125 FERC ¶ 61,146
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

LS Power Development, LLC
Luminus Management, LLC

Docket No. EC08-67-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES
UNDER SECTION 203 OF THE FEDERAL POWER ACT

(Issued November 5, 2008)

1. On April 8, 2008,[1] LS Power Development, LLC (LS Power) and Luminus Management, LLC (Luminus Management) (collectively, Applicants) filed an application under section 203 of the Federal Power Act (FPA)[2] requesting Commission authorization under FPA section 203(a)(1) to indirectly acquire, through their subsidiaries, up to 20 percent of the common stock of TransAlta Corporation (TransAlta) (Proposed Transaction).[3] The Commission has reviewed the Application under the Merger Policy Statement.[4] As discussed below, we will authorize the Proposed Transaction under section 203(a)(1), as we find that it is consistent with the public interest.

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[1] April 8, 2008 Filing. This filing was supplemented on April 17, 2008, May 13, 2008, July 1, 2008, July 22, 2008, and July 30, 2008.

[2] 16 U.S.C. § 824b (2006).

[3] We note that TransAlta is not an applicant to this proceeding, and therefore we assume that the shares Applicants seek to acquire will be from third party entities.

[4] *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). *See also FPA Section 203 Supplemental Policy Statement*, 72 Fed. Reg. 42,277 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008). *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).

I. Background

A. Description of the Parties

1. LS Power and its Subsidiaries

2. Applicants state that LS Power is a holding company that indirectly owns 10 percent or more of various exempt wholesale generators (EWGs) and qualifying facilities (QFs).[5] Applicants describe LS Power as the principal operating company of the LS Power Group, which consists of LS Power, LS Power Associates, L.P. (LSP Associates), and LS Power's controlled subsidiaries.

3. Applicants state that LS Power owns LSP Associates as a general partner along with various passive limited partner investors, and in that capacity develops, owns, and operates independent power projects in the United States.

4. Applicants state that LS Power, LSP Associates, and various passive limited partner investors own LS Power Partners, LP (LSP Partners I)[6] and LS Power Partners II, LP (LSP Partners II). They state that LSP Partners I is the general partner along with various passive limited partner investors of LS Power Equity Partners, L.P. (LSP Equity Partners) and LS Power Equity Partners PIE I, L.P. (LSP Equity PIE). Applicants state that LSP Partners II is the general partner along with various passive limited partner investors of LS Power Equity Partners II, L.P. (LSP Equity Partners II) and LS Power Equity Partners PIE, II, L.P. (LSP Equity PIE II).

5. Applicants state that LSP Partners I, LSP Equity Partners, and LSP Equity PIE (collectively, Fund I) own directly and indirectly, LSP Penn Holdings I, LLC (Penn I). They state that LSP Partners II, LSP Equity Partners II, and LSP Equity PIE II (collectively, Fund II) own directly and indirectly, LSP Penn Holdings II, LLC (Penn II).

6. Applicants state that Penn I, Penn II, and various subsidiaries of Luminus Management, as described below, own LPCO Investments S.à r.l. (LPCO). Applicants state that LPCO and LTAC SPV I, LLC (LTAC), another subsidiary of Luminus Management, will acquire the shares of TransAlta Corporation at issue in this filing.

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[5] EWG status is granted under the Public Utility Holding Company Act of 2005, enacted by Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1261 *et seq.*, 119 Stat. 594 (2005); 18 C.F.R. §§ 292.201 *et seq.* (2008). QF status is granted under the Public Utility Regulatory Policies Act, 16 U.S.C. § 824a-3 (2006).

[6] While the Application states that "LSP Partners and LSP Partners II" are owned by LSP Power, LS Power Associates, and various passive limited partner investors, we assume that Applicants meant to refer to "LSP Partners I and LSP Partners II." Application at 3.

