

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Sithe Energies, Inc.,
Apollo Energy, LLC,
Exelon (Fossil) Holdings, Inc.,
Exelon Power Holdings, LP,
Exelon SHC, Inc.,
ExRes SHC, Inc.,
Marubeni MS Power, Inc.,
Marubeni American Corporation,
National Energy Development Inc., and
RCSE, LLC

Docket No. EC03-122-000

ORDER AUTHORIZING DISPOSITION OF
JURISDICTIONAL FACILITIES

(Issued October 22, 2003)

1. On August 11, 2003, as amended August 15, 2003, Sithe Energies, Inc. (Sithe); Apollo Energy, LLC (Apollo Energy); Exelon (Fossil) Holdings, Inc. (Exelon Fossil); Exelon Power Holdings, LP (Exelon Power); Exelon SHC, Inc. (Exelon SHC); ExRes SHC, Inc. (ExRes SHC); Marubeni MS Power, Inc. (MMSP) and Marubeni American Corporation (MAC) (collectively, Marubeni); National Energy Development, Inc. (NEDI); and RCSE, LLC (RCSE) (collectively, Applicants) filed a joint application pursuant to Section 203 of the Federal Power Act (FPA)¹ requesting Commission authorization to transfer certain indirect ownership interests in Sithe from Apollo Energy and Marubeni to RCSE. The Commission has reviewed the transaction under the Commission's Merger Policy Statement² and will authorize the disposition as consistent with the public interest.

¹16 U.S.C. ' 824b (2000).

²Inquiry 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

I. Background

A. Description of the Parties

2. Sithe, along with various subsidiaries, develops and operates certain non-utility generation facilities and engages in related activities, such as steam production and sales, in the United States, Canada, Mexico and other countries.

3. Apollo Energy owns an interest in Sithe. It is affiliated with investment and financial companies that, apart from their interests in Apollo Energy, do not own any interests in or have control over electric generation or transmission facilities or any other energy-related assets associated with this application.

4. The following Exelon subsidiaries will participate in the transaction proposed in this application: (1) Exelon Fossil, which owns an interest in Sithe; (2) Exelon Power, which owns a 100 percent interest in Exelon Fossil;³ (3) Exelon SHC, which will hold a temporary interest in Exelon Fossil and indirectly, in Sithe at some point in this transaction; and (4) ExRes SHC, which will acquire Exelon Fossil from Exelon SHC upon completion of this transaction.

5. Marubeni Corporation is a Japanese general trading company, and MMSP and MAC are wholly-owned subsidiaries of Marubeni. Through its subsidiaries MSP and MAC, Marubeni Corporation currently holds an interest in Sithe.

6. RCSE was formed solely for the purpose of engaging in this transaction, and is owned by Reservoir Capital Partners, L.P. and Reservoir Capital Master Fund, L.P.

7. NEDI was formed to hold interests in Sithe, and is owned by Exelon Fossil and Apollo Energy.

B. The Transaction

8. Upon completion of the transaction, RCSE will acquire indirect interests currently owned by Apollo Energy and Marubeni in the following Sithe subsidiaries that own jurisdictional facilities in New York: (1) AG-Energy, L.P.; (2) Power City Partners, L.P.,

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).

³As a result of this transaction, Exelon Power will be dissolved and its ownership interests in Exelon Fossil will be assumed by Exelon SHC.

- (3) Seneca Power Partners, L.P., (4) Sterling Power Partners, L.P.,
(5) Sithe/Independence Power Partners, L.P., and (6) Sithe Energy Marketing, L.P.

9. The transaction involves a shift of direct and indirect interests through the various Applicants that will occur in three stages. In the first stage, Exelon Fossil will acquire all of Apollo Energy's and Marubeni's direct and indirect interests in Sithe. In the second stage, which will occur simultaneously with the first stage, Exelon Power will be dissolved and its ownership interests in Exelon Fossil will be assumed by Exelon SHC. In the third stage, Exelon SHC will transfer its interest in Exelon Fossil to ExRes SHC and RCSE will purchase 50 percent of ExRes SHC's stock from Exelon. Upon completion of the transaction, RSC and Exelon will each own a 50 percent indirect interest in Sithe.

10. Applicants request the Commission to authorize the transaction at the earliest possible date, but in any event not later than October 22, 2003.

II. Notice and Intervention

11. Notice of the filing was published in the Federal Register, 68 Fed. Reg. 52,196 (2003) with comments, protests, or interventions due on or before September 2, 2003. NSTAR Electric & Gas Corporation (NSTAR) filed a timely motion to intervene and protest.⁴ San Diego Gas & Electric Company (SDG&E) filed an untimely motion to intervene raising no substantive issues.

12. On September 5, 2003, Applicants filed an answer to NSTAR's protest.

III. Discussion

A. Procedural Matters

13. 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 serves to make the entity that filed it a party to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,⁵ we find good cause to grant SDG&E's

⁴ NSTAR is the service company for three operating companies: Boston Edison Company, Cambridge Electric Light Company and Commonwealth Electric Company. NSTAR provides electricity to end-users (commercial and residential customers) in the Northeastern Massachusetts Area ("NEMA").

⁵ 18 C.F.R. § 385.214(d) (2003).

untimely, unopposed motion to intervene, given its interest in this proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay.

14. Rule 213 of the Commission's Rules of Practice and Procedure⁶ prohibits answers to protests unless otherwise ordered by the decisional authority. We will accept Applicants' answer because it provides information that will assist us in our decision-making process.

