

120 FERC ¶ 61,215
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.

Oncor Electric Delivery Company
TXU Portfolio Management Company LP
Texas Holdings Limited Partnership

Docket No. EC07-87-000

ORDER AUTHORIZING DISPOSITION OF
JURISDICTIONAL FACILITIES

(Issued September 6, 2007)

1. Oncor Electric Delivery,¹ TXU Wholesale,² and Texas Holdings³ (collectively, the Applicants) filed a joint application under section 203 of the Federal Power Act (FPA)⁴ requesting all authorizations necessary in connection with a disposition of the facilities of Oncor Electric Delivery and TXU Wholesale through the acquisition of their parent company, TXU Corporation, by Texas Holdings (Transaction). The Applicants also request blanket authorization for certain transfers of equity ownership interests in the general partner of Texas Holdings for a limited time period following the Transaction. In this order, the Commission authorizes the Transaction as consistent with the public interest and as otherwise meeting the requirements of section 203. The Commission also grants the blanket authorization Applicants requested.

¹ Oncor Electric Delivery Company, formerly TXU Electric Delivery Company (Oncor Electric Delivery).

² TXU Portfolio Management Company LP, formerly known as TXU Energy Trading Company (TXU Wholesale).

³ Texas Energy Future Holdings Limited Partnership (Texas Holdings).

⁴ 16 U.S.C. § 824b (2000), *amended by* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594 (2005).

2. The Commission has reviewed the proposed Transaction under the Commission's Merger Policy Statement and Order Nos. 669, 669-A and 669-B.⁵ We will authorize it because it is consistent with the public interest and because we find that it 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. We will also authorize certain transfers of equity ownership interests with the limitations discussed below.

I. Background

A. Applicants' Description of the Parties

1. Applicants

3. Oncor Electric Delivery, a wholly-owned subsidiary of TXU Corporation, is an electric transmission and distribution utility that delivers power at cost-based rates approved by the Public Utility Commission of Texas (Texas Commission). It provides open access wholesale interconnection and transmission service under tariffs on file with the Commission for certain transactions that are subject to our jurisdiction under sections 210, 211 and 212 of the FPA.⁶

⁵ See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (Dec. 30, 1996), FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 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 (Nov. 28, 2000), FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (Mar. 23, 2001), 94 FERC ¶ 61,289 (2001); *Transactions Subject to FPA Section 203*, Order No. 669, 71 Fed. Reg. 1,348 (Jan. 6, 2006), FERC Stats. & Regs. ¶ 31,200 (2006).

⁶ Oncor Electric Delivery provides transmission service under its Tariff for Transmission Service To, From and Over Certain Interconnections, FERC Electric Tariff, Ninth Revised Volume No. 1, and its ERCOT Standard Generation Interconnection Agreement, FERC Electric Tariff, First Revised Volume No. 3. It provides service to Tex-La Electric Cooperative of Texas under its FERC Electric Tariff, Fourth Revised Volume No. 2.

4. TXU Wholesale is a Texas limited partnership and an indirect subsidiary of TXU Corporation.⁷ It sells wholesale power in the Electric Reliability Council of Texas (ERCOT) competitive market. These sales are subject to the jurisdiction of the Texas Commission. TXU Wholesale sells wholesale power at market-based rates outside of ERCOT under a tariff on file with the Commission. The Applicants state that these sales occur primarily in the ISO-New England Inc. and PJM Interconnection, LLC regions. The Applicants also state that TXU Wholesale does not have any long-term power purchase positions, tolling-type arrangements or energy management agreements in markets outside of ERCOT through which TXU Wholesale controls generation capacity.

5. Texas Holdings is a limited partnership formed to carry out the Transaction. It is owned by its sole general partner, Texas Energy Future Capital LLC (Texas Capital), and its limited partners. The Applicants state that Texas Holdings will be controlled by Texas Capital and that each of the limited partners will own only passive interests. Upon consummation of the Transaction, Texas Holdings will become the direct parent of TXU Corporation and will be a holding company under the Public Utility Holding Company Act of 2005.