2. Luminus Management and its Subsidiaries

7. Applicants state that Luminus Management is owned by certain trusts. They describe Luminus Management as the principal operating company of both Luminus Asset Partners L.P. (Luminus Asset) and Luminus Energy Partners Master Fund, LTD (LEPM) (collectively, Luminus). Applicants state that Luminus Management, and not the passive limited partner investors, has ultimate control over the day-to-day activities of Luminus.

8. Applicants state that Luminus Asset is owned directly and indirectly by Vega Energy GP, LLC, and by various passive limited partner investors. Applicants state that LEPM is owned directly and indirectly by Luminus Energy Partners QP, L.P. and Luminus Energy Partners, LTD. As previously mentioned, Applicants state that Luminus, Penn I and Penn II own LPCO.

9. Applicants state that Common Sense Special Opportunity, LP (CSSO) and Luminus Asset own LTAC. Applicants state that CSSO is a passive investor and does not control either directly or indirectly LTAC's day-to-day operations of its investments. As mentioned above, LPCO and LTAC will acquire the requested interest in TransAlta.

3. TransAlta

10. Applicants state that TransAlta is a power generation and wholesale power marketing company that operates generation assets in Canada, the United States, Mexico, and Australia. Applicants state that TransAlta has two wholly-owned subsidiaries, TransAlta Utilities Corporation and TransAlta Energy Corporation (TransAlta Energy). They state that TransAlta Energy, through its subsidiaries, operates electric energy generation in the United States. Applicants state that TransAlta Energy wholly owns TECWA Power, Inc. (TECWA), which wholly owns TransAlta Centralia Generation LLC (Centralia), an EWG in Washington state that is interconnected to the Bonneville Power Administration (BPA). Additionally, Applicants state that TransAlta wholly owns TransAlta Energy, Inc. (TEI), which wholly owns TransAlta Energy Marketing (U.S.) Inc. (TEMUS), which markets electric energy and capacity at wholesale. Applicants state that both Centralia and TEMUS have market-based rate authorization. Applicants further state that TransAlta is not a traditional utility with captive retail or wholesale customers and does not provide unbundled transmission service.

11. Applicants further state that in addition to Centralia, TransAlta has indirect interests in the following QFs in the United States: (1) a 37.5 percent indirect interest in the Saranac Facility, a natural gas cogeneration facility in Plattsburgh, New York, whose entire output is sold under contract to the New York State Electric & Gas Corporation; (2) a 50 percent indirect interest in the Yuma Facility, a natural gas cogeneration facility in Yuma, Arizona, whose entire output is sold under contract to San Diego Gas & Electric; (3) a 50 percent indirect interest in Power Resources, a natural gas cogeneration

facility in Big Springs, Texas, whose entire output is sold to Texas utilities; (4) a 50 percent direct interest in Wailuku River Hydroelectric L.P., a hydroelectric facility in Wailuku, Hawaii; and (5) a 50 percent indirect interest in ten thermo power plants.

4. **Indirect Interests in Other Generation**

12. Applicants state that LSP Partners I, LSP Associates, LSP Equity Partners, LSP Equity PIE, and LSP Gen Investors, L.P. (LSP Dynegy Shareholders) own all of the Class B voting securities of Dynegy Inc. (Dynegy); this is approximately 40 percent of the outstanding voting securities of Dynegy (LSP Dynegy Interest). Applicants also state that Dynegy, through various subsidiaries, provides electricity to wholesale customers throughout the United States, and owns power plants, totaling more than 19,000 MW of generating capacity.

13. Applicants state that as part of the LSP Dynegy Shareholders' ownership interest in Dynegy, the LSP Dynegy Shareholders may elect up to three directors out of 11 members of Dynegy's Board of Directors. Applicants explain that the LSP Dynegy Shareholders may not vote for or seek removal of the remaining eight directors. Applicants further state that LSP Dynegy Shareholders may not act alone to remove Dynegy's management.

