

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

MACH Gen, LLC  
Millennium Power Partners, L.P.  
New Athens Generating Company  
New Covert Generating Company, LLC  
New Harquahala Generating Company, LLC  
Lehman Commercial Paper Inc.  
Merrill Lynch Credit Products, LLC

Docket No. EC06-167-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued November 15, 2006)

1. On September 28, 2006, MACH Gen, LLC (MACH Gen), its Project Companies,<sup>1</sup> Lehman Commercial Paper Inc. (Lehman), and Merrill Lynch Credit Products, LLC (Merrill Lynch) (collectively, Applicants) filed a joint application under section 203 of the Federal Power Act (FPA).<sup>2</sup> Applicants request: 1) Commission authorization for a disposition of certain jurisdictional facilities<sup>3</sup> associated with equity interests that

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<sup>1</sup> The Project Companies include Millennium Power Partners, L.P. (Millennium), New Athens Generating Company, LLC (New Athens), New Covert Generating Company, LLC (New Covert), and New Harquahala Generating Company, LLC (New Harquahala).

<sup>2</sup> 16 U.S.C. § 824b (2000), *amended by* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) (EPAAct 2005).

<sup>3</sup> The jurisdictional facilities are the Project Companies' interconnection facilities, market-based rate tariffs and related wholesale power sales contracts, and books, records and accounts associated with their generating facilities.

Lehman and Merrill Lynch propose to acquire in MACH Gen (Proposed Transactions); and 2) that the Commission modify an existing blanket authorization that permits certain future transfers of equity interests in MACH Gen among direct or indirect subsidiaries of the same parent company (Future Subsidiary Transactions).<sup>4</sup>

2. The Commission has reviewed the Proposed Transactions and the requested modification of the blanket authorization for Future Subsidiary Transactions under the Commission's Merger Policy Statement and Order Nos. 669, 669-A and 669-B.<sup>5</sup> We will authorize the Proposed Transactions and requested modification of the blanket authorization granted in the *Original Blanket Authorization Order*. We find that they are consistent with the public interest and 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.

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<sup>4</sup> See *MACH Gen, LLC*, 113 FERC ¶ 61,138 (2005) (*Original Blanket Authorization Order*) (describing in more detail the Future Subsidiary Transaction blanket authorization). Applicants request that the Commission grant the authorizations without ruling on the threshold jurisdictional issue as to whether section 203 authorization is required. Thus, jurisdiction over the proposed transactions is assumed, without making any determination of jurisdiction. See *Ocean State Power*, 47 FERC ¶ 61,321 at 62,130 (1989); and *Ocean State Power*, 43 FERC ¶ 61,466 (1988).

<sup>5</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); see also *Transactions Subject to Federal Power Act Section 203*, Order No. 669, 71 Fed. Reg. 1348 (2006), FERC Stats. & Regs. ¶ 31,200 (2006), *order on reh'g*, Order No. 669-A, 71 Fed. Reg. 28,422 (2006), FERC Stats. & Regs. ¶ 31,214 (2006) (*Order No. 669-A*), *order on reh'g*, Order No. 669-B, 71 Fed. Reg. 42,579 (2006).

## I. Background

### A. Description of Applicants

#### MACH Gen and the Project Companies

3. Applicants state that MACH Gen, which holds all of the ownership interests in the Project Companies, is owned directly and indirectly by a group of lender-owners.<sup>6</sup> The Project Companies were previously owned and operated by National Energy & Gas Transmission, Inc. (NEGT).<sup>7</sup> In 2004, NEGТ transferred its interests in the Project Companies to MACH Gen as a result of NEGТ restructuring its debt obligations.<sup>8</sup>

4. Millennium owns a 360 megawatt (MW) generating facility in Massachusetts that is interconnected with New England Power Company. Millennium sells power to and receives energy management and marketing services from Merrill Lynch Commodities, Inc. (Merrill Lynch Commodities) under an energy management and marketing agreement. In turn, Merrill Lynch Commodities sells the power purchased from Millennium into markets administered by ISO New England, Inc. (ISO-NE). Millennium is authorized to sell wholesale power at market-based rates.

