

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

USGen New England, Inc.,
Dominion Energy New England, Inc.,
Dominion Energy Marketing, Inc.,
Dominion Energy Salem Harbor, LLC,
Dominion Energy Brayton Point, LLC, and
Dominion Energy Manchester Street, Inc.

Docket No. EC05-4-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued December 23, 2004)

1. Applicants are: (1) USGen New England, Inc. (USGenNE); and (2) Dominion Energy New England, Inc., Dominion Energy Marketing, Inc., Dominion Energy Salem Harbor, LLC, Dominion Energy Brayton Point, LLC, and Dominion Energy Manchester Street, Inc. (collectively, Dominion). On October 8, 2004, Applicants filed an application under section 203 of the Federal Power Act (FPA)¹ requesting Commission authorization for the disposition of jurisdictional facilities associated with the sale by USGenNE to Dominion of certain generating assets: the Brayton Point Station (net capacity of 1,594 MW) and the Salem Harbor Station (net capacity of 745 MW), in Massachusetts; and the Manchester Street Station (net capacity of 495 MW), in Rhode Island.² The jurisdictional facilities are interconnection facilities and wholesale power sales agreements (Assigned

¹ 16 U.S.C. § 824b (2000).

² Applicants state that the sale of these generating assets is being conducted under procedures approved by the United States Bankruptcy Court for the District of Maryland. In re: USGen New England, Inc., Case No. 03-30465 (PM).

Agreements). In this order, we authorize the proposed transaction as consistent with the public interest. This order benefits customers by permitting the transfer of jurisdictional facilities from a public utility in bankruptcy.

Background

A. Applicants

2. USGenNE is a subsidiary of National Energy & Gas Transmission, Inc. (National Energy), which, in turn, is a subsidiary of PG&E Corp. (PG&E), an exempt public utility holding company. USGenNE is a public utility and is authorized to sell power at market-based rates under section 205 of the FPA.³ USGenNE filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code in July 2003.⁴ On December 22, 2004, the Bankruptcy Court approved a settlement agreement between National Grid and USGenNE in that proceeding.

3. Dominion Energy New England, Inc. (Dominion New England) is a subsidiary of Dominion Resources, Inc. (Dominion Resources), a registered holding company under the Public Utility Holding Company Act of 1935 (PUHCA). Dominion New England was created to acquire, among other things, the generating assets, appurtenant interconnection facilities, and Assigned Agreements at issue in this case.

4. Dominion Energy Marketing, Inc. (Dominion Marketing), an electric power marketer, is a subsidiary of Dominion Energy, Inc. (DEI), which, in turn, is a subsidiary of Dominion Resources. DEI directly and indirectly owns and/or controls, among other entities, various exempt wholesale generators, qualifying facilities, and wholesale electric marketing companies. Upon closing of the transaction, the Assigned Agreements will be transferred to Dominion Marketing.

5. Dominion Energy Salem Harbor, LLC, Dominion Energy Brayton Point, LLC, and Dominion Energy Manchester Street, Inc. (collectively, the Dominion Generating Subsidiaries), special purpose subsidiaries of Dominion New England, were created to own the generating assets being transferred. In a separate joint application filed concurrently, the Dominion Generating Subsidiaries request market-based pricing

³ 16 U.S.C. § 824d (2000).

⁴ National Energy also filed a petition for reorganization under the Bankruptcy Code in July 2003. The Commission has authorized National Energy to sell, or transfer to its creditors, its interests in numerous generating projects.

authority.⁵ Applicants contemplate that the Dominion Generating Subsidiaries will either sell their output to Dominion Marketing or have Dominion Marketing be their agent to market the output of the generating assets.

B. Transaction

6. Dominion New England would buy the Brayton Point Station, the Salem Harbor Station and the Manchester Street Station from USGenNE. Applicants state that these facilities are in the New England Power Pool (NEPOOL) and the control area administered by ISO New England, Inc. (ISO-NE), and will be dispatched in accordance with the rules of ISO-NE.