2. Texas Capital

6. Texas Capital is another limited partnership formed to carry out the Transaction and as stated above, is the general partner of Texas Holdings. KKR 2006 Fund L.P. and TPG Partners V, L.P. own the controlling interests in Texas Capital.⁸ Upon consummation of the Transaction, the Applicants state that they expect that the controlling interest in Texas Capital will be owned by a combination of funds: (1) KKR 2006 Fund L.P. and other investment vehicles affiliated with KKR (collectively, KKR Funds); (2) TPG Partners V, L.P., and other investment vehicles affiliated with TPG (collectively, TPG Funds); (3) investment vehicles associated with The Goldman Sachs Group, Inc. (Goldman) (collectively, Goldman Funds); and (4) investment vehicles affiliated with Lehman Brothers Holdings Inc. (Lehman) (collectively, Lehman Entities).

⁷ Specifically, TXU Wholesale is an indirect subsidiary of TXU Energy Company LLC, which is a subsidiary of TXU US Holding Company, which in turn is a wholly-owned subsidiary of TXU Corporation.

⁸ KKR 2006 Fund L.P. is an investment fund affiliated with Kohlberg Kravis Roberts & Co. L.P. (KKR) and TGP Partners V, L.P. (an investment fund affiliated with TPG Capital, L.P. (TPG)). Both KKR Funds and TPG Funds are described in greater detail below.

7. The Applicants state that they expect that the KKR Funds, the TPG Funds and (assuming certain conditions are satisfied) the Goldman Funds will hold approximately equal governance rights in Texas Capital.⁹ The Goldman Funds and Lehman Entities have agreed with KKR 2006 Fund L.P. and TPG Partners V, L.P. that before they acquire membership interests in Texas Capital or limited partnership interests in Texas Holdings, they and their affiliates will seek to sell or otherwise dispose of all of their ownership of any generation facilities located in, or capable of offering electricity for sale in, Texas.¹⁰ However, if the Goldman Funds or the Lehman Entities (including their respective affiliates) do not dispose of their ownership of such generation before the closing date of the Transaction, then the Goldman Funds and/or the Lehman Entities (as applicable) either will not make any investment in Texas Capital or Texas Holdings or, if they do invest, will be passive owners¹¹ owning, directly or indirectly, less than five percent of the total economic interests in Texas Holdings.

3. Controlling Owners

8. Upon consummation of the Transaction, the KKR Funds, the TPG Funds, the Goldman Funds and the Lehman Entities, collectively, will have the right to cause Texas Holdings to appoint all of the members of the board of directors of TXU Corporation, and thereby will effectively control the management of TXU Corporation. With the exception of the Lehman Entities, they will also have consent rights over extraordinary transactions by TXU Corporation and its subsidiaries.¹²

⁹ Applicants note that the Goldman Funds must satisfy certain unspecified conditions before acquiring these rights.

¹⁰ Applicants note that on March 27, 2007, affiliates of the Goldman Funds executed an agreement to sell all of their interests in electric generation in Texas and the Southwest Power Pool, Inc. (SPP) region.

¹¹ Passive owners will be divided into two categories: Passive LLC Owners and Passive LP Owners. The exact number of passive owners is not known, but the Applicants estimate that, based on the size of the transaction, the total number of such investors will number in the hundreds or more. Passive LLC Owners and Passive LP Owners are described in greater detail below.

¹² Applicants list as examples of extraordinary transactions a change of control, an initial public offering or a voluntary bankruptcy.

9. The KKR Funds are limited partnerships that are controlled by their general partners, each of which is owned and controlled by the members of KKR.¹³ The KKR Funds will own between 25 and 65 percent of Texas Capital and, together with the TPG Funds, the Goldman Funds and the Lehman Entities, will control Texas Capital. KKR states that it is a private equity fund that acquires businesses and works with management to design and implement value-creating strategies. The investors in KKR's affiliated funds are primarily state and corporate pension funds, banks, insurance companies, and university endowments. KKR states that neither it nor its affiliates have any current investments (directly or indirectly) in the U.S. energy sector, including any generation or transmission facilities.

10. The TPG Funds are limited partnerships controlled by their respective general partners, each of which is indirectly controlled by the principals of TPG. TPG Partners V, L.P. and KKR 2006 Fund L.P. currently own the controlling interests in Texas Capital. TPG is a private investment partnership that invests in franchises. The TPG Funds will own between 17 and 54 percent of Texas Capital and, together with the KKR Funds, the Goldman Funds, and the Lehman Entities, will control Texas Capital. TPG manages over \$30 billion in assets and invests in franchises in various businesses, including energy.