5. New Athens owns a 1,080 MW generating facility in New York that is interconnected with Niagara Mohawk Power Corporation. New Athens, like Millennium, sells power to and receives energy management and marketing services from Merrill Lynch Commodities under an energy management and marketing agreement. In turn, Merrill Lynch Commodities sells the power purchased from New Athens into markets administered by the New York Independent System Operator, Inc. (NYISO). New Athens is authorized to sell wholesale power at market-based rates.

6. New Harquahala owns a 1,050 MW generating facility in Arizona that is interconnected with Arizona Public Service Company (APS) and is in the APS and Salt

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<sup>6</sup> Each lender-owner holds only a minority interest in MACH Gen.

<sup>7</sup> NEGТ was formerly known as PG&E National Energy Group, Inc.

<sup>8</sup> The Commission authorized these transfers under FPA section 203. *See Athens Generating Co., L.P., et al.*, 103 FERC ¶ 61,290 (2003); *Athens Generating Co., L.P., et al.*, 104 FERC ¶ 62,076 (2003).

River Project (SRP) control areas.<sup>9</sup> Like Millennium and New Athens, New Harquahala sells power to and receives energy management and marketing services from Merrill Lynch Commodities under an energy management and marketing agreement. New Harquahala is authorized to sell wholesale power at market-based rates.

7. New Covert owns a 1,200 MW generating facility in Michigan that is interconnected with Michigan Electric Transmission Company, L.L.C. New Covert sells power to and receives energy management and marketing services from The Cincinnati Gas & Electric Company (CG&E) under an energy management and marketing agreement. The facility is in the Michigan Electric Control System control area of the Midwest Independent Transmission System Operator, Inc. (Midwest ISO). New Covert is authorized to sell wholesale power at market-based rates.

### **Lehman**

8. Lehman, a publicly-held financial services institution, is not primarily engaged in energy-related business activities.<sup>10</sup> Applicants state that Lehman does not manage, direct, or control generation, transmission, or any other jurisdictional assets or activities. The following are Applicants' representations as to Lehman's holdings that are relevant to the present proceeding.

9. Within the ISO-NE, Lehman Brothers Holdings Inc. (LBHI) has a 6.3 percent interest in Lake Road Holding Company, LLC (Lake Road), which owns Lake Road Generating Company, L.P. This generating company owns a 750 MW generation facility in Connecticut. In addition, LBHI wholly owns Neuberger Berman Inc. (Neuberger Berman), an investment advisory company. As part of its client services, Neuberger Berman trades in equity markets and periodically takes positions in companies that own energy-related assets in the United States.

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<sup>9</sup> Although the application here identifies New Harquahala as being in the SRP control area, the application in Docket No. EC05-97-000, which underlies the *Original Blanket Authorization Order*, states that New Harquahala is located in the APS/SRP control areas. See *Original Blanket Authorization Order*, 113 FERC ¶ 61,138 at P 6.

<sup>10</sup> Lehman conducts business in equity and fixed income sales, trading and research, investment banking, private investment management, asset management and private equity. Due to the number of affiliates and subsidiaries in Lehman's corporate family, any reference to Lehman will also include the ownership interests of Lehman affiliates and subsidiaries. Further specificity will be provided where clarity requires it.

10. Lehman Brothers Commodity Services Inc. (LBCS), an indirect subsidiary of LBHI, is a power marketer authorized to sell electricity at market-based rates. LBCS sells, markets and trades wholesale power, capacity, ancillary and related services, and natural gas to various markets in the United States.

