

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Commonwealth Edison Company
and Exelon Generation Company

Docket No. ER06-43-001

ORDER DENYING REHEARING

(Issued May 1, 2006)

1. On December 16, 2005, the Commission granted an application under section 205 of the Federal Power Act (FPA),¹ allowing Exelon Generation Company (Exelon Generation) to make power sales to its affiliate, Commonwealth Edison Company (Commonwealth Edison).² Exelon Generation will make these sales pursuant to the proposed Illinois Auction Proposal, if this auction is approved by the Illinois Commerce Commission (Illinois Commission). The Commission found that this competitive solicitation satisfies the Commission's concerns regarding affiliate abuse and will result in rates that are just and reasonable.

2. The Illinois Attorney General (Attorney General) raises these issues on rehearing: (1) whether the Commission should have granted a trial-type evidentiary hearing on asserted issues of material fact and whether the Commission failed to adequately consider the evidence that was submitted on these issues; (2) whether the Commission erred by approving a service agreement and supplier forward contracts that allegedly violate its affiliate abuse standards; and (3) whether the prohibition against *ex parte* communications was violated. For the reasons set out below, we deny the request for rehearing.

¹ 16 U.S.C. § 824d (2000).

² *Commonwealth Edison Company and Exelon Generation Company*, 113 FERC ¶ 61,278 (2005) (Order).

Background

3. On October 17, 2005, Commonwealth Edison and Exelon Generation (collectively referred to as Applicants) jointly requested that the Commission accept: (1) a service agreement between Exelon Generation and Commonwealth Edison under Exelon Generation's market-based rate tariff; and (2) two standardized supplier forward contracts for use in the proposed auction. The Applicants stated that the service agreement would permit Exelon Generation to participate in auctions held as part of the proposed Illinois Auction Proposal and the standardized supplier forward contracts would be executed in the event that Exelon Generation is a winning bidder in an auction.

4. The Applicants stated that Commonwealth Edison has obligations in Illinois as a provider of last resort to provide generation services to retail customers who do not or cannot choose an alternative supplier. The Applicants also stated that, since Commonwealth Edison no longer owns any generating capacity, Commonwealth Edison currently purchases all the power necessary to satisfy its provider of last resort obligations from its affiliate, Exelon Generation, through a power supply contract that expires on December 31, 2006. Applicants stated that, once the contract expires, Commonwealth Edison will need to procure power from the market to fulfill its provider of last resort obligations. To meet these obligations, it is applying to the Illinois Commission to conduct an auction to procure needed energy, capacity, and certain ancillary services.

5. In their submittal, the Applicants sought Commission confirmation that the proposed Illinois Auction Proposal is consistent with the Commission's guidelines in *Edgar*³ and *Allegheny*.⁴ The Applicants stated that it is modeled on the process that the Commission approved for use in New Jersey. The Applicants stated that it allows potential suppliers to bid against each other to serve tranches of Commonwealth Edison's load, and that Commonwealth Edison's acquisition price will be the lowest price at which the demands of its customers can be satisfied simultaneously. Commonwealth Edison anticipates that the initial Illinois Auction Proposal auction will be held in September 2006 and annually each year thereafter.

³ Boston Edison Company Re: Edgar Electric Energy Company, 55 FERC ¶ 61,382 (1991) (Edgar).

⁴ Allegheny Energy Supply Company, LLC, 108 FERC ¶ 61,082 (2004) (Allegheny).

6. The Commission explained that the primary issue in reviewing Applicants' filing is whether the proposed Illinois Auction Proposal is structured in a manner that satisfies the Commission's concerns regarding affiliate abuse. In *Edgar*, the Commission stated that, in cases where affiliates are entering into market-based rate sales agreements, it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is not distorted. The Commission thus has approved affiliate sales resulting from competitive bidding processes after the Commission has determined that, based on the evidence, the proposed sale was a result of direct head-to-head competition between affiliated and competing unaffiliated suppliers.⁵ The Commission has required assurance that: (1) a competitive solicitation process was designed and implemented without undue preference for an affiliate; (2) the analysis of bids did not favor affiliates, particularly with respect to non-price factors; and (3) the affiliate was selected based on some reasonable combination of price and non-price factors.⁶