¹³ Applicants explain that KKR 2006 Fund L.P. has assigned a portion of its equity commitment to KKR Private Equity Investors, L.P. (KPE), a Guernsey limited partnership that is affiliated with KKR. Through KKR PEI Investments, L.P., of which KPE is the sole limited partner, KPE will own (upon consummation of the transaction) less than five percent of Texas Capital. KKR 2006 Fund L.P. also may assign a portion of its equity commitment to KKR Financial Corp. (KFN), a publicly-traded corporation that is externally managed and advised by KKR Financial Advisors LLC under a management agreement between KFN and KKR Financial Advisors LLC. KKR Financial Advisors LLC is a limited liability company that is wholly owned by KKR Financial LLC, a limited liability company that is owned (in turn) by KKR, as well as the chief executive officer and the chief operating officer of both KFN and KKR Financial Advisors LLC. KKR 2006 Fund L.P. also may assign a portion of its equity commitment to KKR Strategic Capital Fund, L.P., a limited partnership that is controlled by its general partner, KKR Strategic Capital Partners, L.L.C., a limited liability company and wholly-owned subsidiary of KKR Financial LLC. KKR Strategic Capital Fund, L.P. is externally managed and advised by KKR Strategic Capital Management, L.L.C., a limited liability company that is wholly owned by KKR Financial LLC. Based on their actual equity investments, if any, KFN and KKR Strategic Capital Fund, L.P. each will own (upon consummation of the transaction) less than five percent of the interests in Texas Capital.

Applicants state, however, that TPG and its affiliates do not have any current investments (directly or indirectly) in the U.S. energy sector, including any generation or transmission facilities.

11. The Goldman Funds are limited partnerships managed and controlled by their respective general partners, managing limited partner, and investment managers, all of which are wholly-owned, direct or indirect subsidiaries of the Goldman Sachs Group, Inc. (Goldman). The Goldman Funds currently own no equity interests in Texas Capital or Texas Holdings, but (upon consummation of the Transaction), will own up to 28 percent of Texas Capital and, together with the KKR Funds, the TPG Funds, and the Lehman Entities, will control Texas Capital.

12. Goldman, together with its subsidiaries, is a banking, securities and investment management firm that serves corporations, financial institutions, governments, and high-net worth individuals. Goldman indirectly owns interests in two power marketers, J. Aron & Company (J. Aron) and Power Receivable Finance, LLC (PRF).¹⁴ The Applicants state that Goldman and its affiliates do not own for proprietary investment purposes (for their own benefit) ten percent or more of the voting securities of any company that owns electric generation or transmission facilities or that owns or controls resources of inputs to generation. Goldman indirectly holds voting interests in electric generating facilities, all of which are either eligible facilities of exempt wholesale

¹⁴ Applicants state that neither J. Aron nor PRF owns interests in any electric generation, transmission, or distribution facilities. With the exception of a tolling-type arrangement under which J. Aron has the right to purchase and dispatch the output of two units of an 800 MW generating facility located in Batesville, Mississippi, Applicants state that J. Aron has no long-term power purchase positions in any U.S. market that assign control of generation capacity to J. Aron. In various markets, J. Aron has a number of power-purchase agreements that are standard liquidated damages contracts with third parties. Applicants assert that J. Aron cannot withhold supply from the market under these contracts. If J. Aron declines to accept delivery of power under these contracts, the seller is still able to sell the power. PRF is authorized by the Commission to sell wholesale power at market-based rates. PRF is limited, however, by its constituent documents to performing under a single long-term supply agreement with J. Aron and a single long-term sale agreement with the State of California Department of Water Resources. These agreements are the basis for a financing arrangement that PRF entered into when it was organized.

generators under the Public Utility Holding Company Act of 2005¹⁵ or qualifying facilities under the Public Utility Regulatory Policies Act of 1978, as amended.¹⁶ The Applicants state that, other than being a dealer and market-maker in securities and its interests in qualifying cogeneration facilities and exempt wholesale generators, Goldman and its affiliates do not beneficially own for proprietary investment purposes ten percent or more of the voting securities of any company that owns electric generation or transmission facilities or that owns or controls essential resources or inputs to generation. They further state that Goldman is not currently affiliated with any public utility that holds a franchised electric service territory.

