

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.

Entegra Power Group LLC
Gila River Power, L.P.
Union Power Partners, L.P.

Docket No. EC07-44-000

ORDER DENYING AMENDMENT OF BLANKET AUTHORIZATION FOR
DISPOSITION OF JURISDICTIONAL FACILITIES AND ACQUISITION OF
SECURITIES

(Issued April 6, 2007)

1. On December 28, 2006, Entegra Power Group LLC (Entegra), Gila River Power, L.P. (Gila River), and Union Power Partners, L.P. (Union Power) (collectively, Applicants) filed a request that the Commission amend the conditions imposed under sections 203(a)(1) and 203(a)(2) of the Federal Power Act (FPA)¹ in an order granting blanket authorization to engage in certain transactions.² The transactions involved are acquisitions and transfers of active (voting rights) interests in Entegra to entities that are not primarily in the energy business. Entegra is a special-purpose entity through which lender-owners (Entegra members) hold ownership interests in Gila River and Union Power (Project Companies). Applicants' jurisdictional facilities consist of market-based rate tariffs, wholesale power sales contracts, related books and records, and interconnection facilities associated with generating facilities owned by Project

¹ 16 U.S.C. § 824b (2000), *amended by* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) (EPAct 2005).

² *Entegra Power Group, LLC*, 115 FERC ¶ 62,038 (2006) (*Original Authorization Order*), *amended by* 118 FERC ¶ 61,181 (2007) (March 5 Order) (together, *Blanket Authorization Order*).

Companies. Under the blanket authorization previously approved by the Commission, an acquirer of interests in Entegra may not own five percent or more of the voting interests in any public utility that has interests in generating facilities or certain other activities in the relevant geographic area. Applicants seek to increase from five percent to ten percent the level of public utility voting interests that acquirers of Entegra interests may own. They ask permission to make transfers under the requested modification for two years following the issuance of this order. For the reasons discussed below, we deny Applicants' request.

I. Background

A. Description of Applicants

2. Entegra identifies itself as a special purpose vehicle through which a group of lender-owners (Entegra Members) holds ownership interests in the Project Companies. The lender-owners acquired their interests in the Project Companies under a bankruptcy plan of reorganization in a transaction authorized by the Commission.³ Entegra states that it has two classes of ownership interests: Class A Unit holders are active investors with full voting rights, while Class B Unit holders are passive investors with few voting rights. According to Entegra, each of the current Entegra Members is a bank, institutional investor, financial institution, investment company, or related entity that is not primarily engaged in energy-related business activities. Because of its ownership interests in the Project Companies, Entegra states that it is a holding company, as defined under the Public Utility Holding Company Act of 2005.⁴

3. Entegra asserts that the Project Companies are its wholly-owned subsidiaries. Union Power owns and operates a 2,200 megawatt (MW) natural gas-fired, combined-cycle generating facility in Arkansas (Union Power Facility) that is interconnected with the transmission system of Entergy Arkansas, Inc., an operating company of Entergy Corporation (Entergy). Union Power sells wholesale power within the Entergy control area at market-based rates. Entegra also has a wholly-owned subsidiary, Trans-Union Interstate Pipeline, L.P., that owns a 42-mile interstate natural gas pipeline that delivers gas to the Union Power Facility. Gila River owns and operates a 2,200 MW natural gas-

³ Entegra February 10, 2006 Application at 5 (*citing Lender Co.*, 110 FERC 61,044 (2005)).

⁴ The Public Utility Holding Company Act of 2005 was enacted in the Energy Policy Act of 2005 (EPAAct 2005) § 1262(8)(A), 119 Stat. 972, *to be codified at* 42 U.S.C. § 16451.

fired combined-cycle generating facility in Arizona that is interconnected to the transmission system of the Arizona Public Service Company (APS). Gila River sells wholesale power at market-based rates in the APS/Salt River Project (APS/SRP) control area, within the Western Electricity Coordinating Council region.

B. Prior Orders

4. The existing *Blanket Authorization Order* grants blanket authorization under section 203(a)(1) for a two-year period for future acquisitions and transfers of Entegra Class A Units by current and future Entegra members to an acquiring party that: (1) is a financial institution or related entity that is not primarily engaged in energy-related activities and is not affiliated with a traditional utility with captive customers; (2) does not individually, or collectively with affiliates, own *five percent or more* of the voting interests in any public utility that has interests in any generating facilities or that engages in jurisdictional activities within the Entergy and APS/SRP control area, provided that such restriction on jurisdictional activities does not apply to a power marketing affiliate that does not own or control generation or transmission facilities;⁵ and (3) will hold twenty percent or less of the Entegra Class A Units. Blanket authorization was also granted under section 203(a)(2) for a two-year period for future transfers of Entegra Class A Units in the secondary market to any holding company in a holding company system that includes a transmitting utility or an electric utility, if the acquiring party meets the same three conditions.

