

125 FERC ¶ 61,181
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.

Bank of America Corporation

Docket No. EC09-7-000

Bank of America, N.A.

Merrill Lynch & Co., Inc.

Merrill Lynch Commodities, Inc.

ORDER AUTHORIZING MERGER AND DISPOSITION
OF JURISDICTIONAL FACILITIES

(Issued November 17, 2008)

1. On October 17, 2008, Bank of America Corporation (Bank of America), Bank of America, N.A. (Bank of America NA), Merrill Lynch & Co., Inc. (Merrill Lynch), Merrill Lynch Commodities, Inc. (Merrill Commodities) (collectively, Applicants) filed an application seeking authorization under section 203(a)(1) of the Federal Power Act¹ for a transaction in which a wholly-owned subsidiary of Bank of America will merge with and into Merrill Lynch resulting in Bank of America's indirect purchase of the securities of Merrill Commodities (Proposed Transaction). The jurisdictional facilities involved in the Proposed Transaction include Bank of America NA's and Merrill Commodities' market-based rate tariffs and wholesale power sales contracts, and associated books and records.

2. The Commission has reviewed the Proposed Transaction under the Merger Policy Statement.² As discussed below, we authorize the Proposed Transaction as consistent with the public interest.

¹ 16 U.S.C. § 824b(a)(1) (2006).

² 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*,

(continued)

I. Background

A. The Purchasers

3. Bank of America, a bank holding company, through its subsidiaries indirectly holds passive or non-controlling interests in companies that own electric generation, transmission and pipelines. Bank of America NA is a national banking association and a wholly-owned, indirect subsidiary of Bank of America that engages in commercial banking activities and provides financial services. Bank of America NA, as part of its commodities business, engages in wholesale electricity transactions as a power marketer. Applicants state that neither Bank of America NA nor any of its affiliates own, operate, or control generation or transmission facilities, but they also state that Bank of America and its non-bank affiliates may take a passive or non-controlling position in unaffiliated companies that own electric generation, transmission or pipelines. For example, they state that a Bank of America broker-dealer subsidiary holds a non-controlling membership interest in Milford Holdings LLC, an unaffiliated company that owns generation, as well as MACH Gen. LLC, an unaffiliated company with subsidiaries that own generation.

B. The Sellers

4. Merrill Lynch is an investment bank that, from time to time, holds, through its affiliates, public utility stocks in connection with its underwriting and related financial services business. Merrill Commodities is a wholly-owned, indirect subsidiary of Merrill Lynch and engages in wholesale electricity transactions as a power marketer. Merrill Commodities owns, as a booking vehicle, Merrill Lynch Commodities Canada. Applicants state that neither Merrill Commodities nor any of its affiliates own, operate, or control generation or transmission facilities. In addition to its power marketing activities, Merrill Commodities provides services to several generation plants pursuant to the terms and conditions of energy management agreements between Merrill Commodities and each plant owner. Applicants state that in each case, the plant owner retains ultimate decision-making authority and control of the facility and related sales of wholesale power.

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).

C. The Proposed Transaction

5. Pursuant to the merger agreement, a wholly-owned subsidiary of Bank of America will merge with and into Merrill Lynch, with Merrill Lynch continuing as the surviving company and becoming a wholly-owned subsidiary of Bank of America. The net result is that Merrill Commodities will become an affiliate of Bank of America NA, thus merging or consolidating their jurisdictional facilities (i.e., market-based rate tariffs and wholesale power sales contracts, and associated books and records).

6. As part of the Proposed Transaction, each share of Merrill Lynch common stock will be converted into 0.8595 (exchange ratio) of a share of Bank of America's common stock. Non-convertible preferred stock of Merrill Lynch will be exchanged for preferred stock issued by Bank of America having substantially identical terms. Convertible preferred stock of Merrill Lynch will remain outstanding after the Proposed Transaction and, thereafter, will be convertible in accordance with its terms into shares of Bank of America common stock based on the exchange ratio. Additionally, all outstanding Merrill Lynch stock options and other stock-based awards will be converted into stock options and stock-based awards with respect to shares of Bank of America's common stock, reflecting the exchange ratio. Lastly, following the closing of the Proposed Transaction, three existing directors of Merrill Lynch will be appointed to newly-created directorships on the Board of Directors of Bank of America.³

7. Applicants state that on or following consummation of the Proposed Transaction, they may begin to integrate their respective power marketing businesses to the extent permissible for national banks. They further state that, at some point, they may fully integrate their power marketing businesses by transferring existing wholesale power contracts, personnel and related books and records from Bank of America NA to Merrill Commodities, or vice versa, again to the extent permissible for national banks. Applicants argue that existing blanket authorizations would permit all such activities as part of an internal corporate integration without further approval from the Commission.⁴

II. Notice and Responsive Pleadings

8. Notice of the application was published in the *Federal Register*, 73 Fed. Reg. 63,956 (2008), with interventions and protests due on or before November 7, 2008. None was filed.

