

107 FERC ¶ 61, 148
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Exelon New England Holdings, LLC
Boston Generating, LLC
EBG Holdings, LLC

Docket No. EC04-77-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued May 10, 2004)

1. On March 19, 2004, Exelon New England Holdings, LLC (Exelon New England), Boston Generating, LLC (Boston Generating), and EBG Holdings, LLC (EBG Holdings) (collectively, Applicants) filed a joint application pursuant to section 203 of the Federal Power Act (FPA)¹ requesting Commission authorization for an indirect disposition of jurisdictional facilities associated with the transfer of 100 percent of the membership interests in Boston Generating from Exelon New England to EBG Holdings. The Commission has reviewed the transaction under the Commission's Merger Policy Statement² and will authorize the disposition as consistent with the public interest.

¹ 16 U.S.C. § 824b (2000).

² 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., Regulations Preambles July 1996-December 2000 ¶ 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-December 2000 ¶ 31,111 (2000), order on reh'g, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001).

I. Background

A. Description of Applicants

2. Boston Generating, a direct, wholly-owned subsidiary of Exelon New England,³ owns all of the outstanding limited liability company interests of three public utility companies: Mystic I, LLC; Mystic Development, LLC; and Fore River Development, LLC (collectively, “Project Companies”). The Project Companies own four generating units in the Boston area, with an aggregate nominal capacity of approximately 3000 megawatts (MWs), and the transmission facilities that interconnect the generating units to the transmission grid of ISO-New England, Inc. (ISO-NE). All of the Project Companies have market-based rate authority.

3. EBG Holdings is a newly created special purpose entity that will be indirectly owned by a group of financial institutions that are lenders (Lenders)⁴ to Boston Generating under a credit agreement (Credit Agreement).

B. The Transaction

4. The proposed transfer of the membership interests in Boston Generating to EBG Holdings is the first part (Stage I) of a two-step process by which Exelon New England and its affiliates will divest themselves of ownership and control of the Project Companies. Stage I, the subject of this application, is the divestiture of Exelon New England’s downstream ownership of the Project Companies. The next step (Stage II) will divest Exelon New England’s indirect control over the Project Companies’ jurisdictional facilities to an entity yet to be determined that will not be affiliated with EBG Holdings or Exelon New England. The Stage II transaction will be the subject of a later application under FPA section 203.

³ Exelon New England is wholly owned by ExGen, an indirect, wholly-owned subsidiary of the Exelon Corporation (Exelon).

⁴ The administrative agent for the Lenders is BNP Paribas. The Lenders also include: (1) National Australia Bank Limited; (2) The Bank of Nova Scotia; (3), Rabobank Ireland plc; (4) Sumitomo Misui Banking Corp.; (5) Toronto Dominion, Inc.; (6) Abbey National Treasury Services; (7) Australia and New Zealand Banking Group Limited; (8) Governor and Company of the Bank of Scotland; (9) The Bank of Tokyo-Mitsubishi, Ltd., New York Branch; (10) Bayerische Landesbank, Cayman Islands Branch; (11) Bayerische Hypo-Und Vereinsbank AG, New York Branch; (12) Credit Lyonnais, New York Branch; (13) CoBank ACB; (14) Credit Suisse First Boston; (15) DZ Bank AG, Deutsche Zentral-Genossenschaftsbank, Frankfurt am Main; (16) Fortis Capital Corp.; (17) NIB Capital Bank N.V.; and (18) JPMorgan Chase Bank.

5. The Stage I transaction arises because Boston Generating has defaulted to a group of Lenders, who have agreed to accept a voluntary transfer of membership interests in Boston Generating to a special purpose subsidiary to be indirectly owned by the Lenders. For the time being, an Exelon affiliate will continue to market power from the generators, and the Lenders and their subsidiary will have no voice in the operation of the jurisdictional facilities or the control of the power sales.

