

133 FERC ¶ 61,248  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur.

Fore River Development, LLC  
Mystic I, LLC  
Mystic Development, LLC  
Boston Generating, LLC  
Constellation Mystic Power, LLC

Docket Nos. EC10-85-000  
EC10-85-001

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued December 22, 2010)

1. On August 18, 2010, as supplemented on October 8, 2010,<sup>1</sup> Fore River Development, LLC (Fore River), Mystic I, LLC (Mystic I), Mystic Development, LLC (Mystic Development), Boston Generating, LLC (Boston Generating) (collectively, the Boston Companies) and Constellation Mystic Power, LLC (Mystic Power) (together with the Boston Companies, Applicants) filed an application under section 203(a)(1) of the Federal Power Act (FPA)<sup>2</sup> requesting Commission authorization for the Boston Companies to transfer to Constellation Holdings, Inc. (Constellation Holdings) or its designee (Mystic Power) five generating facilities, including the associated electric interconnection facilities, and certain other assets (collectively, the Acquired Assets) (Proposed Transaction).

2. The Commission has reviewed the Proposed Transaction under the Merger Policy Statement.<sup>3</sup> As discussed below, we will authorize the Proposed Transaction as consistent with the public interest.

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<sup>1</sup> The August 18, 2010 filing is referred to here as the Application. The October 8, 2010 filing was made in response to a Commission staff request for additional information and is referred to here as Applicants' Supplement.

<sup>2</sup> 16 U.S.C. § 824b (2006).

<sup>3</sup> See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996),

(continued...)

**I. Background****A. Description of the Parties****1. Fore River**

3. Applicants state that Fore River, a wholly-owned subsidiary of Boston Generating, is an exempt wholesale generator (EWG) that has been granted market-based rate authorization by the Commission. It owns a 688.3 megawatt (MW) natural-gas fired facility (Fore River Facility) in North Weymouth, Massachusetts in the ISO New England Inc. (ISO-NE) market.

**2. Mystic I**

4. Applicants state that Mystic I, a wholly-owned subsidiary of Boston Generating, is an EWG that has been granted market-based rate authorization by the Commission. It owns two generating facilities in Everett, Massachusetts within the ISO-NE market – a 577.6 MW facility (the Mystic 7 Facility) and a 5.9 MW facility (the Mystic Jet Facility) (collectively, Mystic Station).

**3. Mystic Development**

5. Applicants state that Mystic Development, a wholly-owned subsidiary of Boston Generating, is an EWG that has been granted market based-rate authorization and owns two 690.9 MW facilities in the ISO-NE market (the Mystic 8 Facility and the Mystic 9 Facility) (collectively, the Mystic Development Facilities).

**4. Boston Generating and EBG**

6. Applicants state that Boston Generating, a wholly-owned subsidiary of EBG Holdings LLC (EBG), is authorized to make sales at market-based rates. EBG is a wholly-owned subsidiary of US Power Generating Company (USPowerGen).

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*reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). *See also FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement). *See also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). *See also Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

## 5. USPowerGen

7. Applicants state that through EBG and its subsidiaries, USPowerGen owns the Fore River Facility, Mystic Station, and the Mystic Development Facilities (collectively, the Facilities) which total 2,653.6 MW. Additionally, Applicants state that USPowerGen's subsidiaries, separate and apart from EBG and its subsidiaries, own approximately 2,100 MW of electric generating facilities in New York City. USPowerGen is 54 percent owned by a group of Class A shareholders and 46 percent owned by New Astoria Generating Company Holdings, LLC (New Astoria). Applicants state that New Astoria is owned by Madison Dearborn, Hunt Generation Investments, L.P., and certain individuals, each of whom owns less than a 10 percent interest in New Astoria.