11. Applicants note that LBHI, Lehman, and their affiliates may hold other debt and equity positions from time to time in energy companies in connection with their general business activities. Applicants state that these are transitory, passive, non-controlling interests that change frequently, and further cite a Commission holding that there is no reason to ascribe control to entities having transitory holdings of electric utility stocks when those stocks are held in connection with investment or merchant banking, market-making or asset management activities.<sup>11</sup>

### **Merrill Lynch**

12. Merrill Lynch, a wholly-owned subsidiary of Merrill Lynch & Co., is a financial institution not primarily engaged in energy-related business activities.<sup>12</sup> Merrill Lynch is affiliated with power marketers authorized to sell electricity at market-based rates, namely, Merrill Lynch Capital Services, Inc. (MLCS) and Merrill Lynch Commodities. According to Applicants, Merrill Lynch Commodities sells wholesale power at market-based rates, but does not own or otherwise control electrical generation, transmission or distribution facilities, or natural gas pipeline or storage facilities. As noted above, Merrill Lynch Commodities is the energy manager of Millennium, New Athens, and New Harquahala.

13. Merrill Lynch has an interest of approximately 11.4 percent in Lake Road, the indirect owner of the 750 MW generating facility in the ISO-NE. In addition, Merrill Lynch, Pierce, Fenner & Smith Incorporated (MLPFS), an affiliate of Merrill Lynch, recently received authorization to hold up to 20 percent of the equity interests in Entegra Power Group, LLC (Entegra), a holding company that indirectly owns a 2,200 MW

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<sup>11</sup> See *Morgan Stanley Capital Group Inc.*, 69 FERC ¶ 61,175 (1994).

<sup>12</sup> Due to the number of affiliates and subsidiaries in Merrill Lynch's corporate family, any reference to Merrill Lynch will also include the ownership interests of Merrill Lynch affiliates and subsidiaries. Further specificity will be provided where clarity requires it.

generating project in the APS/SRP control areas and a 2,200 MW generating project in the Entergy Corporation control area.<sup>13</sup>

### **Sellers**

14. Each entity that will transfer equity interests to Lehman and/or Merrill Lynch (Seller)<sup>14</sup> holds (or will hold) a minority equity interest in MACH Gen. According to Applicants, no Seller's equity interest in MACH Gen gives it operational or commercial control over Millennium, New Athens, New Covert, or New Harquahala, or any portion of the output of those projects. Each Seller intends to transfer all or part of its equity interest in MACH Gen (ranging from approximately 0.01 percent to less than eight percent) to Lehman and/or MLCP.

### **B. Proposed Transactions**

15. The *Original Blanket Authorization Order* authorized: (1) specific transfers of equity interests in MACH Gen, including those in which both Lehman and Merrill Lynch acquired interests in MACH Gen; and (2) future transfers of equity interests (Future Transactions), on a blanket basis (over a two year period), from current or new owners to other current or new owners if certain conditions are met. The *Original Blanket Authorization Order* provides that Future Transactions in MACH Gen "will be permitted without further section 203 application only if the buyer and its affiliates do not collectively own or control five percent or more voting interest in any generation

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<sup>13</sup> See *Entegra Power Group LLC*, 117 FERC ¶ 61,085 (2006) (*Entegra*), which was issued after Applicants' filing here.

<sup>14</sup> Most of these entities are listed in Attachment B to the September 18, 2006 Notice of Consummation filed in Docket No. EC05-97-000. A Seller might also be an entity holding MACH Gen interests not listed in Attachment B because it acquired these interests as part of a transaction after September 15, 2006. Sellers to Lehman include Fortis Proprietary Capital Inc., J.P. Morgan Securities Inc., 761 Holdings Corp., Drawbridge Special Opportunities Fund, LP, Baroreo Lloyd Corp., Banc of America Securities LLC, Merrill Lynch, Bear Stearns & Co. Inc., Fernwood Restructurings Ltd, and Fernwood Associates L.L.C. Sellers to MLCP include J.P. Morgan Securities Inc., Credit Suisse Securities (USA) LLC, Cargill Financial Services International, Inc., Mason Sunnyside Credit Master Fund, Ltd., and Citi GoldenTree Ltd.

