

103 FERC ¶ 61,290
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Athens Generating Company, L.P.
Covert Generating Company, LLC
Harquahala Generating Company, LLC
Millennium Power Partners, L.P.
New GenHoldings

Docket Nos. EC03-18-000
and EC03-18-001

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued June 5, 2003)

I. Introduction

1. In this order we authorize the disposition of jurisdictional facilities owned by four generation companies pursuant to Section 203 of the Federal Power Act (FPA)¹, which requires that the Commission approve such a disposition if it finds that it “will be consistent with the public interest.” The four generation companies are indirect subsidiaries of PG&E National Energy Group, Inc. (“PG&E NEG”). This order will benefit customers because it will enable the financially distressed parent company to relinquish control of the assets of the companies, thus allowing the incomplete generation projects known as Athens, Covert and Harquahala to be completed expeditiously by the new owners and allowing the operational facility known as Millennium to continue to operate.

¹16 U.S.C. § 824b (2000).

II. Background

2. The Applicants² are four companies that own jurisdictional facilities and a proposed new holding company, New GenHoldings. In this Order, the four companies are referred to as “the NEG Companies.”

3. On November 15, 2002, the NEG Companies filed an application pursuant to Section 203 seeking Commission approval for the transfer of the NEG Companies’ jurisdictional assets to New GenHoldings, which is to be owned by certain financial institutions (“Lenders”) that are lenders to the NEG Companies (the “November Application”).

4. On March 19, 2003, the NEG Companies requested that the Commission hold the November Application in abeyance pending resolution between the Lenders and the NEG Companies of the terms of the proposed transfer.

5. On April 10, 2003, the Applicants filed a “restated” application for authorization for a substantially similar transaction (the “April Application”). They intend for the November Application to be replaced by the April Application and ask that the proceeding cease being held in abeyance.

A. Description of Parties

6. PG&E NEG is a direct, wholly-owned subsidiary of PG&E National Energy Group, LLC, which is a direct, wholly-owned subsidiary of PG&E Corporation (“PGEC”). PGEC is an exempt holding company pursuant to Section 3(a)(1) of the Public Utilities Holding Company Act of 1935, as amended (“PUHCA”).³ These companies are affiliated with Pacific Gas and Electric Company (“PG&E”), which is a public utility with a franchised service territory. PG & E is a direct, wholly-owned subsidiary of PGEC.

7. Athens is constructing a natural gas-fired, combined-cycle electric plant with a nominal rating of approximately 1,080 MW (the “Athens Project”). The Athens Project

²The Applicants are:

- (a) Athens Generating Company, L.P. (“Athens”);
- (b) Covert Generating Company, LLC (“Covert”);
- (c) Harquahala Generating Company, LLC (“Harquahala”);
- (d) Millennium Power Partners, L.P. (“Millennium”); and
- (e) New GenHoldings, not yet formed.

³15 U.S.C. § 79c(a)(1)(2000).

will also consist of related facilities, including interconnection facilities and facilities for the transmission of power generated by the facility to the grid. The Athens Project is in the New York Independent System Operator (the “NYISO”) market. The Athens Project has begun producing test power, and is expected to enter commercial operations in the fall of 2003.

8. Millennium owns a 360 MW electric generating facility (the “Millennium Project”). The Millennium Project also consists of related facilities, including interconnection facilities for the transmission of power generated by the Millennium Project to the grid. The Millennium Project is within the New England Power Pool (the “NEPOOL”) market operated by the ISO New England, and entered commercial operation in April 2001.

9. Covert is constructing a natural gas-fired, combined-cycle electric plant with a nominal rating of approximately 1,200 MW (the “Covert Project”). The Covert Project will also consist of related facilities, including interconnection facilities and facilities for the transmission of power generated by the facility to the grid. The Covert Project is in the Michigan Electric Coordinated System (the “MECS”) control area within the Midwest Independent Transmission System Operator (the “Midwest ISO”) market, and is expected to commence commercial operation in the fall of 2003.

10. Harquahala is constructing a natural gas-fired, combined-cycle electric plant with a nominal rating of approximately 1,050 MW (the “Harquahala Project”). The Harquahala Project will also consist of related facilities, including interconnection facilities and facilities for the transmission of power generated by the facility to the grid. The Harquahala Project is in the control area of Arizona Public Service Company (“APS”) within the Western Electricity Coordinating Council (the “WECC”) market, and is expected to commence commercial operation in the fall of 2003.