## 6. Mystic Power

8. Applicants state that Mystic Power is a newly created entity that has concurrently filed an application for market-based rate authorization with the Commission.<sup>4</sup> They also state that Mystic Power is directly wholly owned by Constellation Holdings, which does not directly own any jurisdictional facilities. Constellation Holdings is, however, an indirect, upstream owner of certain of the non-nuclear, merchant generation facilities owned by Constellation Energy Group, Inc. (Constellation Energy) subsidiaries. Constellation Holdings is directly wholly owned by Constellation Enterprises, Inc., which is directly wholly owned by Constellation Energy, a publicly-traded integrated energy holding company. Constellation Energy has both regulated and unregulated operations, including merchant plants and competitive wholesale and retail providers. Applicants also state that Constellation Energy has contractual rights through its subsidiary Constellation Energy Commodities Group, Inc. (Constellation Commodities) to 14.4 MW of generation owned by Bangor Hydro-Electric Company located in Maine in the ISO-NE market. Constellation Commodities also entered into a tolling agreement for energy from the planned 620 MW Kleen Energy combined-cycle facility (Kleen Energy Facility) under construction in Connecticut in ISO-NE, which is not expected to become commercially operational until the summer of 2011.

9. Constellation Energy also owns a 50.01 percent interest in Constellation Energy Nuclear Group, LLC (Constellation Nuclear), which owns approximately 2,100 MW of generating capacity in the New York Independent System Operator, Inc. (NYISO) market through its subsidiaries R.E. Ginna Nuclear Power Plant, LLC and Nine Mile Point Nuclear Station, LLC. It also owns Baltimore Gas and Electric Company (BGE), a combined electric and gas utility in Maryland that serves as the provider of last resort for

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<sup>4</sup> *Constellation Mystic Power, LLC*, Docket No. ER10-2281-000 (Oct. 27, 2010) (unpublished letter order).

retail electric and gas customers in its service territory. BGE does not own or operate any generating facilities. BGE owns and operates jurisdictional transmission facilities that supply retail electric service in Maryland, subject to the direction and control of PJM Interconnection, L.L.C. (PJM) pursuant to PJM's Open Access Transmission Tariff (OATT).

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

10. The Boston Companies, EBG, and Boston Generating's two other wholly-owned subsidiaries, BG New England Power Services, Inc. and BG Boston Services, LLC (collectively, the Debtors) initiated proceedings under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (Bankruptcy Court). In connection with these proceedings, Debtors entered into an August 7, 2010 Asset Purchase Agreement (Asset Purchase Agreement) with Mystic Power.

11. Pursuant to the Asset Purchase Agreement, the Debtors will sell, and Mystic Power will purchase, the five generating facilities, including the associated electric interconnection facilities. Applicants state that the Proposed Transaction will occur subject to "stalking horse" bidding procedures (Bidding Procedures) to be established with the approval of the Bankruptcy Court. Under this process, Applicants anticipate that the Debtors will consider offers for the Acquired Assets from parties other than Mystic Power. They assert that these procedures will confirm that the offer from Mystic Power for the Acquired Assets is the best offer, or identify an alternative bid that is higher or otherwise better. Applicants also state that the Bidding Procedures may result in the submission of one or more applications under section 203 of the FPA for the purchase and sale of the Boston Companies' jurisdictional assets by purchasers other than Mystic Power. Applicants state that Commission approval of the Proposed Transaction will facilitate the expeditious administration of the Debtors' bankruptcy case by establishing that Mystic Power's offer is a viable one.

## **II. Notice of Filing and Responsive Pleadings**

12. Notice of the Application was published in the *Federal Register*, 75 Fed. Reg. 52,521 (2010), with interventions and protests due on or before September 8, 2010. Notice of the Applicants' Supplement was published in the *Federal Register*, 75 Fed. Reg. 65,312 (2010), with interventions and protests due on or before November 8, 2010. Algonquin Gas Transmission, LLC (Algonquin) and NSTAR Electric Company (NSTAR) filed timely motions to intervene and protests. On September 23, 2010, the Boston Companies filed an answer to Algonquin's protest, and Mystic Power filed an answer (September 23 Answer) to NSTAR's protest. On November 8, 2010, Algonquin and NSTAR filed answers to the Boston Companies' and Mystic Power's answers, respectively. On November 15, 2010, Algonquin submitted an informational filing related to a U.S. District Court proceeding that it referred to in its pleadings.

On November 22, 2010, Mystic Power and Boston Companies filed answers to NSTAR's and Algonquin's answers. On December 3, 2010, Algonquin filed a notice to withdraw its protest and answer<sup>5</sup>, and Mystic Power filed a motion to lodge the order of the Bankruptcy Court authorizing the consummation of the Proposed Transaction. On December 7, 2010, NSTAR filed an answer to Mystic Power's November 22 answer.<sup>6</sup>

### **III. Discussion**

#### **A. Procedural Issues**

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, the timely, unopposed motions to intervene serve to make Algonquin and NSTAR parties to this proceeding.