facilities or engage in any jurisdictional activities in the geographic markets in which the Project Companies are located. . .”<sup>15</sup>

16. Since their initial acquisitions, Lehman and Merrill Lynch have decided that they would like to acquire more equity interests in MACH Gen. However, Applicants point out that Lehman and Merrill Lynch cannot use the blanket authorization granted by the Commission for Future Transactions. They each own or control a five percent or more voting interest in certain other generation facilities in the geographic markets or control areas in which the Project Companies are located. Specifically, Lehman and Merrill Lynch both have indirect interests of five percent or more in other generating facilities in the ISO-NE market. Also, as noted previously, an affiliate of Merrill Lynch is authorized to indirectly hold up to 20 percent of a generation facility in the APS/SRP control areas, where MACH Gen’s New Harquahala is located. In addition, because both Lehman and Merrill Lynch are affiliated with power marketers, neither would meet the condition of the blanket authorization in the *Original Blanket Authorization Order* that precludes affiliation with entities that engage in jurisdictional activities, such as power marketing.<sup>16</sup>

17. Under the Proposed Transactions, each Seller will transfer some or all of its equity interests in MACH Gen to Lehman and/or Merrill Lynch in separate transactions. Applicants contend that the corporate structures of the Project Companies and MACH Gen will not change as a result of these transfers. Once the transactions are complete, Lehman will hold up to an approximately 9.99 percent equity interest in MACH Gen, and Merrill Lynch will hold up to an approximately 19 percent equity interest in MACH Gen. However, Applicants also indicate that Lehman and Merrill Lynch intend to resell some of the equity interests they seek authorization to acquire in this proceeding.<sup>17</sup> Applicants state that they seek Commission authorization for the Proposed Transactions to give

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<sup>15</sup> *Original Blanket Authorization Order* at P 40.

<sup>16</sup> We note that the application does not mention the affiliation with power marketers as a reason that the Proposed Transactions cannot be conducted under the blanket granted in the *Original Blanket Authorization Order*.

<sup>17</sup> According to Applicants, these prospective sales (*i.e.*, downstream transfers) will reduce Lehman’s and Merrill Lynch’s equity interests in MACH Gen to two percent and three percent, respectively, well below the twenty percent limit authorized in the *Original Blanket Authorization Order*. Applicants are not now seeking FPA section 203 authorization for any downstream transfers in this proceeding. They state that if any additional authorization is needed to engage in downstream transfers, those transactions will be the subject of a separate application.

Lehman and Merrill Lynch enough time to complete the downstream sales. Commission authorization would also provide a cushion should some of the contemplated downstream sales not occur. Within ten days of each of the Proposed Transactions, Applicants agree to submit a notice of consummation informing the Commission of the specific transfer by a Seller to Lehman and/or Merrill Lynch.

**C. Request for Modification of Future Subsidiary Transaction Blanket Authorization**

18. Applicants request that the Commission modify the blanket authorization granted in its *Original Blanket Authorization Order* for Future Subsidiary Transactions. The *Original Blanket Authorization Order* granted MACH Gen owners, both present and future, authorization to transfer their equity interests in MACH Gen “horizontally” among direct or indirect subsidiaries of the same parent company. Applicants request that the Commission slightly expand this authorization to also permit any MACH Gen owner to transfer its equity interest in MACH Gen “up” to its direct or indirect parent company.

**II. Notice**

19. Notice of the filing was published in the *Federal Register*, 71 Fed. Reg. 59,768 (2006), with interventions, comments or protests due on or before October 19, 2006. None were received.

**III. Discussion**

**A. Standard of Review**

20. Section 203(a) of the FPA provides that the Commission must approve a transaction if it finds that the transaction “will be consistent with the public interest.”<sup>18</sup> The Commission’s analysis of whether a transaction is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.<sup>19</sup> In addition, EPAct 2005 amended section 203 to specifically require that the Commission also determine that the transaction will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless

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<sup>18</sup> 16 U.S.C. § 824b (2000).