³ Application at 7-8.

⁴ *Id.* at 8-9.

III. Discussion

A. Standard of Review under Section 203

9. Federal Power Act (FPA) section 203(a)(4) 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 considering three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.⁵ 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."⁶ The Commission's regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.⁷

1. Effect on Competition

10. Applicants argue that the Proposed Transaction does not raise any horizontal market power concerns because, other than certain generation assets held through passive or non-controlling interests, they neither own nor control generation.⁸ They argue that no

⁵ See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

⁶ 16 U.S.C. § 824b(a)(4) (2006).

⁷ 18 C.F.R. § 33.2(j) (2008).

⁸ Applicants state that their affiliates hold membership interests in entities such as MACH Gen, LLC (MACH Gen), that have subsidiaries that own generation in the United States. We note that existing authorizations allow qualified entities (which are banks, institutional investors, financial institutions, and investment or related entities not primarily engaged in energy-related business activities) holding interests in the parent company (e.g., MACH Gen) to transfer their interests in the subsidiary generating companies, provided that the qualified entities and their respective affiliates do not own or control five percent or more voting interests in any generation facilities or engage in any jurisdictional activities in the geographic markets in which a subsidiary generating company is located and the transaction would result in the qualified entity, together with its affiliates, owning or controlling not more than a 20 percent equity interest in the parent company. See *MACH Gen, LLC*, 113 FERC ¶ 61,138 (2005); *La Paloma Holding Company, LLC*, 112 FERC ¶ 61,052 (2005); *Lake Road Holding Company, LLC*, 112 FERC ¶ 61,051 (2005).

horizontal competitive screen analysis is required because the extent of the incremental business transactions in the relevant geographic market that arise out of the Proposed Transaction is *de minimis*.⁹ The Applicants state that neither Bank of America NA nor Merrill Commodities owns or controls any jurisdictional generation assets; they only sell wholesale power at market-based rates pursuant to the terms of their Commission-approved tariffs. Applicants note that even if the Commission were to assume Applicants have control over the generation assets held through their passive or non-controlling interests (which they have no plans and are not in a position to do), the only potential for an overlap of capacity resulting from combined ownership would occur in the ISO New England market. They argue that the combined assets (i.e., the Millennium Project, a 326 megawatt (MW) facility located in Massachusetts; Granite Ridge, a 720 MW facility located in New Hampshire; and Milford Power Company LLC, a 544 MW facility located in Connecticut) would represent only 5.1 percent of ISO New England's 31,072 MW of installed capacity.¹⁰

11. In addition, Applicants argue that the Proposed Transaction raises no vertical competition concerns because it does not involve the acquisition or transfer of control over any transmission or transportation facilities, either electric or natural gas. Applicants further state that they can neither individually nor collectively erect barriers to entry.¹¹

12. We find that the Proposed Transaction does not raise horizontal market power concerns. Applicants have demonstrated that the effect of combining their operations in all relevant geographic markets is *de minimis*. Therefore, the Proposed Transaction will not eliminate a competitor or materially increase market concentration in the relevant markets.

13. In transactions combining electric generation assets with inputs to generating power (such as natural gas, transmission, or fuel), competition can be harmed if a transaction increases the merged firm's ability or incentive to exercise vertical market power in wholesale electricity markets. For example, by denying rival firms access to inputs or by raising their input costs, a merged firm could impede entry of new competitors or inhibit existing competitors' ability to undercut an attempted price increase in the downstream wholesale electricity market. Here, Applicants have shown that the Proposed Transaction does not raise any of these concerns. We agree with Applicants that they do not own or control assets that would allow them to exert vertical

⁹ Application at 10-11.

¹⁰ *Id.* at 11.

¹¹ *Id.* at 10.

market power in wholesale power markets. We find that the Proposed Transaction does not raise vertical market power concerns.

