

125 FERC ¶ 61,144
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Harbinger Capital Partners Master Fund I, Ltd Docket No. EC08-117-000
Harbinger Capital Partners Special Situation
Fund, L.P.

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

(Issued November 5, 2008)

1. Harbinger Capital Partners Master Fund I, Ltd. (Harbinger Master Fund) and Harbinger Capital Partners Special Situations Fund, L.P. (Harbinger Special Situations Fund) (collectively, Harbinger) filed an application seeking authorization under section 203 of the Federal Power Act (FPA)¹ for the acquisition by Harbinger of shares of up to 20 percent of the outstanding voting securities of Sunoco, Inc. (Sunoco) (Proposed Transaction).
2. The Commission has reviewed the Proposed Transaction under the Merger Policy Statement.² As discussed below, we will authorize the Proposed Transaction under

¹ 16 U.S.C. § 824b (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*, 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).

section 203(a)(1), as we find that it is consistent with the public interest. Although Harbinger does not specifically state whether it seeks authorization under section 203(a)(1)³ or 203(a)(2),⁴ in the instant order the Commission is asserting jurisdiction under section 203(a)(1). We note that authorization under section 203(a)(2) is granted pursuant to the blanket authorization granted in section 33.1(c)(8) of the Commission's regulations. We remind applicants that when they submit an application seeking authorization under section 203 of the FPA, they must specify the subsection(s) of section 203 under which they are seeking authorization. Moreover, if an entity is uncertain whether a particular disposition or acquisition is a transfer of control that requires a section 203 authorization, it should seek a declaratory order or file the appropriate section 203 application.⁵

I. Background

A. Description of the Parties

1. Harbinger and Related Entities

3. Harbinger Master Fund and Harbinger Special Situations Fund are hedge funds. They are separate investment funds, but they are under common control. According to Harbinger, both funds invest primarily in distressed/high yield debt securities, special situation equities, and private loans and notes, including the securities of financially-distressed generation companies.

4. Harbinger states that it owns approximately 24 percent of the outstanding voting shares of Calpine Corporation (Calpine).⁶ Calpine owns two generating facilities in the

³ Section 203(a)(1) applies to dispositions of jurisdictional facilities by public utilities. Harbinger never directly references this section, but states that "separate prior Commission approval should not be required under section 203 because [it is] not proposing to acquire control of Sunoco." Application at 11.

⁴ Section 203(a)(2) requires prior Commission authorization for holding companies to acquire certain securities with values in excess of \$10 million of transmitting utilities, electric utility companies or holding companies containing such entities. Harbinger states that section 203(a)(2) is "relevant" to the Proposed Transaction. Application at 10.

⁵ See Order 669-A, FERC Stats. & Regs. ¶ 31,214 at P 96.

⁶ Harbinger received authorization to hold up to 40 percent of Calpine in connection with Calpine's emergence from bankruptcy proceedings. *Calpine Corp.*, 121 FERC ¶ 62,223 (2007). In their application seeking authorization to acquire Calpine,

(continued)

Entergy balancing authority. Harbinger also currently owns approximately 10 percent of the outstanding voting securities of Mirant Corporation (Mirant). In separate orders issued concurrently with this order, we grant Harbinger's request for approval under section 203 to acquire between 10 and 20 percent of the outstanding voting securities of Entegra Power Group LLC (Entegra),⁷ subject to certain conditions, and we grant Harbinger's requests for approval under section 203 to increase its ownership of Mirant securities to up to 25 percent.⁸

5. In addition, Harbinger Master Fund and Harbinger Special Situations Fund are holding companies with respect to one or more EWGs, qualifying facilities (QFs), and foreign utility companies (FUCOs). Harbinger states that it owns 100 percent of Kelson Holdings, LLC (Kelson), which indirectly owns four large EWGs in the southern and

Calpine, SPO Partners II, L.P. and Harbinger performed an analysis based on the potential competitive effects of Harbinger acquiring more than 10 percent of Calpine. They stated that the balancing authority areas of Entergy Services, Inc. and the Tennessee Valley Authority were the only two relevant geographic markets in which both Calpine and Harbinger own and control generation, and in each case the extent of business operations in the same geographic market is *de minimis*. Thus, they argued that the transaction presented no horizontal market power concerns. Calpine November 16, 2007 Joint Application for Approval Under Section 203 of the Federal Power Act, Docket No. EC08-15-000, at 28-30. The Commission authorized the transaction, but did not make any findings on the issue of whether Harbinger controls Calpine.