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept Mystic Power's September 23 Answer because it has provided information that assisted us in our decision-making process. We will reject NSTAR's and the Boston Companies' answers and the answer that Mystic Power filed on November 22, 2010, because they have not provided information that assisted us in our decision-making process.

#### **B. Standard of Review Under Section 203**

15. Section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest. The Commission's analysis of whether a transaction will be 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>7</sup> Section 203 also requires the Commission to find 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,

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<sup>5</sup> On December 8, 2010, Algonquin filed a second notice of withdrawal, which withdraws the December 3 notice of withdrawal and also withdraws its protest and answer. We accept the notice of withdrawal filed on December 8.

<sup>6</sup> On December 8, 2010, Mystic Power submitted a letter stating that neither Mystic Power nor the Boston Companies intends to submit an answer to NSTAR's December 7 answer.

<sup>7</sup> See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

pledge, or encumbrance will be consistent with the public interest.”<sup>8</sup> The Commission’s regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.<sup>9</sup>

**C. Analysis Under Section 203**

**1. Effect on Competition – Horizontal Market Power**

**a. Applicants’ Analysis**

16. Applicants argue that the Proposed Transaction does not raise any horizontal market power issues.<sup>10</sup> Applicants reviewed the markets in which the Boston Companies and Constellation Holdings have generation, and identified overlapping generation in the ISO-NE market.<sup>11</sup> Applicants analyzed the ISO-NE market as a whole and also included

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<sup>8</sup> 16 U.S.C. § 824b(a)(4) (2006).

<sup>9</sup> 18 C.F.R. § 33.2(j) (2010).

<sup>10</sup> Application at 10. In the Application, Applicants argue that pursuant to section 33. (a)(2)(i) of the Commission’s regulations, they do not need to file a competitive analysis, because the parties to the transaction “do not conduct business in the same geographic market or . . . the extent of the business transactions in the same geographic market is *de minimis*.” *Id.* (quoting 18 C.F.R. § 33.3(a)(2)(i) (2010)). In its September 24, 2010 letter, the Commission determined that the Applicants had not demonstrated that the effect of the Proposed Transaction on competition in ISO-NE is *de minimis* and that Applicants should therefore perform and submit a delivered price test for ISO-NE. In accordance with this letter, Applicants submitted Applicants’ Supplement on October 8, 2010.

<sup>11</sup> Applicants performed an Appendix A analysis to determine the pre- and post-transaction market shares from which the market concentration or Herfindahl-Hirschman Index (HHI) change can be derived. The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are considered to be unconcentrated; markets in which the HHI is greater than or equal to 1,000 but less than 1,800 points are considered to be moderately concentrated; and markets in which the HHI is greater than or equal to 1,800 points are considered to be highly concentrated. The Commission has adopted the Federal Trade Commission/Department of Justice Horizontal Merger Guidelines, which state that in a horizontal merger, an increase of more than 50 HHI points in a highly concentrated market or an increase of 100 HHI points in a moderately concentrated

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an analysis of the ISO-NE market taking into account the Kleen Energy Facility which is not yet operational. Additionally, Applicants analyzed the Connecticut submarket in ISO-NE.

17. Applicants analyzed the ISO-NE market as a whole. Applicants performed the Delivered Price Test (DPT) analysis of Economic Capacity and Available Economic Capacity. Applicants contend that the analysis of Economic Capacity is more relevant than the Available Economic Capacity analysis, because the ISO-NE market has been restructured.<sup>12</sup> Under the Economic Capacity measure, the post-merger ISO-NE market is unconcentrated (i.e., HHI is below 1,000) in all periods. Specifically, post-merger HHIs range from 481 to 601 with HHI increases under 100 in all periods. Under the Available Economic Capacity measure, the post-merger ISO-NE market is unconcentrated in all periods, with HHIs significantly below the 1,000 threshold. The analysis also shows no impact on the Ancillary Services markets in ISO-NE, or on the ISO-NE capacity markets.