13. The Lehman Entities are LB I Group Inc., a subsidiary of Lehman Brothers Holdings Inc. (Lehman Brothers Holdings), and Lehman Brothers Co-Investment Partners L.P., which is controlled by its general partner, which in turn is controlled by Lehman Brother Holdings.¹⁷ The Lehman Entities currently own no equity interests in Texas Capital or Texas Holdings, but (upon consummation of the Transaction) they will hold up to 12 percent of the membership interests in Texas Capital (which will control Texas Holdings).

14. Lehman Brothers Holdings is a financial services institution that directly, and through its subsidiaries, conducts business in equity and fixed-income sales, trading and research, investment banking, private investment management, asset management and private equity. Its affiliates are non-controlling members of (or participants in) entities that own electric generation facilities. It also indirectly owns several subsidiaries that sell electricity. The Applicants state that the Commission has granted affiliates of the Lehman Entities market-based rate authorization and that the Lehman Entities are not affiliated with any electric transmission-owning utilities.

¹⁵ Energy Policy Act of 2005, Pub. L. No. 109-58, §1261, *et seq.*, 119 Stat. 594, 972-78 (PUHCA 2005). *See also Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, Order No. 667, 70 Fed. Reg. 75,592 (Dec. 20, 2005), FERC Stats. & Regs. ¶ 31,197 (2005), *order on reh'g*, Order No. 667-A, 71 Fed. Reg. 28,446 (May 16, 2006), FERC Stats. & Regs. ¶ 31,213, *order on reh'g*, Order No. 667-B, 71 FR 42,750 (July 28, 2006), FERC Stats. & Regs. ¶ 31,224 (2006), *order on reh'g*, Order No. 667-C, 72 Fed. Reg. 8277 (Feb. 26, 2007), 118 FERC ¶ 61,133 (2007).

¹⁶ 16 U.S.C. § 2601, *et seq.* (West Supp. 2006).

¹⁷ Applicants add that Lehman Entities may also consist of other investment funds affiliated with Lehman Brothers Holdings Inc.

4. Passive Owners

15. As indicated above, the Applicants state that other investors in Texas Capital and Texas Holdings will hold interests as Passive LLC Owners and Passive LP Owners, both of which are non-controlling and passive.

16. Passive LLC Owners may acquire membership interests in Texas Capital. These membership interests would not give them any right to manage, direct or otherwise control the activities of Texas Holdings, Texas Capital, TXU Corporation or any TXU Corporation subsidiary. No Passive LLC Owners (or affiliate) will own 5 percent or more of the total membership interests of Texas Capital. The Passive LLC Owners will have limited consent rights based on their *pro rata* ownership of the membership interests (less than five percent) over amendments to the governing agreements for Texas Capital. The consent rights will be limited to matters directly related to the Passive LLC Owners' economic and other specific rights in Texas Capital. The Applicants will provide the Commission with a complete list of all owners of Texas Capital, including all Passive LLC Owners, along with a summary of their ownership interests, within 30 days of consummation of the Transaction.¹⁸

17. Passive LP Owners may acquire passive, limited partnership interests in Texas Holdings. They will be able to hold such limited partnership interests directly or indirectly through investment vehicles. While the Passive LP Owners will have no voting or governance rights, they will have minimal consent rights based on their *pro rata* ownership of the limited partnership interests over amendments to the limited partnership agreement. The Applicants commit that they will not knowingly permit any passive owner (or group of affiliated passive owners) to acquire ownership interests that would amount to ten percent or more of the total direct or indirect economic interests in Texas Holdings.

B. Proposed Transaction

18. The Applicants entered into an agreement and plan of merger (Agreement) between TXU Corporation, Texas Holdings and Texas Energy Future Merger Sub Corp. Under the Agreement, Texas Energy Future Merger Sub Corp, a wholly-owned subsidiary of Texas Holdings, will merge with TXU Corporation and the latter will

¹⁸ If the ownership of Texas Capital changes after that date, including the addition of new Passive LLC Owners, the Applicants will provide an updated list of the owners in reports filed with the Commission at quarterly intervals after the initial report.

survive as a subsidiary of Texas Holdings.¹⁹ The Applicants state that under the Agreement, Texas Holdings will effectively acquire all (or substantially all) of the outstanding shares of TXU Corporation for \$69.25 per share. This is a value of approximately \$32 billion. In addition, Texas Holdings will assume TXU Corporation's outstanding debt of approximately \$12 billion. Upon the merger of Texas Energy Future Merger Sub Corp with TXU Corporation, each outstanding share of TXU Corporation common stock will be cancelled and converted into the right to receive \$69.25 in cash, without interest, except for shares owned by shareholders exercising dissenters' rights and shares held by either TXU Corporation or by Texas Holdings or Texas Energy Future Merger Sub Corp or their respective subsidiaries.²⁰ The Applicants state that no new debt will be incurred by Oncor Electric Delivery at the closing or thereafter to finance the Transaction.²¹

II. Notices and Interventions

19. Notice of the filing was published in the *Federal Register*, 72 Fed. Reg. 28,485 (2007), with interventions and protests due on or before June 18, 2007.

