

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.

Northeast Generation Company  
Holyoke Water Power Company  
NU Enterprises, Inc.  
Select Energy, Inc.  
NE Energy, Inc.  
Mt. Tom Generating Company LLC  
ECP Energy, LLC

Docket No. EC06-154-000

ORDER AUTHORIZING DISPOSITION AND ACQUISITION OF  
JURISDICTIONAL FACILITIES

(Issued October 19, 2006)

**I. Introduction**

1. On August 15, 2006, Northeast Generation Company (Northeast), Holyoke Water Power Company (Holyoke), NU Enterprises, Inc. (NU Enterprises), Select Energy, Inc. (Select), NE Energy, Inc. (NE Energy), Mt. Tom Generating Company LLC (Mt. Tom), and ECP Energy, LLC (ECP Energy) (collectively, Applicants) filed an application under section 203 of the Federal Power Act (FPA).<sup>1</sup> The Applicants are requesting Commission authorization for: (1) the transfer of all issued and outstanding stock of Northeast from NU Enterprises to NE Energy; (2) the transfer of a 145.7 megawatt (MW) coal-fired generating facility and related interconnection facilities (Mt. Tom Facility) from Holyoke to Mt. Tom; and (3) the assignment of Select's rights and obligations under certain sales contract confirmations to ECP Energy.<sup>2</sup>

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<sup>1</sup> 16 U.S.C. § 824b (2000), as amended by the Energy Policy Act of 2005 (EPAct 2005), Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982-93 (2005).

<sup>2</sup> Mt. Tom and ECP Energy have also submitted, under section 205 of the FPA, applications for market-based rate authorization, which have been accepted for filing. *Mt. Tom Generating Company, LLC*, Docket No. ER06-1291-000 (August 28, 2006) (unpublished letter order); *ECP Energy LLC*, Docket Nos. ER06-1118-000, *et al.* (September 7, 2006) (unpublished letter order).

2. The Commission has reviewed the proposed transaction under the Commission's Merger Policy Statement and Order Nos. 669, 669-A and 669-B.<sup>3</sup> We will authorize the transaction, as we find that it will not have an adverse effect on competition, rates or regulation and is thus consistent with the public interest, and that it 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.

## II. Background

### A. Description of the Parties

#### 1. Northeast Utilities Entities

3. Northeast is a direct wholly-owned subsidiary of NU Enterprises, which in turn, is a direct wholly-owned subsidiary of Northeast Utilities (NU). Northeast has approximately 1,296 MWs of generation in the market administered by ISO New England Inc. (ISO-NE). Its generating facilities include the 1,080 MW Northfield Mountain Project pumped storage facility, the 67.2 MW Turner Falls Project hydroelectric facility, the 115 MW Housatonic River Project hydroelectric facility, the 2.2 MW Scotland Project hydroelectric facility, the 20.8 MW Tunnel ICU jet-kerosene fired generating facility, and various other small facilities. Northeast is authorized by the Commission to sell electric energy, capacity and ancillary services at market-based rates. Northeast currently sells the entire output of its facilities to its affiliate, Select, pursuant to a power purchase and sales agreement.

4. NU Enterprises is a public utility holding company under the Public Utility Holding Company Act of 2005.<sup>4</sup> Its principal operating utility subsidiaries are the

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<sup>3</sup> 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 (Jan. 6, 2006), FERC Stats. & Regs. ¶ 31,200 (2006), *order on reh'g*, Order No. 669-A, 71 Fed. Reg. 28,422 (May 16, 2006), FERC Stats. & Regs. ¶ 31,214 (2006), *order on reh'g*, Order No. 669-B, 71 Fed. Reg. 42,579 (July 27, 2006) (to be codified at 18 C.F.R. pt. 33).

<sup>4</sup> Pub. L No. 109-58, §§ 1261 *et seq.*, 119 Stat. 594, 972-78 (2005) (to be codified at 42 U.S.C. §§ 16451, *et seq.*).

Connecticut Light and Power Company, Public Service Company of New Hampshire, Western Massachusetts Electric Company, and Yankee Gas Service Company.

5. Holyoke is a manufacturing company that owns and operates the Mt. Tom Facility. It is a direct wholly-owned subsidiary of NU. Northeast Utilities Service Company, on behalf of Holyoke, is authorized by the Commission to sell wholesale electric energy, capacity and ancillary services at market-based rates. Holyoke currently sells the entire output of the Mt. Tom Facility to Holyoke Power and Electric Company, which in turn sells it to Select under a power sales agreement.

6. Select is a wholly-owned subsidiary of NU Enterprises. It is authorized by the Commission to sell electric energy, capacity and ancillary services at market-based rates. Select has entered into contracts for the sale of power, related to its entitlement to the output of the Mt. Tom Facility, with Constellation Commodities Group, Inc. and UBS, AG (Select Contracts).