11. The NEG Companies are affiliated with the owners of numerous generating facilities within the relevant markets.⁴ The Applicants state that within WECC, in addition to the generating assets of PG&E, the NEG Companies’ affiliates own three generating facilities with a cumulative capacity of approximately 1,200 MW in California, a 474 MW generating facility in Oregon, and a 113 MW generating facility in Colorado. Within the Midwest ISO, the NEG Companies’ affiliates own three generating facilities with a cumulative capacity of approximately 150 MW. Within NYISO, the NEG Companies’

⁴The Applicants have defined the relevant markets as the WECC (where the Harquahala Project is located), the Midwest ISO (where the Covert Project is located), NEPOOL (where the Millennium Project is located), and the NYISO (where the Athens Project is located).

affiliates own two generating facilities with a cumulative capacity of approximately 446 MW. Within NEPOOL, the NEG Companies' affiliates own eight generating facilities with a cumulative capacity of approximately 5,300 MW.

12. Each NEG Company has a market-based rate tariff⁵ and has been determined by the Commission to be an exempt wholesale generator.⁶ Each NEG Company has a long-term sales agreement with an affiliated power marketer, PG&E Energy Trading-Power, L.P., which will be transferred to New GenHoldings as part of this transaction.

13. Since neither the Covert nor the Harquahala Projects have been completed, the Applicants contend that the only jurisdictional facilities held by Covert and Harquahala are their market-based rate schedules. While Athens has not yet begun commercial operation, it has begun producing test power. The Applicants state that the jurisdictional facilities held by Athens may therefore include both its market-based rate schedule and its interconnection facilities and facilities for the transmission of power generated by the Athens Project to the grid. The Millennium Project has already begun commercial operations, and the jurisdictional facilities held by Millennium are stated to consist of its market-based rate schedule and its interconnection facilities and facilities for the transmission of power generated by the Millennium Project to the grid.

14. New GenHoldings will be owned by the Lenders. Each of the Lenders will directly

⁵Athens Generating Company, L.P., FERC Electric Tariff, Original Volume No. 1, accepted for filing by the Commission on October 13, 1999 in Milford Power Co., 89 FERC ¶ 61,024 (1999); Covert Generating Company, LLC, FERC Electric Tariff, Original Volume No. 1, accepted for filing by an unpublished letter order issued February 9, 2001 in Docket Nos. ER01-520-000 and ER01-520-001, to be effective on the date service commences; Harquahala Generating Company, LLC, FERC Electric Tariff Original Volume No. 1, accepted for filing by an unpublished letter order issued February 28, 2001 in Docket Nos. ER01-748-000 and ER01-748-001, to be effective on the date service commences; Millennium Power Partners, L.P., FERC Electric Tariff, Original Volume No. 1, accepted for filing by the Commission on January 15, 1998 in Millennium Power Partners, L.P., 82 FERC ¶ 61,024 (1998).

⁶Athens Generating Co., 89 FERC ¶ 62,026 (1999); Covert Generating Co., 93 FERC ¶ 62,237 (2000); Harquahala Generating Co., 94 FERC ¶ 62,099 (2001); Millennium Power Partners, L.P., 82 FERC ¶ 62,085 (1998).

or indirectly own between 0% and 15% of New GenHoldings. Each of the Lenders is a financial institution that is not primarily engaged in energy-related business activities.⁷

15. Several of the Lenders and their affiliates are stated to own minority or de minimis interests in, but do not exercise control over, generating facilities within the relevant markets. Within the NYISO, one of the Lenders, Toronto Dominion (Texas), Inc. (“Toronto Dominion”), and/or its affiliates hold minority or de minimis interests in six generating facilities with a total capacity of approximately 318 MW. In the WECC, Toronto Dominion and/or its affiliates hold minority, de minimis interests in seven generating facilities with a total cumulative capacity of approximately 2,150 MW. In NEPOOL, Toronto Dominion and/or its affiliates hold de minimis interests in two generating facilities located in Massachusetts with a cumulative capacity of 510 MW.