7. In *Allegheny*,⁷ the Commission provided guidance as to how the Commission would evaluate whether a competitive solicitation process, such as the one in the instant proceeding satisfies the *Edgar* criteria; the underlying principle when evaluating a competitive solicitation process under the *Edgar* criteria is that no affiliate should receive undue preference during any stage of the process. The Commission stated that four guidelines would help the Commission determine if a competitive solicitation process satisfies that underlying principle: transparency, definition, evaluation, and oversight.

8. Applicants responded that: (1) the Illinois Auction Proposal sets forth a timeline for the development of each auction and that each auction will be posted publicly and will provide ample opportunity for bidders to respond; (2) the Illinois Auction Proposal provides for and describes the bidder application process, which is to be completed well in advance of each auction; (3) the auction manager and not Commonwealth Edison, determines which bidder satisfies the application; (4) all bidders will have equal access to data, therefore no party will have an informational advantage; and (5) the Illinois Commission's staff will monitor the bidding and evaluate the results.

9. Applicants explained that the products sought through the Illinois Auction Proposal are defined in a clear and nondiscriminatory manner. Specifically, Applicants stated that Commonwealth Edison is proposing to procure full requirements supply for

⁵ *Edgar*, 55 FERC ¶ 61,382 at 62,167-69. See also *Connecticut Light & Power Co. and Western Massachusetts Electric Co.*, 90 FERC ¶ 61,195 at 61,633-34 (2000); *Aquila Energy Marketing Corp.*, 87 FERC ¶ 61,217 at 61,857-58 (1999); *MEP Pleasant Hill, LLC*, 88 FERC ¶ 61,027 at 61,059-60 (1999).

⁶ *Edgar*, 55 FERC ¶ 61,382 at 62,168.

⁷ *Allegheny*, 108 FERC ¶ 61,082 at P 22.

three categories of retail customers: (1) residential and commercial customers under 400 kW of demand who are on a fixed price service (Commonwealth Edison would be procuring supply for one, three, and five-year terms); (2) commercial and industrial customers with a demand between 400 kW and 3 MW who are on a fixed price service (Commonwealth Edison would be procuring this supply for a one-year term); and (3) larger commercial and industrial customers over 3 MW of demand, and other customers whose service is based on the actual real-time PJM load weighted average locational marginal price for energy for the Commonwealth Edison zone (Commonwealth Edison would procure supply for a one-year term).

10. Applicants also explained that the Illinois Auction Proposal meets *Allegheny's* guidelines as to the other principles, noting that it sets forth bidder qualification criteria and bid evaluation methods and that bidders have knowledge of the bidding and evaluation process before they place their bids. Specifically, the bidders must: (1) demonstrate that they will be able to meet all PJM requirements of the supplier forward contracts by the start of the supply period; (2) agree to the terms of the supplier forward contracts; (3) agree to the terms of the auction rules; (4) submit to a creditworthiness evaluation; (5) submit an indicative offer; (6) submit a financial guarantee to support this indicative offer; and (7) make a number of certifications regarding the handling of confidential information and their independence from other bidders. Applicants stated that there is no post-bid negotiation, and the bids are evaluated on a price-only basis.

11. The Applicants stated that bidders are to submit standard application forms to the auction manager, and the auction manager will decide whether the bidders meet the requirements well in advance of each auction; therefore, each winning bidder can be selected based solely on price. The auction manager, who will have no financial interest in any of the potential bidders, including Commonwealth Edison and its affiliates, or in the outcome of the auction, will administer the Illinois Auction Proposal during all phases of the process including the dissemination of information, the qualification of bidders, the training of bidders, the conduct of the auction, and the preparation of a report to the Illinois Commission. The auction manager will be the sole point of contact with all potential auction participants including Commonwealth Edison affiliates. Finally, the auction manager will evaluate results and select winners without any input from Commonwealth Edison and produce a report. The Illinois Commission staff will monitor the implementation of all phases of the Illinois Auction Proposal and provide a report to the Illinois Commission.