7. The following Assigned Agreements would also be transferred to Dominion Marketing: (1) the Wholesale Standard Offer Service agreement under which USGenNE sells power to Narragansett Electric Company; (2) the Performance Support Agreement under which USGenNE makes available electric energy and capacity to New England Power Company (NEP) to assist NEP in performing its obligations under a power sales agreement with the Massachusetts Government Land Bank d/b/a Massachusetts Development Finance Agency; (3) the Performance Support Agreement under which USGenNE makes available electric energy and capacity to New England Power Company (NEP) to assist NEP in performing its obligations under a power sales agreement with Taunton Municipal Lighting Plant (Taunton); (4) the Power Purchase Agreement under which USGenNE supplies capacity and energy to Select Energy, Inc. (Select Energy); and (5) two Letter Agreements under which USGenNE sells NEPOOL Unforced Capacity to Select Energy.

8. According to Applicants, the proposed transaction is consistent with the public interest under section 203 of the FPA because it will not adversely affect: (1) competition in the relevant markets; (2) wholesale rates; or (3) effective regulation of the Applicants.

C. Notice of Filing and Responsive Pleadings

9. Notice of Applicants' filing was published in the *Federal Register*,⁶ with motions to intervene and protests due on or before October 29, 2004. The Commission granted a motion to extend the due date for motions to intervene and protests to November 5, 2004.

⁵ See Docket No. ER05-34-000, *et al.*, filed on October 8, 2004.

⁶ 69 Fed. Reg. 63,383 (2004).

Timely motions to intervene, raising no substantive issues, were filed by the Official Committee of Unsecured Creditors of USGen New England, Inc. (Unsecured Creditors), the Attorney General of Massachusetts, ISO-NE, NSTAR Electric & Gas Corporation, and the Conservation Law Foundation, Inc., on its own behalf and on behalf of Clean Water Action, HealthLink, the Massachusetts Public Interest Research Group, and the Wenham Lake Watershed Association.

10. Reading Municipal Light Department, Wellesley Municipal Light Plant, Concord Municipal Light Plant, and Massachusetts Municipal Wholesale Electric Company (collectively, Municipals) filed a timely motion to intervene and comments. Taunton filed a timely motion to intervene and protest and alternative request for evidentiary hearing. National Grid USA (National Grid) filed a timely motion to intervene and a timely protest. On November 12, 2004, and November 15, 2004, respectively, USGenNE and Dominion filed answers. On November 15, 2004, TransCanada Hydro Northeast Inc. (TransCanada) filed a motion to intervene out of time raising no substantive issues. On November 17, 2004, TransCanada filed an answer. On November 22, 2004, Unsecured Creditors and USGenNE filed answers. However, USGenNE states that it has reached an agreement in principle with National Grid that would resolve all disputes between them in this and related proceedings, subject to documentation and Bankruptcy Court approval.

11. On December 14, 2004, National Grid and USGenNE filed a conditional notice of withdrawal of National Grid's protest and USGenNE's answer. The withdrawal is conditioned on the Bankruptcy Court's approval of a settlement agreement between the two parties in the bankruptcy proceeding. National Grid and USGenNE state that the settlement agreement in the bankruptcy proceeding will resolve all issues between them in this proceeding. The parties intend their withdrawals to be effective as of the date the Bankruptcy Court approves the settlement agreement. As noted above, on December 22, 2004, the Bankruptcy Court approved the settlement agreement between National Grid and USGenNE.

Discussion**A. Procedural Matters**

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁷ the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will also grant TransCanada's late intervention given its interest in the proceeding, the early stage of the proceeding and the absence of any undue prejudice or delay.

13. Under Rule 216 of the Commission's Rules of Practice and Procedure,⁸ the withdrawals of National Grid's protest and USGenNE's answer to that protest would become effective at the end of 15 days from the date of filing of the notice of withdrawal. However, we will waive Rule 216 to the extent necessary to permit the withdrawals to become effective on December 22, 2004, the date of the Bankruptcy Court's approval of the settlement agreement in that proceeding, as requested by National Grid and USGenNE.

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits answers to protest unless otherwise ordered by the decisional authority.⁹ We will deny TransCanada's and Unsecured Creditors' answers, which were in response to National Grid's protest, because the protest has been withdrawn. We will accept the other answers because they have provided information that assisted us in our decision-making process.

B. Analysis

15. Section 203 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."¹⁰ The Commission's analysis of whether a disposition is consistent with the public interest

⁷ 18 C.F.R. § 385.214 (2004).

⁸ 18 C.F.R. § 385.216 (2004).

⁹ 18 C.F.R. § 385.213(a)(2) (2004).