## **2. Energy Capital Partners Entities**

7. NE Energy is a wholly-owned subsidiary of NE Energy Holdings, Inc. (NE Holdings). NE Holdings is owned by Energy Capital Partners I, LP, Energy Capital Partners I-A, LP, and Energy Capital Partners I (IP-1), LP (collectively, Funds). Funds are owned by Energy Capital Partners GP I, LLC (ECP GP) and various passive investors. ECP GP is a wholly-owned subsidiary of Energy Capital Partners, LLC, which is owned by six individuals. NE Energy does not own or control any generation or transmission facilities. None of the six individuals owns or controls five percent or more of the voting interests in any electric generation or transmission facility.

8. Mt. Tom is a wholly-owned subsidiary of NE Energy and was formed to own and operate the Mt. Tom Facility. Mt. Tom does not currently own or control any generation or transmission facilities. It has been granted authorization to make sales at market-based rates.

9. ECP Energy is a wholly-owned subsidiary of NE Energy and was formed to perform power marketing services. It does not own or control any generation or transmission facilities. ECP Energy has been granted authorization to make sales at market-based rates.

## **B. The Proposed Transaction**

10. Under the Northeast Stock Purchase Agreement, NU Enterprises will sell all of the issued and outstanding stock of Northeast to NE Energy. Under the Purchase and Sale Agreement (Mt. Tom PSA), dated July 24, 2006, Holyoke will transfer, and Mt. Tom will acquire, the Mt. Tom Facility. Additionally, under the Mt. Tom PSA, Select intends to assign its rights and obligations under the Select Contracts to ECP Energy. Following the

closing of the proposed transaction Northeast will be a wholly-owned subsidiary of NE Energy; the Mt. Tom Facility will be directly owned by Mt. Tom, and indirectly owned by NE Energy; and ECP Energy will make sales of power and capacity related to its entitlement to the output of the Mt. Tom Facility to Constellation and UBS under the Select Contracts.

### **III. Notice and Responsive Pleadings**

11. Notice of the filing was published in the *Federal Register*, 71 Fed. Reg. 51,599 (2006), with comments, protests, or interventions due on or before September 5, 2006. The Candlewood Lake Authority and the Town of New Fairfield filed timely motions to intervene raising no issues. The Town of New Milford (New Milford) filed a timely motion to intervene, followed by a timely protest. The City of Danbury (Danbury) filed a timely motion to intervene with comments. Richard Blumenthal, Attorney General for the State of Connecticut (Connecticut Attorney General) filed a timely motion to intervene with comments. Finally, the Connecticut River Watershed Council, Inc. and the Deerfield/Millers Chapter of Trout Unlimited (Connecticut River & Deerfield) filed a joint Motion to Intervene Out of Time and Comments on September 11, 2006.

12. New Milford and Danbury both object, to the applicants' request that we waive the filing of information relating to Candlewood Lake regarding state agency permit requirements, operational information and a map showing the properties that are the subject of the transaction. New Milford states that waiver would be incompatible with the principle of complete public disclosure of information pertaining to Candlewood Lake, a recreational and economic resource that is vitally important to the people of New Milford. According to New Milford, waiver would likely result in speculation about the information for which waiver is requested. New Milford and Danbury both argue that the Commission and the public at large, including the people of New Milford, should be fully apprised of all material information so as to enable them to respond. Finally, New Milford insists that a complete administrative record is necessary in the event of further proceedings in an appellate forum requiring the filing of something as fundamental as a map.

13. The Connecticut Attorney General comments that it seeks to ensure that the transaction is in the best interests of Connecticut's citizens and that the new owner will comply with the Housatonic River Project management terms. The Connecticut Attorney General also states that in a related docket, P-2576-083, the Commission is considering the shoreline management plan that Northeast submitted. He argues that the new owner must comply with the shoreline management plan and understand the effect this plan has on the residents surrounding Candlewood Lake and Lake Lillinonah.

14. Connecticut River & Deerfield comment that they are concerned about discharges into the Connecticut River from Northeast's projects.<sup>5</sup> Both have been parties to various aspects of these projects. Both are conservation organizations that are concerned with protecting the Connecticut River and its wildlife. Similar to New Milford and Danbury, Connecticut River & Deerfield argue that any change of ownership in electric power plants and natural resources of the Connecticut River requires close scrutiny to ensure that the public interest is protected. They comment that the waivers requested by the Applicants are not in the public interest, given the transaction size and the short time period requested for the transaction to close.

#### **IV. Discussion**

##### **A. Procedural Matters**

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Connecticut River & Deerfield filed a motion to intervene out-of-time. These parties have demonstrated that they have an interest in this proceeding and that their participation will not delay the proceeding or prejudice the rights of any other party. Accordingly, for good cause shown, we will grant the motion to intervene out-of-time.<sup>6</sup>

##### **B. Standard of Review**

16. Section 203(a) of the FPA provides that the Commission must approve a disposition of facilities if it finds that the disposition "will be consistent with the public interest."<sup>7</sup> The Commission's analysis of whether a disposition is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.<sup>8</sup> In addition, EPAct 2005 amended section 203 to specifically require that the Commission also determine that the disposition 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

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<sup>5</sup> See Northfield Mountain Pumped Storage Project, Docket No. Project No. P-2485; Turners Falls Project, Docket No. P-1889. Connecticut River & Deerfield also refer to the Mt. Tom Facility in this filing.

