UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

PDI Stoneman, Inc. Docket No. EC03-100-000
Mid-American Power, LLC

ORDER FINDING VIOLATION OF THE FEDERAL POWER ACT AND AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued September 11, 2003)

I. Introduction

1. On June 30, 2003, PDI Stoneman, Inc. (PDI Stoneman) and Mid-American Power, LLC (Mid-American) (collectively, Applicants) filed an application pursuant to Section 203 of the Federal Power Act (FPA)[1] requesting Commission authorization for PDI Stoneman to acquire the one-third share in Mid-American that is presently owned by another entity so that PDI Stoneman will become the 100 percent owner of Mid-American (the 2003 transaction). Applicants also request authorization for previous transactions of May 21, 1996 (the May 1996 transaction) and September 6, 1996 (the September 1996 transaction), in which PDI Stoneman acquired the first two-thirds of Mid-American, if such authorizations should have been obtained under Section 203.

2. The Commission has reviewed the 2003 transaction under the Commission's Merger Policy Statement[2] and will authorize it, since it will not have an adverse effect on competition, rates, or regulation and is consistent with the public interest. We also find

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[1] 16 U.S.C. § 824b (2000).

[2] See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, Order No. 592, 61 Fed. Reg. 68,595 (1996); FERC Stats. & Regs. & 31,044 (1996), reconsideration denied; Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC & 61,321 (1997) (Merger Policy Statement); see also Revised Filing Requirements Under Part 33 of the Commission's Regulations, Order No. 642, 65 Fed. Reg. 70,983 (2000), FERC Stats. & Regs., Regulations Preambles July 1996-Dec. 2000 & 31,111 (2000), order on reh=g, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC & 61,289 (2001).

that the September 1996 transaction, and possibly also the May 1996 transaction, were dispositions of jurisdictional facilities that required approval under Section 203. As discussed below, we take such violations seriously, and we expect public utilities that are planning transactions that may be jurisdictional to come to the Commission for guidance, prior to consummating the questionable transactions. Applicants have requested that we approve these transactions if we find that the Commission had jurisdiction over them. We have done so, and we have concluded that neither of the 1996 transactions had an adverse effect on competition, rates, or regulation and thus, that they were consistent with the public interest. Our findings are discussed below.

II. Background

A. Description of the Parties

3. PDI Stoneman's ultimate parent is WPS Resources (WPS Resources), an exempt public utility holding company under the Public Utility Holding Company Act of 1935. WPS Resources also holds ownership interests in two utilities that sell power on a regulated, cost-of-service basis: Wisconsin Public Service Corporation (WPSC) and Upper Peninsula Power Company (UPPCO). WPSC engages in the generation, distribution and wholesale and retail sale of electric energy, and UPPCO is engaged in the generation, distribution and sale of electric energy. Both WPSC and UPPCO have transferred their transmission assets to American Transmission Company, LLC and are members of the Midwest Independent Transmission System Operator, Inc (MISO).

4. PDI Stoneman's direct parent is WPS Power Development, Inc. (PDI). PDI is a wholly-owned, indirect subsidiary of WPS Resources and is a developer, owner and operator of merchant generation plants.

5. BM Stoneman is a non-utility Missouri corporation specializing in engineering and construction that presently owns a one-third limited liability company interest in Mid-American.

6. Mid-American is a Wisconsin limited liability company. It was initially owned by BM Stoneman, LB Mid-American, Inc. (LB Mid-American) and Melkit Limited (Melkit). PDI Stoneman purchased an interest in Mid-American on November 13, 1995, to become the fourth member, with each holding a 25 percent interest. Applicants state that at that time, Mid-American did not own or operate any public utility assets, so there was no requirement for the transaction to be approved under Section 203. Mid-American was formed to acquire the EJ Stoneman Power Generation Station (the Stoneman generating facility), a 53 MW generating plant in Cassville, Wisconsin with appurtenant transmission facilities, which it acquired from Dairyland Power Cooperative (Dairyland) in the May

1996 transaction. On the day that transaction was completed, PDI Stoneman and LB Mid-American acquired Melkit's interest in Mid-American, which resulted in PDI Stoneman, LB Mid-American and BM Stoneman each holding a one-third interest in Mid-American. In the September 1996 transaction, PDI Stoneman acquired all of the common stock of LB Mid-American, and thereby became the effective owner of two-thirds of the membership interests in Mid-American, with BM Stoneman owning the remaining one-third.

