

125 FERC ¶ 61,122
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Lehman Brothers Commodity Services Inc.
LBMB Fund Eagle Energy Holdings LLC
LBMB Partners Eagle Energy Holdings LLC
LBMB Fund (B) Eagle Energy Holdings LLC
LBMB Capital Partners V Eagle Energy Holdings LLC
Lehman Brothers Holdings Inc.
Eagle Energy Partners I, L.P.
Eagle Energy Management, LLC
EDF Trading North America Management LLC
EDF Trading North America Inc.

Docket No. EC09-4-000

ORDER AUTHORIZING DISPOSITION
OF JURISDICTIONAL FACILITIES

(Issued October 30, 2008)

1. On October 9, 2008, as amended October 14, 2008, Lehman Brothers Commodity Services Inc. (Lehman Brothers Commodity Services), LBMB Fund Eagle Energy Holdings LLC (Main Holdings), LBMB Partners Eagle Energy Holdings LLC (Institutional Holdings), LBMB Fund (B) Eagle Energy Holdings LLC (LBMB Fund (B) Holdings), LBMB Capital Partners V Eagle Energy Holdings LLC (Employee Co-Invest Holdings), Eagle Energy Management, LLC (Eagle Energy Management) (collectively, Sellers), Eagle Energy Partners I, L.P. (Eagle),¹ Lehman Brothers Holdings Inc. (Lehman Brothers Holdings),² EDF Trading North America Management LLC (EDF Trading

¹ Eagle represents assets of Lehman Brothers Holdings being sold out of bankruptcy.

² Lehman Brothers Holdings currently is a debtor in possession in bankruptcy proceedings before the United States Bankruptcy Court for the Southern District of New York.

North America Management) and EDF Trading North America Inc. (EDF Trading North America) (collectively, Applicants), filed a joint application under section 203(a)(1) of the Federal Power Act (FPA)³ requesting Commission authorization for subsidiaries of EDF Trading Limited (EDF Trading Limited) to acquire Eagle from subsidiaries of Lehman Brothers Holdings.⁴ EDF Trading Limited is a wholly-owned subsidiary of EDF Holdings, which is a wholly-owned subsidiary of Electricity de France SA (EDF), the primary supplier of electricity in France. The jurisdictional facilities consist of Eagle's market-based rate tariff, power sales contracts, and associated books and records. Applicants request all necessary Commission authorizations under section 203 for the transaction, and expedited treatment, with approvals granted on or before October 31, 2008.

2. The Commission has reviewed the application under the Commission's Merger Policy Statement.⁵ 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. Applicants state that Commission authorization is needed only under section 203(a)(1), since neither EDF Trading North America Management nor EDF Trading North America is a holding company under PUHCA 2005, nor is Eagle a "transmitting utility," "electric utility company," or a "holding company" under section 203(a)(2).⁶ However, Applicants also request authorization under 203(a)(2) and any other authorization under section 203 to the extent necessary. We agree with Applicants' analysis that the proposed transaction does not require approval under section 203(a)(2). Eagle, as described by Applicants, is a power marketer; therefore, even if EDF Trading North America Management and EDF

³ 16 U.S.C. § 824b (2000), as amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594 (2005).

⁴ Applicants also request any authorization the Commission finds is necessary under section 203(a)(2) and any other authorizations required by section 203.

⁵ *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996) (Merger Policy Statement), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997); *see also FPA Section 203 Supplemental Policy Statement*, 72 Fed. Reg. 42,277 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007).

⁶ Under section 203(a)(1)(A) of the FPA, a public utility may not sell, lease, "or otherwise dispose of" its jurisdictional facilities of a value in excess of \$10 million without prior Commission approval. Section 203(a)(2) requires prior Commission authorization for certain holding companies to acquire certain securities with values in excess of \$ 10 million of transmitting utilities, electric utility companies or holding company systems containing such entities.

Trading North America were holding companies, authorization under section 203(a)(2) would not be required for the acquisition of Eagle because a power marketer is not a “transmitting utility,” an “electric utility company,” or a “holding company.”

