup>6</sup> and JPMorgan Chase Bank, Applicants assert that none of the Lenders and any entities that may be deemed to be affiliated with the Lenders own are expected to own more than minority or *de minimis* interests in, and do not and are not expected to exercise control over generating facilities within the relevant markets.

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Landesbank Girozentrale; Quadrangle Master Funding, LTD; Royal Bank of Canada; The Royal Bank of Scotland plc; Satellite Senior Income Fund, LLC; Societe Generale; Stonehill Institutional Partners, L.P.; Toronto Dominion (Texas), Inc.; UBS AG.

<sup>5</sup> In order to prevent any Lender from having more than a 15 percent voting share in LenderCo at any time, the number of Lenders allowed to choose Class B membership will be restricted.

<sup>6</sup> According to Applicants, Stonehill, together with an affiliate, holds more than a *de minimis* indirect interest in a generating facility in one of the relevant markets. Specifically, Stonehill and its affiliate hold an approximately 48 percent combined indirect ownership interest in NRG Batesville LLC, which owns an 837 MW generating facility in Batesville, Mississippi (Batesville Facility), within the Entergy control area. Applicants contend that this interest will not pose a competitive problem because the amount of generation is minimal compared with the total available generation in the relevant market, noting: (1) the Batesville Facility represents less than two percent of the generation available in the Entergy control area; (2) the Batesville Facility's output is fully committed by long-term Power Purchase Agreements; and (3) Stonehill will have below a five percent total equity interest in LenderCo.

6. Some of the Lenders have minority or *de minimis* interest in generating facilities in certain relevant markets. In the Entergy control area, certain Lenders are participants in a pending transaction to acquire directly or indirectly upstream interests, as part of another lender group, in an 810 MW generating facility in Southaven, Mississippi. And in the APSC control area, certain of the Lenders own an upstream interest in New Harquahala Generating Company, LLC, which is constructing a 1,100 MW generating plant in Arizona. Finally, Applicants note that, in the WECC control area, certain Lenders are participants in a group of lenders with upstream interests in La Paloma Generating Company, LLC, which owns a 1,040 MW combined cycle generating facility near McKittrick, California.

7. Applicants submit that, other than the minority and *de minimis* interests described above, no entities that may be regarded as affiliated with the Lenders have any interests in generation, transmission and/or distribution facilities in the relevant markets. In addition, no entity that may be regarded as affiliated with the Lenders is a public utility company, an electric utility company or a holding company, as defined by section 2 of the Public Utilities Holding Company Act of 1935. Finally, no Lender entity owns an interest in natural gas pipelines and/or local natural gas distribution companies in the relevant markets.

#### **B. Description of the Proposed Transaction**

8. The application explains that the Project Companies are in default of their obligations to Lenders under various credit agreements and related credit documents entered into between the Lenders and each of the respective Project Companies. As a result, the Lenders negotiated an agreement with the TECO Applicants (the owners of the Project Companies) to transfer their respective interests in the Project Companies to the Lenders in lieu of the Lenders exercising their foreclosure rights under the credit agreements for each of the Project Companies.

9. According to the application, the TECO Applicants' general and limited partnership interests in the Project Companies will be transferred to LenderCo, which may consist of one or more limited liability holding companies directly or indirectly owned by the Lenders. In this application, Applicants seek the flexibility: (1) to create intermediate holding companies; (2) to change the corporate form of entities within LenderCo or LenderCo's subsidiaries; (3) to engage in a single or multiple step transfer; and (4) if the transfer is in multiple steps, to stagger the steps in the transfer. Applicants state that this request for flexibility does not change the final result of the proposed

transaction, which is that the assets owned by TECO Energy will ultimately be indirectly and wholly-owned by the Lenders.<sup>7</sup>

### **III. Notice, Interventions and Protests**

10. Notice of the filing was published in the *Federal Register*, 69 Fed. Reg. 60,850 (2004), with comments, protests, or interventions due on or before October 21, 2004. APSC filed a timely motion to intervene. Arizona Electric Power Cooperative, Inc. (AEPSCO) and Aquila, Inc. (Aquila) filed timely motions to intervene and comments. On October 27, 2004, Applicants filed an answer to Aquila's motion to intervene (Applicants' Answer). Aquila filed an answer to Applicants' Answer on October 27, 2004 (Aquila's Answer).

11. AEPSCO expects that the transfer of Panda Gila to LenderCo will have no adverse impact on its Power Purchase Agreement with Panda Gila. AEPSCO attaches to its motion to intervene Panda Gila's letter of assurance to that effect and requests that the letter be accepted into the record of this proceeding.

12. Aquila requests the Commission to deny authorization for lack of sufficient specificity or, in the alternative, to not act until sufficient details are provided. Aquila points out that there is breach of contract litigation with respect to certain wholesale energy transactions between the Project Companies and Aquila pending in another forum. It alleges that the absence of details concerning this proposed transaction may be part of the Applicants' strategy to deny unsecured creditors the rights they would otherwise have in a foreclosure or bankruptcy proceeding.

13. Aquila also is concerned that the Lenders and Project Companies may use a federal preemption defense in litigation related to the Project Companies. According to Aquila, Applicants may claim that any court before which any breach of contract claims may be pending lacks the authority to adjudicate such claims because the Commission has approved the proposed transaction. If the Commission approves the proposed transaction, Aquila requests the Commission to state that nothing in the Commission's

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<sup>7</sup> The application states that, if there is any change in the proposed transaction affecting management or operational oversight of the Project Companies so that control over jurisdictional assets passes from the Project Companies to another entity, Applicants will make a section 203 filing with the Commission seeking approval of the revised proposed transaction.

action precludes a court before which a breach of contract claim is pending from dealing with that claim.

