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.

Entegra Power Group LLC
Gila River Power, L.P.
Union Power Partners, L.P.
Morgan Stanley & Co. Inc.
Merrill Lynch, Pierce, Fenner & Smith Inc.

Docket No. EC06-147-000

ORDER CONDITIONALLY AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES AND ACQUISITION OF SECURITIES

(Issued October 23, 2006)

1. On August 3, 2006, Entegra Power Group (Entegra), LLC, Gila River Power, L.P. (Gila River), Union Power Partners, L.P. (Union Power), Morgan Stanley & Co. Incorporated (MS&Co), and Merrill Lynch, Pierce, Fenner & Smith Incorporated (MLPFS) (collectively, Applicants) filed under section 203 of the Federal Power Act (FPA)[1] for authorization for a disposition of jurisdictional facilities and blanket authorization for certain future transfers and acquisitions of voting equity interests in Entegra.[2] The jurisdictional facilities consist of interconnection facilities, market-based

[1] 16 U.S.C. § 824b (2000), *amended by* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) (EPAct 2005).

[2] Applicants request that the Commission grant the requested authorizations without ruling on the threshold jurisdictional issue as to whether section 203 authorization is required for such transactions. Thus, jurisdiction over the proposed transactions is assumed, without making any determination of jurisdiction. *See Ocean State Power*, 47 FERC ¶ 61,321 at 62,130 (1989); and *Ocean State Power*, 43 FERC ¶ 62,466 (1988).

rate tariffs, wholesale power sales contracts, and related books and records associated with generating facilities owned by Gila River and Union Power (collectively, Project Companies).[3]

2. The Commission has reviewed the proposed transactions under the Commission's Merger Policy Statement and Order Nos. 669, 669-A and 669-B.[4] We will authorize the transactions, subject to conditions. We find that the proposed transactions are consistent with the public interest and 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.

I. Background

A. Description of the Parties

1. Entegra and the Project Companies

3. Entegra is a special purpose vehicle through which a group of lender-owners (Entegra Members), which includes MS&Co and MLPFS, holds ownership interests in the Project Companies. The lender-owners acquired their interests in the Project Companies under a bankruptcy plan of reorganization in a transaction authorized by the

[3] A similar application was filed on behalf of Morgan Stanley & Company, Inc., EBG Holdings, LLC, Boston Generating, LLC, Mystic I, LLC, Mystic Development, LLC, Fore River Development, LLC in Docket No. EC06-144-000. The Commission is acting concurrently on that application in a separate order.

[4] *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); *see also Transactions Subject to Federal Power Act Section 203*, Order No. 669, 71 Fed. Reg. 1348 (2006), FERC Stats. & Regs. ¶ 31,200 (2006), *order on reh'g*, Order No. 669-A, 71 Fed. Reg. 28,422 (2006), FERC Stats. & Regs. ¶ 31,214 (2006), *order on reh'g*, Order No. 669-B, 71 Fed. Reg. 42,579 (2006).

Commission.[5] Entegra has two classes of ownership interests: Class A Unit holders are active investors with full voting rights, while Class B Unit holders are passive investors with few voting rights.[6] Currently, MS&Co is authorized to acquire up to 6.91 percent of Entegra Class A Units and MLPFS is authorized to acquire up to 11.58 percent of Entegra Class A Units.[7] By virtue of its ownership interests in the Project Companies, Entegra is a holding company, as defined under EPAct 2005.[8]

4. The Project Companies are wholly-owned subsidiaries of Entegra. Union Power owns and operates a 2,200 megawatt (MW) natural gas-fired, combined-cycle generating facility in Arkansas (Union Power Facility) that is interconnected with the transmission system of Entergy Arkansas, Inc., an operating company of Entergy Corporation (Entergy). Union Power sells wholesale power within the Entergy control area at market-based rates. Entegra also has a wholly-owned subsidiary, Trans-Union Interstate Pipeline, L.P., which owns a 42-mile interstate natural gas pipeline that delivers gas to the Union Power generating facility. Gila River owns and operates a 2,200 MW natural gas fired combined-cycle generating facility in Arizona that is interconnected to the transmission system of Arizona Public Service Company (APS). Gila River sells wholesale power at market-based rates in the APS/Salt River Project (APS/SRP) control area, within the Western Electricity Coordinating Council region.