14. Applicants state that Dynegy's management, not any of the LSP Dynegy Shareholders, has ultimate control over the day-to-day activities of Dynegy's generation entities. They state that the LSP Dynegy Shareholders do not have a role in running Dynegy's business portfolios or its day-to-day operations, and therefore do not have any control, either directly or indirectly, over the day-to-day operations of its subsidiaries, including any generation project company directly or indirectly owned by any subsidiaries. Applicants state that it is the position of LS Power and Dynegy that the LSP Dynegy Shareholders do not individually or collectively control Dynegy. Accordingly, Applicants state that Dynegy and its subsidiaries are not affiliates of Applicants. Nevertheless, Applicants state that they submit this application out of an abundance of caution and that to ensure timely approval, and solely for such purpose, they have attributed Dynegy's generation assets to LS Power in this application.

15. Applicants state that they collectively own less than 20 percent of the common stock of Calpine Corporation (Calpine). They state that Calpine is engaged through subsidiaries in the development, financing, acquisition, ownership, and operation of independent power production facilities and the wholesale marketing of electricity in the United States and abroad. Applicants state that through various subsidiaries, Calpine owns, leases, and operates natural gas-fired and renewable geothermal power plants in 18 states with an aggregate generating capacity in excess of 22,000 MW.

16. Applicants state that Calpine's power marketer and generator subsidiaries include power marketers and EWGs as well as QFs and entities that operate exclusively in the Electric Reliability Council of Texas region.

17. Applicants state that Calpine is responsible for the day-to-day management of its company. Applicants further state that it is their and Calpine's position that Applicants do not individually or collectively control Calpine, and accordingly, that Calpine and its subsidiaries are not affiliates of Applicants. Nonetheless, Applicants state that they have filed this application out of an abundance of caution and that in order to ensure timely approval of this application, and solely for that purpose, have attributed Calpine's generation assets to Applicants in this application.

B. Description of the Proposed Transaction

18. Applicants describe the Proposed Transaction as the acquisition of up to 20 percent of TransAlta through their current subsidiaries, LPCO and LTAC. Applicants explain that they do not believe that the Proposed Transaction requires section 203 approval, but that the Commission has stated that public utilities that are planning transactions that may be jurisdictional should come to the Commission for guidance before consummating those transactions.[7] Applicants state that they believe they may use the blanket authorization granted in section 33.1(c)(8)[8] for the Proposed Transaction, but out of an abundance of caution, Applicants seek authorization under section 203(a)(1) to acquire up to 20 percent of TransAlta's common stock.

19. Applicants state that the Proposed Transaction is consistent with the public interest because it will not have an adverse effect on competition, rates, or regulation, and will not result in cross-subsidization of a non-utility associated company or the pledge or encumbrance of utility assets for the benefit of an associate company. Applicants also state that they will not be able to control decision-making over TransAlta's sales of electric energy as a result of the Proposed Transaction.

II. Notice of Filing, Supplemental Filings, and Responsive Pleadings

20. Notice of Applicants' April 8, 2008 filing was published in the *Federal Register*, 73 Fed. Reg. 22,145 (2008), with interventions and protests due on or before April 29, 2008. None was filed.

21. Notice of Applicants' April 17, 2008 supplemental filing was published in the *Federal Register*, 73 Fed. Reg. 24,064 (2008), with interventions and protests due on or before May 8, 2008. Calpine Corporation and TransAlta Corporation filed motions to intervene and conditional protests.

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[7] *PDI Stoneman, Inc.*, 104 FERC ¶ 61,270, at P 2 (2003).

[8] Section 33.1(c)(8) provides that holding companies that are holding companies only by virtue of holding EWG, QF, or Foreign Utility Company (FUCO) assets have blanket authority under section 203(a)(2) "to acquire the securities of additional EWGs, QFs, and FUCOs." 18 C.F.R. § 33.1(c)(8) (2008).