<sup>19</sup> See *supra* note 5.

the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.<sup>20</sup> As discussed below, we will approve the Proposed Transactions because they meet the statutory standards.

## **B. Proposed Transactions**

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

21. Applicants argue that the Proposed Transactions do not raise any horizontal market power issues. They state that neither Lehman nor Merrill Lynch currently have any interests in generation in the relevant geographic markets (NYISO, New England Power Pool (NEPOOL), Midwest ISO, and SRP control areas) other than, as previously described, the non-controlling, *de minimis* interests in NEPOOL.<sup>21</sup> They argue that after the Proposed Transactions are consummated, interests held by Lehman and Merrill Lynch in the relevant geographic markets will remain *de minimis*.

22. Applicants state that Millennium's 360 MW project is in Western Massachusetts, which is not a transmission constrained area of NEPOOL, and that the project has approximately 1.2 percent of the total installed capacity in NEPOOL. According to Applicants, the amount of generation owned indirectly by Lehman or MLCP is extremely small compared to the total installed generating capacity in NEPOOL, and will remain so after the Proposed Transactions. Applicants claim that following the Proposed Transactions, Lehman and Merrill Lynch will hold indirect and non-controlling interests in generation that are approximately 0.6 percent and 1.58 percent respectively of the total generation located in the NEPOOL market.

23. Applicants similarly state that the other Project Companies' installed capacity in their respective markets or control areas is a minor percentage of the total installed capacity in the relevant market or control area: (1) New Athens' 1,080 MW is approximately 2.7 percent in the NYISO market, (2) New Covert's 1,200 MW is approximately 0.85 percent in the Midwest ISO market, and (3) New Harquahala's 1,050 MW is 12.9 percent of SRP control area. Following the Proposed Transactions, Lehman and Merrill Lynch will hold indirect and non-controlling interests in generation that are,

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<sup>20</sup> EPAAct 2005 § 1289, 119 Stat. 982-83, to be codified at 16 U.S.C. § 824b(a)(4).

<sup>21</sup> Applicants state that projects in which Lehman or Merrill Lynch hold less than a five percent interest are not relevant here. *See, e.g., ITC Holdings Corp. and International Transmission Company*, 111 FERC ¶ 61,149 (2005) and *USB AG*, 103 FERC ¶ 61,284, P 15 (2003).

respectively, approximately: (1) 0.2 and 0.5 percent in the NYISO market, (2) .08 and 0.16 percent in the Midwest ISO market, and (3) 1.3 and 2.5 percent in the SRP control area.<sup>22</sup>

24. Applicants state that Lehman and Merrill Lynch's power marketer affiliates buy and sell power in some or all of the relevant control areas, but that they do not control any generation or transmission facilities there. Each power marketer affiliate has been granted market-based rate authority by the Commission and thus has received a determination that it lacks market power.

25. Applicants state that Millennium, New Athens, and New Harquahala sell power to and receive energy management and marketing service from Merrill Lynch Commodities through energy management and marketing agreements. Applicants assert that the energy management agreements do not transfer control of these Project Companies to Merrill Lynch Commodities.<sup>23</sup>

26. Applicants state that Lehman's affiliate, Neuberger Berman, in providing its wealth management services, takes positions on behalf of clients in companies that own energy-related assets. Neuberger Berman's investment positions change frequently, are held in connection with asset management and brokerage activities, and are passive in nature. Further, Applicants state that Neuberger Berman does not acquire securities for the purpose of exercising control over or influencing the management of the issuer, and none of its present positions allows the company or its affiliates to control the day-to-day operation of any Commission-jurisdictional assets. Applicants claim that Neuberger Berman exercises no control over Lehman's trading business, and that the Securities and Exchange Commission treats Neuberger Berman as a separate reporting entity for the purposes of complying with regulation 13D and Schedules 13D and 13G under the Securities and Exchange Act of 1934.