18. Applicants also analyzed the ISO-NE market taking into consideration future rights to generation from the Kleen Energy Facility. Under the Economic Capacity measure, the post-merger ISO-NE market with the Kleen Energy Facility is unconcentrated in all periods with post-merger HHIs ranging from 492 to 624 and HHI increases under 100.

19. Finally, Applicants analyzed the Connecticut submarket where the Kleen Energy Facility is located.<sup>13</sup> Under the Economic Capacity measure, the post-merger Connecticut submarket with the Kleen Energy Facility is unconcentrated in all but one period with post-merger HHIs ranging from 795 to 1,071. The HHI increases are under 100 in all periods with values ranging from 21 to 62.

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market fails its screen and warrants further review. U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, 57 Fed. Reg. 41,552 (1992), revised, 4 Trade Reg. Rep (CCH) ¶ 13,104 (April 8, 1997). We note that on April 20, 2010, the Federal Trade Commission (FTC) and Department of Justice (DOJ) proposed new Horizontal Merger Guidelines that revise these guidelines. On August 19, 2010, the FTC and DOJ issued final, revised versions of the guidelines based on this proposal. The revised guidelines raise the thresholds for the measures of market concentration. Our analysis here is based on the guidelines in effect prior to August 19, 2010.

<sup>12</sup> Applicants argue that in a restructured market, the traditional linkage between load obligations and generation ownership no longer exists and thus it is difficult to accurately model available supply in the market. Applicants' Supplement at 4.

<sup>13</sup> The Connecticut submarket consists of all of Connecticut.

**b. NSTAR Protest**

20. NSTAR takes issue with Applicants' statement that the extent of the Boston Companies' and Constellation's<sup>14</sup> "business transactions in the same geographic market is *de minimis*."<sup>15</sup> NSTAR argues that both the Boston Companies and Constellation have a significant presence in the New England market, are rival sellers of power, and that the Proposed Transaction's elimination of one of the rivals could cause significant harm.<sup>16</sup> To support this point, NSTAR points to the Boston Companies' ownership of approximately eight percent of ISO-NE's generating capacity and Constellation's participation as a server of retail load. Though unable to precisely quantify Constellation's market presence, NSTAR surmises that Constellation participates extensively as a purchaser in ISO-NE. It alleges that Constellation avoids showing long-term contractual rights to ISO-NE capacity due to a technicality in the relationship between ISO-NE market structure and the Commission's market power analyses which require capacity information under long-term contracts defined as a year or more in duration.<sup>17</sup> More specifically, NSTAR asserts that in New England, indirect retail load responsibilities are met through contracts with local distribution utilities, which are typically six months in duration. It argues that Constellation would therefore be able to satisfy its retail load responsibilities through back-to-back contracts and other contracts defined as "short-term" for purposes of Commission market power analysis.<sup>18</sup> NSTAR estimates that Constellation's ultimate consumer load responsibility is around 3,500 MW.<sup>19</sup> Based upon this estimate, NSTAR assumes that it would purchase and hold rights to an equivalent amount of generation within ISO-NE.<sup>20</sup> For this reason, NSTAR states that Constellation could exercise control over a substantial share of ISO-NE's generating capacity through direct ownership and contract rights, which, in NSTAR's opinion, should be included in Applicants' analysis of ISO-NE.<sup>21</sup>

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<sup>14</sup> In its protest, NSTAR refers to Constellation Holdings and its subsidiaries as "Constellation" and to the four selling companies as "Boston Generating." For the purposes of this order, we refer to the four companies as "the Boston Companies." NSTAR September 8, 2010 Protest at n. 1.

<sup>15</sup> *Id.* at 6 (quoting Application, Affidavit of Julie R. Solomon at 2).

<sup>16</sup> *Id.* at 6.

<sup>17</sup> *Id.* at 7.

<sup>18</sup> *Id.* at 7-8.

<sup>19</sup> *Id.* at 7.

<sup>20</sup> *Id.* at 8.