22. Notice of Applicants' May 13, 2008 supplemental filing was published in the *Federal Register*, 73 Fed. Reg. 30,913 (2008), with interventions and protests due on or before June 3, 2008. None was filed.

23. Applicants submitted an answer to the protests with their supplemental filing.

24. On July 1, 2008 Applicants supplemented their application with a copy of the order of the New York Public Service Commission relating to the transaction. In the Declaratory Ruling on the Acquisition of Common Stock, the New York Public Service Commission found that the acquisition of TransAlta stock by LS Power does not pose the potential for adverse impact on the interests of captive New York ratepayers, and required no further review.

25. On July 22, 2008, Applicants submitted a letter informing the Commission that they, along with Global Infrastructure Partners, sent a letter dated July 18, 2008 to TransAlta proposing to acquire 100 percent of TransAlta's outstanding voting securities. Applicants attached with their letter a copy of Amendment No. 11 to their Schedule 13 D filing with the Securities and Exchange Commission (SEC) which contains information on that proposal. Applicants requested that the Commission continue its review of the proposed transaction to acquire up to 20 percent of TransAlta. Applicants also indicated that LS Power and its affiliates are shareholders of TransAlta and currently hold approximately nine percent of TransAlta's common stock.

26. On July 23, 2008, Commission Staff issued a deficiency letter requesting that Applicants provide more information regarding any cost-based rate schedules that they or their subsidiaries have on file with the Commission. The deficiency letter further stated that if any such cost-based rate schedules are on file with the Commission, Applicants must provide an amended application with a hold harmless provision explaining how ratepayers under cost-based rates are protected. Applicants responded on July 30, 2008. In their response, Applicants commit that neither they nor their subsidiaries will seek to recover any transaction-related costs through their cost-based wholesale sales or transmission service for five years after the transaction, except to the extent that there are offsetting transaction-related savings.

27. Notice of Applicants' response to the Commission's July 23, 2008 deficiency letter (Response to Deficiency Letter) was published in the *Federal Register*, 73 Fed. 46,615 (2008), with interventions and protests due on or before August 11, 2008. None was filed.

28. On October 17, 2008, Applicants submitted an informational filing including a copy of the Schedule 13 D Amendment No. 12 filed with the SEC on October 8, 2008. This amended Schedule 13 D indicates that Applicants have withdrawn their proposal to acquire 100 percent of TransAlta. Applicants reserve their right to engage in discussions with management and the Board of Directors concerning the business and future plans of TransAlta, including the submission of a revised or new proposal to acquire all or any portion of TransAlta.

A. Protests

29. TransAlta states that it does not oppose the Proposed Transaction, provided that the Commission finds that Applicants will not control TransAlta and TransAlta's market-based rate sellers. TransAlta states that if the Commission does not make such a finding, it protests the application solely because of the adverse effect such control could have on: (i) the market-based rate authorizations of the TransAlta market-based rate sellers and (ii) future generation asset acquisitions by TransAlta or its subsidiaries.

30. TransAlta states that the application assumes that Applicants control Calpine and Dynegy and will control TransAlta. TransAlta also states that the Applicants make the assumptions to simplify the Commission's analysis and are not seeking a determination on this issue. TransAlta is concerned, however, that if the Commission determines now or in the future, based on the statements made in the application, that the Applicants control Calpine and/or Dynegy and will control TransAlta, such common control could have an adverse impact on the TransAlta market-based rate sellers' market-based rate authorizations and on future asset acquisitions by TransAlta.

