

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Midwest Generation, LLC
Nesbitt Asset Recovery, Series C-1
Nesbitt Asset Recovery, Series C-2
Nesbitt Asset Recovery, Series C-3
Nesbitt Asset Recovery, Series C-4

Docket No. EC04-73-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued May 10, 2004)

I. Introduction

1. On March 12, 2004, as supplemented March 18, 2004, Midwest Generation, LLC (Midwest), along with four Owner Trusts¹ (collectively, Applicants), filed an application pursuant to section 203 of the Federal Power Act (FPA)² requesting Commission authorization for the disposition of jurisdictional facilities associated with the termination of a sale and leaseback arrangement involving the Collins Generating Station (Collins Facility), a 2,698 megawatt generating plant located in Illinois. The jurisdictional facilities involved are Midwest's market-based rate schedule, the Collins Power Purchase Agreements (PPAs) with the Commonwealth Edison Company (ComEd), and interconnection facilities associated with the Collins Facility. The Commission has

¹ The Owner Trusts are Nesbitt Asset Recovery, Series C-1 (Series C-1), Nesbitt Asset Recovery, Series C-2 (Series C-2), Nesbitt Asset Recovery, Series C-3 (Series C-3), and Nesbitt Asset Recovery, Series C-4 (Series C-4) (collectively referred to as Owner Trusts).

² 16 U.S.C. § 824b (2000).

reviewed the transaction under the Merger Policy Statement³ and will authorize the disposition under section 203 of the FPA as consistent with the public interest.

II. Background

A. Description of the Parties and the Current Ownership Structure

2. Midwest is engaged exclusively in owning and operating the Collins Facility and other electric generation plants and marketing the output of such facilities to wholesale customers. Midwest is an indirect wholly-owned subsidiary of Edison Mission Energy (EME) and an affiliate of Southern California Edison Company. EME is an indirect wholly-owned subsidiary of Edison International, an exempt holding company under the Public Utility Holding Company Act of 1935 (PUHCA).⁴ Midwest is authorized by the Commission to sell power at market-based rates. Midwest owns or controls transmission facilities necessary to interconnect its generation facilities to the transmission grid, but neither owns nor controls any other transmission facilities.

3. The Owner Trusts are business trusts, each of which holds title to a 25 percent interest in the Collins Facility. The Owner Trusts are indirect wholly-owned subsidiaries of Public Service Enterprise Group, Inc., and do not themselves engage in any power sales or transmission service activities. The Owner Trusts currently lease the Collins Facility to Collins Holdings EME, LLC, which then subleases it back to Midwest. Midwest is solely responsible for operating the facility and marketing its output.

B. Description of the Proposed Transaction

4. Applicants propose to terminate the current sale and leaseback structure and create a new ownership structure in which Midwest will own, either directly or indirectly, 100 percent of the Collins Facility.

³ 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. 33,342 (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. 70,984 (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).

⁴ 15 U.S.C. § 79 et seq. (2000).

III. Notice, Intervention and Protests

5. Notice of Applicants' initial filing was published in the Federal Register⁵ with comments, protests, or interventions due on or before April 2, 2004. Notice of Applicants' March 18, 2004 supplement was subsequently published in the Federal Register⁶ with comments, protests or interventions still due on or before April 2, 2004. Exelon Corporation (Exelon) filed a timely motion to intervene and requests that the Commission condition any approval of the proposed transaction on a commitment by Midwest to subject any proposed retirement of the Collins Facility to PJM's generation retirement policy.

6. On April 7, 2004, Applicants filed a request for leave to answer and an answer to Exelon's comments.

IV. Discussion

A. Procedural Matters

7. Pursuant to rule 214 of the Commission's Rules of Practice and Procedure,⁷ the timely, unopposed motion to intervene serves to make the entity that filed it a party to this proceeding. Rule 213 of the Commission's Rules of Practice and Procedure⁸ prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Applicants' answer because it has provided information that assisted us in the decision-making process.

B. Standard of Review

8. Section 203(a) of the FPA provides that the Commission must approve a disposition of jurisdictional facilities if it finds that the disposition "will be consistent with the public interest."⁹ Under the Merger Policy Statement, the Commission's analysis of whether a disposition of facilities is consistent with the public interest generally involves the consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.¹⁰ As discussed below, we will

⁵ 69 Fed. Reg. 13,516 (2004).

⁶ 69 Fed. Reg. 16,245 (2004).

⁷ 18 C.F.R. § 385.214 (2003).

⁸ 18 C.F.R. § 385.213(a)(2) (2003).

⁹ See 16 U.S.C. § 824b.

¹⁰ See generally Merger Policy Statement at ¶ 30,111.

approve the proposed disposition of jurisdictional facilities as consistent with the public interest.

1. Effect on Competition

9. Applicants explain that the disposition of jurisdictional assets proposed here will not affect competition because it will not result in a change of control over the operation or the marketing of the output of the Collins Facility; Midwest will control the Collins Facility before and after the transaction. Applicants state that the transaction will result in no change in concentration of ownership of generation or market shares for Midwest and its affiliates.