2. MS&Co

5. MS&Co is a wholly-owned subsidiary of Morgan Stanley. In addition to their ownership interest in Entegra, MS&Co and its affiliate, Morgan Stanley Senior Funding, Inc. (MSSF), hold less than a 10 percent interest in MACH Gen, LLC (MACH Gen), which, in turn, indirectly owns generating facilities in New York, Michigan, Massachusetts, and Arizona.[9] The MACH Gen generating facility in Arizona is

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[5] *Lender Co.* , 110 FERC ¶ 61,044 (2005).

[6] *Id.* at P 4.

[7] *See Entegra Power Group LLC*, 113 FERC ¶ 62,185 (2005).

[8] *See* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1262(8)(A), 119 Stat. 594, 972 (2005).

[9] For a description of the generation and energy assets located outside of any relevant control areas, Applicants reference a November 8, 2005 application in Docket No. EC06-32-000 and the July 27, 2006, application in Docket No. EC06-144-000.

1,050 MWs and is in the APS/SRP control area. An affiliate of MS&Co, Morgan Stanley Capital Group Inc. (MSCG), has market-based rate authority and has several subsidiaries that are also authorized by the Commission to sell power at market-based rates. Applicants state that MSCG and its subsidiaries do not own or control electric generation or transmission facilities.

3. MLPFS

6. MLPFS is a wholly-owned subsidiary of Merrill Lynch & Co (Merrill Lynch). Two affiliates of MLPFS are authorized by the Commission to sell power at market-based rates but do not own or otherwise control electric generation, transmission, or distribution facilities or natural gas pipeline or storage facilities. In addition to MLPFS' ownership interests in Entegra, its affiliate, Merrill Lynch Credit Products, LLC (MLCP), will acquire less than 10 percent of the membership interests in MACH Gen. Another affiliate, Merrill Lynch Commodities, Inc. (MLCI), provides energy and risk management services under an energy management agreement (EMA) to three of MACH Gen's project companies, including the project company that owns the 1,050 MW generation facility in the APS/SRP control area.

7. MLPFS and Merrill Lynch International collectively own 8.7 percent of an oil and natural gas exploration and development company that plans to develop a liquefied natural gas processing and storage facility in Louisiana. MLPFS has a less than 10 percent interest in an oil and gas company focused on the acquisition and sale of share participations in crude oil and natural gas production in the United States. An affiliate of MLPFS owns less than 10 percent of the shares of Enron Corp., a diversified energy company currently involved in the restructuring and distribution of surviving companies to creditors and liquidation of its remaining business. Another MLPFS affiliate owns less than 10 percent of a midstream portfolio company of Warburg Pincus that pursues, among other things, midstream gathering, processing, and transmission asset acquisitions primarily located in the Gulf Coast, Gulf of Mexico, mid-Continent, and Rocky mountain regions, intrastate natural gas pipelines, natural gas storage, and liquid natural gas infrastructure assets.[10] In addition, Merrill Lynch & Co. and its affiliates may hold other debt and equity positions from time to time in energy companies in connection with their broker/dealer, financial trading, banking, or market-making activities.

[10] For a description of the holdings of MLPFS and its affiliates outside of the relevant control areas, Applicants reference a June 19, 2006 application in Docket No. EC06-134-000.

B. The Proposed Transaction

8. Applicants anticipate that MS&Co and MLPFS will continue to both acquire and transfer Entegra Class A Units in the ordinary course of business in the secondary market. Applicants state that secondary markets have emerged for the trading of debt in distressed project companies and the associated equity interests in their upstream companies. They also state that these secondary markets are often fast-moving and require regulatory flexibility and certainty to maintain sufficient liquidity.