C. Proposed Modification

5. Applicants request that the Commission raise the permissible level of ownership interests in public utilities in the same geographic region from five percent to ten percent. Applicants state that the proposed modification would apply to transactions that meet the criteria set forth in the existing *Blanket Authorization Order*.⁶

II. Notice

6. Notice of the filing was published in the *Federal Register*, 72 Fed. Reg. 1,505 (2007), with interventions, comments or protests due on or before January 18, 2007. None were received.

⁵ In this order, we will refer to this condition as the cap on interests “in public utilities.”

⁶ See footnote 2.

III. Discussion

A. Standard of Review

7. 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.”⁷ 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.⁸ In addition, EAct 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 the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.⁹ As discussed below, we will deny the proposed modification because Entegra has not shown that increasing the cap from five percent to ten percent will ensure that the transactions meet the statutory standards.

B. Arguments

8. Applicants’ request is for an amended blanket authorization under FPA section 203(a)(1), which requires Commission authorization for certain dispositions of jurisdictional facilities by public utilities. Applicants claim that there will be no adverse effect on competition, rates or regulation if Entegra investors are allowed to own up to ten percent of voting interests in a public utility in the same geographic area. They claim

⁷ 16 U.S.C. § 824b (2000).

⁸ 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).

⁹ EAct 2005 § 1289, 119 Stat. 982-83, to be codified at 16 U.S.C. § 824b(a)(4).

that such interests will not result in “control” of a public utility, and thus no horizontal or vertical market power issues will arise. Applicants state that there is an active market for trading of the debt in distressed project companies and the associated equity interests, such as Entegra securities. Grant of their application, they state, would increase regulatory certainty and the efficiency of trading in Entegra shares, making the shares more desirable to investors and increasing the liquidity of this secondary market, while at the same time ensuring that Commission resources are not expended unnecessarily on review of applications that raise no concerns.

9. In support of their request, Applicants point to findings made in Order No. 669-A with respect to blanket authorizations granted under FPA section 203(a)(2), which requires Commission authorization for certain holding company acquisitions involving electric utility companies or transmitting utilities. Applicants state that, similar to the Commission’s finding in Order No. 669-A, in the context of blanket authorizations under section 203(a)(2), the less conservative, but commonly applied, ten percent threshold will ensure that control of a public utility has not been transferred to the acquirer.¹⁰ Applicants note that in Order No. 669-A, the Commission denied requests for rehearing that advocated lowering the section 203(a)(2) blanket authorization threshold to five percent rather than ten percent.¹¹ Applicants also note the Commission’s statement in Order No. 669-A that “...in other contexts, [the Commission] ha[s] determined that holding ten percent of a company’s voting stock was the level at which a rebuttable presumption of control applied for the purposes of determining whether a company was an affiliate.”¹² Applicants state that raising the “cap” to ten percent “...adopts the 18 C.F.R. § 358.3(b)(1) definition of ‘affiliate’ (*i.e.*, a rebuttable presumption of control based on a ‘voting interest of ten percent or more’).”¹³ Applicants argue that, since ownership of less than ten percent is presumed not to result in control, transactions that

¹⁰ Application at 11, *citing* Order No. 669-A and Order No. 669-B.

¹¹ *Id.* *citing* Order 669-A at P 102.

¹² *Id.* *citing* Order 669-A at P 101; Application further cites at n. 23 “*see, e.g.*, 18 CFR § 358.3(c)(2006)(‘[a] voting interest of ten percent or more creates a rebuttable presumption of control.’); *New England Power Pool*, 79 FERC ¶ 61,374 at 62,585 (1997) (ordering revision of the restated New England Power Pool agreement to limit the permitted ownership percentage of a ‘Related Person’ to ten percent. ‘*The Commission generally uses ten percent as an indicator of an affiliate relationship...*’ (emphasis added and citations omitted)), *order on reh’g*, 85 FERC ¶ 61,242 (1998).”