2. Effect on Rates

14. Applicants state that the Proposed Transaction will not have an adverse impact on rates. They state that they have no transmission assets and only sell wholesale power at market-based rates. They state that because they lack market power, neither Bank of America NA nor Merrill Commodities can exert any undue influence over market-based rate prices. Thus, they argue that the Proposed Transaction will not adversely impact the rates of Bank of America NA's and Merrill Commodities' wholesale power transactions.¹²

15. Nothing in the application indicates that rates to customers will increase as a result of the Proposed Transaction, and no customer argues otherwise. Therefore, we find that the Proposed Transaction will not adversely affect rates.¹³

3. Effect on Regulation

16. Applicants state that the Proposed Transaction will not adversely affect regulation because the Commission will continue to regulate the relevant jurisdictional sales made by Applicants. Applicants further state that the Proposed Transaction does not affect the jurisdiction of any state commission.¹⁴

17. Based on the facts presented in the application, we find that the Proposed Transaction will not adversely affect regulation. We note that no state commission has intervened in this proceeding.

¹² Application at 12.

¹³ Order No. 652 requires that sellers with market-based rate authorization 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. 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 appropriate filings under section 205 of the FPA, to implement the transaction.

¹⁴ Application at 12-13.

4. Cross-subsidization

18. In the Supplemental Policy Statement, the Commission described several types of “safe harbor” transactions in which it is clear that no cross-subsidization issues arise and therefore no detailed showing is required.¹⁵ Applicants assert that this Proposed Transaction falls into the safe harbor where “a franchised public utility with captive customers is not involved.” Because neither Bank of America nor Merrill Lynch has any controlling interest in any franchised public utility with captive customers, Applicants contend that no cross-subsidization concerns are raised by the Proposed Transaction.

19. Based on the facts as presented in the application, we find 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 benefit of an associate company. We note that no party has argued otherwise.

B. Other Matters

20. Applicants state that while plans for management of their businesses post-Transaction have not been determined, it is a possibility that on or following consummation of the Proposed Transaction, Bank of America NA and Merrill Commodities will begin to integrate their respective power marketing businesses to the extent permissible for national banks. Applicants state that the integration may include, among other things, the sharing of personnel, the coordination of market information and the common management of risk. Applicants further state that at some point Applicants may fully integrate their power marketing businesses by transferring existing wholesale power contracts, personnel and related books and records from Bank of America NA to Merrill Commodities, or vice versa, again to the extent permissible for national banks. Applicants believe that existing blanket authorizations would permit all such activities as part of an internal corporate integration without further approval from the Commission. If determined by the Commission to be necessary, however, Applicants request authorization of a full integration of the jurisdictional activities of Bank of America NA and Merrill Commodities as part of the Application. Applicants note that the Commission, pursuant to 18 C.F.R. § 33.1(c)(6) grants blanket authorization under FPA sections 203(a)(1) and (a)(2) as relevant, for internal corporate reorganizations that do not result in the reorganization of a traditional public utility that has captive customers or that owns or provides transmission services over jurisdictional transmission facilities, and that do not present cross-subsidization issues. The Applicants also note that the Commission further grants blanket authorization pursuant to 18 C.F.R. § 33.1(c)(11) under FPA section 203(a)(1) for any public utility to transfer a wholesale market-based rate contract to any other public utility affiliate that has the same ultimate upstream ownership,

¹⁵ Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31, 253 at P 17.

provided that neither affiliate is affiliated with a traditional public utility with captive customers.

21. Based on the facts presented, and assuming that the future transaction complies with the clarification in Order No. 708-A, we agree with Applicants that the blanket authorizations would apply.¹⁶

The Commission orders:

(A) Applicants' Proposed Transaction is authorized, 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 any appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction.

(F) 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 shall be made.

¹⁶ We note that the Commission clarified that the blanket authorization in 18 C.F.R. § 33.1(c)(6) applies to transactions involving the transfer of assets from one non-traditional utility subsidiary (i.e., a public utility that does not have captive customers and does not own or control transmission facilities) to another non-traditional utility subsidiary when only one of the two non-traditional utility subsidiaries survives the transaction. *Blanket Authorization Under FPA Section 203*, Order No. 708, 73 Fed. Reg. 11,003 (Feb. 29, 2008), FERC Stats. & Regs. ¶ 31,265, *order on reh'g*, Order No. 708-A, 73 Fed. Reg. 43,066 (Jul. 24, 2008), FERC Stats. & Regs. ¶ 31,273, at P 37 (2008).

(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 Proposed Transaction.

(H) Applicants shall notify the Commission within 10 days of the date that the Proposed Transaction has been consummated.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.