

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Orion Power Holdings, Inc. Docket No. EC04-120-000
Great Lakes Power Inc.
Brascan Power Hudson River LLC
Brascan Power St. Lawrence River LLC
Brascan Power Lake Ontario LLC

ORDER AUTHORIZING DISPOSITION OF
JURISDICTIONAL FACILITIES

(Issued September 21, 2004)

I. Introduction

1. On June 14, 2004, as amended June 29, 2004, Orion Power Holdings, Inc.¹ (Orion), Great Lakes Power Inc. (Great Lakes Power), Brascan Power Lake Ontario LLC (Brascan Lake Ontario), Brascan Power St. Lawrence River LLC (Brascan St. Lawrence River), and Brascan Power Hudson River LLC (Brascan Hudson River) (collectively, Applicants) filed a joint application under section 203 of the Federal Power Act (FPA)² requesting Commission authorization for a two-step transfer of jurisdictional facilities.³

¹ Orion submits this application on behalf of itself and the following wholly-owned subsidiaries: Orion Power New York GP II, Inc. (Orion Power NY GP II), Erie Boulevard Hydropower, L.P. (Erie), and Carr Street Generating Station, L.P. (Carr Street) (collectively, Orion Project Companies).

² 16 U.S.C. § 824b (2000).

³ The two-step transfer will occur under the Purchase and Sale Agreement among Orion, Reliant Energy, Inc. (Reliant), Great Lakes Power, and Brascan Corporation (Brascan).

The jurisdictional facilities are power purchase agreements, transmission interconnection facilities, interconnection agreements, and related accounts, books, and records.

II. Background

A. Description of the Parties

2. Orion is a wholly-owned subsidiary of Reliant. Orion owns a number of jurisdictional subsidiaries that are engaged in the ownership and operation of generation facilities and the selling of energy and energy-related products at wholesale. Reliant provides electric energy-related services to wholesale and retail customers.

3. Orion Power NY GP II is a direct, wholly-owned subsidiary of Orion. It owns and operates the 2.2 megawatt (MW) Newton Falls hydroelectric project on the Oswegatchie River in St. Lawrence County, New York. Orion Power NY GP II is authorized by the Commission to sell power at market-based rates.

4. Erie is an indirect, wholly-owned subsidiary of Orion. It owns and operates 71 hydroelectric facilities in the State of New York with a total rated capacity of approximately 672 MWs. Erie is authorized by the Commission to sell power at market-based rates.

5. Carr Street is a public utility and an indirect, wholly-owned subsidiary of Orion. It owns and operates a 102 MW gas-fired combined cycle cogeneration facility in East Syracuse, New York. Carr Street is authorized by the Commission to sell power at market-based rates.

6. Brascan, headquartered in Toronto, Canada, has real estate, power generating and asset management businesses in North and South America. Through subsidiaries, Brascan owns operating interests in 43 power generating stations in North America with a combined generating capacity of 1,741 MWs. Brascan, through downstream subsidiaries, also owns a 110 MW cogeneration facility in northern Ontario and a 25 MW cogeneration facility in New Hampshire.

7. Great Lakes Power is a wholly-owned direct and indirect Canadian subsidiary of Brascan. It will own 100 percent of the shares of Great Lake Holding America Corporation (Great Lakes Holding), which in turn will own Brascan Power New York Corporation and Brascan Power New York GP Corporation. These two subsidiaries will hold the partnership interests of Erie (to be renamed Brascan Power New York Hydro L.P.) and Carr Street (to be renamed Brascan Power New York Thermal L.P.), respectively.

B. Description of the Proposed Transaction

8. According to the application, the proposed transaction will be accomplished in two stages. The first stage involves the sale to Great Lakes Power of Erie, whose name will be changed to Brascan Power New York Hydro L.P., and of Carr Street, whose name will be changed to Brascan Power New York Thermal L.P. If the internal reorganization is not completed before the closing date, then Orion Power Operating Services Coldwater, Inc. (OPOS Coldwater), Orion Power Operating Services Carr Street (OPOS Carr Street)⁴ and Orion Power NY GP II to Great Lakes Power, will be sold to Great Lakes Power.

9. In the second stage, Great Lakes Power will simultaneously or shortly thereafter transfer the hydroelectric projects owned by Erie to Brascan St. Lawrence River, Brascan Lake Ontario, Brascan Hudson River (collectively, the Brascan Hydro Subsidiaries) and, if the internal reorganization has not occurred before the closing date, it will convert Orion Power NY GP II to Brascan St. Lawrence River, a limited liability company, simultaneously with the transfer of any hydroelectric projects.