10. We agree with Applicants' analysis of the competitive effects of the proposed transaction. We find that Applicants' proposal will not result in any functional change in the operation of the Collins Facility or the marketing of its output, since Midwest will continue to operate the plant and market its output as it did under the sublease, and the Collins PPA will continue to be in effect. As a result, we find that the proposed transaction will have no adverse effect on competition.

2. Effect on Rates

11. Applicants explain that the proposed transaction will not affect rates because wholesale sales from the Collins Facility have been and will continue to be made at market-based rates. Applicants note that Midwest has no franchised service territory or captive customers whose rates would be affected by the proposed transaction. Applicants also note that Midwest has no transmission customers.

12. We agree with the Applicants, and 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. Therefore, we find that the proposed transfer will not adversely affect rates.

3. Effect on Regulation

13. Applicants state that the proposed transaction will not impair the effectiveness of the Commission's or any State's regulation of Midwest. Applicants state that the transaction does not result in the formation of a new registered holding company subject to the Securities and Exchange Commission's (SEC) jurisdiction under PUHCA. Likewise, Applicants state that all sales from the facility will continue to be entirely at wholesale and not subject to State commission regulation.

14. We find that the transaction will not result in a shift of regulation from the Commission to the SEC. We note that no party has raised concerns about the proposed

transaction's effect on State or Federal regulation, and no State has indicated that it lacks jurisdiction to consider the transaction's effect on retail rates. Thus, we conclude that the proposed disposition of jurisdictional facilities will not adversely affect Federal or State regulation.

4. Request for Condition on Approval

a. Exelon Comments

15. Exelon is a registered holding company whose holdings include ComEd. ComEd currently purchases the output of the Collins Facility at wholesale from Midwest under the Collins PPA.¹¹ Exelon contends that a form recently filed with the SEC indicates that Midwest may retire the Collins plant after the Collins PPA expires.¹² Exelon states that a retirement of the Collins Facility could affect reliability because it would reduce the voltage stability margin in the control area. Exelon notes that while the ComEd control area would still meet its planning criteria in 2005 with reduced margins, it might fail to meet the criteria in future years. Accordingly, Exelon requests that the Commission condition any approval of the transaction on Midwest agreeing to subject any retirement of the Collins Facility to PJM's generation retirement policy. Exelon states that this policy requires that notice of a proposed retirement of generation be given to PJM to allow for an assessment of the effect on reliability.

b. Applicants' Response

16. Applicants argue in their answer that the condition proposed by Exelon is unrelated to the subject of the application and is unnecessary. Applicants state that "[r]etirement of the Facility is one possible future option."¹³ However, Applicants argue that retirement is a separate issue, and not part of the transaction proposed here. Additionally, Applicants explain that when ComEd transfers control over its transmission facilities to PJM, the PJM Operating Agreement and associated market rules will apply to certain wholesale sales activities and generator and transmission facility operations within the ComEd service territory. At that time, Midwest will be obligated to comply with applicable PJM retirement rules, and PJM will have the ability and authority to enforce those rules as necessary. Applicants also contend that the imposition of the condition requested by Exelon would be "particularly unfair, given that PJM has not yet adopted a final rule with respect to generator retirements," and that while an interim rule

¹¹ The Collins PPA between ComEd and Midwest expires on December 31, 2004.

¹² See Motion to Intervene and Comments of Exelon at 2-3.

¹³ Request for Leave to Answer and Answer of Applicants at 3.

is in place, “there is no reasonable basis for applying such a rule to generation that is not yet located within PJM.”¹⁴

c. Commission Findings

17. Applicants are only requesting Commission approval under section 203 of the FPA for a disposition of jurisdictional facilities. Our determination that the proposed transaction is consistent with the public interest does not affect any other approvals necessary to complete the transaction, such as approval by a State commission, any necessary consent from any party to a contract, or any required PJM approval.¹⁵ The issue of Midwest subjecting any retirement of the Collins Facility to PJM’s generation retirement policy is a matter that will be resolved under any applicable rules at that time. We agree with Applicants that the possible retirement of the Collins Facility is not part of the disposition of jurisdictional facilities connected with the termination of the sale and leaseback arrangement proposed here.

The Commission orders:

(A) Applicants’ proposed disposition of jurisdictional facilities is hereby 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 appropriate filings under section 205 of the FPA, as necessary, to implement the transaction; and

¹⁴ Id. at 4-5.

¹⁵ See Otter Tail Power Company, 97 FERC ¶ 61,226 at ¶ 62,033 (2001), order on reh’g, 98 FERC ¶ 61,112 at ¶ 61,355 (2002); see also Commonwealth Atlantic Limited Partnership, Commonwealth Atlantic Power, LLC, 97 FERC ¶ 61,375 at ¶ 62,719 (2001).

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

By the Commission.

(S E A L)

Magalie R. Salas
Secretary