

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeem G. Kelly.

Boston Generating, LLC, *et al.*

Docket No. EC05-119-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued October 31, 2005)

1. In this order, the Commission authorizes two groups of transactions for a two-year period without further filings under section 203 of the Federal Power Act (FPA).¹ The first group of transactions would involve transfers of equity interests from current owners to other existing owners or new buyers that have not yet been determined (Future Transactions). The second group of transactions would involve transfers of interests from current or future holders of equity interests to direct or indirect wholly-owned subsidiaries of their ultimate parents (Future Subsidiary Transactions). The Commission has reviewed the Application under the Merger Policy Statement² and will authorize the Future Transactions and Future Subsidiary Transactions as consistent with the public interest.

I. Introduction

2. On August 5, 2005, as amended on September 13, 2005, Boston Generating, LLC (Boston Generating); its three wholly-owned subsidiaries, Mystic I, LLC (Mystic I), Mystic Development, LLC (Mystic Development), and Fore River Development, LLC

¹ 16 U.S.C. § 824b (2000).

² 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) (*Merger Filing Requirements*).

(Fore River) (collectively, Project Companies); Tyr Energy, LLC (Tyr); K Road Management LLC (K Road Management); EBG Holdings, LLC (EBG Holdings); and K Road BG LLC (K Road) (collectively, Applicants) filed a joint application under section 203 of the FPA³ requesting Commission authorization for an indirect disposition of jurisdictional facilities that would result from changes in ownership and operational structure, including certain transfers of ownership or control of equity interests in EBG Holdings. The jurisdictional facilities involved include generator leads, generator step-up transformers, a market-based rate tariff, related books and records, interconnection facilities, and power sales contracts associated with generating facilities owned and operated by the Project Companies.

3. Applicants requested section 203 authorization for three groups of transactions. The first group of transactions involved the restructuring of EBG Holdings (Proposed Transaction). The second and third groups of transactions (Future Transactions and Future Subsidiary Transactions) are described above. Applicants amended their application on September 13, 2005, requesting expedited review of the Proposed Transaction and stating that the Commission could address their requests for advance authorizations for Future Transactions and Future Subsidiary Transactions at a later date. The Commission issued an order on the Proposed Transaction on October 7, 2005.⁴ The instant order authorizes Applicants' request for advance authorizations for Future Transactions and Future Subsidiary Transactions.

II. Background

A. Description of the Applicants

4. EBG Holdings is a limited liability company that owns the membership interests of Boston Generating. EBG Holdings is a passive financial owner with a management structure that consists of a single member Class B Manager and Class A Members with rights typically allowed to passive investors. However, as provided in *Boston Generating*, EBG Holdings will change from a passive to an active owner with the ability to exercise some managerial control over Boston Generating and the Project Companies. The reorganization authorized in *Boston Generating* will replace the current management

³ 16 U.S.C. § 824b (2000).

⁴ *Boston Generating, LLC*, 113 FERC ¶ 61,016 at P 3-4 (2005) (*Boston Generating*).

structure with two new classes of Unit holders: Class A and Class B.⁵ The Class A Unit holders will be active investors with full voting rights. The Class B Unit holders will be passive investors with few voting rights.

5. Boston Generating owns the Project Companies that own and operate the jurisdictional facilities. The Project Companies collectively own 3,248 megawatts of generating capacity and have market-based rate authority. Boston Generating purchases the output from the generators and resells the power to Sempra Energy Trading Corp.