20. Timely motions to intervene raising no protests were filed by CenterPoint Energy Houston Electric, LLC; the Henderson Area Chamber of Commerce (Henderson); Project CREATE; the Lone Star District Lodge of the International Brotherhood of Boilermakers; Tejas Associates;²² Fred Oberlender & Associates, Inc.; Peggy M. Venable of Americans for Prosperity-Texas; Waco, TX, Mayor Virginia DuPuy (Mayor DuPuy); Fairfield, TX, Mayor Roy W. Hill; the DeSoto Chamber of Commerce (DeSoto); J. William Lauderback of the American Conservative Union; USCO Power Equipment Corp.; Keasler Associates, Keasler Sales LLC; Arlington, TX, Mayor

¹⁹ Texas Energy Future and Texas Energy Future Merger Sub Corp are directly or indirectly owned by KKR 2006 Fund L.P. and TPG Partners V, L.P.

²⁰ We note that the Applicants filed proposed accounting entries to record the purchase adjustments required by the Transaction. This order does not address those entries and should not be construed as approving them.

²¹ Applicants state that Texas Holdings has committed to the Texas Commission that it will continue to hold a majority of its ownership interests in Oncor Electric Delivery for more than five years after the closing of the transaction.

²² Two motions to intervene were filed on behalf of Tejas Associates, one by Randy Renzi of Mitsubishi Electric Power Products, Inc. and one by James De La Cruz of the Tejas Associates.

Robert N. Cluck; and Texans for Affordable and Reliable Power (TARP). The Texas State Association of Electrical Workers and the Texas AFL-CIO filed a timely joint motion to intervene and Environmental Defense filed an untimely motion to intervene.

III. Discussion

A. Procedural Matters

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Environmental Defense has demonstrated an interest in this proceeding, and its untimely motion to intervene will not delay, disrupt, or otherwise prejudice this proceeding. Accordingly, we will grant the untimely motion to intervene.

B. Jurisdiction

22. The Applicants identify two elements of their proposed acquisition of TXU Corporation requiring Commission approval under section 203. The first is an indirect change in control of certain facilities (jurisdictional power contracts, books and records relating to those contracts, and market-based rate tariff) owned by TXU Wholesale, which is a public utility under section 201(e) of the FPA. Secondly, the Applicants state that Oncor Electric Delivery owns a 100 MW undivided interest in the East HVDC Interconnection between ERCOT and SPP and provides interconnection and transmission service through three Commission-approved tariffs under sections 210, 211 and 212 of the FPA. The Applicants note that the Commission has specified that a transfer of ownership of the East HVDC Interconnection would be subject to Commission approval under FPA section 203.²³

²³ *Central Power and Light Company*, 40 FERC ¶ 61,077, at 61,222 (1987). Applicants acknowledge that section 203(a)(2) can apply to transactions occurring within ERCOT, but they argue that this provision is not applicable here. Application at 4-5, n. 4. However, the Applicants also state that the Commission need not determine whether section 203(a)(2) applies here because the application fully addresses the matters that “the Commission must consider in determining whether the transaction is in the public interest.” *Id.* at 5. While the facts of this Transaction indicate that it may trigger the need for approval under section 203(a)(2) in addition to section 203(a)(1), we agree that there is no need to decide this issue since the public-interest analysis (effect on competition, rates and regulation) applies under both section 203(a)(2) and 203(a)(1) and since our conclusion in this case would not change.