31. TransAlta contends that the Commission should determine that Applicants will not control TransAlta and thus that Applicants' assets and their controlled affiliates' assets will not be under common control with TransAlta. It maintains that if Applicants acquire 20 percent of TransAlta's common stock, Applicants will not have control of TransAlta and the TransAlta market-based rate sellers. TransAlta argues that the officers of the TransAlta market-based rate sellers and TransAlta, with oversight by their respective directors, and not the shareholders of TransAlta, make the decisions as to how and when energy is sold.[9]

32. Calpine asks the Commission to make an affirmative finding that the Proposed Transaction will not affect Calpine market-based rate sellers' market-based rate authorization. It contends that given the results of the market power analysis submitted by Applicants, it should be relatively straightforward for the Commission to provide such relief.

33. Calpine notes that Applicants assume for purposes of this application that they control Calpine by virtue of their ownership of 10-20 percent of Calpine's common stock. It states that while it understands why Applicants have made this conservative, simplifying assumption, an assumption about control made to facilitate expeditious processing of a section 203 filing should not be deemed an admission that such control actually exists. Calpine contends that Applicants do not control Calpine because Applicants have no control over the decisions relating to the sales of electricity or discretion as to how and when power will be sold.

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[9] TransAlta's Protest at 5.

B. Applicants' Answer

34. Applicants agree with some of the contentions raised by Calpine and TransAlta. They agree that Applicants do not control Calpine and that they will not control TransAlta upon acquiring up to 20 percent of the common stock in TransAlta. Applicants reiterate that this application does not seek a Commission determination on issues of control. They object to the Commission making the findings requested by Calpine and TransAlta if such a finding would delay processing of the application. Applicants state that the issues presented by Calpine and TransAlta should be considered in a section 205 proceeding.

35. Applicants acknowledge Calpine's and TransAlta's desire to protect their subsidiaries' market-based rate authorizations. However, Applicants point out that Calpine correctly notes that even if one assumes that Applicants control Calpine, and will, after the consummation of the proposed transaction, control TransAlta, the Proposed Transaction will not harm competition. Applicants also agree that an assumption of control made to facilitate expeditious processing of a section 203 filing should not be deemed an admission that such control actually exists.[10]

III. Discussion

A. Procedural Matters

36. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

37. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Applicants' answer because it has provided information that assisted us in our decision-making process.

B. Analysis

1. Standard of Review under Section 203

38. Section 203(a)(4) of the FPA requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest.[11] Under the Commission's regulations, its analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on

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[10] Applicants' Answer at 6.

[11] 16 U.S.C. § 824b (2006).

competition; (2) the effect on rates; and (3) the effect on regulation.[12] 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, pledge, or encumbrance will be consistent with the public interest."[13] The Commission's regulations establish verification and informational requirements for applicants that seek determinations that a transaction will not result in inappropriate cross-subsidization or an inappropriate pledge or encumbrance of utility assets.[14]

2. Effect on Competition

a. Horizontal Market Power

39. Applicants submitted an affidavit as Attachment 1 to their application. The affidavit concludes that even assuming *arguendo* a worst-case scenario – that the Proposed Transaction will result in LS Power acquiring control over TransAlta, and further assuming *arguendo* that control over Dynegy's generation assets and Calpine's generation assets should be attributed to LS Power – the Proposed Transaction presents no horizontal market power concerns.[15] Applicants assert that where TransAlta and LS Power are concerned, there would be *de minimis* generation overlaps (competition) in the relevant geographic markets, i.e., the New York Independent System Operator Inc., the California Independent System Operator Corporation, and the Bonneville Power Administration balancing authority.

40. With regard to Applicants' statement that they believe that they may use the blanket authorization granted in section 33.1(c)(8) for the Proposed Transaction, as a preliminary matter, the blanket authorization set forth in 18 C.F.R. § 33.1(c)(8) grants authorization under section 203(a)(2) for LS Power to acquire shares in TransAlta. The blanket authorization permits a person that is a holding company solely with respect to one or more EWGs, FUCOs, or QFs to acquire under FPA section 203(a)(2) "the securities of additional EWGs, FUCOs, or QFs." Because the blanket authorization permits the acquisition of securities of additional EWGs, FUCOs, or QFs, it also is reasonable to interpret it to permit a qualifying holding company to increase its investment in EWGs, FUCOs, or QFs whose securities it has already acquired.