<sup>21</sup> *Id.*

21. NSTAR considers the Application “patently deficient,” because it fails to disclose the magnitude of Constellation’s ISO-NE operations.<sup>22</sup> NSTAR maintains that the Applicants had the responsibility to fully disclose their respective market participations and to make a *prima facie* case that the Proposed Transaction would not create the opportunity to wield market power.<sup>23</sup> It therefore argues that the Applicants cannot rely upon questionable assurances that the Proposed Transaction will not have anti-competitive impacts when both the Boston Companies and Constellation appear to be heavily involved in ISO-NE.<sup>24</sup>

22. Additionally, NSTAR states that the arithmetic formula underlying the Commission’s market power tests for FPA section 203 and market-based rate purposes do not always disclose instances in which market power exists and can be exercised harmfully.<sup>25</sup> It states that the Proposed Transaction would eliminate one of two rival sellers of power, each with a substantial share of the ISO-NE market.<sup>26</sup> NSTAR argues that this reduction in competition could affect it detrimentally, because in the past NSTAR has transacted with Constellation for service to its ultimate consumer “Provider of Last Resort” load.<sup>27</sup>

23. For these reasons, NSTAR asks the Commission to subject the Proposed Transaction to conditions analogous to certain code of conduct conditions embedded in section 35.39 of the regulations.<sup>28</sup> In particular, NSTAR states, that on a post-transaction basis, Constellation should operate its generation business separately from its retail market business and that there should be no direct sale of power between the generation and retail marketing businesses without a section 205 filing.<sup>29</sup> NSTAR also states that the Constellation generation and retail marketing businesses should be precluded from sharing market information.<sup>30</sup> If these protections are adopted, NSTAR maintains that it

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 9.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

will not oppose Commission approval of the Proposed Transaction despite the Application's alleged deficiency.<sup>31</sup>

**c. Answer**

24. In response to NSTAR's comment that the Application was deficient because it failed to account for the magnitude of Applicants' operations in ISO-NE, Mystic Power argues that Constellation Energy only controls a *de minimis* amount of generation in ISO-NE.<sup>32</sup> Additionally, Mystic Power states that the energy and capacity Constellation buys and sells to meet its wholesale and retail load obligations do not convey control to Constellation and were appropriately accounted for in the Application.<sup>33</sup>

25. Mystic Power also states that a simple count of the number of competitors in a market is not the test that the Commission uses to analyze the effect of an acquisition on competition.<sup>34</sup> Mystic Power instead argues that an HHI would be the appropriate measure of any anti-competitive effect.

26. Finally, Mystic Power states that NSTAR's request that conditions be put on the Commission's approval of the Proposed Transaction should be rejected since NSTAR has not identified any harm arising from the Proposed Transaction that requires remediation.<sup>35</sup>

**d. Commission Determination**

27. We find that, based on Applicants' representations, the Proposed Transaction will have no adverse effect on horizontal competition.

28. We agree with Applicants' conclusion that the Proposed Transaction will not create horizontal market power concerns. While the Proposed Transaction involves the combination of generation beyond what the Commission would view as *de minimis*, the post-transaction markets remain unconcentrated in all periods except the summer off-peak period of the Connecticut submarket analysis (HHI of 1,071) and the HHI changes resulting from the Proposed Transaction are all well below the Commission's

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<sup>31</sup> *Id.*

<sup>32</sup> Mystic Power September 23, 2010 Answer at 9.

<sup>33</sup> *Id.* at 9.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 12.

thresholds.<sup>36</sup> Applicants have provided sufficient analysis to reflect the impact of the Proposed Transaction on market concentration. The Proposed Transaction will not create horizontal market power concerns in the ISO-NE market or Connecticut submarket where Applicants have overlapping generation assets, or in any other market.

29. With respect to NSTAR's concerns regarding the Applicants' claim that their overlapping generation is *de minimis*, we note that the Commission requested that Applicants perform a delivered price test for the ISO-NE market.<sup>37</sup> In response, the Applicants submitted an analysis that showed that the Proposed Transaction will not create horizontal market power concerns. In addition, we affirm that Applicants' analysis is complete and that they have appropriately accounted for all the generation that the Boston Companies and Constellation Holdings and its subsidiaries own or control in ISO-NE. Specifically, Applicants state that their analysis included all capacity that the Boston Companies own in ISO-NE and all the generation that Mystic Power and its affiliates own or control under long-term purchase contract in ISO-NE.<sup>38</sup> In addition, Applicants take a conservative approach and included the generation from the planned 620 MW Kleen Energy Facility in their analysis. Although this facility is not expected to be in operation until 2011, Applicants' inclusion of this additional generation capacity sufficiently demonstrates that there is no horizontal market power concern, even under the most conservative assumptions. Therefore, we find that the analysis submitted in Applicants' Supplement adequately addresses NSTAR's concerns. Accordingly, we find that the Proposed Transaction does not raise horizontal market power concerns.