6. Applicants request confidential treatment of certain documents pursuant to 18 C.F.R. § 388.112, including the Master Settlement and Transaction Agreement, the Amended and Restated Forbearance Agreement, the Transfer Agreement, the Form of Transition Services and Operating Agreement, the Form of Marketing and Procurement Agreement, and the Form of Limited Liability Company Agreement of EBG Holdings LLC. Applicants contend that confidential treatment of these documents is necessary due to the sensitive commercial and financial information contained therein.

II. Notice and Interventions

7. Notice of the filing was published in the Federal Register, 69 Fed. Reg. 16,245 (2004), with comments, protests, or interventions due on or before April 9, 2004. NSTAR Electric & Gas Corporation (NSTAR) and ISO-NE filed timely motions to intervene and comments. The Utility Workers Union of America, Local No. 369 (Local 369) filed a timely motion to intervene in which they argue that we should reject the filing as deficient; it also opposes Applicants' request for confidential treatment. On April 16, the Commission notified Applicants that the Commission was considering release of protected materials, and requested that Applicants provide additional information justifying their position.

8. On April 22, 2004, Applicants filed a response to Local 369's protest and a response to the Commission's April 16, 2004 letter regarding Applicants' request for confidential treatment.

III. Discussion

A. Procedural Matters

9. Pursuant to rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

10. Rule 213 of the Commission's Rules of Practice and Procedure 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 our decision-making process.

B. Section 203 Analysis

11. 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.”⁵ 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.⁶ As discussed below, we will approve the proposed disposition of jurisdictional facilities as consistent with the public interest.

1. Effect on Competition

12. Applicants state that the proposed transfer will have no adverse effect on competition. They assert that neither EBG Holdings nor the Lenders have any affiliates that have more than de minimis interests in generation, transmission or distribution facilities in the relevant geographic markets and that neither entity will exercise operational control over any jurisdictional facilities or generation of the Project Companies. No party intervened to dispute Applicants’ statements to this effect. NSTAR, while not protesting the application, filed comments stating that it urges the Commission to consider the current degree of ownership concentration in the Northeastern Massachusetts area and to promote greater ownership diversity when ruling on this case. Based on the facts of the application as presented, we agree that the transaction will not adversely affect competition.

2. Effect on Rates

13. Applicants assert that there will be no adverse impact on rates for wholesale sales of power because all sales of electric energy from the Project Companies will continue to be made at market-based rates as authorized by the Commission. Applicants also assert that none of the Project Companies makes any retail sales and, therefore, the transaction will have no effect on retail rates. No party intervened to dispute Applicants’ statements to this effect. Based on the facts of the application as presented, we agree that the transaction will not adversely affect rates.

3. Effect on Regulation

14. Applicants assert that the proposed transaction will not adversely affect regulation. They assert that the proposed transfer will not affect the manner or extent to which the Commission or any State may regulate the Project Companies. The status of the Project

⁵ 16 U.S.C. § 824b (2000).

⁶ Supra note 2.

Companies as public utilities subject to the jurisdiction of the Commission will not change as a result of the proposed transaction. We find that the transaction will not result in a shift of regulation from the Commission to the Securities and Exchange Commission.

15. Local 369 asserts that the proposed transfer of ownership could affect regulation, and that Applicants have not demonstrated that the proposed transfer is consistent with the public interest. Despite Local 369's assertion, we see nothing in the record indicating that the proposed transfer will adversely affect regulation. Accordingly, based on the facts of the application as presented, we agree that the transaction will not adversely affect Commission or state regulation.

C. Other Issues

1. ISO New England

16. ISO-NE requests that the Commission condition any approval of Applicants' filing on the Applicants resolving certain reliability concerns. It asserts that in order to effectuate the transfer, a reconfiguration of generation units with respect to the ISO-NE's data communications system will be necessary. However, this may leave another generator without a system that will allow ISO-NE to dispatch the unit, which is an unacceptable reliability risk. ISO-NE also asserts that any reconfiguration should not take place until after the Summer season to ensure that the transfer will not have an adverse impact on reliability. ISO-NE also asserts that prior to conducting the reconfiguration, Applicants are required to secure ISO-NE's approval pursuant to certain NEPOOL operating procedures.