⁷ *Entegra Power Group LLC, et al.*, 125 FERC ¶ 61,143 (2008). According to Harbinger's Joint Application For Approval Under Section 203 of the Federal Power Act filed May 9, 2008, Docket No. EC08-87-000, Entegra is a Delaware limited liability company that holds indirectly all of the equity interests in Gila River Power, L.P. and Union Power Partners, L.P., which are exempt wholesale generators (EWGs). These EWGs are wholly owned by EPG LLC, which in turn, is wholly owned by Entegra TC LLC (Entegra TC), and the Blocker Entities. The Blocker Entities are wholly owned by Entegra TC which, in turn, is wholly owned by Entegra. Each current owner of the equity interests in Entegra is a bank, institutional investor, financial institution, investment company or related entity that is not primarily engaged in energy-related business activities. In the May 9, 2008 application, Harbinger states that it acquired securities of Entegra totaling less than five percent of the outstanding securities of Entegra, and may close on shares up to 9.99 percent while that application was pending.

⁸ *Harbinger Capital Partners Master Fund I, Ltd, et al.*, 125 FERC ¶ 61,145 (2008) (*Mirant*).

western United States.⁹ Specifically, Kelson owns Cottonwood Energy Company LP, an EWG with market-based rate authority that owns a 1,233 MW natural gas-fired generation facility in the Entergy balancing authority area, Dogwood Energy LLC, an EWG with market-based rate authority that leases a 620 MW natural gas-fired generation facility in the Aquila Missouri Public Service Division balancing authority area, Magnolia Energy LP, an EWG subsidiary of Kelson that owns a 807 MW natural-gas fired generation facility in the Tennessee Valley Authority balancing authority area, and Redbud Energy LP,¹⁰ an EWG subsidiary of Kelson that owns a 1,194 MW natural gas-fired generation facility in the Oklahoma Gas and Electric Company balancing authority area.

6. Harbinger also owns interests in two foreign utility companies, the 240 MW Island Cogeneration Plant in Duncan Bay, British Columbia, Canada, and the 300 MW Calgary Energy Centre in Alberta, Canada. Harbinger also owns King City, L.P., which owns the King City Cogeneration Facility, a QF, and leases that facility to Calpine King City Cogeneration, LLC. In addition, Harbinger owns Kelson Energy III LLC, which recently obtained market-based rate authority. A special-purpose entity affiliate of Harbinger maintains an investment in less than 10 percent of the securities of Horsehead Corporation, a manufacturer of zinc oxide and zinc metal. Harbinger states that for purposes of supplying electric energy for its manufacturing processes, Horsehead owns two nominally rated 55 MW coal-fired electric generating facilities located in Monaca, Pennsylvania from which it may make wholesale sales at market-based rates. Harbinger also owns Class A (non-voting) shares of less than 10 percent in U.S. Power Generating Company (US PowerGen).¹¹

7. Harbinger states that it has recently acquired securities of Entegra totaling less than five percent of the outstanding securities of Entegra, and may close on shares up to 9.99 percent while this application is pending. It acquired and will acquire shares of

⁹ Harbinger Master Fund owns a two-thirds interest in Kelson and Harbinger Special Situations Fund owns a one-third interest in Kelson.

¹⁰ Since the filing of this Application, Redbud Energy LP has been sold to Oklahoma Gas and Electric Company. *Oklahoma Gas and Electric Co.*, 124 FERC ¶ 61,239 (2008). *See also* Oklahoma Gas and Electric Co. October 3, 2008 Notice of Consummation, Docket No. EC08-58-000.

¹¹ Harbinger notes that US PowerGen's Class A (non-voting) shares will convert to voting shares upon the occurrence of certain events as discussed by the Commission in Docket No. EC07-67-000. Harbinger August 8, 2008 Application at n.25 (Application) (citing *EGB Holdings LLC*, 119 FERC ¶ 61,172 (2007)).

