

UNITED STATES OF AMERICA 119 FERC ¶ 62,172
FEDERAL ENERGY REGULATORY COMMISSION

EBG Holdings LLC
Boston Generating, LLC
Mystic I, LLC
Mystic Development, LLC
Fore River Development, LLC
K Road BG Management LLC
Astoria Generating Company Holdings, LLC
Astoria Generating Company, L.P.
Astoria Generating Company Acquisitions, LLC
Astoria Generating Company GP, LLC
US Power Generating Company
New Astoria Generating Company Holdings, LLC
EBG Merger LLC
Astoria Merger LLC

Docket No. EC07-67-000

ORDER AUTHORIZING MERGER AND DISPOSITION
AND ACQUISITION OF JURISDICTIONAL FACILITIES

(Issued May 30, 2007)

On March 13, 2007, as supplemented on March 15, 2007, EBG Holdings LLC (EBG Holdings); Boston Generating, LLC (Boston Generating), its wholly-owned subsidiaries Mystic I, LLC (Mystic I), Mystic Development, LLC (Mystic Development), and Fore River Development, LLC (Fore River) (collectively, Boston Gen Project Companies); and K Road BG Management LLC (K Road) (collectively, EBG Group); Astoria Generating Company Holdings, LLC (Astoria Holdings); Astoria Generating Company, L.P. (Astoria Generating); Astoria Generating Company Acquisitions, LLC (Astoria Acquisitions); and Astoria Generating Company GP, LLC (Astoria GP) (collectively, Astoria Group); US Power Generating Company (USPowerGen); New Astoria Generating Company Holdings, LLC (New Astoria Holdings); EBG Merger LLC (EBG Merger); and Astoria Merger LLC (Astoria Merger) (collectively with EBG Group and Astoria Group, Applicants) filed a joint application under sections 203(a)(1) and 203(a)(2) of the Federal Power Act (FPA)¹ seeking authorization for a merger transaction that will result in EBG Holdings and Astoria Holdings becoming wholly-owned subsidiaries of USPowerGen (Merger Transaction), and a two-year blanket authorization

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

for the disposition and acquisition of jurisdictional facilities related to the trading of USPowerGen common stock in the secondary market (Secondary Market Transactions). Applicants also request authorization under section 203(a)(1) for any purchaser to acquire up to 10 percent of USPowerGen common stock through an initial public offering (IPO).² The jurisdictional facilities associated with these transactions consist of market-based rate tariffs, wholesale power sales contracts, related books and records, and interconnection facilities.

Boston Generating is a wholly-owned subsidiary of EBG Holdings with market-based rate authority. Boston Generating purchases the output from the Boston Gen Project Companies and then resells that output to Sempra Energy Trading Corp. Boston Generating also owns two non-jurisdictional companies that provide operational services to the Boston Gen Project Companies.

The Boston Gen Project Companies sell power at market-based rates in the ISO New England Inc. (ISO-NE) market. Mystic I owns and operates two generating facilities (Mystic Jet and Mystic Unit 7) with an aggregate capacity of 565 megawatts (MWs) located in Everett, Massachusetts. Mystic Development owns two 800 MW generating facilities (Mystic Units 8 and 9) located in Everett, Massachusetts. Fore River owns an 800 MW facility (Fore River) located in Weymouth, Massachusetts.

EBG Holdings is a special purpose entity formed to hold the membership interests of Boston Generating and plays an active management role with Boston Generating and the Boston Generating Project Companies. The voting membership interests of EBG Holdings are held by: (1) K Road BG LLC, an affiliate of K Road (the asset manager of Boston Generating and the Boston Generating Project Companies), holding a 10.6 percent interest; (2) officers, directors, and employees of K Road BG LLC, holding 4.8 percent interests; and (3) various financial institutions, banks, institutional investors, investment companies or related entities not primarily engaged in energy-related activities, holding the remaining equity interests (collectively, EBG Members).