16. Allianz AG, the parent company of another one of the Lenders, Dresdner Bank AG, New York and Grand Cayman Branches (“Dresdner”), owns a 6.8% interest in E.ON AG. E.ON AG owns 100% of the stock in PowerGen Limited (“PowerGen”), a public limited company organized under the laws of England and Wales that is a registered holding company under PUHCA. PowerGen owns 100% of the stock in LG&E Energy Corp. (“LG&E Energy”), which owns Louisville Gas and Electric Company (“LG&E”), an electric and gas utility based in Louisville, Kentucky, serving customers in Louisville and 16 surrounding counties, and Kentucky Utilities Company (“KU”), an electric utility based in Lexington, Kentucky, serving 77 Kentucky counties and five counties in Virginia. Both of these utilities are within the Midwest ISO. Within the WECC, LG&E Energy indirectly holds minority or de minimis interests in a 245 MW generating facility in Washington and 34.5 MW of wind turbines in California, and a wholly-owned subsidiary of Dresdner has a 48.72% interest in United States Power Fund, LP (“Power Fund”), which has a minority interest in a 240 MW generating facility in California.

17. The Applicants also submit that, other than the minority and de minimis interests described above, no entities that may be regarded as affiliated with the Lenders have any interest in generation, transmission and/or distribution facilities in the relevant markets.

⁷The Lenders are: Société Générale, Citicorp USA, Inc., JPMorgan Chase Bank, ABN AMRO Bank N.V., The Royal Bank of Scotland plc, Credit Lyonnais, New York Branch, The Governor and Company of the Bank of Scotland, Toronto Dominion (Texas), Inc., DZ Bank AG, Deutsche Zentral Genossenschaftsbank Frankfurt AM Main, New York Branch, Barclays Bank PLC, Bayerische Landesbank Girozentrale, Fortis Capital Corp., Bayerische Hypo-und Vereinsbank AG, Dresdner Bank AG, New York and Grand Cayman Branches, Fleet National Bank, and Landesbank Schleswig-Holstein Girozentrale.

18. The Applicants contend that with the exception of Dresdner's affiliation with E.ON AG, none of the Lenders, nor any entities that may be regarded as affiliates of the Lenders, is a public utility company, an electric utility company, or a holding company, as defined by Section 2 of PUHCA. The Applicants also contend that, of the entities that may be regarded as affiliated with any Lender that owns interests in natural gas pipelines and/or local natural gas distribution companies, none operates in the relevant geographic areas.

19. The Applicants state that there are no common officers or directors between (a) the NEG Companies and their current upstream owners; and (b) New GenHoldings and/or the Lenders, within the meaning of Section 33.2(5) of the Commission's regulations.⁸

B. Description of Disposition

20. The Application describes the proposed transfer, which will be completed in two stages. In the first stage of the transfer, an intracorporate reorganization, Athens, Covert, Harquahala, and Millennium will each transfer all of its assets to, respectively, New Athens Generating Company, LLC ("New Athens"), New Covert Generating Company, LLC ("New Covert"), New Harquahala Generating Company, LLC ("Harquahala"), and New Millennium Power Partners, LLC ("New Millennium") ("the New Companies").⁹ After the first stage of the transfer, each New Company will be a wholly-owned, direct subsidiary of Athens, Covert, Harquahala, and Millennium, respectively, and will thus become a wholly-owned, indirect subsidiary of GenHoldings and PG&E NEG.

21. In the second stage of the transfer, which is described as occurring virtually simultaneously with the first stage, the NEG Companies will transfer 100% of their ownership interests in the New Companies to New GenHoldings. The effect of the second stage of the Transfer will be that the new companies will become direct, wholly-owned subsidiaries of New GenHoldings, and will no longer be affiliated with PG&E NEG.

⁸18 CFR § 33.2(5).

⁹Some of the new companies are yet to be formed.

III. Notice of Filing and Responsive Pleadings

22. Notice of the filing of the April Application was published in the Federal Register,¹⁰ with interventions and protests due on or before May 1, 2003. Iroquois Gas Transmission System, L.P. and APS filed motions to intervene. We will discuss these pleadings below.

IV. Discussion

A. Procedural Matters

23. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely, unopposed motion to intervene by Iroquois Gas Transmission System, LP makes it a party to this proceeding.

24. Arizona Public Service Company, LP filed a motion to intervene out of time on December 12, 2002. Given that the application was refiled in April 2003, with a new intervention deadline of May 1, 2003, the motion to intervene of APS has become timely. It is also unopposed, and thus APS is also a party to this proceeding.

B. Consistency with Public Interest

25. 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."¹¹ 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.¹² As discussed below, we will approve the proposed disposition of jurisdictional facilities as consistent with the public interest.

¹⁰68 Fed. Reg. 6909 (2003).

¹¹16 U.S.C. § 824b (2000).