12. Based on these representations, the Commission granted the application for authorization for Exelon Generation to make power sales to its affiliate, Commonwealth Edison.

Request for Rehearing

13. The Attorney General asserts that the Commission should have granted a request for a trial-type evidentiary hearing on asserted issues of material fact and failed to adequately consider evidence that was submitted on these issues. We disagree, as there are no outstanding issues of material fact in this proceeding.

14. The Attorney General asserts the key issue of material fact is that the sales by Exelon Generation would transfer benefits totaling as much as one billion dollars per year from Commonwealth Edison's captive customers to Exelon's stockholders because bidders like Exelon Generation can obtain higher prices than would be possible in a truly competitive environment. We found in our earlier order that there is "no merit in the Attorney General's contention that the proposed Illinois Auction Proposal will result in a transfer of benefits from Commonwealth Edison's customers to Exelon Generation's shareholders."⁸ The Attorney General's assertions to the contrary are speculative; they do not constitute issues of material fact.⁹ Moreover, our earlier order in this proceeding did not direct that Exelon Generation makes sales to Commonwealth Edison, or direct that the Illinois Commission authorize such sales.¹⁰ Rather, we found that the proposed Illinois Auction Proposal satisfies the Commission's concerns regarding affiliate abuse and will result in rates that are just and reasonable. Accordingly, we deny the request for a hearing as there are no issues of material fact which need to be resolved.

15. The Attorney General also argues that the Commission erred by approving a service agreement and supplier forward contracts that violate the Commission's affiliate

⁸ Order at P 36.

⁹ *Id.* at P 44.

¹⁰ Nothing in our decision is intended to or does prejudice any issue before the Illinois Commission.

abuse standards. We reject this argument;¹¹ we have carefully and in considerable detail evaluated the proposed Illinois Auction Proposal and found it consistent with our standards intended to guard against affiliate abuse.¹²

16. The Attorney General argues that the Commission allows generating companies to sell to their regulated utility affiliates only when there is an adequate showing that captive customers are protected, and the Attorney General references a decision where there was in effect retail choice or a rate freeze, two conditions which will not be available to protect Illinois consumers after 2006. The two conditions cited by the Attorney General are two examples of methods for protecting consumers, and they are not the only methods for protecting consumers. In the current situation, the Commission has found that the proposed Illinois Auction Proposal should provide protection to Illinois consumers from any possible affiliate abuse, *i.e.*, by requiring head to head competition, transparency of transactions, oversight and evaluation of the process by independent managers and the Illinois Commission staff, and ultimate review of the process by the Illinois Commission.

17. We conclude therefore that nothing in the Attorney General's request for rehearing of the Order issued in this proceeding provides any basis on which to grant rehearing.

¹¹ We note that the Commission authorized a sale to take place between Exelon Generation and Commonwealth Edison – but only in the event that Exelon Generation is selected as a supplier pursuant to the proposed competitive solicitation; we did not accept for filing the service agreement and two supplier forward contracts. The Commission has explained that the filing requirements do not require that service agreements be on file, and the Commission's regulations, 18 C.F.R § 35.1(g) (2005), obviate the need to file with the Commission service agreements under market-based rate tariffs. Instead, public utilities must electronically file Electric Quarterly Reports which include a summary of the contractual terms and conditions in every effective service agreement for sales at market-based rates.

¹² *Allegheny*, 108 FERC ¶ 61,082 at P 36. Moreover, while there may have been concerns with Exelon Generation's market-based rate tariff in the past, *see Exelon Generation Co.*, 112 FERC ¶ 61,027 (2005), Exelon Generation has since revised its market-based rate tariff to comply with the Commission's orders and its market-based rate operations are now consistent with the Commission's affiliate abuse standards. *Exelon Generation Co.*, 115 FERC ¶ 61,004 (2006).