Astoria Generating is a limited partnership formed to own and operate three generating facilities in New York (collectively, Astoria Facilities). Astoria Generating sells power from the facilities at market-based rates in the New York Independent System Operator, Inc. (NYISO) market. The Astoria Generating Facility is a 1,280 MW facility located in Astoria, Queens, New York. The Gowanus Turbine Station is a 542 MW facility located in Brooklyn, New York. The Narrows Gas Turbines Station is a 276 MW facility located in Brooklyn, New York. Astoria Generating is owned by Astoria Acquisitions, the limited partner, and Astoria GP, the general partner, which in turn is

² Applicants state that they expect the securities sold through the IPO will be widely dispersed.

wholly-owned by Astoria Acquisitions. Astoria Acquisitions is a direct, wholly-owned subsidiary of Astoria Holdings.

Astoria Holdings is owned by Madison Dearborn Capital Partners IV LP (MDCP IV), Hunt Generation Investments and Transmission Services, L.P. (HGI), and various individuals (Astoria Individual Owners) (collectively, Astoria Holdings Owners). MDCP IV holds the majority membership interests in Astoria Holdings. MDCP IV also holds interests in various energy projects, but Applicants claim that these interests are outside the NYISO or ISO-NE markets. Madison Dearborn Partners, LLC, the general partner of MDCP IV, is a large United States private equity fund. HGI holds a minority membership interest in Astoria Holdings. HGI is owned indirectly by privately-held entities and trusts for the Ray L. Hunt family of Dallas, Texas. Applicants state that HGI and its owners do not own or control generation, transmission, or distribution in the NYISO or ISO-NE markets. The Astoria Individual Owners hold the remaining minority membership interests in Astoria Holdings. Applicants state that the Astoria Individual Owners do not own or control generation, transmission, or distribution in the NYISO or ISO-NE markets.

Merger Transaction

The Merger Transaction will involve the following steps: (1) The Astoria Holdings Owners will transfer their equity interests in Astoria Holdings to New Astoria Holdings, a newly formed entity. New Astoria Holdings will then exchange its ownership interests in Astoria Holdings for Class B (voting) Common stock in USPowerGen. (2) USPowerGen will create two direct, wholly-owned subsidiaries—EBG Merger and Astoria Merger—to facilitate the Merger Transaction. (3) EBG Holdings will be merged with and into EBG Merger, with EBG Holdings surviving; Astoria Merger will be merged with and into Astoria Holdings, with Astoria Holdings surviving. (4) EBG Members will receive Class A (non-voting) Common stock in USPowerGen. Applicants state that following the merger, New Astoria Generating will own 100 percent of USPowerGen's Class B (voting) Common stock, 46 percent of the economic benefits, and the right to appoint five of the nine directors of USPowerGen. EBG Members will own 100 percent of USPowerGen's Class A (non-voting) common stock, 54 percent of the economic benefits, and the right to elect four of the directors.

Applicants state that the Merger Transaction is consistent with the public interest and will not adversely affect competition, rates, or regulation. Applicants state that the Merger Transaction will not harm competition because there is no overlap of ownership or control of generation facilities in the relevant geographic markets—the ISO-NE (Boston Generating) and NYISO (Astoria Generating) control areas. Moreover, Applicants state that Boston Generating has not sold energy in NYISO and Astoria Generating has not sold energy in ISO-NE. Therefore, Applicants contend that the Merger Transaction creates no horizontal competitiveness concerns.

Although Applicants contend that the Merger Transaction will not result in any harmful horizontal competitive effects, they nonetheless analyze the impact of potential business transactions in the same geographic markets. Applicants analyze hypothetical situations in which the Boston Gen Project Companies' generation and Astoria Facilities would be allocated pro rata shares of import capability into, respectively, the NYISO and New York City (Zone J) markets and the ISO-NE and Northeast Massachusetts (NEMA)/Boston markets. Applicants analyze import conditions assuming each of the markets is unconstrained and find that Boston Generating and Astoria Generating would control only 0.3 percent of the capacity that could compete in the NYISO and ISO-NE markets, respectively. Under constrained conditions, Applicants find that the Boston Generating Companies would control 0.2 percent of the capacity in the Zone J market. Astoria would control less than 0.1 percent of the capacity in the NEMA/Boston market. Thus, Applicants conclude that the effect of Applicants' imports into either constrained or unconstrained markets is *de minimus*. Moreover, Applicants contend that the Astoria Facilities will continue to be subject to market power mitigation measures adopted by the NYISO, while the Boston Gen Project Companies' facilities will continue to be subject to mitigation procedures adopted by the ISO-NE. Applicants also analyze the effect of the merger on capacity and ancillary services markets in ISO-NE and NYISO. They conclude that given the locational nature of their generation and ISO-NE and NYISO requirements relating to sale of ancillary services, the transaction raises no competitive concerns in these markets.