B. Description of the 2003 Transaction

7. PDI Stoneman plans to acquire BM Stoneman's one-third interest in Mid-American, thus becoming the 100 percent owner of Mid-American. In 1995, prior to Mid-American's acquisition of the Stoneman generating facility, the owners of Mid-American entered into the Mid-American Operating Agreement (the Operating Agreement) to govern the management of Mid-American's business affairs. The Operating Agreement contains a Supermajority Consent provision, the effect of which is to ensure that the consent of owners of Mid-American holding greater than 80 percent of the voting stock is required for a range of decisions, including the establishment of the company's annual budget and the sale of electricity from the Stoneman generating plant. Day-to-day operational decisions affecting the company require only a simple majority. Applicants state that as PDI Stoneman will be the 100 percent owner of Mid-American once this proposed 2003 transaction is complete, the Supermajority Consent provision will become moot. Thus, Applicants say, PDI Stoneman is now, for the first time, obtaining unilateral control over Mid-American.

C. The 1996 Transactions

8. The May 1996 transaction actually involved two separate transactions, both of which occurred on May 21, 1996. In one of the transactions, Mid-American acquired the Stoneman generating facility from Dairyland, a non-jurisdictional entity which is financed by the Rural Utilities Service. In the other transaction, Melkit's share of Mid-American was divided equally among the other three owners, thus resulting in PDI Stoneman increasing its ownership in Mid-American from 25 percent to one-third. Applicants state that they do not believe that the Commission's authorization under Section 203 of the FPA was required for the acquisition of the Stoneman generating facility because the transmission facilities appurtenant to the generation facility were then non-jurisdictional. The Stoneman generating facility, and thus the appurtenant transmission facilities, were taken out of service by the previous owner for the four year period prior to the May 1996

transaction, and were inoperable at the time they were transferred.[3] Applicants further assert that Section 203 approval was not required as a result of the increase in ownership interest in Mid-American because PDI Stoneman acquired only a minority interest (one-third) and thus did not "control" either Mid-American or the Stoneman generating facility. Mid-American also filed an application with the Commission[4] prior to the May 1996 transaction for approval of a market-based rate for the Stoneman generating facility. Approval was granted with effect from May 17, 1996, four days prior to the May 1996 transaction. After the May 1996 transaction, Mid-American restored the Stoneman generating facility to become commercially operational again in August 1996 and sales of power began.

9. The September 1996 transaction resulted in PDI Stoneman increasing its share in Mid-American to two-thirds, which it accomplished by purchasing the one-third share in Mid-American owned by LB Mid-American. BM Stoneman remained the holder of the remaining one-third share. By the time the September 1996 transaction occurred, the Stoneman generating facility was operational. Applicants contend that despite the fact that PDI Stoneman increased its interest in Mid-American, and hence, in the Stoneman generating facility, from one-third to two-thirds, this did not give it <u>unilateral control</u> over the operation or management of the Stoneman generating facility because of the Supermajority Consent provision and thus, obviated the need for the Section 203 filing.

10. Applicants state that they have not withheld information from the Commission regarding the May 1996 or September 1996 transactions. Several filings were made with the Commission that identified PDI Stoneman's ownership interests in Mid-American, including Mid-American's Exempt Wholesale Generator Notice of October, 1996,[5] informing the Commission of the May 1996 transaction and the September 1996 transaction. Applicants assert that they have acted in good faith.

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[3] At that time, it appeared that the value of the Stoneman generating facility to Mid-American would be the land on which it was situated, not the plant itself.

[4] In Docket No. ER96-1858-000.

[5] In Docket No. EG96-71-000.

III. Notice of Filing

11. Notice of the filing was published in the Federal Register,[6] with interventions and protests due on or before July 21, 2003. No comments, interventions or protests were received.

IV. Discussion

A. The Two 1996 Transactions

12. The Applicants have provided two arguments as to why prior approval from the Commission under Section 203 of the FPA was not required for either of the transactions by which Mid-American acquired the first two-thirds of the Stoneman generating facility. These are: (1) when Mid-American acquired the Stoneman generating facility from Dairyland (the May 1996 transaction), the Stoneman generating facility and the appurtenant transmission facilities were not jurisdictional because they were not operational; and (2) at no time did PDI Stoneman obtain unilateral control over the Stoneman generating facility, due to the Supermajority Consent provision.

13. Section 203 requires prior Commission approval for a sale, lease, or other disposition, or a direct or indirect merger or consolidation "by any means whatsoever," by a public utility of the whole or any part of "facilities subject to the jurisdiction of the Commission..."[7] The requirement to obtain the Commission's approval depends on whether the facilities are subject to the jurisdiction of the Commission and whether the transaction directly or indirectly would result in a change of control of the facilities.

14. Section 201(b)(1) describes the activities that are subject to the jurisdiction of the Commission: " … the transmission of electric energy in interstate commerce and … the sale of electric energy at wholesale in interstate commerce." The section further describes the facilities that are jurisdictional: "The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy,..."[8] with certain exceptions not relevant here.