¹⁰ 16 U.S.C. § 824b (2000).

generally involves consideration of three factors: (1) effect on competition; (2) effect on rates; and (3) effect on regulation.¹¹ As discussed below, the Commission will approve the proposed transaction as consistent with the public interest.

1. Effect on Competition

a. Arguments in Application

16. Applicants state that the transaction will not adversely affect competition in any relevant wholesale market. Applicants' witness, Dr. John Morris, analyzed the effect of the transaction on competition in three relevant product markets: short-term energy, installed capacity, and ancillary services. Dr. Morris defined the relevant geographic markets as the entire ISO-NE control area. He also analyzed a smaller geographic market within ISO-NE to account for periods when the New Hampshire/Maine transmission interface is constrained; when that happens, certain generators located in Maine cannot reach the rest of New England. He refers to this market as the "Rest of New England" market.

17. Applicants report no failures of the Commission's Competitive Analysis Screen for any relevant market for either of the two proxies the Commission has defined for short-term energy: Economic Capacity and Available Economic Capacity.¹² For Economic Capacity, the post-acquisition New England market is unconcentrated (Herfindahl-Hirschman Index (HHI) < 1000) and the change in HHI resulting from the acquisition ranges from 105 to 222. The post-acquisition "Rest of New England" market is also unconcentrated and the change in HHI resulting from the acquisition ranges from 125 to 222. Using Available Economic Capacity, Applicants report that the post-

¹¹ See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (Dec. 30, 1996), FERC Statutes & Regulations, Regulations Preambles July 1996-December 2000 31,044 (1996), *order on reconsideration*, Order No. 592-A, 62 Fed. Reg. 33,341 (June 19, 1997), 79 FERC 61,321 (1997); see also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,983 (Nov. 28, 2000), FERC Statutes & Regulations, Regulations Preambles July 1996-December 2000 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (Mar. 23, 2001), 94 FERC ¶ 61,289 (2001).

¹² Economic Capacity is the capacity that could sell in the relevant market given prevailing market prices and transmission availability. Available Economic Capacity deducts a seller's native load obligation from its Economic Capacity.

acquisition market is unconcentrated for both New England and “Rest of New England.” Applicants also performed a sensitivity test assuming that all generators with more than 100 MW of capacity had one-half of their capacity obligated to serve load and the other half included as potential Available Economic Capacity. They report no screen failures under that scenario.¹³

18. Applicants also analyzed the effect of the acquisition on the New England installed capacity market. They report that the post-acquisition market is unconcentrated in all seasons and conclude that the acquisition will not harm competition in the New England installed capacity market.

19. Applicants also analyzed the effect of the acquisition on relevant ancillary services markets. Dr. Morris argues that there will be no impact on those markets because Dominion’s only existing resource in New England is the Millstone Power Station nuclear plant (Millstone Station), which is run as a baseload unit that does not generally provide spinning reserves or imbalance energy and, because of its long start-up time, is incapable of providing non-spinning reserves. Therefore, because there is no overlap between existing capacity used to provide ancillary services and that capacity being acquired by Dominion, there will be no increase in concentration in ancillary service markets and no harm to competition.

20. Applicants argue that the transaction will not create or enhance vertical market power either through the combination of electric generation and transmission assets or the combination of electric generation and fuel source assets. They argue that because the downstream market is unconcentrated in all cases, Dominion will not be able to foreclose markets to competitors or raise costs to its rivals. They note that the Commission has found that highly concentrated upstream and downstream markets are necessary for vertical market power to arise.¹⁴ In addition, Dr. Morris analyzed market concentration in upstream fuel supply and delivery markets and found them to be unconcentrated. Finally, Applicants state that neither Dominion nor any of its affiliates own or control any electric transmission facilities in the relevant geographic market.

¹³ Applicants’ witness, Dr. Morris, explains that he performed the sensitivity test because it is not clear what native load obligations exist in New England’s restructured retail electricity markets.