¹³ *Id.*

would qualify under their proposed modification are not the type of transactions that require individual review. There would be no horizontal market power issues because none of the investors would have controlling interests over generation in the relevant control areas.¹⁴

10. In addition, Applicants contend that, due to the twenty percent limitation on ownership of Entegra securities, no investor would be able to obtain operational control over either the Entegra Project Companies' facilities, or any portion of the output of those facilities, through its acquisition of Entegra securities.¹⁵ Further, Applicants argue that no vertical market power issues would result from raising the cap to ten percent because the blanket authorization still restricts the ownership of, or affiliation with, traditional public utilities with captive customers, including those that own transmission.

C. Commission Determination

11. When, in *La Paloma*,¹⁶ the Commission granted one of the first blanket authorizations for financial institutions to acquire up to twenty percent of distressed assets, it conditioned the exercise of that blanket authorization on two important restrictions: an entity would not qualify for the blanket authorization if it owned five percent or more of any public utility in the same market area; it also would not qualify if it was primarily engaged in energy-related market activities. The Commission noted that the five percent cap ensured that transactions would not "consolidate unknown amounts of generating and transmission assets owned by acquiring entities with their partial ownership interest" in the facility at issue there.¹⁷

12. In Entegra's original application for blanket authorization, Entegra requested the same five percent cap that was applied in *La Paloma* and stated its "commitment to comply with...the conditions and requirements that the Commission has previously established when granting blanket authorization for transactions under section 203."¹⁸

¹⁴ Application at 12, 15.

¹⁵ Application at 15.

¹⁶ *La Paloma Holding Co., LLC*, 112 FERC ¶ 61,052 (2005); *See also Lake Road Holding Co., LLC*, 112 FERC ¶ 61,051 (2005).

¹⁷ *La Paloma Holding Co., LLC*, 112 FERC ¶ 61,052 at 17.

¹⁸ Entegra February 10, 2006 Application at 3, *citing MACH Gen, LLC*, 113 FERC ¶ 61,138 at P 40 (2005); *La Paloma Holding Co., LLC*, 112 FERC ¶ 61,052 at P 18; *Lake*

Applicants have not presented sufficient justification here to dilute this measure of protection, which helps to ensure that entities exercising blanket authorization do not acquire significant assets in a market area or adversely impact competition in the market area. In addition, Applicants have not shown that circumstances under which their original blanket authorization was granted have changed in such a way as to require reexamination of the reasons for the five percent cap. We note that Applicants are free to pursue a request to raise the five percent cap in an individual, identified holding.

13. While we recognize that the Order 669-A precedent cited by Applicants with respect to concerns about “control” of a public utility supports a general proposition that control is not likely to be triggered if an entity has less than ten percent of the voting shares of a public utility, the situation before us is different. We are presented not only with a request to allow an entity to own up to ten percent voting interests in a public utility, but to also allow that entity to own up to twenty percent of voting interests in Entegra and its jurisdictional facilities. The financial entities not primarily engaged in energy-related activities and that do not hold more than five percent of the voting interests in a public utility within Entegra’s control areas are already authorized to hold *up to twenty percent* of Entegra. Increasing the cap on ownership of a public utility in the same control area would increase the incentive and ability of an entity to operate the various jurisdictional facilities in a manner that could adversely affect competition in that market area. The situation addressed in Order No. 669-A did not involve entities receiving blanket authorization to acquire twenty percent of a group of investor-owners of jurisdictional facilities in addition to ten percent ownership of a public utility with jurisdictional facilities. Where, as here, a twenty percent ownership interest has already been authorized, increasing the cap on that entity’s interest in other generating facilities in the same market is not required by the Order No. 669 precedent.

14. While it is possible that a higher ten percent cap on public utility ownership would not result in the exercise of control over a public utility under the circumstances presented, we do not find that the record here, or our experience under newly amended section 203, gives us sufficient confidence that competition would not be adversely affected if we were to grant Applicants’ request. We conclude that the more conservative cap of five percent public utility ownership interests, in combination with the twenty percent limit on ownership interests in Entegra, is appropriate at the present time. Because of this finding, we will not review the Applicants’ claims that their proposed modification will not have an adverse effect on rates or regulation and will not result in

Road Holding Co., LLC, 112 FERC ¶ 61,051 at P 17; *Boston Generating, LLC, et al.*, 113 FERC ¶ 61,109 at P 8 (2005).

cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company.

The Commission orders:

Blanket Authorization for transactions under the Proposed Modification is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Philis J. Posey,
Acting Secretary.