Entegra pursuant to the pre-authorization granted in 18 C.F.R. § 33.1(c)(2), and states that the transfer of such shares was made and will be made pursuant to the blanket pre-authorization granted in 18 C.F.R. § 33.1(c)(12).¹² Harbinger also states that while Entegra has a company-specific order permitting certain transfers to proceed without a prior Commission order, the Proposed Transaction does not meet the requirements of that company-specific blanket authorization.¹³

2. Sunoco

8. Harbinger states that Sunoco manufactures and markets petroleum products and chemicals with its principal place of business in Philadelphia, Pennsylvania. It is publicly traded on the New York Stock Exchange, and owns and operates refineries in Westville, New Jersey; Philadelphia, Pennsylvania; Marcus Hook, Pennsylvania; Toledo, Ohio; and Tulsa, Oklahoma. Sunoco is also a retail marketer of transportation fuels (gasoline and diesel fuels) in 27 states.

9. Harbinger states that Sunoco Power Generation LLC (Sunoco Power), a wholly-owned subsidiary of Sunoco, is a Delaware limited liability corporation with its principal place of business in Philadelphia, Pennsylvania. Sunoco Power owns and operates the Eagle Point Cogeneration Facility (Eagle Point), a natural gas-fired cogeneration facility located in Westville, New Jersey with a nameplate capacity of approximately 225 MWs and a maximum operating capacity of approximately 200 MWs. Eagle Point is a QF. Harbinger states that the output of Eagle Point is sold at market-based rates into the wholesale power markets operated by PJM Interconnection, LLC (PJM).¹⁴

¹² Application at 10-11.

¹³ *Id.* at 12. In *Entegra Power Group LLC*, 123 FERC ¶ 61,006, at P 5 (2008), for example, the Commission extended for a three-year period until April 10, 2011 blanket authority for transfers of Entegra Units to an acquiring party that: (1) is a financial institution or related entity that is not primarily engaged in energy-related activities and is not affiliated with a traditional utility with captive customers; (2) does not individually, or collectively with affiliates, own five percent or more of the voting interests in any public utility that has interests in any generating facilities or engages in jurisdictional activities within the Entergy and APS/SRP control areas; and (3) will hold twenty percent or less of the Entegra Units.

¹⁴ See Sunoco October 17, 2005 FERC Form 556, Docket No. QF86-1061-007, at 3; see also *Sunoco Power Generation LLC*, Docket No. ER04-879-000 (July 16, 2004) (unpublished letter order) (accepting market-based rate schedule).

10. Sunoco Power Marketing, a wholly-owned subsidiary of Sunoco, is a wholesale power marketer with a market-based rate wholesale power sales tariff on file with the Commission.¹⁵

11. Sunoco owns approximately 43 percent of Sunoco Logistics Partners, L.P. (Sunoco Logistics), a publicly traded Delaware limited partnership that operates refined product and crude oil pipelines and terminals, and conducts crude oil acquisition and marketing activities. Certain of Sunoco Logistics' crude oil and products pipelines are common carriers subject to the Commission's jurisdiction under the Interstate Commerce Act, including Sunoco Pipeline, L.P. Sunoco Logistics also holds interests in Explorer Pipeline Company, Wolverine Pipe Line Company, West Shore Pipeline Company, Yellowstone Pipe Line Company, Mesa Pipe Line System, West Texas Gulf Pipe Line Company and Mid-Valley Pipeline.¹⁶ Sunoco Logistics also has ownership interests in the following non-Commission jurisdictional crude oil trunk pipelines and gathering pipelines in Oklahoma and Texas: Corsicana/Wichita Falls Pipeline; Mesa Pipeline; Millennium Pipeline; Kilgore Pipeline; Amdel Pipeline; and White Oil Pipeline.¹⁷ Sunoco also owns SunCoke Energy, a manufacturer of high-quality coke for use by steel manufacturers in the production of blast-furnace steel.