¹⁴ Application at 17, citing *Engage Energy America, LLC*, 98 FERC ¶ 61,207 at 61,750 (2002).

b. Intervenors' Arguments

21. Taunton argues that Applicants have not shown that the transaction would not harm competition and requests an evidentiary hearing. Specifically, Applicants' use of New England as the relevant geographic market understates Dominion's presence in the market and the effect of the transaction on market concentration, especially in the installed capacity market. Taunton states that there are well-known, significant transmission constraints within New England. Taunton further argues that the combination of the plants in Southeastern Massachusetts and Rhode Island with Dominion's existing ownership of the Millstone Station will create opportunities and incentives for strategic bidding by Dominion in order to crowd out competitors from scarce transmission capacity on the Southeastern Massachusetts-Rhode Island interface. Finally, Taunton Applicants should have analyzed the effect of the transaction on competition in New England's forthcoming locational installed capacity market.

c. Applicants' Response

22. Dominion argues that combining the Brayton Point and Manchester Street Stations with Dominion's Millstone Station will not create or enhance the ability or incentive of Dominion to engage in strategic bidding in order to harm competition. First, it notes that control of the Brayton Point and Manchester Street Stations is currently combined within USGenNE, and the transaction will not change that. Next, the Millstone Station is a baseload nuclear facility that is designed to run "at full output around the clock," so it is difficult to conceive how Dominion could alter the operations of Millstone in order to crowd out competitors.¹⁵ It further argues that Dr. Morris did include the relevant transmission constraints in his analysis of the New England market. Dr. Morris noted that there are transmission limitations on imports into the Connecticut area where Millstone is located, but not on exports, which Taunton argues could be used to affect competition in the Southeastern Massachusetts/Rhode Island region. Finally, Dominion challenges Taunton's claim that the New England locational installed capacity market should have been analyzed and that the relevant geographic markets for locational installed capacity would be regions within New England rather than all of New England. It states that if Taunton is correct, then, because the Millstone plant and the Southern Massachusetts/Rhode Island assets being acquired by Dominion are on opposite sides of a transmission constraint, the transaction could not increase market concentration because there is no overlap between Dominion's existing generation assets and the generation assets being acquired in the transaction.

¹⁵ Dominion's Response at 17.

d. Commission Determination

23. Applicants have shown the transaction will not harm competition in any relevant market. They have analyzed the proper geographic markets for short-term energy, capacity and ancillary services and found no violations of the Commission's Competitive Analysis Screen. We reject Taunton's argument that the transaction will create the incentive and ability for Dominion to engage in strategic bidding and dispatch of its Millstone Station in order to crowd out competitors. As we have stated in previous cases, it is difficult to engage in strategic dispatch of nuclear units, given their operating characteristics and stringent regulatory oversight.¹⁶

24. We further find that Applicants' analysis of the installed capacity market adequately reflects the effect of the transaction on relevant capacity markets. While Taunton is correct that there can be smaller geographic markets within New England, the concern would be if Dominion's existing generation resource (Millstone Station) were in the same constrained sub-region as those assets being acquired. In such a case, market concentration could significantly increase and competition could be harmed. Here, however, the existing assets and the assets being acquired are on opposite sides of a transmission constraint, so concentration within those sub-regions would not change.

25. Finally, we find that the transaction will not affect competition in New England ancillary services markets. We agree with Applicants' assertion that Dominion's existing resource, the Millstone Station, is not physically or economically suited to provide reserves or imbalance energy, so there is no overlap with the assets being acquired in the transaction.

26. We find that the transaction will not create or enhance vertical market power either through the combination of electric generation and transmission assets or the combination of electric generation and fuel source assets. Regarding the combination of natural gas and electric generation assets, Applicants have shown that upstream fuel supply and delivery markets and the downstream electricity markets are unconcentrated, there would not be a possibility of market foreclosure or raising rivals' costs in order to harm competition. Regarding electric transmission and generation assets, neither Dominion nor any of its affiliates owns or controls any electric transmission facilities in the relevant geographic market, so there is no vertical market power concern.

¹⁶ See *Ohio Edison Co.*, 94 FERC ¶ 61,291 at 62,044, citing *Commonwealth Edison Co.*, 91 FERC ¶ 61,036 at 61,134 n.42 (2000).