I. Background

A. Description of the Parties

3. Lehman Brothers Commodity Services is a wholly-owned indirect subsidiary of Lehman Brothers Holdings. It is authorized by the Commission to make wholesale sales of power at market-based rates.⁷ Neither Lehman Brothers Commodity Services nor any of its subsidiaries is a franchised public utility and none of them directly or indirectly owns or controls any generation or transmission facilities in North America.

4. Main Holdings is a limited liability corporation and a merchant banking fund that sought long-term capital appreciation through its direct investments in Eagle. Main Holdings is wholly owned by Lehman Brothers Special Financing, Inc. (Lehman Brothers Special Financing) and is managed by the Lehman Brothers Private Equity Group (LB Private Equity Group). Lehman Brothers Special Financing is a wholly-owned subsidiary of Lehman Brothers Holdings. LB Private Equity Group is a business unit of Lehman Brothers Inc. (Lehman Brothers), which in turn, is a wholly-owned subsidiary of Lehman Brothers Holdings. Lehman Brothers is a registered broker/dealer and investment advisor that specialize in securities trading as principal and agent, securities underwriting, investment banking, private equity and financial advisory services.

5. Institutional Holdings is a merchant banking fund that sought long-term capital appreciation through its direct investment in Eagle. Institutional Holdings is wholly-owned by Lehman Brothers Special Financing and LB Private Equity Group.

6. LBMB Fund (B) Eagle Energy Holding is a merchant banking fund that sought long-term capital appreciation through its direct investment in Eagle. LBMB Fund (B) Eagle Energy Holding is wholly-owned by Lehman Brothers Special Financing and LB Private Equity Group.

7. Employee Co-Invest Holdings is a merchant banking fund that sought long-term capital appreciation through its direct investment in Eagle. Employee Co-Invest Holdings is wholly-owned by Lehman Brothers Special Financing and LB Private Equity Group.

⁷ *Lehman Brothers Commodity Services, Inc.*, 113 FERC ¶ 61,095 (2005).

8. Lehman Brothers Holdings is a financial services institution that, directly and through its subsidiaries, conducts business in equity and fixed income sales, trading and research, investment banking, private investment management, asset management and private equity. Neither Lehman Brothers Holdings nor any of its affiliates or subsidiaries, including Lehman Brothers Commodity Services or Eagle, is presently engaged in the generation or sale of electric power, other than the sale of electric power from qualifying facilities (QFs), eligible facilities of exempt wholesale generators (EWGs), power marketers, or facilities used for self-generation. In addition, Lehman Brothers Holdings and its affiliates or subsidiaries do not own or control any electric transmission or distribution facilities, intrastate natural gas transportation, gas storage or distribution facilities, sites for generation capacity development, or sources of coal supplies and transportation of coal supplies in the relevant markets. Finally, neither Lehman Brothers Holdings nor any of its affiliates or subsidiaries is a public utility with a franchise electric service territory.

9. Eagle Energy Management is the general partner of Eagle, a buyer and seller of natural gas and electricity in various wholesale markets. It is not a franchised utility in North America. Eagle Energy Management is owned by the following entities: Lehman Brothers Commodity Services (95.7077864 percent); Institutional Holdings (3.2180860 percent); Main Holdings (0.2365184 percent); LBMB Fund (B) Eagle Energy Holdings (0.8361758 percent); and Employee Co-Invest Holdings (0.0014334 percent). Eagle Energy Management currently holds 1.49 percent ownership interest in Eagle and its primary purpose and activity is to manage Eagle.

10. Eagle is a Texas limited partnership and a wholly-owned subsidiary of Lehman Brothers Commodity Services. It is also a power marketer authorized by the Commission to make wholesale sales of power at market-based rates, including the sale of capacity, energy and ancillary services. Eagle provides energy management services under Energy Management Agreements to the owners of seven generation facilities. The services consist of advice and administrative services to the owners with respect to energy marketing, power management, fuel management and risk management. Under each Energy Management Agreement, the plant owner retains ultimate decision-making authority over the plant's operation and output. Eagle's marketing activities are largely confined to the Electric Reliability Council of Texas, the Midwest Independent Transmission System Operator, Inc., the PJM Interconnection and Tennessee Valley Authority markets. Neither Eagle nor any of its subsidiaries is a franchised public utility in North America. Additionally, Eagle and its affiliates do not directly or indirectly own or control any generation or transmission facilities, any physical natural gas transportation facilities or other physical inputs to electric generation or transmission facilities in North America.