Applicants also assert that the Merger Transaction does not raise competitive concerns with regard to vertical market power. Applicants state that there are no transmission concerns because they are not affiliated with an electric utility with a franchised service territory, and they do not own any transmission facilities other than interconnection facilities. Applicants state that they do not have the ability to erect barriers to entry for suppliers through control of siting capacity, fuel inputs to generation, or fuel transportation or equipment. Applicants state that they do not have any ownership interest in fuel supplies (except for fuel purchase and transportation agreements), fuel transportation systems, or other inputs to electricity products in the relevant markets.

Applicants state that the Merger Transaction will have no adverse effect on rates. Applicants contend that all sales of electric energy and ancillary services from the Boston Gen Project Companies and the Astoria Facilities will continue to be made at market-based rates or under the rules of the markets in which Applicants operate. Applicants add that neither the EBG Group nor the Astoria Group provides transmission service; therefore, no transmission rates are affected.

Applicants state that the Merger Transaction will not diminish the Commission's authority or affect any state regulatory agency's authority.

Applicants contend that the Merger 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 because none of the parties to the transaction are, or are affiliated with, traditional utilities with captive customers. Applicants represent that based on known or reasonably foreseeable information, the transaction will not result in, at the time of the transaction or in the future: (1) future 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 (Public Utility), and an associate company; (2) any new issuances of securities by a Public Utility, for the benefit of an associate company; (3) any new pledge or encumbrance of assets of a Public Utility, for the benefit of an associate company; or (4) any new affiliate contracts between a non-utility associate company and a Public Utility, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA.

Secondary Market Transactions

Applicants state that USPowerGen voting common stock will likely trade in the secondary market among financial institutions after the merger but prior to the IPO. All Class A (non-voting) Common Stock will become voting shares in USPowerGen upon the earliest of (1) closing of the IPO, (2) the first date the Astoria Members no longer beneficially own a majority of the Class B (voting) Common stock, or (3) the first date no shares of Class B Common stock are issued and outstanding.

Applicants request a two-year³ blanket authorization to trade the stock on essentially the same terms and conditions approved in *Boston Generating*.⁴ Specifically, the blanket authorization would apply to an investor that:

- is a financial institution or related entity that is not primarily engaged in energy-related business activities and is not affiliated with a traditional utility with captive customers;
- does not individually or collectively with affiliates own or control five percent or more of the voting interests in any public utility that has interests in any generation facilities or engages in jurisdictional activities within ISO-NE, where Boston Generating's facilities are located, and within NYISO, where the Astoria Facilities are located; and
- will hold no more than 20 percent of the equity interests in USPowerGen.

³ Applicants are seeking blanket authorization for a period ending immediately prior to the IPO or two years from the date from the Commission's order in this docket, whichever is earlier.

⁴ See *Boston Generating, LLC*, 113 FERC ¶ 61,109 (2005) (*Boston Generating*).

Applicants also commit to the notice and reporting requirements that applied to *Boston Generating*. Applicants will submit, both in a compliance filing within 30 days of the closing of the initial sales transaction, and in subsequent notifications of holding company equity sales transactions, the following information:

- the identity of both pre-and post-transaction equity holders (and percentage ownership) of USPowerGen;
- any contracts for (or summary of) power purchase agreements, energy management services, asset management services, and any fuel supply services provided to the Boston Gen Project Companies facilities or Astoria Facilities, including the contract counterparty, and any affiliation between that counterparty and post-transaction equity holders; and
- the identity of any party acquiring equity interests that is subject to the Commission's Code of Conduct Rules as a result of acquiring these equity interests.

Applicants state that they seek this authorization to facilitate the trading of equity interests in USPowerGen to encourage investment in energy infrastructure and to attract capital to the energy sector.