2. Effect on Rates

a. Arguments in Application

27. Applicants argue that the transaction will not adversely affect the rates of any wholesale customer. They state that Dominion New England will assume USGenNE's obligations under the Assigned Agreements and that the output of the Fossil Generating Assets in New England will be sold under the Dominion Generating Subsidiaries' Commission-approved market-based rate authority.

b. Intervenors' Arguments

28. On May 14, 2004, USGenNE filed a proposed Salem Harbor Reliability Agreement (Reliability Agreement), an unexecuted agreement between itself and ISO-NE under which load serving entities in the Boston/Northeast Massachusetts reliability region would provide unsecured capital financing for an estimated \$85 million for the installation of a new pollution control train at USGen's Salem Harbor Station. Municipals argue that the Reliability Agreement should terminate effective upon the closing of the sale of the Salem Harbor Station and request that Applicants clarify that the Reliability Agreement will terminate at that time.¹⁷ They contend that the Reliability Agreement will no longer be necessary upon the sale of the Salem Harbor Station to a solvent owner.

c. Applicants' Response

29. USGenNE states that Applicants anticipate that the Reliability Agreement will continue after the sale of the Salem Harbor Station and be assigned to Dominion, subject to the terms of the agreement. Commission approval under FPA section 203 to transfer the Reliability Agreement is one of the authorizations they are requesting as part of the transactions contemplated by the purchase and sale agreement. It states that, absent the pollution control equipment that would be financed under the Reliability Agreement, the Salem harbor Station would need to be retired, and ISO-NE has determined that such retirement would significantly harm reliability in NEPOOL. It further states that the

¹⁷ Municipals' Comments at 2-3.

Commission has accepted the Reliability Agreement for filing and that there is a pending FPA section 205 proceeding in which Municipals can pursue their concerns about the Reliability Agreement.¹⁸

d. Commission Determination

30. Applicants have shown that the transaction will not adversely affect the rates of any wholesale customer. Dominion New England will assume USGenNE's obligations under the Assigned Agreements, and the output of the Fossil Generating Assets in New England will be sold pursuant to the Dominion Generating Subsidiaries' Commission-approved market-based rate authority. We note that neither Dominion Resources nor any of its subsidiaries owns or operates transmission facilities in New England, so the transaction will not affect any wholesale transmission rates.

31. With respect to the Reliability Agreement, one of the arguments made by protesters in the section 205 proceeding is that new owners of the Salem Harbor Station (as a result of the bankruptcy) may not need the proposed funding for environmental upgrades.¹⁹ Further, the Commission, in providing guidance to expedite the settlement process, stated, among other things, that it was concerned that the Reliability Agreement's terms will endure long after the Salem Harbor Station is needed for reliability purposes or, if the Station is sold, long after it would be appropriate for any subsequent Station owner to receive such terms.²⁰ Therefore, the pending FPA section 205 proceeding is the proper forum for Municipals to raise concerns regarding the terms and conditions of the Reliability Agreement.

3. Effect on Regulation

a. Arguments in Application

32. Applicants state the transaction will not affect the regulation of any of the Applicants. They state that the transaction will not create a new registered holding company system and thus will not cause a transfer of regulatory authority from the

¹⁸ See *USGen New England Inc.*, 108 FERC ¶ 61,012 (2004) (accepting unexecuted Reliability Agreement for filing and establishing hearing and settlement judge procedures) (*USGen New England*).

¹⁹ *USGen New England*, 108 FERC ¶ 61,012 at P 13.

²⁰ *Id.* at P 21-22.

Commission to the Securities and Exchange Commission (SEC). Applicants further state that the transaction will not affect state regulation.

b. Commission Determination

33. As explained in the Merger Policy Statement, the Commission's primary concern with the effect on regulation involves the possible changes in the Commission's jurisdiction when a registered holding company is formed, thus invoking the jurisdiction of the SEC. We are also concerned with the effect on state regulation where a state does not have authority to act on a merger and has raised concerns about the effect of the transaction on its regulation.

34. The transaction does not involve the formation of a new registered holding company system and thus will not cause a transfer of regulatory authority from the Commission to the SEC. There will be no change in the Commission's jurisdiction over the relevant facilities. In addition, no state commission intervened in this proceeding. For these reasons, and because no party argues to the contrary, we conclude that the transaction will not adversely affect regulation.

The Commission orders:

(A) The proposed transaction is hereby authorized for the purposes set forth in the application, 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 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.

(E) Applicants shall make appropriate filings under FPA section 205, as necessary, to implement the transaction.

(F) Applicants shall notify the Commission within 10 days of the date that the disposition of the jurisdictional facilities under the proposed transaction is consummated.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.