30. Lastly, we find that absent a showing of harm arising from the Proposed Transaction, the necessity of any imposition of conditions on the Proposed Transaction is unnecessary. While NSTAR is correct that the Proposed Transaction will eliminate a seller in the wholesale market, the Applicants' analysis has shown that the markets are unconcentrated in all periods except the summer off-peak period of the Connecticut submarket analysis. Therefore, the Proposed Transaction will have no adverse effect on horizontal competition. Accordingly, the Commission has no basis for requiring any additional conditions on this authorization.

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<sup>36</sup> The HHI change in the summer off-peak period of the Connecticut submarket analysis is 52, which is below the 100 HHI threshold.

<sup>37</sup> On September 24, 2010, Commission staff issued a deficiency letter in response to Applicants' filing. On October 8, 2010, Applicants' filed its response to the deficiency letter that included a delivered price test.

<sup>38</sup> Applicants' Supplement at 3; Thus, Applicants need not include in their analysis the short-term contracts described by NSTAR. 18 C.F.R. § 33.3(c)(4)(i)(A) (2010). Furthermore, NSTAR has provided no evidence to support its allegations pertaining to these contracts.

## 2. Effect on Competition – Vertical Market Power

### a. Applicants’ Analysis

31. Applicants contend that the Proposed Transaction does not raise any vertical market power issues, because it does not involve any transmission facilities other than the limited interconnection facilities required to interconnect the Facilities to the transmission grid.<sup>39</sup> Additionally, they state that neither Mystic Power nor any of its affiliates owns or controls any transmission facilities in the ISO-NE balancing authority area or has any ownership interest in or control of fuel supplies, fuel delivery systems, or other inputs to electricity markets or any new sites for electric generation that could raise barriers to entry in the ISO-NE balancing authority area.<sup>40</sup>

### b. Commission Determination

32. Based upon the Applicants’ representations, we find that the Proposed Transaction raises no vertical market power concerns. It does not involve the transfer of any transmission facilities that are used to provide transmission services. Further, the Proposed Transaction does not involve the sale of any fuel supplies or fuel delivery systems that could be used to impose barriers to entry to competing suppliers. Moreover, we note that no party raised vertical market power issues in this proceeding.

## 3. Effect on Rates

### a. Applicants’ Analysis

33. Applicants argue that the Proposed Transaction will not have any adverse effect on rates.<sup>41</sup> They argue that currently, all sales of electric energy, capacity, and ancillary services from the Facilities are made pursuant to the Boston Companies’ respective market-based rate authorizations.<sup>42</sup> Additionally, Applicants state that, after the Proposed Transaction, all sales of electric energy, capacity and ancillary services will be made pursuant to Mystic Power’s market-based rate authorization. Applicants also maintain that the Proposed Transaction will not affect any captive wholesale power

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<sup>39</sup> Application at 12.

<sup>40</sup> *Id.* at 12-13.

<sup>41</sup> *Id.* at 13.

<sup>42</sup> *Id.*

customers.<sup>43</sup> Similarly, they state that there are no transmission customers whose rates could be affected by the Proposed Transaction.<sup>44</sup>

**b. Commission Determination**

34. We agree that the Proposed Transaction will not have an adverse effect on rates. Applicants will continue to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates. Additionally, we note that Applicants have stated that there are no transmission customers whose rates could be affected by the Proposed Transaction. We also note that no party argued that the Proposed Transaction would have an adverse effect on rates.