Supplement and Amendment to Request for Rehearing

18. On March 13, 2006, the Attorney General filed a supplement to the request for rehearing and on March 29, 2006 filed a corrected request for rehearing. On March 17, 2006, Commonwealth Edison and Exelon Generation filed an answer to the Attorney General's supplement.¹³

19. The Attorney General argues that the Commissioners engaged in *ex parte* communications relating to the application filed in this docket, in violation of 5 U.S.C. § 557(d)(1)(E) (2000) (Administrative Procedure Act or APA). The Attorney General asks that the Commission grant rehearing, find that the applicants' representatives engaged in prohibited *ex parte* communications; rescind approval and dismiss the application; require the Commissioners who engaged in *ex parte* contacts to recuse themselves from further participation in this or any subsequent proceeding that has substantially similar issues and applicants; and revise its *ex parte* rules to comply with the APA.¹⁴

20. The Attorney General specifically asserts the *ex parte* communications consist of a private meeting with the Commissioners and Commission staff to discuss issues before the Commission in this docket and the Commission failed to disclose such private communications. The Attorney General refers to e-mails from Exelon representatives dated September 20, 21, 22, 23 and October 6, 2005 and related meetings on October 6, 2005 with the Commissioners and Commission staff. Additionally, the Attorney General specifically asserts the e-mails and transmittal of the application on October 17, 2005 and the answer to the Attorney General's protest on November 15, 2005 violate *ex parte* rules.

21. The Attorney General argues the *ex parte* communications should have been disclosed but were not and therefore sanctions are required.

22. Initially, we note that the Commission does not permit supplements or amendments to requests for rehearing filed more than 30 days after the date of the

¹³ Answers to requests for rehearing are not permitted. *See* 18 C.F.R. § 385.713(d) (2005).

¹⁴ We do not agree that our regulations are, as the Attorney General implies, inconsistent with the APA. In any event, this proceeding is not the appropriate vehicle to address a request to revise our regulations.

order.¹⁵ Accordingly, the supplement and amendment filed by the Attorney General are rejected.

23. Nevertheless, even if we were to consider the substance of the supplemental pleadings, we find that, in any event, the Attorney General's request should be denied; there were no impermissible *ex parte* communications. There are two discrete circumstances here: pre-filing communications and post-filing communications. In *Exelon Corp.*,¹⁶ the Commission addressed similar pre-filing communications and found that they were not impermissible:

The regulations prohibit such off-the-record communications in a contested on-the-record proceeding “from the time of filing of an intervention disputing any material fact that is the subject of a proceeding.”¹⁷ At the time that employees of the Applicants met with the Commissioners, the Commission's prohibition against off-the-record communications did not apply because there was no proceeding whatsoever, much less a contested on-the-record proceeding, nor were there any parties. As the prohibition against off-the-record communications did not apply at this point, we find that the Commissioners acted according to the rules set forth in the Commission's regulations.¹⁸

24. In this proceeding, the communications in September and early October 2005 preceded the filing of the application and therefore were not impermissible *ex parte* communications.¹⁹

25. The later communications were simply the transmission of copies of documents that were being formally and publicly filed and contemporaneously served on all parties,

¹⁵ See, e.g., *CMS Midland, Inc.*, 56 FERC ¶ 61,177 at 61,623 (1991); *Public Service Company of New Hampshire*, 56 FERC ¶ 61,105 at 61,403 (1991); *Houlton Water Company v. Maine Public Service Company*, 60 FERC ¶ 61,141 at 61,511 & n.8 (1992).

¹⁶ 113 FERC ¶ 61,299 (2005).

¹⁷ 18 C.F.R. § 385.2201(d)(1)(iv) (2005).

¹⁸ *Exelon Corp.*, 113 FERC ¶ 61,299 at P 92-93 (2005).

¹⁹ *Id* at P 92-96.

including the Attorney General. Thus, they were not impermissible *ex parte* communications.²⁰

26. In sum, there were no *ex parte* communications and neither our regulations nor the requirements of the APA were violated.

The Commission orders:

The Attorney General's request for rehearing is hereby denied; the supplement and amendment to the rehearing are hereby rejected.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

²⁰ 18 C.F.R. § 385.2201(b)(4) (2005).