B. Description of the Proposed Transaction

12. As stated above, Harbinger requests Commission approval under FPA section 203 to acquire up to 20 percent of the outstanding voting securities of Sunoco, to the extent such approval may be required. Harbinger states that it currently owns approximately nine percent of the outstanding shares of Sunoco. It maintains that it did not acquire

¹⁵ *Sunoco Power Marketing, LLC*, Docket Nos. ER97-870-014 and ER97-870-015 (July 28, 2006) (unpublished letter order).

¹⁶ Harbinger states that oil supply and oil transportation also may be inputs to electric power production, however, 18 C.F.R. §35.36(a)(4) does not include such inputs in the definition of "inputs to electric power production" and Order No. 697 does not require such inputs to be reported under its regulations regarding market-based rate authority. *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268, at P 167-168 (2008), *clarified*, 124 FERC ¶ 61,055 (2008).

¹⁷ Harbinger argues that crude oil is unlikely to be a direct input into power generation, but it notes that refined products such as diesel or jet fuel could be used to generate electricity.

these shares in order to obtain control over Sunoco, but as a passive investment. Harbinger represents that it has filed a Schedule 13G with the Commission relating to its holdings of Sunoco stock pursuant to 18 C.F.R. § 33.1(c)(4). It argues that, while the shares that Harbinger has acquired to date do not trigger the need for a separate Commission order granting FPA section 203 approval, Harbinger Master Fund and Harbinger Special Situations Fund may from time to time wish to purchase additional shares of Sunoco stock. Accordingly, Harbinger states that the Application is submitted to ensure that it has all necessary regulatory approvals that may be required regarding their potential ownership of up to 20 percent of Sunoco's shares.

13. Harbinger states that it is unclear whether the value of Sunoco's jurisdictional assets that would be associated with Harbinger's holdings of 20 percent of the outstanding shares of Sunoco would exceed \$10 million. In addition, since Harbinger Master Fund and Harbinger Special Situations Fund are holding companies exclusively as to EWGs, QFs and FUCOs and Sunoco is a holding company only as to a QF, Harbinger states that the blanket authorization set forth in FPA section 33.1(c)(8) may apply. Harbinger argues that section 33.1(c)(8) provides that holding companies that are holding companies solely by virtue of holding EWG, QF or FUCO assets have blanket authority pursuant to section 203(a)(2) to "acquire the securities of additional EWGs, FUCOs, or QFs."¹⁸

14. Harbinger further argues that separate prior Commission approval should not be required under section 203 because Harbinger is not proposing to acquire control of Sunoco. Harbinger states that in the Supplemental Policy Statement, the Commission explained that it would consider "the totality of circumstances and attach the presumption of control when an entity can affect the ability of capacity to reach the market" when evaluating what arrangements convey control.¹⁹ Harbinger states that the Commission further explained that the "guiding principle is that an entity controls the facilities of another when it controls the decision-making over sales of electric energy, including discretion as to how and when power generated by these facilities will be sold."²⁰

15. Harbinger thus argues that it will not have the ability to manage, direct or control the day-to-day wholesale power sales activities conducted by Sunoco relating to Eagle Point, or have other rights that would constitute control. Harbinger states that its principal business is managing investment funds, rather than producing, selling, or transmitting electric power. Harbinger argues that it will not be able to control the

¹⁸ See 18 C.F.R. § 33.1(c)(8) (2008).

¹⁹ Citing Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 53.

²⁰ *Id.*

decision-making over Sunoco Power's or Sunoco Power Marketing's sales of electric energy at market-based rates.²¹

II. Notice of Filing and Responsive Pleadings

16. Notice of the application was published in the *Federal Register*, 73 Fed. Reg. 49,178 (2008), with interventions and protests due on or before August 29, 2008. Calpine filed a timely motion to intervene and conditional protest.

17. Notice of Harbinger's Schedule 13G Filing was published in the *Federal Register*, 73 Fed. Reg. 46,615 (2008), with interventions and protests due on or before August 19, 2008. None was filed.