9. Applicants state that, to promote regulatory flexibility and certainty, the Commission has already granted blanket authorization for transfers of Entegra Class A Units that could result in current and future Entegra Members holding up to 20 percent of the Entegra Class A Units, if certain criteria are met that are designed to ensure the transfers' consistency with the public interest.[11] One of the criteria is that the acquiring entity and its affiliates cannot own or control five percent or more of the voting interests in a public utility that has interests in any generation facilities or engages in any jurisdictional activities in relevant control areas or markets. Applicants state that they are seeking the authorization in this application because neither MS&Co nor MLPFS qualifies for the blanket authorization granted in *Entegra Blanket Authorization Order.* They state that each is affiliated with a power marketer that operates in the APS/SRP and Entergy control areas, where the generating facilities indirectly owned by Entegra are located. However, Applicants also state that none of the power marketers own or control generation.

10. Applicants argue that the requested blanket authorizations are consistent with the Commission's precedent.[12] They state they will comply with the additional notification conditions and filing requirements that are consistent with requirements that the Commission established when granting blanket authorization for transactions under

[11] *Entegra Power Group, LLC*, 115 FERC ¶ 62,038 (2006) (*Entegra Blanket Authorization Order*).

[12] *See, e.g., Entegra Blanket Authorization Order*; *MACH Gen, LLC*, 113 FERC ¶ 61,138 (2005) (*MACH Gen*); *La Paloma Holding Co., LLC and La Poloma Generating Co., LLC*, 112 FERC ¶ 61,052(2005) (*La Paloma*); *Lake Road Holding Co., LLC and Lake Road Generating Co., L.P.*, 112 FERC ¶ 61,051 (2005) (*Lake Road*); and *Boston Generating, LLC*, 113 FERC ¶ 61,109 (2005) (*Boston Generating*).

section 203, including the conditions and requirements established in the *Entegra Blanket Authorization Order*.[13]

11. Applicants request that the Commission grant blanket authorization for the following categories of transfers without additional filings under section 203(a)(1) of the FPA:

(i) for a two-year period beginning on the date of a Commission order in this proceeding, transfers of Entegra Class A Units to MS&Co that will result in MS&Co, individually or together with its affiliates, holding 20 percent or less of Entegra Class A Units; and

(ii) for a two-year period beginning on the date of a Commission order in this proceeding, transfers of Entegra Class A Units to MLPFS that will result in MLPFS, individually or together with its affiliates, holding 20 percent or less of the Entegra Class A Units (together, Future Section 203(a)(1) Transfers); and

(iii) transfers of Entegra Class A Units from MS&Co and MLPFS to direct or indirect wholly-owned subsidiaries of the ultimate corporate parent of each (Future Affiliate Transfers).

12. Applicants further request that the Commission grant blanket authorization under section 203(a)(2):

(i) for a two-year period beginning on the date of a Commission order in this proceeding, for MS&Co and MLPFS to both acquire up to 20 percent of Entegra Class A Units (Future Section 203(a)(2) Acquisitions); and

(ii) for transfers of Entegra Class A Units from MS&Co and MLPFS to direct or indirect wholly-owned subsidiaries of the ultimate corporate parent of each (Future Affiliate Transfers).

13. Applicants commit to complying with the following requirements for any Future Section 203(a)(1) Transfer and/or Future Section 203(a)(2) Acquisition;

(i) Transferor of interests will report any transfer within 10 days and include a statement of other generating or power marketing interests directly or indirectly

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[13] *See, e.g.*, *MACH Gen* at P 40, *La Paloma* at P 18, *Lake Road* at P 17, and *Boston Generating* at P 8.

owned by the buyer or its affiliates, irrespective of the market or region of the country in which such interests are operated;

(ii) Applicants will submit, both in a compliance filing within 30 days of the closing of the individual sale transaction, and in any subsequent notification of any holding company equity sales transaction, the following information:

- The identity of both pre- and post-transaction equity holders (and percentage ownership) of the holding company;

- Any contracts (or summary of) power purchase agreements, energy management services, asset management services, and any fuel supply services provided to the Project Companies' facilities, including contract counterparty, and any affiliation between counterparty and post-transaction equity holders; and

- The identity of any parties acquiring equity interests that are subject to the Commission's Code of Conduct rules as a result of acquiring these interests.

