

129 FERC ¶ 61,139
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Harbinger Capital Partners Master Fund I, Docket No. EC08-117-001
Ltd.
Harbinger Capital Partners Special
Situations Fund, L.P.

ORDER GRANTING CLARIFICATION AND DENYING REHEARING

(Issued November 19, 2009)

1. The Commission granted the request of Harbinger Capital Partners Master Fund I, Ltd. (Harbinger Master Fund) and Harbinger Capital Partners Special Situations Fund, L.P. (Harbinger Special Situations Fund) (collectively, Harbinger) for authorization to acquire up to 20 percent of the outstanding voting securities of Sunoco, Inc. (Sunoco) (Proposed Transaction)¹ under section 203(a)(1) of the Federal Power Act (FPA).² Harbinger filed a request for rehearing, or in the alternative, clarification of the November 5 Order. In this order, we deny rehearing of the November 5 Order. We also clarify certain conditions that were imposed on the Proposed Transaction.

I. Background

2. In the November 5 Order, the Commission authorized the Proposed Transaction, finding it to be consistent with the public interest with the conditions imposed. Because the Proposed Transaction would result in a disposition of up to a 20 percent interest in Sunoco and could therefore result in a change in control of a public utility, the Commission asserted jurisdiction over the Proposed Transaction under FPA section 203(a)(1).

¹ *Harbinger Capital Partners Master Fund I, Ltd.*, 125 FERC ¶ 61,144 (2008) (November 5 Order).

² 16 U.S.C. § 824b (2006).

3. Based on the facts presented in Harbinger's request for authorization and subject to certain reporting conditions, the Commission concluded that the Proposed Transaction would not adversely affect competition in terms of horizontal market power. The Commission found that Harbinger could have the ability to control Sunoco with the disposition of 10 percent or more of its voting interests; it further noted that Harbinger could have the ability to control Mirant.³ The Commission then determined that Harbinger-controlled capacity would constitute only 5,244 MWs of the 165,300 MWs of installed capacity in PJM. Accordingly, the Commission held that Harbinger's combined interests in generation as a result of the Proposed Transaction would be *de minimis*.⁴

4. In addition, the Commission found that the Proposed Transaction did not raise any vertical market power concerns, would not have an adverse effect on rates, and would not have any adverse effect on the effectiveness of federal or state regulation. Moreover, based on the facts presented, the Commission found that the Proposed Transaction would not result in cross-subsidization, or the pledge or encumbrance of utility assets for the benefit of an associate company.

5. Following Commission precedent in similar cases,⁵ the November 5 Order required Harbinger to file with the Commission, for informational purposes, within 45 days of the end of each calendar quarter, a quarterly report of utility holdings by both Harbinger Master Fund and Harbinger Special Situations Fund stated in terms of the number of the shares held at the end of the quarter and as a percentage of the outstanding shares. The Commission also directed Harbinger to file with the Commission any filing it makes at the Securities and Exchange Commission (SEC) pertaining to Sunoco on Schedule 13G or Schedule 13D. Any changes in the information provided on the initial Schedule 13G or 13D must be reflected in an annual amended filing due within 45 days

³ November 5 Order, 125 FERC ¶ 61,144 at P 25 (citing *Harbinger Capital Partners Master Fund I, Ltd*, Docket No. EC08-59-000).

⁴ The Commission noted that in a concurrent order, it approved Harbinger's request to acquire interests in Entegra Power Group LLC and that that approval did not affect the market power analysis regarding Harbinger's acquisition of Sunoco. *Id.* at n.33.

⁵ See, e.g., *Legg Mason, Inc.*, 121 FERC ¶ 61,061 (2007); *Goldman Sachs Group, Inc.*, 121 FERC ¶ 61,059 (2007), *order on clarification*, 122 FERC ¶ 61,005 (2008); *Morgan Stanley*, 121 FERC ¶ 61,060 (2007), *order on clarification*, 122 FERC ¶ 61,094 (2008).

of the end of each calendar year. Harbinger must also file with the Commission any comment or deficiency letters received from the SEC that concern Schedule 13G- or 13D-related compliance audits conducted by the SEC.

II. Request for Rehearing

6. In its request for rehearing, Harbinger argues that the Commission erred to the extent that it required Harbinger to file all comment or deficiency letters received from the SEC that concern Schedule 13G- or 13D-related compliance audits conducted by the SEC, rather than those that pertain solely to Harbinger's acquisition of Sunoco securities. In the event the Commission declines to grant Harbinger's requested clarification that the condition pertains solely to SEC audits pertaining to Sunoco, Harbinger argues that this condition is overly broad and has not been adequately supported. It states that the Commission has not cited any authority to require Harbinger Funds to file comment or deficiency letters that the SEC has not made publicly available.

7. Harbinger further argues that the Commission erred in failing to indicate that the conditions only apply to the extent Harbinger is using the authorization granted in the November 5 Order. It states that the Commission did not provide adequate reasoning to justify the imposition of the conditions when the Application raised no competitive issues.

III. Commission Determination

8. We reject Harbinger's argument that the Commission did not provide adequate reasoning to justify the imposition of conditions on the Proposed Transaction. In the November 5 Order, the Commission explained that because the Proposed Transaction involved the disposition of 10 percent or more of voting interests in Sunoco, it could result in a change in control of a public utility. Accordingly, the Commission asserted jurisdiction over the Proposed Transaction under FPA section 203(a)(1). The Commission has the responsibility to impose conditions on its approval of the transaction if the conditions are necessary to ensure that the transaction is in the public interest,⁶ and to require compliance filings to facilitate the Commission's continued oversight of the Proposed Transaction. For example, the Commission imposes reporting requirements to monitor the status of completed transactions. Since the acquisition of Sunoco voting securities by Harbinger will take place over time, the Schedule 13 reporting requirements allow the Commission to track the status of the Proposed Transaction without causing undue burden on the applicants.

⁶ 16 U.S.C. § 824b (2006).

9. We grant Harbinger's request for clarification that Harbinger is required only to file comment or deficiency letters received from the SEC concerning Schedule 13G- or 13D- related compliance audits by the SEC that pertain to Harbinger's investment in Sunoco. In addition, we clarify that the conditions set forth in the November 5 Order apply only to the extent Harbinger holds 10 percent or more of Sunoco's outstanding voting securities, and thus is holding such securities pursuant to the authorization granted in the November 5 Order.

10. We will deny Harbinger's request that it only be required to file comment or deficiency letters received from the SEC concerning Schedule 13G- or 13D- related compliance audits pertaining to Harbinger's investment in Sunoco to the extent that such letters are public. Harbinger provides no support for this request. It is effectively asking this Commission to draw a distinction based on a sister agency's determinations of whether its communications should be public. However, because we are relying on Harbinger's SEC filings, in part, to support compliance with conditions imposed in furtherance of our responsibilities under section 203 of the FPA, it is important that this agency receive all relevant filings, not just the public filings. Harbinger may file the documents that the SEC has designated as confidential with this Commission with a request for confidential treatment. This should address Harbinger's concerns with making the matter public.

The Commission orders:

Harbinger's request for clarification and/or rehearing is hereby granted in part and denied in part.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.