23. When reviewing applications under section 203 of the FPA, the Commission evaluates the entire transaction to determine whether it is consistent with the public interest. Even where only a small portion of a transaction requires authorization under section 203, the overall effect of the transaction on matters within this Commission's jurisdiction must be considered before approval may be granted.²⁴

C. Standard of Review

24. Section 203(a)(4) of the FPA provides that the Commission must approve a transaction if it finds that the transaction “will be consistent with the public interest.”²⁵ 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. In addition, the Commission must conclude 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.²⁶

D. Section 203 Analysis

1. Effect on Competition

25. The Applicants state that the Transaction will not have an adverse effect on competition and will not result in any meaningful change in the competitiveness of any relevant market. With regard to horizontal competition, they assert that there is no actual competition between TXU Corporation and its subsidiaries on the one hand, and the controlling owners of Texas Holdings in any jurisdictional market on the other hand. Applicants state that all of the generation controlled by TXU Corporation is in ERCOT. Applicants maintain that neither the KKR Funds nor the TPG Funds have any generation facilities in ERCOT or in any control areas that are directly connected to ERCOT. They

²⁴ *Ameren Energy Generation Co.*, 108 FERC ¶ 61,081, at P 25 (2004).

²⁵ 16 U.S.C. § 824b(a)(4) (2000).

²⁶ 16 U.S.C. § 824b(a)(4) (2000), *amended by* Energy Policy Act of 2005 § 1289, Pub. L. No. 109-58, 119 Stat. 594, 982-83 (2005).

further state that the Goldman Funds have a *de minimis* interest in jurisdictional markets surrounding ERCOT²⁷ and that the Lehman Entities have no generation interests in those markets.

26. Applicants state that the Transaction does not allow any party to erect barriers to entry by using transmission market power in relevant markets. They note that only TXU Corporation has any affiliated transmission facilities other than those necessary to connect generation to the grid, and those transmission facilities are subject to open access requirements imposed by the Texas Commission. Neither TXU Corporation and its affiliates nor the controlling owners of Texas Holdings and their affiliates have any “unique”²⁸ control over the availability of existing or prospective generation sites. Nor do TXU Corporation, the controlling owners, or their affiliates have control over fuel transportation systems in the relevant markets.

27. Based on the facts presented and the representations made by the Applicants, we find that the Transaction will not harm competition. Specifically, we are satisfied that the Transaction will not result in horizontal market power for several reasons. First, the financial investors that will control TXU Corporation after the Transaction are not primarily engaged in the utility business. In addition, the merging entities do not currently conduct business in the same geographic markets. Neither KKR nor TPG has electric generation facilities in ERCOT or any control area directly interconnected to ERCOT. Goldman owns and controls two 200 MW wind generating facilities under development in ERCOT and Lehman has an interest in the Rio Nogales generating unit (also within ERCOT). The ability of generation from these facilities to leave ERCOT is limited by their small *pro rata* share of Oncor Electric Delivery’s interest in the East HVDC Interconnection. Lehman has no generating facilities directly connected to ERCOT, and Goldman’s partial interests in wind generation within SPP are small and

²⁷ Applicants state that the Goldman Funds’ affiliates own no more than 225 MW of generation in SPP. On March 27, 2007, affiliates of the Goldman Funds executed an agreement to sell all of their interests in electric generation in Texas and the SPP region to EDP-Energias De Portugal S.A. On May 21, 2007 Lehman Brothers Commodity Services Inc. received Commission approval to acquire Eagle Energy Partners I, L.P., a Texas-based entity engaged in the wholesale sale of electric energy at market-based rates, but that does not directly or indirectly own or control generation or transmission facilities in North America.

²⁸ While the Applicants do not define “unique,” they argue that their lack of control is evidenced by the considerable amount of new generation entry that has occurred and is scheduled to occur in the SPP and ERCOT regions.

also not directly connected to ERCOT. In sum, the Transaction will not eliminate any competition between TXU Corporation's existing or planned portfolio of generation in ERCOT on the one hand and generation owned by the controlling owners of Texas Holdings outside of ERCOT on the other hand.

28. Additionally, we find no vertical market power issues arising from the Transaction. A single corporate entity will not get ownership or control over both a utility and a merging entity that provides inputs to electricity products. We are further satisfied that the Applicants cannot erect barriers to entry to any jurisdictional markets through control of either transmission or fuel transportation systems.

29. Finally, we note that no intervenor argues that the Transaction will harm competition.

2. Effect on Rates

30. Applicants state that TXU Wholesale will continue to sell electric energy at market-based rates after the Transaction. Applicants commit that the transmission customers of Oncor Electric Delivery will be held harmless from any transmission rate increases that are the result of costs related to the Transaction for 5 years. In other words, these customers will not bear any of the costs of the Transaction because neither fees or expenses, nor any incremental borrowing costs of the TXU Corporation or its other subsidiaries, related to the Transaction will be included in Oncor Electric Delivery's rates.