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[6] 68 Fed. Reg. 42,412 (2003).

[7] This applies if the facilities have a value greater than $50,000.

[8] Section 201(b)(1) FPA; 16 U.S.C. 824 § 201 (2000).

1. Market-Based Rate Schedule

15. We need not decide whether the transmission facilities at issue here were jurisdictional facilities in May 1996, since there were other jurisdictional facilities at that time in any case. We note that the Commission gave conditional approval for a market-based rate for the facility with effect from May 17, 1996,[9] four days prior to the May 1996 transaction. A transaction in which a market-based rate schedule is transferred (or there is a change in control over that market-based rate schedule) requires Commission approval under Section 203, since a rate schedule is a jurisdictional facility.[10] Thus, at the time of the May 1996 transaction, if the increase in PDI Stoneman's ownership from 25 percent to one-third was a change in control, control of an asset over which the Commission had jurisdiction was transferred, and thus this May 1996 transaction was required to have prior Commission approval under Section 203. Applicants, however, argue that the effect of the Supermajority Consent provision obviated the need for such approval, as discussed below.

2. Effect of Supermajority Consent Provisions

16. The May 1996 transaction involved the transfer of a market-based rate schedule and by the time of the September 1996 transaction, the transmission facilities associated with the Stoneman generating facility were operational and wholesale power sales were occurring. Accordingly, each of the 1996 transactions involved jurisdictional facilities. In each transaction, there was a transfer of voting securities or membership interests resulting in PDI Stoneman progressively increasing its interest in a company (Mid-American) that owned those jurisdictional facilities. The question remains whether these transactions resulted in a change of control over the jurisdictional facilities, thus requiring prior Commission approval under Section 203. Applicants state that neither of these transactions required the Commission's approval under Section 203 because the Supermajority Consent provision prevented PDI Stoneman from gaining genuine or full control over the Stoneman generating facility.

17. We are not persuaded that the Supermajority Consent provision prevented Applicants from having control under Section 203. Although PDI Stoneman may not have had unilateral control of Mid-American, PDI Stoneman did have some control of Mid-American. Applicants do not assert otherwise. The owners of Mid-American were

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[9] Mid-American Power, LLC, 76 FERC ¶ 61,035 (Order) (1996).

[10] Ocean State Power, 38 FERC ¶ 61,140 (1987).

unlike the limited partners in a limited partnership, which typically have authority to vote only on certain major investment and broad-level actions. Here, PDI Stoneman, as well as the other owners, had the authority to influence all significant decisions, including the sale of power, involving the plant. The transactions involving membership interests in Mid-American involved the transfer of a significant portion of ownership – one-third was transferred on each occasion. The September 1996 transaction involved a transfer of one-third of the membership interests in Mid-American to PDI Stoneman, thus giving PDI Stoneman two-thirds ownership of Mid-American. Due to the material change in the proportion of membership interests in Mid-American held by PDI Stoneman after the September 1996 transaction, we find that the September 1996 transaction resulted in a change in control of jurisdictional facilities and associated assets, requiring prior Commission approval under Section 203. The May 1996 transaction may also have resulted in a change of control sufficient to have warranted prior Commission approval. Applicants have requested that in addition to approving the proposed 2003 transaction, we also determine whether approval should be granted for each of the 1996 transactions, if such approval was required. Our decision on all three transactions is set out below.

B. Consistency with Public Interest of All Three Transactions

18. Section 203(a) of the FPA provides that the Commission must approve a disposition of facilities if it finds that the disposition "will be consistent with the public interest."[11] The Commission's analysis of whether a disposition 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. As discussed below, we find that each of the three transactions (the May 1996 transaction, the September 1996 transaction and the proposed 2003 transaction) involving the disposition and transfer of jurisdictional facilities is (or was, prior to its occurrence) consistent with the public interest.

19. Applicants state that even if the Commission finds the May 1996 and September 1996 transactions were jurisdictional, Applicants believe that those transactions are consistent with the public interest for the same reasons that the proposed 2003 transaction is consistent with the public interest. As a general matter, the circumstances that would affect our analysis of the effect of Section 203 transactions could change, depending on the timing of the transaction, and possibly lead to different findings regarding the effect on rates and regulation and competition, particularly. However, in the circumstances of this application, the Commission does not believe, based on facts as asserted in the application and our understanding of the market conditions at the time of the prior

[11] 16 U.S.C. § 824b (2000).

transactions, that the analysis of the competitive, rate or regulatory effects would be materially different over the course of the period covered by the transactions. Therefore, we will analyze the transaction under present day circumstances.