**4. Effect on Regulation**

**a. Applicants' Analysis**

35. Applicants assert that the Proposed Transaction will not diminish the Commission's regulatory authority or create a regulatory gap or shift regulatory authority between the Commission and any state Commission.<sup>45</sup> They also state that the Proposed Transaction will not affect the Commission's jurisdiction over wholesale sales of electric energy, capacity, or ancillary services from the Facilities because of Mystic Power's application to make wholesale sales of electric energy, capacity, and ancillary services from the Facilities pursuant to a Commission-approved market-based rate tariff.<sup>46</sup> Additionally, Applicants state that the Proposed Transaction will not result in the removal of any facilities from the Commission's jurisdiction or have any effect on state commission regulation.<sup>47</sup>

**b. Commission Determination**

36. Based on the facts presented in the application, the Commission finds that the Proposed Transaction will not adversely affect federal or state regulation. We find that the Proposed Transaction will not create a regulatory gap at the federal level, because the Commission will retain its regulatory authority over the companies after consummation of the Proposed Transaction. We also note that no party alleges that the Proposed

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 13-14.

<sup>47</sup> *Id.* at 14.

Transaction will impair regulation, and no state commission has requested that the Commission address the issue of the effect on state regulation.

**5. Cross-Subsidization**

**a. Applicants' Analysis**

37. Applicants state that they need not provide evidentiary support to demonstrate a lack of cross-subsidization, because the Proposed Transaction falls within one of the Commission's safe harbors under section 203(a)(4) of the FPA.<sup>48</sup> More specifically, they state that the Proposed Transaction does not involve any franchised public utility with captive customers (i.e., wholesale or retail electric energy customers served under cost-based regulation).<sup>49</sup> Moreover, they assert that the only franchised public utility affiliated with Mystic Power is BGE, and it does not have any wholesale or retail captive customers and is subject to ring-fencing measures imposed by the Maryland Public Service Commission.<sup>50</sup> For these reasons, Applicants state that the Proposed 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.

**b. Commission Determination**

38. Because the Proposed Transaction does not involve a franchised public utility with captive customers and Applicants are not, nor are they affiliated with, a franchised utility with captive customers, we find that the Proposed Transaction will not result in cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company.

39. When a controlling interest in a public utility is acquired by another company, whether a domestic company or a foreign company, the Commission's ability to adequately protect public utility customers against inappropriate cross-subsidization may be impaired unless it has access to the acquirer's books and records. Section 301(c) of the FPA gives the Commission authority to examine the books and records of any person who controls, directly or indirectly, a jurisdictional public utility insofar as the books and records relate to transactions with or the business of such public utility. The approval of this transaction is based on such ability to examine books and records.

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 14-15.

<sup>50</sup> *Id.* at 15.

## **D. Settlement Agreement Involving Mystic Development**

### **1. NSTAR Protest**

40. NSTAR asks the Commission to assure compliance with the terms of the December 28, 2006 settlement agreement in Docket No. ER06-427-000 (Settlement Agreement), which, according to NSTAR, binds the Boston Companies to address and remediate reliability issues associated with the Mystic Development Facilities.<sup>51</sup> NSTAR claims that these facilities have a common mode failure problem involving their gas supply from Distrigas of Massachusetts LLC through a common header system that can cause simultaneous tripping of both units.<sup>52</sup> It argues that this problem can increase the amount and cost-of-reserve requirements on Northeastern Massachusetts ratepayers, because ISO-NE must plan for the simultaneous outage of both units.<sup>53</sup> According to NSTAR, these issues also affect energy costs due to increased congestion whenever the units are out of service or operating at reduced levels.<sup>54</sup>

41. Though NSTAR asserts that it has worked with ISO-NE and the Boston Companies to alleviate these reliability issues, it voices concern that Constellation will claim that it is not subject to its predecessor's settlement obligations. NSTAR, therefore, asks the Commission to condition the Proposed Transaction on Constellation's acceptance of the Settlement Agreement's obligations and the additional condition that the Proposed Transaction does not eliminate the Boston Companies obligations to remediate the reliability issues.<sup>55</sup> Moreover, it asks the Commission to deny approval for the Proposed Transaction absent a commitment by Constellation to solve and eliminate the common mode failure conditions.<sup>56</sup>

### **2. Mystic Power's Answer**

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<sup>51</sup> NSTAR Protest at 3-4.

<sup>52</sup> *Id.* at 4.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 5-6.

<sup>56</sup> *Id.* at 6.