41. Nevertheless, as the Commission stated in Order No. 669-B, even when the blanket authorization in 18 C.F.R. § 33.1(c)(8) applies to the holding company's

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[12] *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044, at 30,111 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997).

[13] 16 U.S.C. § 824b(a)(4) (2006), *amended by* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982-83 (2005).

[14] 18 C.F.R. § 33.2 (2008).

[15] Application at 13.

acquisition under FPA section 203(a)(2), FPA section 203(a)(1) requires Commission approval if a transaction results in a change of control of an EWG that is a public utility owned by the holding company whose securities are being acquired.[16] The Proposed Transaction would result in the disposition of up to 20 percent of the common stock of TransAlta. Because the disposition of 10 percent or more of voting interests could result in a change of control of a public utility, we will assert jurisdiction over the Proposed Transaction under section 203(a)(1).

42. Having found that the Proposed Transaction could result in a change in control over TransAlta, we turn to whether there will be an adverse effect on competition in terms of horizontal market power as a result of the Proposed Transaction. Even if Applicants also control Dynegy and Calpine, we find there would not be an adverse effect on competition. Applicants' market power analysis shows that the change in market concentration increases the Herfindahl-Hirschman Index (HHI) by less than 50 points in all seasons/load conditions, indicating no failure of the Commission's Competitive Analysis Screen.[17] Based on this analysis, we find that the Proposed Transaction will not have an adverse effect on competition in terms of horizontal market power.

43. As noted above, Calpine and TransAlta have filed protests that an assumption here that they are controlled by LS Power may have adverse implications for Calpine's and TransAlta's market-based rate authorization now, and/or their corporate authorizations in a future section 203 proceeding. We appreciate these concerns, and in response we offer the following points. First, we note that the issue of what constitutes control for FPA section 203 and market-based rate purposes is the subject of a petition for guidance filed by the Electric Power Supply Association on September 2, 2008 in Docket No. PL09-3-000 (originally docketed as Docket No. EL08-87-000). This is an issue of significance to the industry that the Commission intends to address in Docket No. PL09-3-000. Second, we will relieve Calpine and TransAlta of their obligation to make a market-based rate change of status filing pertaining to the Proposed Transaction, pending the outcome of

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[16] Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 at P 44.

[17] Affidavit of Julie R. Solomon at 13-15. 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 unconcentrated; markets in which the HHI is greater than or equal to 1,000 but less than 1,800 points are considered moderately concentrated; and markets where the HHI is greater than or equal to 1,800 points are considered 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 less than 50 points, even in highly concentrated markets post-merger, are unlikely to have adverse competitive consequences and ordinarily require no further analysis. U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, 57 Fed. Reg. 41,552 (1992).

Docket No. PL09-3-000 or any other proceeding the Commission may initiate to address the issues raised in Docket No. PL09-3-000. By taking this approach, the Commission is able to process LS Power's application at this time without imposing an additional reporting burden on Calpine and TransAlta.

44. We accept Applicants' commitment noted above that they do not currently control Dynegy, TransAlta, or Calpine, nor will they attempt to do so in the future.[18] In addition, we will require Applicants to file with the Commission, no later than 45 days after the end of each quarter, a report listing their holdings of the outstanding shares of TransAlta, stated in terms of the number of shares held as a percentage of the outstanding shares.

b. Vertical Market Power

45. Applicants also contend that the Proposed Transaction presents no vertical market power concerns. They state that neither they nor their affiliates own or control any electric transmission facilities, except for facilities used to interconnect generating facilities with the transmission grid, or inputs to electricity production in any relevant market that would allow them to erect barriers to entry by new generation in that market.

46. Based on the facts as presented in the application, we find that the Proposed Transaction does not raise vertical market power concerns.