11. EDF Trading North America Management and EDF Trading North America are wholly-owned subsidiaries of EDF Trading. Each entity's principal place of business is

London, England. EDF Trading is a wholly-owned subsidiary of EDF Holdings. EDF Trading actively trades in the international wholesale energy market; buying and selling electricity, emissions, natural gas, coal, freight, biomass, and oil. Its marketing activities are largely confined to Europe. EDF Trading is not, and does not own or control, a franchised utility in North America. In addition, EDF Trading does not directly or indirectly own or control any generation, transmission, or distribution facilities, gas transportation facilities or other inputs to electric generation or transmission.

12. EDF, through its indirect interest in enXco, Inc. (enXco), is a holding company under the Public Utility Holding Company Act of 2005 (PUHCA 2005). Applicants state that at the time of the application, EDF held a 9.51 percent interest in Constellation Energy Group Inc. (Constellation), acquired through stock purchases on the open market.

13. enXco, itself a holding company, is indirectly wholly owned by EDF Energies Nouvelles, a French limited liability company, which in turn is owned by EDF Development Environment, S.A. (50 percent), a French corporation, and Paris Mouratoglou (25 percent), with the remaining interest (25 percent) traded publicly. enXco indirectly owns or controls 762 MWs of wind-powered generation capacity at 23 wind projects across the United States through QFs and EWGs. enXco is not, and does not own or control, a franchise utility in North America. Other than its indirect interest in the Sagebrush Partnership (Sagebrush), through its subsidiary Oasis Power Partners, LLC (OPP), enXco does not directly or indirectly own or control any transmission facilities in North America. Sagebrush owns and operates a 46-mile 230 kV transmission line that extends from the Tehachapi region of California to Southern California Edison Company's Vincent Substation.

B. Description of the Proposed Transaction

14. Under the Purchase Agreement dated September 26, 2008, EDF Trading North America will acquire all of the ownership interests in Eagle. Specifically, EDF Trading North America will acquire all of the limited partnership interests in Eagle and EDF Trading North America Management will acquire all of the general partnership interests in Eagle. After the closing of the proposed transaction, EDF Trading North America will hold a 98.5 percent limited partnership interest in Eagle and, EDF Trading North America Management will hold a 1.5 percent general partnership interest in Eagle. Also, Eagle will remain a power marketer. Applicants state that the proposed transaction is consistent with the public interest and will have no adverse effect on competition, rates, or regulation, nor will it result in any cross-subsidization or the pledge or encumbrance of utility assets to any associated company.

II. Notice and Responsive Filings

15. Notice of the filing was published in the *Federal Register*, 73 Fed. Reg. 62266 (2008), with comments, protests, or interventions due on or before October 23, 2008. PJM Interconnection, L.L.C. (PJM), filed a timely motion to intervene raising no issues.

III. Discussion

A. Procedural Issues

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁸ PJM's timely, unopposed motion to intervene serves to make it a party to this proceeding.

B. Standard of Review Under Section 203

17. 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. 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 competition; (2) the effect on rates; and (3) the effect on regulation.⁹ 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."¹⁰ 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.¹¹

C. Substantive Issues

1. Effect on Competition

18. Applicants state that the transaction raises no horizontal market power concerns. Applicants argue that because Eagle does not own or control any generation facilities, the

⁸ 18 C.F.R. § 385.214 (2008).

⁹ See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

¹⁰ 16 U.S.C. § 824b(a)(4) (2000), amended by Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982-83 (2005).