31. In support of the Transaction, TARP and Mayor DuPuy argue that it will create lower electric rates. Henderson and DeSoto argue that there will be no new debt incurred at TXU Electric Delivery to finance the Transaction, and that there is no reason for TXU Electric Delivery's rates to increase as a result of the transition.

32. We find the Applicants' five-year hold harmless commitment reasonable and consistent with Commission policy.²⁹ Moreover, no intervenors argue that the Transaction will have an adverse effect on rates. In light of the Applicants' five-year hold harmless commitment, we find that the Transaction will not adversely affect rates.

²⁹ See, e.g., *Sierra Pacific Power Co.*, 87 FERC ¶ 61,077, at 61,334, *order on reh'g*, 88 FERC ¶ 61,058 (1999); *Long Island Lighting Co.*, 82 FERC ¶ 61,129, at 61,463 (1998); *Wis. Elec. Power Co.*, 74 FERC ¶ 61,069, at 61,191-93 (1996), *order on reh'g*, 79 FERC ¶ 61,158 (1997).

3. Effect on Regulation

33. The Applicants state that neither the Commission's nor the relevant state commission's regulation will be impaired as a result of the Transaction. They state that the Commission will continue to have jurisdiction over Oncor Electric Delivery's jurisdictional transmission service and its 100 MW ownership interest in the East HVDC Interconnection, as well as over the interstate wholesale marketing activities of TXU Wholesale. The Commission will also maintain its authority over any jurisdictional activities of the owners of Texas Holdings.

34. Applicants state that the Transaction will not have any adverse effect on the regulatory jurisdiction of any state over them. Wholesale and retail activities of TXU Corporation and its subsidiaries within Texas (including Oncor Electric Delivery) will remain subject to the jurisdiction of the Texas Commission after the Transaction. Texas law requires Oncor Electric Delivery to file with the Texas Commission a report concerning the Transaction, and the Texas Commission has authority to determine whether it is consistent with the standards set forth in the Texas law. Oncor Electric Delivery and Texas Energy Future submitted the report on April 25, 2007.

35. Based on the facts presented in the application, the Commission finds that the Transaction will not adversely affect regulation. The Transaction does not impair any state's ability to regulate the Applicants and we note that no state commission intervened.

4. Cross-Subsidization

36. The Applicants assert that, based on facts and circumstances known (or that are reasonably foreseeable), the proposed merger 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. The Applicants state that the proposed merger will not result in: (1) any transfer of facilities between a traditional utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) any new issuances 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; (3) 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; and (4) 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, other than non-power goods and services agreements subject to review under section 205 and 206 of the FPA.

37. The Applicants note that the Texas Commission has extensive rules regarding affiliate codes of conduct and related provisions. These rules are designed to assure that captive wholesale or retail customers are protected from the effects of cross-subsidization.³⁰ They prohibit a utility from subsidizing the business activities of any affiliate with revenues from a regulated source and require full allocation of costs for any shared resources. The rules also contain various provisions regarding the sharing of books and records, assets, marketing, and other contacts between a utility and its competitive affiliates.

38. The Applicants also propose a set of ring-fencing mechanisms to assure that captive wholesale power customers and transmission and distribution customers are protected from the effects of cross-subsidization. For example, Oncor Electric Delivery will have a separate board of directors that will not include any members from the boards of directors of TXU Energy Retail or Luminant Energy, TXU Corporation's power generation company. In addition, Oncor Electric Delivery's headquarters will be in a separate building; a new holding company (Oncor Holdings) will be formed between it and TXU Corporation; and Oncor Electric Delivery's name and logo will be separate and distinct from the names of TXU Corporation's retail electric provider and wholesale generation companies.³¹ As stated above, Oncor Electric Delivery will not incur, guaranty or pledge assets with respect to any incremental new debt related to financing the Transaction at the closing, or thereafter, and its financial integrity will be protected from the separate operations of TXU Energy Retail and Luminant. The Applicants state that each ring-fenced entity will maintain an "arm's-length" relationship with TXU Corporation and its subsidiaries, and each will maintain accurate, appropriate and detailed books, financial records and accounts, as well as custodial and other securities safekeeping accounts that are distinct from those of any other entity.