14. In addition, Applicants assert that any acquisition of Entegra Class A Units by a holding company in a holding company system that includes a transmitting utility or an electric utility would be subject to the reporting requirements in Order Nos. 669 and 669-A, including filing copies, as applicable, of schedules 13D, 13G and form 13F of the Securities and Exchange Commission within 45 days of the purchase. In addition, Applicants state that Future Affiliate Transfers would be subject to the reporting requirements established by the Commission in similar grants of blanket authorization under pre-EPAct 2005 section 203 provisions.[14] In particular, Applicants pledge to identify the affiliate that directly owns such Entegra Class A Units within 10 days of any Future Affiliate Transfer.

II. Notice and Responsive Pleadings

15. Notice of the filing was published in the *Federal Register*, 71 Fed. Reg. 47,197 (2006), with comments, protests, or interventions due on or before August 24, 2006. None were received.

[14] *See MACH Gen; La Paloma; Lake Road;* and *Boston Generating*.

III. Discussion

A. Standard of Review

16. Section 203(a) of the FPA provides that the Commission must approve a transaction if it finds that the transaction "will be consistent with the public interest."[15] The Commission's analysis of whether a transaction is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.[16] In addition, EPAct 2005 amended section 203 to specifically require that the Commission also determine 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.[17] As discussed below, we will approve the proposed transactions because they meet these statutory standards.

1. Effect on Competition

17. Applicants argue that the proposed transactions will not have an adverse effect on competition. There are no horizontal market power issues because neither MS&Co, MLPFS, nor any of their affiliates, will be able to obtain any operational control over either of the Entegra Project Companies' facilities, or any portion of the output of those facilities, by virtue of its acquisition of Entegra Class A Units. They state that neither MS&Co, MLPFS, nor any of their affiliates, will acquire more than 20 percent of such Units under the proposed transactions. In addition, Applicants state that other than *de minimis* and non-controlling interests of less than 10 percent in MACH Gen, neither MS&Co, MLPFS, nor their parents, affiliates, subsidiaries or associates own, control, or operate generation in any manner in the relevant control areas.

18. Applicants also argue that under the EMA with the MACH Gen project company operating in the APS/SRP control area, MLCI acts as an agent without operational discretion for the MACH Gen project, and therefore that neither MLPFS nor its affiliate, MLCI, exercise control over the MACH Gen's project companies. Applicants state that the Commission has held that there is no reason to ascribe control to entities such as

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[15] 16 U.S.C. § 824b (2000).

[16] *See supra* note 3.

[17] EPAct 2005 § 1289, 119 Stat. 982-83, to be codified at 16 U.S.C. § 824b(a)(4).

Merrill Lynch & Co. and its affiliates having transitory holdings of electric utility stocks, when these stocks are held in connection with investment or merchant banking, market-making, or asset management activities.[18]

19. Applicants further argue that the proposed transaction does not present any vertical market power issues because neither MS&Co, MLPFS, nor their parents, affiliates, subsidiaries or associates own, control, or operate any electric transmission in the relevant control areas, except for interests in the interconnection facilities associated with generators that are not used to serve others. In addition, Applicants state that neither MS&CO, MLPFS, nor their parents, affiliates, subsidiaries or associates have control, over fuel delivery or supply facilities in the relevant control areas.

20. Based on facts and safeguards as presented in this application, the Commission is satisfied that the consolidation of the additional ownership interests proposed here with MS&Co, MLPFS and their affiliates' existing indirect ownership of generation does not raise competitive issues.[19] The power marketers affiliated with MS&Co and MLPFS will not control generation in relevant control areas or markets. The Commission noted in *Duke Energy Corp.* that without control of capacity, competition in wholesale energy markets cannot be harmed.[20] Accordingly, we find that the affiliation of MS&Co and MLPFS with such power marketers, as identified in the application, does not pose competitive concerns and we will not interpret the restriction of less than five percent of a public utility that engages in jurisdictional activities, as stated in the *Entegra Blanket Authorization Order*, to apply to their affiliation with such power marketers. We note, however, that the *Entegra Blanket Authorization Order*'s restriction of less than five percent of the voting interests in other generation in the relevant control areas or markets

[18] *See Morgan Stanley Capital Group Inc.*, 69 FERC ¶ 61,175 (1994).