10. The application explains that Great Lakes Power intends to transfer the Erie hydroelectric plants to the three Brascan Hydro Subsidiaries simultaneously with the stage one closing, but may not be able to complete the initial organization of the Brascan Hydro Subsidiaries and obtain market-based rate authorization for each in a timely manner. Therefore, Great Lakes Power requests that the Commission approve such a transfer in this application, but allow Great Lakes Power to stagger the second stage of closing if necessary.

III. Notice, Interventions and Protests

11. Notice of the filing was published in the *Federal Register*, 69 Fed. Reg. 35,340 (2004), with comments, protests, or interventions due on or before July 6, 2004. The City of Lockport, New York (Lockport) filed a timely motion to intervene and comment. The Town of Moreau, New York (Moreau) and the South Glens Falls Central School District (the School District) filed a joint protest and motion to intervene. On July 13, 2004, Orion filed an answer to these motions to intervene, and Great Lakes Power, Brascan Lake Ontario, Brascan St. Lawrence River and Brascan Hudson River (collectively, the Applicants) also filed an answer to these motions to intervene on July 14, 2003.

⁴ Neither OPOS Coldwater nor OPOS Carr Street owns or control any jurisdictional facilities.

12. On July 22, 2004, the Green Island Power Authority (GIPA) submitted a motion to intervene out of time requesting clarification and, if necessary, supplemental conditions. The Applicants filed an answer to this motion on July 23, 2004.

IV. Discussion

A. Procedural Matters

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will grant GIPA's motion to intervene out of time because we find that GIPA has demonstrated good cause for its delay in filing, the early stage of this proceeding, and the fact that the interventions will not disrupt the proceeding or burden other parties. 18 C.F.R. § 385.214(a) (2004).

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure 18 C.F.R. § 385.213(a) (2)(2004) prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Applicants' answers because they have provided information that assisted us in the decision-making process.

B. Standard of Review

15. Section 203(a) 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.

⁵ 16 U.S.C. § 824b (2000).

⁶ 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. 33,341 (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-Dec. 2000 ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001).

1. Effect on Competition

16. Applicants state that the proposed transaction is consistent with the public interest and presents neither horizontal or vertical market power issues. With respect to horizontal market power, Applicants assert that neither Great Lakes Power, nor any of its affiliates or subsidiaries, currently owns any generation facilities in the relevant geographic market, the New York Independent System Operator (NYISO) control area. Applicants state that the amount of generation affected by this transaction (approximately 776 MWs) is less than 2.1 percent of the total generating capacity in NYISO market (approximately 36,500 MWs) and should be considered *de minimis*. Applicants contend that the proposed transaction would actually decrease concentration in the NYISO market. With respect to vertical market power, Applicants state that neither Great Lakes Power nor any of its affiliates own or control any transmission facilities, fuel, fuel supply facilities and interstate gas pipelines in the New York control area.

17. Lockport argues that the market analysis should address the ability of an entity to affect the supply of power, especially renewable power, and hence prices, within and into the State of New York. Lockport is concerned that the application's market analysis, which focuses upon comparison to Reliant, misses the mark. Lockport argues that the Applicant's inclusion of the Erie Boulevard-Niagara Mohawk power purchase agreement in their application makes it clear that the aggregation of a significant number of hydro projects into the hands of a few entities will give those entities greater market power with which to extract from the local utility rates and terms more favorable to themselves than those usually offered to smaller power producers.

18. In its answer to Lockport's protest, Orion argues that the application specifically compares the amount of generation affected by the proposed transaction – 776 MWs – with the total generation in the NYISO control area of approximately 36,500 MWs. Orion states that following the consummation of the proposed transaction, the amount of generation that Applicants will control within New York will be a mere 2.1 percent of the total generation in the NYISO control area. In their separate answer, Applicants argue that the market analysis shows that the proposed transaction will not give Great Lakes Power or its subsidiaries the ability to influence power supply within and into New York, and in fact will de-concentrate the New York wholesale power market. Applicants contend that a 2.1 percent share of the generation in a market the size of New York is simply too small to influence market prices, as is the 4.3 percent market share that Applicants would possess if import capacity were taken into account.