Protest

18. In its conditional protest, Calpine asserts that the Commission should clarify that Harbinger's acquisition of an interest of up to 20 percent of Sunoco's voting securities will not adversely impact the ability of Calpine's market-based rate sellers to retain their market-based rate authority. Calpine states that it does not object to the Commission's granting the authorization requested in the Application, provided that the Commission makes clear that any findings made in order to approve the Application will apply equally in the market-based rate setting.²²

19. Calpine explains that approximately 24 percent of its common stock is currently owned by Harbinger, and that the Commission has granted authorization pursuant to section 203 of the FPA for Harbinger to acquire between 10 and 40 percent of Calpine's common stock through distributions pursuant to Calpine's plan of reorganization in bankruptcy and subsequent secondary market purchases.²³ Calpine states that for purposes of the November 16, 2007 application,²⁴ Harbinger and Calpine assumed, but did not concede that by virtue of owning 10 percent or more of Calpine's common stock,

²¹ Application at 11.

²² Calpine Protest at 5-6.

²³ *Id.* at 2-3 (citing *Calpine Corp.*, 121 FERC ¶ 62,223 (2007)).

²⁴ *Id.* (citing Calpine Corp. November 16, 2007 Joint Application for Approval Under Section 203 of the Federal Power Act, at 28-30, Docket No. EC08-15-000). The Commission authorized the transaction, but did not make any findings on the issue of whether Harbinger controls Calpine.

Harbinger would control Calpine such that their generation assets should be regarded as being under common control.²⁵

III. Discussion

A. Procedural Issues

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), Calpine's timely, unopposed motion to intervene serves to make it a party to this proceeding.

B. Analysis

1. Standard of Review Under Section 203

21. Section 203(a)(4) requires the Commission to approve a transaction if it determines that it will be consistent with the public interest.²⁶ The Commission's 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.²⁷ 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."²⁸ The Commission's regulations establish verification and informational requirements for applicants that seek

²⁵ Calpine also explains that the same assumption regarding Harbinger's purported control over Calpine, as well as similarly conservative assumptions concerning affiliation and control between and among Calpine, LS Power Development, LLC, Luminus Management, LLC, and Dynegy Inc. was reflected in a January 31, 2008 notification of change in status filed by the indirect subsidiaries of Calpine with market-based rate authority relating to the Harbinger/Calpine transaction, as well as certain other developments affecting characteristics upon which the Commission relied in authorizing the Calpine market-based rate sellers to sell electricity at market-based rates. *Id.* at 3-4.

²⁶ 16 U.S.C. § 824b (2006).

²⁷ See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

²⁸ 16 U.S.C. § 824b(a)(4) (2006).

a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.²⁹

2. Effect on Competition

a. Horizontal Market Power

22. Harbinger states that the Proposed Transaction presents no horizontal market power concerns because it will have no ability to control Sunoco. Harbinger further states that as a percentage of total capacity in PJM, Eagle Point's 225 MWs would have a *de minimis* effect on the geographic market. Harbinger argues that even considering its investment in Mirant and Mirant's 5,244 MWs of capacity in PJM, there would be *de minimis* generation overlaps compared to the 165,300 MWs of installed capacity in PJM.

Commission Determination

23. 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 Harbinger to acquire additional shares in Sunoco. 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.

24. 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 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.³⁰ The Proposed Transaction would result in a disposition of up to a 20 percent interest in Sunoco. 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).

25. Having found that the Proposed Transaction could result in a change in control over Sunoco, we turn to whether there will be an adverse effect on competition in terms

²⁹ 18 C.F.R. § 33.2(j) (2008).

³⁰ Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 at P 44.

of horizontal market power as a result of the Proposed Transaction. Sunoco's Eagle Point has a capacity of 225 MWs. While we have found that Harbinger could have the ability to control Mirant,³¹ Harbinger-controlled capacity constitutes only 5,244 MWs of the 165,300 MWs of installed capacity in PJM.³² Accordingly, we agree that Harbinger's combined interests in generation as a result of the Proposed Transaction would be *de minimis*.³³

26. Therefore, based on the facts presented, we find that the Proposed Transaction will not adversely affect competition in terms of horizontal market power. Nevertheless, we will require Harbinger to file with the Commission, for informational purposes, within 45 days of the end of each calendar quarter, a quarterly report of utility holdings by both Harbinger Master Fund and Harbinger Special Situations Fund stated in terms of the number of the shares held at the end of the quarter and as a percentage of the outstanding shares.