14. In their answer, Applicants argue that Aquila raises issues that are irrelevant under section 203. They argue that Aquila does not identify any information missing from the application that is required. They also argue that Aquila fails to show a nexus between its interest as a party alleging breach of contract in another forum and its interest in this transaction. According to Applicants, the Commission has sufficient information.

15. Applicants argue that Aquila raises issues relating to Aquila's unrelated contract claims pending in Missouri state court against the Project Companies. Applicants contend that Aquila fails to explain how or why the Project Companies would be in any different position with respect to the pending state contractual action as a result of LenderCo's acquisition of the Project Companies. Applicants allege that Aquila is attempting to delay the proposed transaction and induce the Project Companies to settle Aquila's state court claims.

16. Applicants conclude, therefore, that Aquila's motion to intervene should be denied for failure to state a legitimate interest in this proceeding, or, at a minimum, the relief requested should be denied.

17. In its answer, Aquila asserts that it is an unsecured creditor of the Project Companies with a direct interest in the transfer of ownership and control of the Project Companies, and, therefore, its motion to intervene should be granted. Aquila then reiterates that Applicants' application lacks sufficient substance to be approved under section 203 of the FPA.

#### **IV. Discussion**

##### **A. Procedural Matters**

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will grant Aquila's opposed motion to intervene, in light of the interest it represents, the absence of any undue prejudice or delay, and the early stage of the proceeding.

19. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a) (2)(2004), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Applicants' and Aquila's Answers because they have provided information that assisted us in our decision-making process.

## **B. Standard of Review**

20. Section 203(a) provides that the Commission must approve a disposition of facilities if it finds that the disposition “will be consistent with the public interest.”<sup>8</sup> The Commission’s analysis of whether a disposition is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.<sup>9</sup> As discussed below, we will approve the proposed disposition of jurisdictional facilities as consistent with the public interest.

21. As an initial matter, we find that Aquila raises concerns that are outside the scope of an FPA section 203 proceeding. The Commission will not condition its section 203 approval in this proceeding on matters that should be addressed in another proceeding or forum.<sup>10</sup> As the Commission has explained in other section 203 proceedings, we will deny the relief requested in interventions in a section 203 proceeding where such interventions are based solely on contract disputes.

### **1. Effect on Competition**

22. Applicants state that the proposed transaction does not raise horizontal market power issues, and will have no adverse effect on competition because the Lenders and entities that are affiliated with the Lenders have investment interests in very limited generation facilities in the relevant markets. Applicants state that the amount of generation being transferred to each Lender in the relevant market is *de minimis*, with each Lender having no more than 15 percent voting interest in LenderCo, and no holder of Class A units having more than a 15 percent voting interest in LenderCo. In addition,

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<sup>8</sup> 16 U.S.C. § 824b (2000).

<sup>9</sup> See Inquiry Concerning the Commission’s Merger Policy Under the Federal Power Act: Policy Statement, Order No. 592, 61 Fed. Reg. 68,595 (1996); FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); *see also* Revised Filing Requirements Under Part 33 of the Commission’s Regulations, Order No. 642, 65 Fed. Reg. 70,983 (2000), FERC Stats. & Regs., Regulations Preambles July 1996-Dec. 2000, ¶ 31,111 (2000), *order on reh g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001).

<sup>10</sup> See *Niagara Mohawk Holdings, Inc.*, 86 FERC ¶ 61,283 (1999).

Applicants state that the proposed transaction involves the disposition of TECO Energy's interests in two generation facilities that are in geographically remote and separate markets to new owners with little or no control of any generation in those markets.

23. Applicants state further that the proposed transaction does not raise vertical market power issues because TECO wholesale's wholly-owned, indirect subsidiary Trans-Union will be transferred to LenderCo. Applicants assert that since the Project Companies affiliated with Trans-Union will continue to be affiliated with Trans-Union after the transfer is effectuated, there is no change in vertical market analysis with respect to the Project Companies.

24. No party disputes these statements. We agree with Applicants' analysis of the horizontal and vertical market power impacts of the proposed transaction. We find that the proposed transaction will not adversely affect competition.

## **2. Effect on Rates**

25. The application explains that neither the Applicants nor the Lenders have any retail or wholesale requirements customers in the relevant markets. Applicants note that all of the electric energy sold by the Project Companies from the facilities will continue to be at market-based rates.

26. As noted in the Commission's Merger Policy Statement,<sup>11</sup> the Commission primarily examines a disposition's effect on rates in order to protect wholesale power and transmission service customers. We note that nothing in the application indicates that rates to customers will increase as a result of the proposed transaction, and no customer argues otherwise. For this reason, we are satisfied that the proposed transaction will not adversely affect rates.

## **3. Effect on Regulation**

27. Applicants state that the Project Companies will continue to be subject to the Commission's and state regulatory agencies' jurisdiction to the same extent after the proposed transaction as they were before the transaction. Applicants also state that the proposed transaction will not result in the formation of a registered public utility holding company, which could diminish the Commission's authority over the Project Companies.

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<sup>11</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,126.

Moreover, Applicants state that all sales from the Project Companies will continue to be entirely at wholesale, and therefore, not subject to regulation by any state commission.

28. We note that no party has raised concerns about the proposed transaction's effect on state or federal regulation, and no state has indicated that it lacks jurisdiction to consider the transaction's effect on retail rates. We conclude that the proposed disposition of jurisdictional facilities will not adversely affect state or federal regulation.

The Commission orders:

(A) Applicants' proposed disposition of jurisdictional facilities is hereby authorized, as discussed in the body of 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 costs, 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 Federal Power Act to issue supplemental orders as appropriate.

(E) 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 )

Linda Mitry,  
Deputy Secretary.