19. We find that the proposed transaction will not adversely affect competition. The proposed transaction will not result in any meaningful change in NYISO market shares or concentration and thus does not raise any horizontal market power issues. The proposed transaction will lead to a small decrease in NYISO market concentration and will

increase the number of competitors present in the NYISO market. Similarly, the proposed transaction does not raise any vertical market power issues because neither Great Lakes Power nor its affiliates own or control any inputs to electricity products, such as electric transmission systems, fuel, fuel supply facilities or interstate gas pipelines in the NYISO control area. As the transaction will not adversely affect competition, we find Lockport's protest to be without merit.

2. Effect on Rates

20. Applicants state that the proposed transaction will not have an adverse effect on wholesale rates because sales of the output of the generation facilities associated with the Orion Project Companies will continue to be made at market-based rates. Applicants also state that none of the Orion Project Companies makes any retail sales, and, therefore, the proposed transaction will have no effect on retail sales.

21. Lockport notes that many ratepayers in New York are currently making payments to Niagara Mohawk Power Corporation (Niagara Mohawk) for stranded costs associated with Niagara Mohawk's divestiture of hydro plants in the late 1990s. Lockport states that the purchase prices to be paid in the proposed transaction indicate that Erie Boulevard/Reliant will reap a significant windfall on its hydro investment, while New York ratepayers continue to pay for stranded costs on the original sale of those same assets. Lockport argues that the increase in value paid by a Canadian corporation suggests that the Commission should consider the need to inquire about whether the shifting of control over so many hydro assets to foreign corporations is in the public interest.

22. Orion responds that the stranded costs issue raised by Lockport has no bearing on the proposed transaction. In support, Orion asserts that Niagara Mohawk has no ownership interest in the facilities to be transferred, is not a party to the transaction, and is not affiliated with any party to the transaction.

23. As noted in the Commission's Merger Policy Statement,⁷ the Commission primarily examines a disposition's effect on rates in order to protect wholesale power and transmission service customers. We note that nothing in the application indicates that

⁷ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044, at P 30,126.

rates to customers will increase as a result of the proposed transaction, and no customer argues otherwise. For these reasons, we are satisfied that the proposed transaction will not adversely affect rates, and we will reject the protests as lacking in merit.

3. Effect on Regulation

24. With respect to regulation, Applicants state that the rates, terms, and conditions of wholesale sales by the Orion Project Companies will continue to be subject to the Commission's regulation to the same extent after the proposed transaction as they were before the transaction. Applicants also state that all sales of electric power from the Orion Project Companies will continue to be at wholesale, and therefore, will not be subject to the regulation of any state commission.

25. 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 state or federal regulation.

4. Request for Joint Agency Hearings

26. Lockport requests that the Commission consider convening joint-agency hearings with the New York Public Service Commission (NYPSC) in order to avoid a piecemeal analysis of the transaction that could prejudice the NYPSC's exercise of its authority under the New York Public Service Law. In support of its request, Lockport argues that the transfer of licensed projects from Erie Boulevard to other entities appears to be subject to section 70 of the New York Public Service Law, which requires a finding by the NYPSC that the transfer of jurisdictional assets is in the interest of New York ratepayers.

27. Orion argues that Lockport fails to state a legal basis for convening such joint hearings. In addition, Orion argues that the Commission has no authority to delegate its section 203 jurisdiction to the NYPSC or to convene joint agency consideration of an application under section 203 of the FPA. Orion notes that the Applicants have submitted petitions to the NYPSC for various approvals related to the proposed transaction. Applicants contend that precedent clearly shows that the Commission and the NYPSC are both fully aware of their obligations and authority with respect to transactions involving assets located in New York, and each is quite willing and able to exert its respective authority without the other's assistance.

28. Orion's contention that the Commission does not have the authority to convene joint agency proceedings in a section 203 proceeding is incorrect. Section 209(a) of the FPA⁸ expressly provides that it is within the Commission's discretion to refer any matter arising under Part II of the FPA to a joint board composed of Commission-appointed members nominated by the affected states. However, we do not believe that joint hearings would be of assistance in this proceeding as there are no factual issues in dispute that would make any hearings necessary. Accordingly, we will deny Lockport's motion for joint-agency hearings.

5. Other Concerns

a. Licensing Issues

29. Lockport is concerned that the Applicants appear to be driven in part by the desire to comply with the FPA's requirement that hydro licenses may only be held by citizens of the United States. Given the significant public safety interests involved in the operation of hydroelectric plants, Lockport requests that the Commission ensure that it can effectively monitor and enforce timely compliance with terms and conditions of the exemption and licenses at issue.

30. The School District contends that its citizens have an interest in ensuring that compliance with certain licensing conditions, particularly those related to an oil spill at Sherman Island, is addressed as part of this application. The School District argues that, although this issue was addressed in the relicensing application and is included in the license, it is important that such issues be acknowledged as a continuing obligation of the new owner.