6. K Road is a limited liability company authorized to purchase up to 20 percent of the equity interests of EBG Holdings as a Class A Unit holder.⁶

B. Description of the Transactions

1. Future Transactions

7. EBG Holdings requests authorization for a two-year period without further section 203 filings for Future Transactions involving transfers of EBG Holdings' Class A Units to other existing Unit holders or to new buyers. Applicants state that the transactions would be subject to the following conditions: 1) the transfers would be limited to buyers that are financial institutions or related entities that are not primarily engaged in energy-related business activities; 2) the transfers would limit a buyer to owning 20 percent or less of the equity interests in EBG Holdings; 3) the transfers would be limited to buyers and their affiliates that do not collectively own or control five percent or more voting interests in any public utility that has interests in any generation facilities or engages in jurisdictional activities within Independent System Operator, Inc., New England (ISO-NE), where the Project Companies' generating plants are located.⁷

8. In addition, EBG Holdings states that, as a condition for advance approval, it will comply with the Commission's additional notification conditions and compliance filing requirements, as stated in *La Paloma* and *Lake Road*,⁸ as follows:

⁵ Members will own Units rather than Membership Interests. Application at 5.

⁶ *Boston Generating, LLC*, 113 FERC ¶ 61,016 at P 3, 8, 12, 42 (2005).

⁷ Applicants state that these limitations are similar to those that the Commission established in *Lake Road Holding*, 112 FERC ¶ 61,051 (2005) (*Lake Road*) and *La Paloma*, 112 FERC ¶ 61,052 (2005) (*La Paloma*).

⁸ Application at 22-23.

1. Transferors of interests will report the transfers within 10 days and include a statement of other generating or power marketing interests directly or indirectly owned by the buyer or its affiliates, irrespective of the market or region of the country in which such interests are operated;
2. Applicants will submit, both in a compliance filing within 30 days of the closing of the initial sales transaction, and in any subsequent notification of holding company equity sales transactions, the following information:
 - The identity of both pre- and post-transaction equity holders (and percentage ownership) of the holding company;
 - Any contracts for (or a summary of) power purchase agreements, energy management services, asset management services, and any fuel supply services provided to the Project Companies' facilities, including the contract counterparty, and any affiliation between that counterparty and post-transaction equity holders; and
 - The identity of any parties acquiring equity interests that are subject to the Commission's Code of Conduct rules as a result of acquiring these equity interests.
9. EBG Holdings states that it seeks this authorization to facilitate the trading of equity interests in EBG Holdings to enhance the financial stability and flexibility of the projects.⁹

2. Future Subsidiary Transactions

10. EBG Holdings also seeks advance authorization for a two-year period without further section 203 filings for Future Subsidiary Transactions to allow any current or future holders of Class A Units to transfer such interests to direct or indirect wholly-owned subsidiaries of their ultimate corporate parents.¹⁰ EBG Holdings proposes that the Future Subsidiary Transactions would be subject to the reporting requirements set out in *La Paloma* and *Lake Road*, i.e., that the applicants are required to identify the direct or

⁹ Application at 23.

¹⁰ Applicants state that these transactions are similar to those in *La Paloma Generating Trust, Ltd.*, 107 FERC ¶ 62,179 (2004), *Lake Road*, and *La Paloma*. See Application at 24.

indirect subsidiaries that will hold the equity interests. Applicants state that they are seeking this additional authorization to facilitate future long-term investment in EBG Holdings.¹¹

III. Notice and Responsive Pleadings

11. Notice of the filing was published in the *Federal Register*, 70 Fed. Reg. 48,116 (2005), with interventions and protests due on or before August 26, 2005. Protests were filed by the Reading Municipal Light Department, Wellesley Municipal Light Plant, and Concord Municipal Light Plant (collectively, Municipals), Local 369, Utility Workers Union of America, AFL-CIO (Local 369), and NSTAR Electric & Gas Corporation (NSTAR).¹² On August 31 and September 6, 2005, Applicants filed answers to the protests. On September 7, 2005, the Municipals and Local 369 filed answers to Applicants' response to the protests.

IV. Discussion

A. Procedural Matters

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. In *Boston Generating*, the Commission granted NSTAR's motion to intervene in this case out of time.¹³

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2)(2005), prohibits an answer to a protest unless otherwise ordered by the decisional authority. In *Boston Generating*, we accepted the answers filed in this proceeding because they provided information that assisted us in our decision-making process.¹⁴

¹¹ *Id.* at 24.