1. Effect on Competition

20. Applicants assert that the transactions will not harm competition because the capacity of the Stoneman generating facility is only 53 MW, which is not sufficient, either on its own or in conjunction with other generating capacity owned by any subsidiary of WPS Resources, to give any WPS Resources subsidiary the opportunity to exert market power. In addition, Applicants state that the capacity of the Stoneman generating facility cannot be added to WPSC and/or UPPCO generating capacity because the plant is in Dairyland's control area as opposed to the WPSC or UPPCO service area.

21. The Commission finds that the transactions will not harm competition. Initially, we agree with Applicants that the circumstances of this application exempt them from the need to provide additional information regarding possible horizontal or vertical competitive impacts arising from the transaction, as provided for under Order No. 642.[12] We note that, according to Applicants, the capacity of the Stoneman generating facility accounts for less than 0.04 percent of the total MISO generating capacity of 122,000 MW. More significantly, however, the effect of the transactions on market concentration within the WPS control area as a separate destination market would likely be de minimis. Although the transactions increased or will increase total capacity controlled by WPS entities by 53 MW (less than 3 percent of WPS' existing capacity in the Upper Midwest), this additional 53 MW is in Dairyland's control area, which is not directly interconnected with the WPS control area. As a consequence, this capacity is forced to compete with other capacity for use of limited import transfer capability into WPS' control area, with the result that very little of the capacity from Mid-American's plant is likely to be available for sale in the WPS market. Therefore, the Commission concludes that the consolidation of the capacity of the Stoneman generating facility with the generating capacity owned and controlled by PDI Stoneman's WPS affiliates does not present horizontal market power concerns and is unlikely to otherwise adversely affect competition in relevant markets. We further note that no entity has intervened to raise market power issues associated with the transactions.

[12] Order No. 642 at 31,903.

2. Effect on Rates

22. The application states that as Mid-American would continue to have the same contractual rights and obligations after the transactions are complete, notwithstanding that the transactions would increase PDI Stoneman's ownership share of Mid-American, there will be no change in the services provided to its customers, or the terms on which such services are provided, that may affect the rates they pay. Moreover, Mid-American does not have captive native load wholesale or retail customers. Applicants conclude that there is nothing in the transactions that would affect wholesale power or transmission rates. The Commission agrees that the transactions did not and will not adversely affect rates.

3. Effect on Regulation

23. As explained in the Merger Policy Statement and Order No. 642, the Commission's primary concern with the effect on regulation of a proposed merger involves possible changes in the Commission's jurisdiction when a registered holding company is formed, thus invoking the jurisdiction of the Securities and Exchange Commission. That situation would not result from any of the transactions. We agree with Applicants that federal regulation would not be impaired, and we further note that no party alleges that federal regulation would be impaired by the transactions.

24. We note that no state has indicated that it lacks jurisdiction to consider the transactions' effects on retail rates, nor has any state asked us to do so. Thus, we are satisfied that the transactions have no effect on regulation, either of the Commission, or any state regulatory authority.

C. Conclusions

25. For the reasons outlined above, we find that the September 1996 transaction, and possibly the May 1996 transaction, resulted in a disposition of a jurisdictional facility. Applicants did not timely obtain Commission authorization for these transactions We note that Section 203 of the FPA requires Commission approval of such dispositions <u>before</u> they are implemented. Implementing such dispositions without prior Commission approval is directly contrary to statutory requirements. Although we note that the Commission has few, if any, effective remedies to address non-compliance with Section 203, we take non-compliance with this requirement very seriously, and expect public utilities to do the same. Among other things, non-compliance may require the Commission to impose remedies as a term or condition of its approval under Section 203, in addition to the obvious risk to the public utility that a disposition implemented without

prior authorization may be voidable in court by any affected party.

26. The Applicants also state that they previously filed an application for exempt wholesale generator status for the Stoneman generating facility, in which they referred to both the May and September 1996 transactions. There is no onus on the Commission to review applications relating to other issues in order to ascertain whether the facts indicate a requirement for Commission approval for other matters. Unless a filing expressly applies for Commission approval for a specific Section 203 transaction, it is assumed that such approval has not been sought.

The Commission orders:

(A) Each of the transactions, the proposed 2003 transaction, the May 1996 transaction and the September 1996 transaction, is authorized upon the terms and conditions and for the purposes set forth in the application.

(B) The foregoing authorizations are without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of cost or any other matter whatsoever now pending or which may come before the Commission.

(C) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

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

(E) Applicants shall notify the Commission within 10 days of the date that the disposition of the jurisdictional facilities under the proposed 2003 transaction is consummated.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.