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<sup>22</sup> We note that the ownership restriction of less than five percent adopted for the blanket authorization granted in the *Original Blanket Authorization Order*, as relevant here, applied to other generation facilities in the combined APS/SRP control areas, not solely the SRP control area. In the APS/SRP control areas, the ownership held by Lehman and Merrill Lynch would be much less than the stated amounts for the SRP control area alone.

<sup>23</sup> Notice of Non-material change in Circumstances, *Entergy-Koch Trading, L.P.*, FERC Docket Nos. ER01-2781-001, *et al.* (filed August 29, 2003).

27. Applicants further argue that the Proposed Transactions do not raise any vertical market power issues. They represent that neither Lehman nor Merrill Lynch has an ownership interest of five percent or greater in any electric transmission company in the relevant markets. Applicants also state that neither Lehman nor Merrill Lynch owns or controls any fuel or fuel transport systems that sell or transport fuel to generation in the relevant markets.

28. The Commission is satisfied that the consolidation of additional ownership interests in MACH Gen proposed here with Lehman's and Merrill Lynch's existing ownership in either MACH Gen or other generation (or generation capacity) in the relevant markets or control areas, does not raise competitive issues.<sup>24</sup> Even if ownership gave control, the increase in concentration brought about by consolidation of the Lehman's affiliate's ownership of other generation in NEPOOL (and, if relevant, Merrill Lynch's affiliates' ownership of other generation in the APS/SRP control areas) with the additional ownership interests proposed here would not be enough to raise concern about market power in the generation market.

29. Further, we note that Applicants have asserted that the power marketers affiliated with Lehman and MLCP will not control generation in relevant control areas or markets. The Commission noted in *Duke Energy Corp.* that without control of capacity,

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<sup>24</sup> The Commission notes that, rather than Applicants' reported ownership of 11.58 percent of Entegra by a Merrill Lynch affiliate, that affiliate is now authorized to hold 20 percent or less of interest in Entegra. *See Entegra, supra.* This could be significant because Entegra's Gila River Power, L.P. (Gila River) sells wholesale power into APS/SRP control areas. *See Entegra, supra*, at P 4. As noted in footnote 9 of this order, the *Original Blanket Authorization Order* states that New Harquahala is located in the same APS/SRP control areas. However, even if the relevant control area for New Harquahala is the APS/SRP control areas, the total installed capacity of the generators in the APS/SRP control areas in which Merrill Lynch has an ownership interest is a lower percentage than Applicants' reported percentage of total installed capacity for New Harquahala in the SRP control area alone.

competition in wholesale energy markets cannot be harmed.<sup>25</sup> Accordingly, we find that the Proposed Transactions will not adversely affect competition.<sup>26</sup>

## 2. Effect on Rates

30. Applicants argue that the Proposed Transactions will not have any adverse effect on rates. They state that all sales of electric energy from the Project Companies will continue to be made at market-based rates previously authorized by the Commission and that the Proposed Transactions will have no effect on the rates, terms, or conditions of wholesale power sales agreements. In addition, they state that the Project Companies provide no unbundled transmission services.

31. Based upon these representations, we find that the Proposed Transactions will not adversely affect rates.

## 3. Effect on Regulation

32. Applicants state that the Proposed Transactions will not diminish the Commission's authority. In addition, Applicants argue that the Proposed Transactions will not result in the merger of public utilities because all sales from the Project Companies' generating facilities will continue to be at wholesale and not be subject to state commission regulation. Therefore, Applicants state, the Proposed Transactions will not have any adverse effect on state regulation.

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<sup>25</sup> *Duke Energy Corp*, 113 FERC ¶ 61,297 at P 15 (2005). Also see *Entegra, supra*, at P 20. Note, however, that the *Original Blanket Authorization Order's* restriction of less than five percent of the voting interests in other generation in the relevant control areas or markets continues in force with respect to transactions conducted under the blanket authorization.