3. Effect on Rates

47. Applicants state that the Proposed Transaction will not have an adverse effect on rates because wholesale sales of electric energy, capacity, and ancillary services will continue to be made at market-based rates or under other rate schedules on file with the Commission. Applicants state that they "commit that neither LS Power nor Luminus Management, nor any subsidiary controlled by LS Power and/or Luminus Management, will seek to recover any Transaction-related costs through their cost-based wholesale sales or transmission service – assuming such service should exist – for a period of five years after the Transaction is consummated, except to the extent that there are offsetting Transaction-related savings equal to or in excess of the Transaction-related costs."[19] Additionally, Applicants maintain that TransAlta is not a traditional utility with captive retail or wholesale customers and does not provide unbundled transmission service.

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[18] We note that Applicants have reserved a right, in Amendment No. 12 to Schedule 13D recently filed with the SEC and in this proceeding, to submit a future offer to acquire part or all of TransAlta and presume that Applicants will make any appropriate filings under section 203 with this Commission for prior authorization in connection with such an offer.

[19] Applicants state in their Response to Deficiency Letter that they are not aware of any cost-based rate schedules on file with the Commission associated with other entities which Applicants do not control but in which they hold, or may hold an investment position. Response to Deficiency Letter at 2.

48. We agree that the Proposed Transaction will not have an adverse effect on rates, and note that no customer argues otherwise.

4. Effect on Regulation

49. Applicants state that the Proposed Transaction will not have any adverse effect on the effectiveness of federal or state regulation.

50. We note that no party alleges that regulation would be impaired by the Proposed Transaction. Based on the facts presented in the application, we find that the Proposed Transaction will not have an adverse effect on federal or state regulation.

5. Cross-Subsidization or Pledge or Encumbrance of Utility Assets

51. Applicants further state that the Proposed Transaction will not result in: (1) any transfer of facilities between a traditional public 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 issuance 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 sections 205 and 206 of the FPA.[20]

52. Applicants state that the Proposed Transaction falls into one of the three classes of "safe harbor" transactions that the Commission recognizes are unlikely to present cross-subsidization concerns.[21] They contend that the Proposed Transaction does not involve a franchised public utility with captive customers. Applicants maintain that they are not, nor are they affiliated with, a franchised public utility with captive customers.

53. Based on the facts as presented in the application, 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. As discussed above, we also find that the Proposed Transaction will not adversely affect competition, rates or regulation. Therefore, we authorize the disposition to LS Power of up to 20 percent of the common stock of TransAlta.

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[20] *See* Applicants' April 8 Filing, Exhibit M.

[21] Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 16.

The Commission orders:

(A) We hereby grant authorization under section 203(a)(1) for the disposition of up to 20 percent of the outstanding voting shares of TransAlta, as discussed in this order.

(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 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) If the Proposed Transaction results in changes in the status or the upstream ownership of Applicants' affiliated qualifying facilities, if any, an appropriate filing for recertification pursuant to 18 C.F.R. § 292.207 (2008) shall be made.

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

(G) Applicants must inform the Commission of any change in circumstances that would reflect a departure from the facts the Commission relied upon in authorizing the transaction.

(H) Applicants shall file with the Commission, for informational purposes, within 45 days of the end of the quarter, a quarterly report listing their holdings of the outstanding shares of TransAlta stated in terms of the number of the shares held at the end of the quarter, and as a percentage of the outstanding shares.

(I) Applicants shall file with the Commission, for informational purposes, any filing they make at the SEC pertaining to TransAlta on Schedule 13G or Schedule 13D and shall file these documents with the Commission at the same time they file them with the SEC. 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 of the end of each calendar year. Applicants shall file with the Commission any comment or deficiency

letters received from the SEC that concerns Schedule 13G- or 13D-related compliance audits conducted by the SEC. Such filings shall be made in this docket or in appropriate sub-dockets of this docket.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.