Applicants state that the Secondary Market Transactions are consistent with the public interest and will have no adverse effect on competition, rates, or regulation. With respect to competition, Applicants contend that the Secondary Market Transactions raise no horizontal market power issues. Applicants state that none of the investors or their affiliates would have controlling interests in other generation in the relevant control areas, and none would be able to exercise control over the Boston Gen Project Companies' facilities or the Astoria Facilities because of the 20 percent ownership restriction in USPowerGen. Similarly, Applicants state that the transaction raises no vertical market power concerns because the 20 percent ownership restriction in USPowerGen limits ownership or control of voting interests in public utilities that are engaged in jurisdictional activities, including those that own transmission. Applicants add that their proposed conditions would also restrict ownership of or affiliation with traditional public utilities with captive customers, including those that own transmission.

Applicants assert that the Secondary Market Transactions will have no adverse effect on rates because all sales of electric energy and ancillary services from the Boston Gen Project Companies and the Astoria Facilities will continue to be made at market-based rates and under the rules of the markets in which they operate. Applicants state that the transaction will have no effect on the rates, terms, or conditions of any wholesale power agreements. Applicants add that neither the EBG Group nor the Astoria Group provides any transmission service.

Applicants state that neither Commission nor state regulation will be affected by the Secondary Market Transactions.

Applicants state that the Secondary Market Transactions will not result in cross-subsidization of a non-utility associate company nor the pledge or encumbrance of utility assets for the benefit of an associate company. Applicants state that none of the parties to the transaction are, or are affiliated with, traditional utilities with captive customers. Moreover, Applicants state that under the ownership restrictions in USPowerGen the acquiring party cannot be or be affiliated with a traditional utility with captive customers.

Notice of the application was published on March 20, 2007, with comments, protests, or interventions due on or before April 3, 2007. None were received. Notices of intervention and unopposed timely filed motions to intervene are granted pursuant to the operation of Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214). Any opposed or untimely motion to intervene is governed by the provision of Rule 214.

If, as result of the IPO, there is a change of control over USPowerGen or other disposition of jurisdictional facilities that requires authorization under section 203(a)(1), the requisite application seeking such authorization would need to be filed.

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.⁵ The foregoing authorization may result in a change in status. Accordingly, USPowerGen, Boston Generating, and Astoria Generating are advised that they must comply with the requirements of Order No. 652. In addition, USPowerGen, Boston Generating, and Astoria Generating shall make appropriate filings under section 205 of the FPA, to implement the transaction.

After consideration, it is concluded that the Merger Transaction and the Secondary Market Transactions are consistent with the public interest and are hereby authorized, subject to the following conditions:

- (1) The Merger Transaction and the Secondary Market Transactions are authorized upon the terms and conditions and for the purposes set forth in the application;

⁵ *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).

- (2) 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;
- (3) 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;
- (4) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate;
- (5) If the transactions result 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;
- (6) Applicants shall make appropriate filings under section 205 of the FPA, as necessary, to implement the transaction;
- (7) This order does not relieve acquirers of securities in these transactions from the necessity of making appropriate filings under section 203 of the FPA, as required;
- (8) Applicants shall notify the Commission that the Secondary Market Transactions have been consummated in accordance with the understanding discussed in the body of this order;
- (9) USPowerGen shall provide the Commission with updates at six-month intervals regarding issuances of voting securities to the public; and, for a two-year period commencing with the IPO, shall inform the Commission within 10 days after obtaining or receiving information, or after receiving any notification as a result of regulations imposed by the Securities and Exchange Commission (SEC), that a party or entity has acquired five percent or more of its equity securities, as that term is defined in SEC Schedules 13 D and 13 G; and
- (10) Applicants shall notify the Commission within 10 days of the date that the Merger Transaction has been consummated.

This action is taken pursuant to the authority delegated to the Director, Division of Tariffs and Market Development - West, under 18 C.F.R. § 375.307. This order

Docket No. EC07-67-000

9

constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days of the date of issuance of this order, pursuant to 18 C.F.R. § 385.713.

Steve P. Rodgers
Director
Division of Tariffs and Market Development – West