<sup>26</sup> We note that in Docket No. RM04-7-000, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 115 FERC ¶ 61,210 (2006), 71 Fed. Reg. 33,102 (2006), the Commission raised the concern that energy management agreements may confer control of generation, depending on the fact situation. Accordingly, the Commission may revisit this area in the future. However, in this case, even if the energy management agreements give control over the MACH Gen Project Companies to Merrill Lynch's affiliate, the Proposed Transactions would have no effect on concentration or competition, since the ownership interests being acquired would be in generation facilities already controlled by a Merrill Lynch affiliate.

33. We find that the Proposed Transactions will not adversely affect regulation.

#### 4. Cross-subsidization

34. FPA section 203(a)(4)<sup>27</sup> adds a specific requirement that the Commission must find that a proposed transaction under section 203 will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company, unless that cross-subsidization, pledge or encumbrance will be consistent with the public interest.

35. Applicants say that this concern is not applicable here because neither Lehman or Merrill Lynch (or any of their affiliates) is a traditional utility with captive customers. Applicants state that no relevant entity -- including MACH Gen itself, its current owners, entities presently authorized to acquire interests in MACH Gen in the future, Merrill Lynch, Lehman, or the wholly owned subsidiaries of their respective parents -- is a traditional public utility company that has captive customers or that owns or provides transmission service over jurisdictional facilities. Because of this, dispositions or acquisitions of interests in MACH Gen under the Proposed Transactions cannot result now or in the future in cross-subsidization.<sup>28</sup> Applicants stress that the Proposed Transactions 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.

36. In addition, Applicants state that the Proposed Transactions will not result in: (i) any transfer 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; (ii) any new issuance 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; (iii) any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (iv) any new affiliate contract 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,

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<sup>27</sup> See 16 U.S.C. § 824b(a)(4).

<sup>28</sup> See *supra* note 20.

other than non-power goods and services agreements subject to review under FPA sections 205 and 206.<sup>29</sup>

37. We find that Applicants have provided adequate assurance that the transactions will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company.

**C. Modification of Future Subsidiary Transaction Blanket Authorization**

38. We will grant Applicants' request for modification of the blanket authorization for Future Subsidiary Transactions. The requested modification slightly expands the existing "Future Subsidiary Transactions" authorization by permitting MACH Gen owners (both present and future) to transfer their equity interests in MACH Gen "up" to a direct or indirect parent. MACH Gen owners will still be able to transfer their interests "horizontally" among subsidiaries of their direct or indirect parent company as before. This request does not raise issues about changes in control or effects on competition, rates or regulation. It also does not raise concerns about cross-subsidization.

39. Moreover, we find that the ability to transfer interests up the corporate organization chart of the owner to a direct or indirect parent is essentially no different than what we previously authorized. Previously, the transferred interest would have moved up through the parent and then down to a different subsidiary. The modification granted here will allow the transferred interest to remain with the parent. Aggregate market shares are identical in both situations, and the Project Companies remain subject to Commission regulation in both situations. Further, the Project Companies' sales of power at market-based rates, without captive customers, will be the same, and the holding company's independence from a traditional regulated utility also will not change. In addition, this modification does not raise concerns over cross-subsidization.

40. We therefore find that the proposed modification of the blanket authorization for Future Subsidiary Transactions meets the requirements of section 203. We authorize, subject to the conditions of the *Original Blanket Authorization Order*, each present or future owner of MACH Gen to transfer its equity interest in MACH Gen to a direct or indirect parent.

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<sup>29</sup> See Order No. 669-A, *supra*, note 5.

The Commission orders:

(A) Applicants' proposed dispositions of jurisdictional facilities with respect to the Proposed Transactions and modification of the blanket for Future Subsidiary Transactions are authorized, subject to the conditions of the *Original Blanket Authorization Order*, 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 FPA to issue supplemental orders as appropriate.

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

(F) Applicants shall notify the Commission within 10 days of the date that the disposition of jurisdictional facilities under the Proposed Transactions has been consummated. Applicants shall notify the Commission that Future Subsidiary Transactions have been consummated in accordance with the notification requirements of the *Original Blanket Authorization Order*.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.