27. As noted above, Calpine has filed a protest that an assumption here that it is controlled by Harbinger may have adverse implications for Calpine's market-based rate authorization. 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 of its obligation to make a market-based rate change of status filing pertaining to the Proposed Transaction, pending the outcome of 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 Harbinger's application at this time without imposing an additional reporting burden on Calpine.

³¹ See *Harbinger Capital Partners Master Fund I, Ltd*, Docket No. EC08-59-000 (issued concurrently with this order).

³² We note that the competitive overlap with Calpine's generation in PJM was not analyzed because Calpine has current generating plant ownership of less than 100 MW in PJM. See *Mirant*, 125 FERC ¶ 61,145.

³³ We note that in a concurrent order, we are approving Harbinger's request to acquire interests in Entegra. That approval does not affect the market power analysis regarding Harbinger's acquisition of Sunoco that we approve here.

b. Vertical Market Power

28. Harbinger states that the Proposed Transaction presents no vertical market power concerns. They state that neither it nor its affiliates own or control any electric transmission facilities, except for facilities used to interconnect generating facilities with the transmission grid, or operate inputs to electricity production in any relevant market that would allow them to erect barriers to entry by new generation in that market.³⁴

29. Based on the facts presented, we agree that the Proposed Transaction does not raise any vertical market power concerns.

3. Effect on Rates

30. Harbinger contends the Proposed Transaction will have no adverse effect on rates because wholesale sales of electric energy, capacity and ancillary services will continue to be made at market-based rates. Harbinger also notes that neither Sunoco nor its affiliates own a traditional utility with captive retail or wholesale customers, and do not provide unbundled transmission service.³⁵

31. Based on the facts presented, we find that the Proposed Transaction will not have an adverse effect on rates, and note that no customer argues otherwise.

4. Effect on Regulation

32. Harbinger states that the Proposed Transaction will not have any adverse effect on the effectiveness of federal or state regulation.³⁶

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

5. Cross-subsidization

34. Harbinger argues that the Proposed Transaction will not result in cross-subsidization or the pledge or encumbrance of utility assets as to any associate company. Harbinger states that the Commission has recognized three classes of transactions that are unlikely to present cross-subsidization concerns and adopted three “safe harbors” that can

³⁴ Application at 14.

³⁵ Application at 15.

³⁶ *Id.*

be used to demonstrate in section 203 cases that there will be no cross-subsidization, absent concerns identified by the Commission or evidence from interveners that there is a cross-subsidy problem based on the particular circumstances presented.³⁷ Harbinger states that the Proposed Transaction falls within the “safe harbor” for Proposed Transactions that do not involve a franchised public utility with captive customers, a circumstance where the Commission has recognized that there is no potential for harm to customers.³⁸

35. In addition, Harbinger verifies that, based on the facts and circumstances known to it that are reasonably foreseeable, the Proposed Transaction will not result in, at the time of the Proposed Transaction or in the future, any form of cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company.³⁹

36. Based on the facts presented, 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. We note that no party has argued otherwise. As discussed above, we also find that the Proposed Transaction will not adversely affect competition, rates or regulations. Therefore, we authorize the disposition to Harbinger of up to 20 percent of Sunoco’s outstanding voting securities.

The Commission orders:

(A) We hereby grant authorization under section 203(a)(1) for the disposition of up to 20 percent of the voting shares of Sunoco, 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.

³⁷ Application at 15 (citing Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 16).

³⁸ Application at 16

³⁹ Application, Ex. M.

(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 affiliated qualifying facilities, if any, an appropriate filing for recertification pursuant to 18 C.F.R. § 292.207 (2008) shall be made.

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

(G) Harbinger 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) Harbinger shall file with the Commission, for informational purposes, within 45 days of the end of each calendar quarter, a quarterly report that lists holdings of Sunoco by both Harbinger Master Fund and Harbinger Special Situations Fund, 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) Harbinger shall file with the Commission, for informational purposes, any filing that they make at the SEC pertaining to Sunoco on Schedule 13G or Schedule 13D, and shall file these documents with the Commission at the same time that 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)

Nathaniel J. Davis, Sr.,
Deputy Secretary.