¹²Inquiry 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

26. According to the application, the proposed transaction is consistent with the public interest and will not have an adverse effect on competition. Applicants state the transfer raises no horizontal power market issues because other than the jurisdictional facilities now owned by Athens, Covert, Harquahala and Millennium Projects, New GenHoldings and its affiliates will have only *de minimis* interests in other generating capacity/ transmission or distribution facilities or contracts for sale of electricity in the relevant markets.

27. Applicants assert that if the proposed transfer has any effect on competition, the effect will be pro-competitive, because the proposed transfer will decrease the generation capacity held by affiliates of the NEG Companies in the NY ISO and NEPOOL markets.

28. Applicants also state that there will be no vertical effect on competition, as any affiliates of the Lenders that are engaged in electric power activities own or control only minority or *de minimis* interests in generating capacity/transmission or distribution facilities or contracts for the sale of electricity in the relevant markets. Further, these affiliates either do not sell their inputs (such as fuel, fuel supply facilities, and interstate gas transmission pipelines) into the relevant markets or make only *de minimis* sales into the relevant markets.

29. We conclude that the proposed disposition of jurisdictional assets will have no effect on horizontal market power and accept Applicants' assertion that any effect will be pro-competitive, because the proposed transfer will decrease the generation capacity held by affiliates of the NEG Companies in the NY ISO and NEPOOL markets.

30. We also find that the disposition will not increase market concentration of the Lenders or their energy industry affiliates, as those affiliates have only a *de minimis* involvement in energy industry activities. Thus, the new ownership structure will not affect the level of vertical competition in the markets in which the entities that own the jurisdictional facilities will operate.

31. In addition, the disposition of the jurisdictional facilities of the NEG Companies to new owners is stated to facilitate the ongoing development and operation of each of the generation projects. If this results in four new generating facilities coming on-line or continuing to operate where they may otherwise not be able to do so, the disposition is likely to increase competition in the relevant markets. We therefore conclude that the disposition of jurisdictional facilities will not have an adverse effect on competition.

32. Finally, no party in this proceeding claims that the proposed transaction will have any adverse effect on competition.

2. Effect on Rates

33. Applicants state that the transfer will not adversely affect the rates of PGET, which is currently the NEG Companies' only customer. Applicants note that on or prior to the closing of the transfer they intend to terminate their long-term sales agreements with PGET, with PGET's consent.

34. With respect to the effect of the proposed transfer on rates, nothing in the application indicates that rates charged to the NEG Companies' customers will increase as a result of the proposed transaction, and no customer argues otherwise. We conclude that the proposed transfer will not adversely affect rates.

3. Effect on Regulation

35. With regard to the effect on Federal regulation, Applicants state that the New Companies will be subject to Commission jurisdiction to the same extent as the NEG Companies. New GenHoldings will not be a registered holding company under PUHCA. Thus, this Commission will not lose jurisdiction to the Securities and Exchange Commission.

33. We note that no one has raised concerns about this transaction's effect on state or Federal regulation. There will be no change in the Commission's jurisdiction over the relevant facilities. No state has indicated that it lacks jurisdiction to consider the transaction's effect on retail rates, nor has any state asked us to do so. Thus, we are satisfied that the proposed transfer of assets will not adversely affect Federal or state regulation.

C. Third Party Contracts

34. APS states that Harquahala has certain financial commitments it must meet, and that Harquahala is also obligated to obtain permission for the assignment in certain instances under contracts with third parties, specifically an Interconnection Agreement among APS and others and Harquahala. APS's concern is that Harquahala has not addressed these financial commitments nor, to APS's knowledge, have any necessary communications been made by Harquahala to APS or other interested third parties about the proposed transfer of facilities and consequential assignment of the Interconnection Agreement. APS requests that the Commission's approval to be conditional upon all contractual obligations being satisfied.

35. Applicants are merely requesting Commission approval under Section 203 of their application to effect a disposition of jurisdictional facilities. Our approval of the application does not affect any other approvals necessary to complete the transaction.¹³ This would include approvals by any state commission, as well as Applicants obtaining any necessary consent from any party to a contract. The issue of Harquahala's financial commitments is a matter for the parties themselves to resolve.

The Commission orders :

(A) The proposed disposition of jurisdictional facilities in Docket No. EC03-18-001 is hereby authorized, as discussed in the body of this order.

(B) The foregoing authorization of the disposition of jurisdictional facilities 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 further orders as appropriate.

(E) Applicants shall make appropriate filings under section 205 of the FPA, 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 has been consummated.

By the Commission.

(S E A L)

Magalie R. Salas,

¹³Otter Tail Power Company, 98 FERC ¶ 61,112 (2002).

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Secretary.