[19] As noted *supra*, P. 5 and P. 6, MS&Co, MLPFS and their affiliates presently indirectly own, or are authorized under other prior orders to own, interests of less than 10 percent in Entegra, and also indirectly own interests in the MACH Gen generating facility in the APS/SRP control area. To the extent that ownership would give control, the increase in concentration brought about by consolidation of these indirect ownership interests with the additional ownership interests proposed here would not be enough to raise concern about market power in the generation market.

[20] 113 FERC ¶ 61,297 at P 15 (2005).

continues in force. Therefore, subject to conditions as proposed in the application, we find that the proposed transactions will not adversely affect competition.[21]

2. Effect on Rates

21. Applicants argue that the proposed transactions will not have an adverse effect on rates. They state that all sales of electric energy from the Project Companies will continue to be made at market-based rates as previously authorized by the Commission[22] and that the proposed transactions will have no effect on the rates, terms, or conditions of wholesale power agreements. In addition, the Project Companies do not provide any transmission services for others.

22. Based upon these representations, we find that the proposed transactions will not adversely affect rates.

3. Effect on Regulation

23. Applicants argue that the proposed transactions will not diminish the Commission's regulatory authority. Applicants also argue that as the proposed transactions do not result in a merger of public utilities, and because all sales from the Project Companies will continue to be at wholesale, the proposed transactions will not have adverse effect on state commission regulation.[23]

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[21] We note that in Docket No. RM04-7-000, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 115 FERC P 61,210 (2006), the Commission has raised concern that energy management agreements may confer control, depending on the fact situation. Therefore, the Commission may revisit this area in the future. However, in this case, even if the energy management agreement does confer control over the MACH Gen generating facility on MLCI, the increase in concentration would not be enough to raise concern about market power in the generation market.

[22] *See Union Power Partners, L.P.*, Letter Order, FERC Docket No. ER01-930-000 (Mar. 13, 2001); *See also Panda Gila River, L.P.*, Letter Order, FERC Docket No. ER01-931-000 (Mar. 14, 2001).

[23] We note, as well, that no state has argued that its regulation will be impaired.

24. We find that the proposed transactions will not adversely affect regulation.

4. Cross-subsidization

25. FPA section 203(a)(4)[24] adds the requirement that the Commission must find that a proposed transaction under section 203 will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company, unless that cross-subsidization, pledge or encumbrance will be consistent with the public interest. Applicants say this concern is not applicable here, as one of the criteria for Future Section 203(a)(1) Transfers and Future Section 203(a)(2) Acquisitions is that the acquiring party not be affiliated with a traditional utility with captive customers.

26. Applicants argue that dispositions or acquisitions of interests in Entegra pursuant to the proposed transactions cannot result in cross-subsidization. The reason they give is that none of Entegra, its current owners, entities presently authorized to acquire interests in Entegra, MS&Co, MLPFS, or the wholly-owned subsidiaries of their respective parents is a traditional public utility that has captive customers or that owns or provides transmission service over jurisdictional facilities. Applicants argue similarly 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 benefits of an associate company.

27. Applicants state that the proposed transactions will not involve a new issuance of securities. Therefore, the proposed transactions will not result in any new issuances of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities for the benefit of an associate company.

28. Applicants state that the proposed transactions will not result in a new pledge of a traditional 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. Applicants also declare that there will not be, as a result of the proposed transactions, any new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns

[24] *See* 16 U.S.C. § 824b(a)(4).

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.

29. We find that Applicants have provided adequate assurance that the transactions will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company.

The Commission orders:

(A) Applicants' proposed disposition of jurisdictional facilities with respect to future transfers and future acquisitions is authorized, subject to conditions, as discussed in the body of 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 costs, or any other matter whatsoever now pending or which may come before the Commission.

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

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

(E) Applicants shall make appropriate filings under section 205 of the FPA, as necessary, to implement the transaction.

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

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.