¹¹ 18 C.F.R. § 33.2 (2007).

transaction does not involve the transfer in ownership of generation facilities and will not result in a single corporate entity obtaining ownership or control over the generating facilities of previously unaffiliated merging entities. Applicants note that under certain energy management agreements, Eagle provides advice and administrative services to owners of generation facilities with respect to marketing, power management, fuel management, and risk management.¹² Applicants assert that the energy management agreements do not provide Eagle with decision-making authority over sales of electric energy or provide Eagle with authority to decide unilaterally how and when power generated will be sold in any wholesale market.

19. Applicants also contend that the proposed transaction raises no vertical market power concerns. They assert that the transaction poses no issues related to electric transmission ownership and operation or to the combination of electric generation assets and fuel supplies or fuel delivery systems. Applicants state that Eagle does not own or control (a) any electric transmission facilities, (b) any natural gas storage or transportation facilities, or (c) any other upstream inputs to electricity products. While Eagle engages in natural gas commodity trading and holds transportation contracts as needed to make physical delivery of natural gas it trades, Applicants contend that this does not constitute owning or controlling upstream inputs to electricity products under Commission precedent.

20. We agree with Applicants' analysis of the horizontal and vertical market impacts of the proposed transaction. We find that the proposed transaction will not adversely affect competition.

2. Effect on Rates

21. Applicants state that the wholesale rates of Eagle will continue to be market-based, rather than cost-based. In addition, Eagle does not have any transmission facilities or transmission customers.

22. The Commission has found that, where electricity is sold under market-based rates, the transaction is unlikely to have an adverse impact on rates.¹³ We note that nothing in the application indicates that rates to customers will increase as a result of the proposed transaction, and no party argues otherwise. For these reasons, we find that the transaction will not have an adverse effect on rates.

¹² Application at 20.

¹³ *Union Electric Co. d/b/a Ameren UE*, 114 FERC ¶ 61,255, at P 45 (2006).

3. Effect on Regulation

23. Applicants state that the status of Eagle as a power marketer with market-based rate authority and the extent to which it is subject to the jurisdiction of the Commission will not change as a result of the proposed transaction. Moreover, the transaction will not affect the manner or extent to which the Commission, any state, or any other federal agency may regulate the assets of EDF Trading North America's affiliates.

24. We note that no party alleges that regulation would be impaired by the Transaction, and no state commission has requested that the Commission address the issue of the effect on state regulation. We find that neither state nor federal regulation will be impaired by the transaction.

4. Cross-Subsidization

25. Applicants assert that based on facts and circumstances known to them or that are reasonably foreseeable, the proposed transaction will not result in, at the time of the closing or in the future, cross-subsidization of a non-utility associate company or the pledge or encumbrance of assets of a traditional public utility that has captive customers or that owns or provides transmission service over jurisdictional facilities for the benefit of an associate company. Applicants explain that their proposed transaction will not result in, now or in the future: (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; or (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.

26. Based on the facts as presented in the application, we find that the transaction will not result in cross-subsidization, or the pledge or encumbrance of utility assets for the benefit of an associate company.

27. When a controlling interest in a public utility is acquired by another company, whether a domestic company or a foreign company, the Commission's ability to adequately protect public utility customers against inappropriate cross-subsidization may be impaired absent access to the parent company's books and records. Section 301(c) of the FPA gives the Commission authority to examine the books and records of any person

who controls, directly or indirectly, a jurisdictional public utility insofar as the books and records relate to transactions with or the business of such public utility. The approval of this transaction is based on such examination ability.

5. **Order No. 652 Reporting Requirements**

28. Order No. 652 requires that sellers with market-based rate authority timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.¹⁴ The foregoing authorization may result in a change in status. Accordingly, the Applicants are advised that they must comply with the requirements of Order No. 652. In addition, Applicants shall make any necessary filings under section 205 of the FPA to implement the transaction.

The Commission orders:

(A) The proposed disposition of jurisdictional facilities is hereby authorized under section 203(a)(1) 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 this Commission.

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

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

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

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

¹⁴ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

(G) Applicants shall notify the Commission within 10 days of the date that the acquisition and disposition of jurisdictional facilities have been consummated.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.