¹² NSTAR moved to intervene and protest on behalf of its affiliated public utility operating companies, Boston Edison Company, Cambridge Electric Light Company, and Commonwealth Electric Company.

¹³ *Boston Generating*, 113 FERC ¶ 61,016 at P 18.

¹⁴ *Id.* at P 19.

B. Future Transactions and Future Subsidiary Transactions**1. Standard of Review**

14. Section 203(a) of the FPA provides that the Commission must approve a proposed disposition if it finds that the disposition “will be consistent with the public interest.”¹⁵ The Commission generally takes account of three factors in analyzing proposed dispositions of facilities: (a) the effect on competition, (b) the effect on rates, and (c) the effect on regulation. We will grant authorization for Future Transactions and Future Subsidiary Transactions without further section 203 application because these transactions are consistent with the public interest.

2. Effect on Competition

15. Applicants contend that neither the Future Transactions nor the Future Subsidiary Transactions will have an adverse effect on competition because none of the new buyers will have operational or commercial control over EBG Holdings, Boston Generating, the Project Companies, or the jurisdictional generating units. They state that these future transactions incorporate the conditions established under *Lake Road* and *La Paloma*, which address the Commission’s concerns related to advance authorizations.

16. Intervenors oppose the requested advance authorizations for certain future transactions. Municipals state that such advance authorizations would limit the Commission’s review of future transactions until after they occur.¹⁶ Local 639 contends that the advance authorization for unidentified future transactions will not ensure that competitive harm will not occur.¹⁷

17. The Commission finds that the Future Transactions and Future Subsidiary Transactions will not have an adverse effect on competition. These transactions are similar to *Lake Road* and *La Paloma*, where the Commission placed conditions on the transactions to prevent harm to competition and ensure that the transactions are consistent with the public interest. Applicants incorporated these conditions in Future Transactions and in Future Subsidiary Transactions; therefore, we find that these transactions are consistent with the public interest.

¹⁵ 16 U.S.C. § 824b (2000).

¹⁶ Municipals Protest at 10.

¹⁷ Local 369 Protest at 11-12.

3. Effect on Rates

18. In *Boston Generating*, the Commission found that the Proposed Transaction would have no adverse effect on rates. Here, we find that the current rate environment is not likely to change in the future. All sales of wholesale power from Boston Generating and the Project Companies will be made at market-based rates. Moreover, the transactions raise no concerns regarding rates charged for transmission service or for retail sales because neither Boston Generating nor the Project Companies provide transmission service or make retail sales, which is not likely to change in the future. Accordingly, the Commission finds that the Future Transactions and Future Subsidiary Transactions will not have an adverse effect on rates.

4. Effect on Regulation

19. As explained in the Merger Policy Statement and the Merger Filing Requirements, the Commission's primary concern with the effect on regulation of a transaction involves possible changes in the Commission's jurisdiction when a registered holding company is formed, thus invoking the jurisdiction of the Securities and Exchange Commission. Based on the facts stated in the application, neither Commission nor state regulation will be affected by the Future Transactions or Future Subsidiary Transactions. They will not involve the formation of a registered holding company. Moreover, the sales of energy from the Project Companies are not now subject to state regulation, nor are they expected to be in the future. Thus, we find that the Future Transactions and Future Subsidiary Transactions will not adversely affect state or federal regulation.

The Commission orders:

(A) Applicants' proposed Future Transactions and Future Subsidiary Transactions are hereby authorized.

(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 FPA to issue supplemental orders as appropriate.

(E) Applicants shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the transactions.

(F) If the transactions result 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 shall be made.

(G) This order does not relieve acquirers of securities in these transactions from the necessity of making appropriate filings under section 203 of the FPA, as required.

(H) Applicants shall notify the Commission that the transactions have been consummated in accordance with the understanding discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.