42. Mystic Power asks the Commission to reject NSTAR's proposed conditions for authorization of the Proposed Transaction.<sup>57</sup> It argues that NSTAR has offered no evidence to support its reliability claims.<sup>58</sup> Mystic Power also asserts that if it is the successful bidder, it commits to "continue in good faith" the discussion that Mystic Development has commenced pursuant to Part II, Paragraph 6 of the Settlement Agreement to the extent not already completed.<sup>59</sup> It argues, however, that NSTAR's proposed conditions exceed the Settlement Agreement's terms.<sup>60</sup> On this point, Mystic Power states that the Settlement Agreement does not require the Boston Companies to remediate or eliminate the common mode failure; instead, Mystic Power states that the Settlement Agreement only requires that the parties "work together" to "identify potential causes" and to "determine what, if any, actions can be taken to eliminate those causes."<sup>61</sup> Additionally, it contends that the Settlement Agreement binds only Mystic Development, not the Boston Companies.<sup>62</sup>

43. Moreover, Mystic Power states that a section 203 proceeding is not the appropriate forum to address pre-existing conditions or resolve issues unrelated to the Commission's analysis of the Proposed Transaction.<sup>63</sup> Additionally, it maintains that the Commission only conditions section 203 authorizations when doing so is necessary to address "specific, transaction related harm."<sup>64</sup> Mystic Power believes that the common mode failure is not a transaction-related harm and that its voluntary commitment to assume the remaining obligations under Part II, paragraph 6 of the Settlement Agreement removes any possible concern that the Proposed Transaction would affect the status quo.<sup>65</sup> Consequently, it asks the Commission to reject NSTAR's request that the Commission condition its authorization for the Proposed Transaction.

### 3. Commission Determination

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<sup>57</sup> Mystic Power Answer at 2-7.

<sup>58</sup> *Id.* at 3.

<sup>59</sup> *Id.* at 4.

<sup>60</sup> *Id.* at 5.

<sup>61</sup> *Id.* at 5-6 (citing Settlement Agreement at 6).

<sup>62</sup> *Id.* at 6.

<sup>63</sup> *Id.* at 4.

<sup>64</sup> *Id.* at 6 (citing *Entergy Gulf States*, 121 FERC ¶ 61,182, at P 71 (2007)).

<sup>65</sup> *Id.* at 6.

44. NSTAR's arguments concerning possible avoidance of Settlement Agreement obligations are without merit. It maintains that Mystic Power may claim that it is not subject to the requirements of the Settlement Agreement, and the Commission must therefore condition approval of the Proposed Transaction on acceptance of the Boston Companies' obligations under the Settlement Agreement and also impose additional remediation requirements that are not found in the Settlement Agreement. We see no need to do this. If Mystic Power is the successful bidder, it will be bound to the Settlement Agreement's terms in accordance with Section II, Paragraph 19 of that agreement. This paragraph states that the Settlement Agreement is "binding upon . . . the Parties and their successors and assigns, including any entity that purchases Mystic Unit 8 or 9."<sup>66</sup> Mystic Power therefore could not claim that it is not subject to the requirements of the Settlement Agreement. In addition, we see no reason to impose additional requirements on Mystic Power as NSTAR requests. Mystic Power correctly states that the configuration of the plant and the common mode failure "pre-exist this Transaction."<sup>67</sup> Consummation of the Proposed Transaction would not affect the status quo, and thus, there are no grounds for establishing requirements beyond those that currently exist.

#### **E. Other Considerations**

45. Information and/or systems connected to the bulk power system involved in this transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to FPA section 215. Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information databases, and operating systems. If affiliates, personnel or investors are not authorized for access to such information and/or systems connected to the bulk power system, a public utility is obligated to take the appropriate measures to deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, etc., must comply with all applicable reliability and cyber security standards. The Commission, North American Electric Reliability Corporation or the relevant regional entity may audit compliance with reliability and cyber security standards.

#### **The Commission orders:**

(A) The Proposed Transaction is hereby authorized, as discussed in the body of this order.

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<sup>66</sup> Mystic Development December 28, 2006 Settlement Agreement at P 19, Filed in Docket No. ER06-427-003.

<sup>67</sup> Mystic Power Answer at 2.

(B) Applicants must inform the Commission within 30 days of any material change in circumstances that departs from the facts the Commission relied upon in granting the application.

(C) 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.

(D) 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.

(E) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

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

(G) Applicants shall notify the Commission within 10 days of the date on which the Proposed Transaction is consummated.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.