39. As part of the ring-fencing program, Oncor Electric Delivery's debt will be limited so that its regulatory debt-to-equity ratio is at or below the assumed debt-to-equity ratio established periodically by the Texas Commission for ratemaking purposes, which is

³⁰ These rules are found at 16 Tex. Administrative Code, Texas Commission Substantive Rules §§ 25.272, 25.273 (2006).

³¹ Oncor Holdings and Oncor Electric Delivery will each have a board of directors of at least nine persons. A majority of the board members of each will qualify as "independent" in all material respects (in accordance with the rules and regulations of the New York Stock Exchange) from TXU Corporation and its subsidiaries.

currently set at 60 percent debt to 40 percent equity. For ratemaking purposes, Oncor Electric Delivery will support a cost of debt that does not exceed its actual cost of debt immediately prior to the announcement of the Transaction.

40. In addition, the Applicants state that they propose to remove the ability of the TXU Group³² to cause the ring-fenced entities to file for bankruptcy. They will do this by requiring through the organizational documents of each of Oncor Electric Delivery and Oncor Electric Delivery Holdings that a voluntary petition in bankruptcy for a ring-fenced entity must have the unanimous approval of the directors present and voting (which in any event will include all of the independent directors). In addition, none of the ring-fenced entities will guarantee or otherwise hold out its credit as being available to support the obligations of any member of the TXU Group and cash management systems will be separate.

41. Based on the facts as presented in the application, we find that the Transaction will not result in inappropriate cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company.³³

E. Blanket Authorization

42. The Applicants request blanket authorization for transfers of interests among the KKR Funds, the TPG Funds, the Goldman Funds and the Lehman Entities, and their affiliates. The Applicants request that the order approving the Transaction provide that these controlling owners' transactions are authorized until six months following closing of the Transaction, at which point the Applicants will notify the Commission of the percentage of ownership interests held by each controlling owner, as well as other owners.

43. The controlling owners anticipate that the ownership interest held by each of them may change as a result of the sale of equity to co-investors planned to occur before and shortly after the Transaction closes. The Applicants state that the transfers would not change the identity of the controlling owners, only the ownership percentage each controlling owner would ultimately hold. The Applicants argue that some limited

³² The Applicants define the TXU Group as the TXU Corporation and its subsidiaries other than the ring-fenced entities.

³³ Although the Applicants filed this Transaction with the Commission prior to our recent issuance of the Supplemental Policy Statement, we note that the Transaction is consistent with the policies expressed in that statement. *See FPA Section 203 Supplemental Policy Statement*, FERC Statutes and Regulations ¶ 31,253 (2007).

flexibility to adjust ownership interests will be required during the period in which the financing for the Transaction is being finalized. Thus, granting the request will simplify the financing process and ensure a successful transition to new ownership of TXU Corporation.³⁴

44. Based on the Applicants' representation of the facts in the instant application, we will grant authorization for transfers of interests in Texas Capital among the KKR Funds, the TPG Funds, the Goldman Funds and the Lehman Entities, and their affiliates, for a period of six months following closing of the Transaction, at which point the Applicants will notify the Commission of the percentage of ownership interests held by each controlling owner, as well as other owners.

The Commission orders:

(A) The proposed Transaction is 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.

³⁴ Applicants note that future transfers of passive interests in Texas Holdings between Passive Owners would not affect control over TXU Corporation or its subsidiaries and thus would not require prior approval under section 203. They assert that each Passive LLC Owner and its affiliates will have an interest of less than 5 percent in Texas Capital and limited consent rights, and the Passive LP Owners will have no voting rights and only limited customary consent rights over extraordinary events. In addition, no Passive Owner will have an economic interest of 10 percent or more, directly or indirectly, in Texas Holdings. The consent rights granted to the Passive Owners are limited to consent to amendments to governing documents as necessary to protect such owners' economic and other rights. Applicants conclude that the Passive Owners will not have the ability to control Texas Capital or Texas Holdings.

(E) The Applicants shall notify the Commission that future acquisitions and future transfers have been consummated in accordance with the discussion in the body of this order.

(F) KKR Funds, the TPG Funds, the Goldman Funds and the Lehman Entities, and their affiliates, are hereby authorized to transfer interests in Texas Capital for a period of six months following closing of the Transaction, at which point the Applicants will notify the Commission of the percentage of ownership interests held by each controlling owner, as well as other owners.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.