17. The Commission does not believe it necessary to impose the requested condition. Our authorization does not relieve Applicants from regulatory requirements or contractual obligations involving other entities, including ISO-NE. Moreover, the Stage I Transaction is solely a structural change in ownership, not operation, of the jurisdictional facilities and associated generating units. Applicants have stated that Exelon affiliates will retain control over the administration, management and operations of the facilities and will perform all marketing activities for the Project Companies until a Stage II transaction occurs that will transfer those functions to a non-Exelon entity.⁷ ISO-NE states that the various parties involved with the reliability matters have held discussions,

⁷ Applicants state that although the generating units are currently in operation, there are material elements of construction that have not been completed due to disputes with contractors. They also state that those disputes have now been resolved and that prompt approval of the Stage I transaction will allow the construction process to be completed in a timely fashion. Application at 23-24. The Commission presumes that such construction activities do not implicate the reliability concerns raised by the ISO-NE.

but that its reliability concerns have not yet been resolved. If those concerns remain at the time of the Stage II filing, they will be addressed at that time. We note that our authorization of the Stage I transaction here does not prejudice any cost issues arising from any resolution of reliability matters or independent actions by affected parties to address those matters.

2. Local No. 369

18. Local 369 claims that the filing is deficient because the sale agreements are unexecuted and the corporate structure for the new entities, including selection of a managing member to control the facilities on behalf of passive owners, is not yet finalized. Second, Local 369 asserts that there is no information on how service companies will be compensated, or that this may affect the incentive of the service providers to operate the plants safely and reliably. Local 369 also asserts that approval of the transfer may result in incentives for additional layoffs, and implies that this could compromise reliability at the transferred facilities. Lastly, Local 369 opposes Applicants' request for confidential treatment, claiming that confidentiality would not be in the public interest.

19. We disagree that we must have a finalized proposal, including fully executed contracts, in order to approve a disposition of facilities. Order No. 642 does not require fully executed agreements. Draft agreements are satisfactory as long as there is no material change in the executed contract. Also, we would be authorizing the transfer of ownership to EBG Holdings without asserting jurisdiction over EBG Holdings as a passive owner. So long as the final agreement maintains EBG Holdings as a passive entity, the exact ownership and structure of EBG Holdings is not necessary for our prior approval. Applicants will be required to provide those details upon consummation of the Stage I transaction.

20. We also decline to reject Applicants' proposal based on Local 369's concerns about layoffs and reliability. While we may consider factors other than competition, rates and regulation when reviewing transactions under section 203 of the FPA,⁸ Local 369 has not shown that the new owners are likely to implement measures compromising reliability.

21. We will grant Applicants' request for confidential treatment. Applicants state that the information contained in the documents is sensitive commercial and financial information, and that disclosure could impede the ability of the parties to the underlying transactions to negotiate similar transactions in the future. Nevertheless, the Commission in the past has given little credence to predictions of competitive harm, based on

⁸ 18 C.F.R. § 2.26(b) (2003).

conjecture, that are not sufficient to show substantial harm to a company's competitive position or to competition in general.⁹ Rather, the Commission is concerned with fostering competition through transparency of rates and terms of services rather than protecting individual competitors. In this case, however, there are other mitigating factors which persuade us to grant Applicants' request. Local 369 is neither a competitor nor a customer of the Applicants. Local 369 has already executed a nondisclosure agreement with Applicants' counsel and received copies of the transaction documents. Because Local 369 is already in possession of the documents in question, and because no other party has protested the request for confidential treatment, we see no reason to deny Applicants' request.

The Commission orders:

(A) The transaction is authorized upon the terms and conditions and for the purposes set forth in the application, effective as of the date 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 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;

(D) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate; and

(E) Applicants are required to notify the Commission within 10 days of the consummation of the proposed Stage I transaction and to provide details of the exact ownership structure of EBG Holdings.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁹ See Entergy Services, Inc., 105 FERC ¶ 61,208 (2003).