31. With respect to the School District's concerns about ensuring compliance with certain licensing conditions, Orion maintains that this issue was resolved in the relicensing of the Sherman Island development as part of Hudson River Project No. 2482, and the Applicants have not proposed to alter any condition of the license in the application. Applicants argue that compliance with a Commission license or exemption from licensing is a FPA Part I issue, not a section 203 issue. In addition, Applicants state that foreign upstream ownership of a licensed hydroelectric project is not prohibited under Part I of the FPA, as even Lockport admits.

⁸ 16 U.S.C. § 824h(a) (2000).

32. We will reject the protests outlined above because the concerns that they raise fall outside the scope of a section 203 proceeding. We further note that the protesters have not alleged that the Applicants or the proposed transaction violates any provision of the FPA or of the hydro licenses granted to them by the Commission; in fact, the protests demonstrate the lengths to which the Applicants have gone to ensure compliance with their obligations.

b. Accounting Issues

33. GIPA asserts that, while it is correct that the Orion Project Companies are presently exempt from the requirements of the Commission's Uniform System of Accounts under Part 101 of the Commission's regulations, the Brascan Hydro Subsidiaries have not sought waivers from these accounting requirements. GIPA requests that we require the Brascan Hydro Subsidiaries to file proposed accounting entries under Part 101 for the second stage of the transaction because they have not yet sought such waivers from these requirements. GIPA argues that the maintenance of accurate records and access to these records by the Commission and GIPA are essential to the eventual development of the Cohoes Falls Project, for which it has filed an application for a preliminary permit. In addition, GIPA asserts that the resolution of the School Street Project relicensing proceeding, which may entail the issuance of a non-power license or its equivalent, is essential to the successful development of the Cohoes Falls Project.

34. In response to GIPA's motion, Applicants state that Erie is already required to maintain accounting data reflecting the information of interest to GIPA. Specifically, Applicants state that, at closing on stage one, this information will remain with Erie, which will continue to maintain it. At the closing of stage two, the information will be transferred to the Brascan Hydro Subsidiaries, and each will then be required to maintain such information with respect to its set of hydroelectric projects. Applicants commit that Erie will continue to comply with all of its obligations as a licensee and that the Brascan Hydro Subsidiaries will comply with all of the terms and conditions of their respective licenses, including any accounting requirements pursuant to Part I of the FPA.

35. We find that the response provided by Applicants' addresses the issues raised by GIPA. Therefore, we will accept Applicants' commitment to comply with all of the terms and conditions of their respective licenses, including any accounting requirements pursuant to Part I of the FPA.

c. Tax Issues

36. Moreau requests the Commission to deem the application incomplete and to defer processing it until the Applicants assign a value (or propose a methodology for assigning a value) to each generating unit that is subject to the application. Moreau contends that the current owners and their predecessors have challenged the tax assessment for the three hydro generating facilities in Moreau. Moreau further notes that the tax dispute was not included in the publicly disclosed portion of the application. It argues that by bundling the sale of 72 hydro projects rather than showing individual purchase prices or even the methodology for the aggregate purchase price, the Applicants have prevented local governmental bodies that have taxing authority from seeing the actual sales price for facilities located within their jurisdictions. The School District notes that the 72 hydro projects base purchase price is approximately \$900 million, which is substantially greater than the \$425 million that these same facilities sold for several years ago.

37. Orion's response argues that the Commission should deny the protest of Moreau and the School District because the issues they raise are irrelevant to the Commission's consideration of the proposed transaction. Orion argues that the School District cites no Commission requirement that each generating unit have assigned a specific value. With respect to Moreau's contention concerning the Applicants' failure to disclose the existence of the tax dispute, Orion notes that the Commission's regulations do not require the disclosure of pending litigation in a section 203 application, and the joint protest of Moreau and the School District cite no precedent to the contrary. Applicants submit that the resolution of a property tax issue is a local matter that the Commission should not become involved in, and in fact has refused to become involved in on several prior occasions.

38. We will reject the Moreau and the School District's joint protest regarding the local tax dispute because the concerns that they raise fall outside the scope of a section 203 proceeding.

The Commission orders:

(A) Applicants' proposed disposition of jurisdictional facilities is hereby authorized, as discussed in the body of this order.

(B) Lockport's motion for a joint-agency hearing is hereby denied.

(C) 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.

(D) 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.

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

(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)

Linda Mitry,
Acting Secretary.