B. Section 203 Analysis

15. 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."⁷ 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.⁸ As discussed below, we will approve the proposed disposition of jurisdictional facilities as consistent with the public interest.

1. Effect on Competition

a. Applicants' Analysis

16. Applicants assert that the net effect of the multi-step transaction is to transfer the indirect interests in Sithe currently owned by Apollo Energy and Marubeni to RCSE. Applicants state that the proposed transaction will not affect competition in the relevant market because it will not result in any meaningful change in market shares or concentration levels. Apollo Energy, Marubeni, and RCSE do not generate, sell, or provide inputs to electricity production or electricity products in the same geographic markets. Apollo Energy, Marubeni, and RCSE also do not provide inputs to electricity production or electric products in the same geographic markets. Applicants conclude, therefore, that they are not required to file a horizontal⁹ or vertical competitive screen analysis under the Commission's regulations.¹⁰

⁶ 18 C.F.R. § 385.213(a) (2) (2003).

⁷ 16 U.S.C. § 824b (2000).

⁸ Supra note 2.

⁹ 18 C.F.R. § 33.3(a)(2)(i) (2003).

¹⁰ 18 C.F.R. § 33.4(a)(2)(i) (2003).

b. NSTAR Protest

17. NSTAR asserts that it is unclear from the application what entity or entities will own precisely what assets in New England and under whose market-based rate authority those assets will be operated if the proposed transaction is approved. NSTAR contends that this proceeding presents the Commission with an opportunity to promote ownership diversity and alleviate the exercise of market power in NEMA. In light of this lack of clarity, NSTAR requests the Commission to conduct an inquiry into the market power implications of the proposed transaction and to require Applicants to explain what entity will own what generation assets; who will operate those assets; and under whose market-based rate authority output from those facilities will be priced. NSTAR also requests the Commission to order divestiture of generation assets and resources in NEMA in order to create a more diverse ownership of generation as a condition to approval of the transaction.

c. Applicants' Response

18. Applicants argue that NSTAR is attempting to transform this transaction into a referendum on New England market power issues. Applicants contend that NSTAR wants the Commission to use this proceeding to dilute the concentration of ownership among generators in the Boston area. They point out that, since all of Sithe's jurisdictional generation assets are in New York, the proposed transaction does not involve any assets in New England.

19. Applicants note that NSTAR already raised these allegations of market power in a Section 206 complaint that was denied by the Commission less than a year ago and in other Section 203 proceedings that have nothing to do with assets in New England.¹¹ Applicants argue that NSTAR is simply repackaging these previously rejected claims. Applicants, therefore, request the Commission to disregard NSTAR's protest.

d. Commission Decision

20. Applicants state that the transaction will be competition neutral in the relevant New York market because it will not result in any meaningful change in market shares or concentration levels. Applicants point out that the transaction simply will substitute one non-utility owner for two current non-utility owners of Sithe. Applicants also note that the increase in Exelon's ownership stake in Sithe from 49.9 percent to 50 percent will not give Exelon market power, and therefore, will not have any adverse competitive effects. We agree with Applicants.

¹¹ See *NSTAR Electric & Gas Corp. v. Sithe Edgar LLC, et al.*, 101 FERC ¶ 61,064 (2002); *Vivendi Universal, S.A., et al.*, 101 FERC ¶ 62,059 (2002).

21. We are not persuaded by NSTAR's arguments in this proceeding that this transaction, which involves assets in New York, will affect competition in NEMA. We conclude that the proposed disposition of jurisdictional assets will have no effect on market power in New York.

2. Effect on Rates

22. Applicants state that none of them have any captive ratepayers whose rates could be adversely affected by the transfer of the indirect interests in the Sithe facilities. Applicants note that all power sales by the Sithe entities will be made in the wholesale market at negotiated, market-based rates, and all sales of power from Qualifying Facilities owned by Sithe's, RCSE's, or RCSE's affiliates will continue to be made pursuant to existing long-term power sale agreements. No party intervened to dispute Applicants' statement to this effect.

23. Given that none of the Applicants have any captive ratepayers and all power sales by the Sithe entities will be made at market-based rates, we find the proposed transfer will not adversely affect rates.

3. Effect on Regulation

24. Applicants maintain that the transaction will not impair the Commission's ability to regulate any company subject to the Commission's jurisdiction. Applicants point out that wholesale sales by the utilities subject to this application will continue to be subject to Commission jurisdiction. Applicants state further that the transaction will not result in the formation of a registered holding company.¹² They also note that the proposed transaction will not impair any state's ability to regulate Applicants or any of their affiliates.

25. We find that the transaction will not result in a shift of regulation from the Commission to the Securities and Exchange Commission. No state agency intervened to allege an adverse effect on regulation. Accordingly, we find the transaction will not adversely affect Federal or state regulation.

The Commission orders:

(A) The transaction is hereby authorized, upon the terms and conditions and for the purposes set forth in the application, to be effective October 22, 2003.

¹²See Merger Policy Statement, FERC Stats. & Regs., Regulations Preambles ¶ 31,044 at 30,112 and 30,124-125; see also Ohio Power Co. v. FERC, 954 F.2d 779, 782-786 (D.C. Cir. 1992), cert. denied, 498 U.S. 73 (1992).

(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 notify the Commission within 10 days of the date that the transaction has been consummated.

By the Commission

(S E A L)

Magalie R. Salas,
Secretary.