<sup>6</sup> 18 C.F.R. § 385.214(d) (2006).

<sup>7</sup> 16 U.S.C. § 824b (2000).

<sup>8</sup> See *supra* note 3.

company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.<sup>9</sup> As discussed below, we will approve the proposed transaction because it meets these statutory standards.

17. First, we reject the objections to the Applicants' request that we waive the requirements to file certain information. As shown below, the information in question was not necessary for the Commission to determine that the transaction will not harm competition, rates, or regulation. The Commission is also able 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. Moreover, granting these waivers is consistent with the Commission's precedent.<sup>10</sup> Finally, with regard to the Connecticut Attorney General's comments, we find that such concerns are best suited to the docket addressing the shoreline management plan in question.

18. Additionally, the arguments that this lack of information will not allow for proper planning is not relevant to the Commission's consideration of the Application. The Commission has made clear that it "will not condition its section 203 approval . . . on matters that should be addressed in another proceeding or forum."<sup>11</sup> Accordingly, the Commission will not require Applicants to file any additional information.

### **1. Effect on Competition**

19. Applicants state that the proposed transaction does not raise horizontal market power issues because neither NE Energy nor any of its affiliates owns or controls any generation in Northeast's geographic market, which is ISO-NE. Applicants also state that the proposed transaction involves the disposition of NU assets to new owners with no control of any generation in the market and thus will de-concentrate the market.

20. Applicants state further that the proposed transaction does not raise vertical market power issues because neither NE Energy nor any of its affiliates owns or controls transmission facilities in the United States or control any inputs to electricity production in the relevant market.

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<sup>9</sup> EPA Act 2005 § 1289, 119 Stat. 982-83, to be codified at 16 U.S.C. § 824b(a)(4).

<sup>10</sup> See, e.g., *MACH Gen, LLC*, 113 FERC ¶ 61,138 (2005). Applicants requested certain limited waivers of the Commission's Part 33 filing requirements that were not necessary to ensure that the transfers met the requirements of section 203 of the FPA, and the Commission authorized the transaction without requiring that the material be filed.

<sup>11</sup> *LenderCo, et al.*, 110 FERC ¶ 61,044 at P 21 (2005).

21. No party disputes these statements or claims that the proposed transaction will have an adverse effect on competition. We agree with Applicants on the horizontal and vertical market power effects of the proposed transaction and find that it will not adversely affect competition.

## **2. Effect on Rates**

22. Applicants state that the proposed transaction will not have an adverse effect on rates because Applicants will be making all sales at market-based rates. Applicants also state that none of them have any transmission customers whose rates could be adversely affected.

23. As noted in the Commission's Merger Policy Statement,<sup>12</sup> the Commission primarily examines a transaction's effect on rates in order to protect wholesale power and transmission service customers. We note that nothing in the application indicates that rates to customers will increase as a result of the proposed transaction, and no customer argues otherwise. For this reason, we are satisfied that the proposed transaction will not adversely affect rates.

## **3. Effect on Regulation**

24. Applicants state that the transaction will not diminish the Commission's regulatory authority over them. The Commission will continue to exercise the same jurisdiction over Northeast, Select, Mt. Tom, Holyoke and ECP Energy, and the transaction will not impair the Commission's jurisdiction over any of the public utility affiliates. Applicants also state that the transaction will not create a regulatory gap or shift regulatory control between the Commission and any state commission.

25. The Commission finds that neither state nor federal regulation would be impaired by the proposed transaction. We note that no party has requested that the Commission address the effect of the transaction on state regulation.

## **4. Cross-subsidization**

26. FPA section 203(a)(4),<sup>13</sup> as amended by EPAct, requires that the Commission must find that a proposed transaction will not result in cross-subsidization of a non-utility

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<sup>12</sup> *Merger Policy Statement*, FERC Stats. & Regs. ¶ 31,044 at 30,126.

<sup>13</sup> *See* 16 U.S.C. § 824b(a)(4) (2006).

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 state that the proposed transaction will not result in the cross-subsidization of a non-utility associate company or in the pledge or encumbrance of utility assets for the benefit of an associate company.

27. As required by Order No. 669,<sup>14</sup> Applicants each confirm that, based on facts and circumstances known to them, or that are reasonably foreseeable, the transaction will not result in: (1) transfers 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) 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; (3) new pledges or encumbrances 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. Applicants further verify that the transaction does not involve the assets of a traditional public utility company with captive customers, and therefore, there are no existing pledges or encumbrances that must be disclosed under 18 C.F.R. § 33.2(j)(1)(i) (2006).

28. We find that Applicants have provided adequate assurance that the transaction will not result in cross-subsidization.

The Commission orders:

(A) The proposed transaction is hereby approved, 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.

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<sup>14</sup> Order No. 669, FERC Stats. & Regs. ¶ 31,200 at P 167 (2006), *order on reh'g*, Order No. 669-B, 71 Fed. Reg. 42,579 (July 27, 2006), FERC Stats. & Regs. ¶ 31,225 (2006).

(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 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 shall be made.

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

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

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.