

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

PSEG Fossil LLC
PSEG Nuclear LLC
PSEG Energy Resources & Trade LLC

Docket No. ES07-28-000

ORDER ON REQUEST FOR BLANKET AUTHORIZATION
TO ISSUE SECURITIES AND ASSUME LIABILITIES

(Issued June 7, 2007)

1. On March 18, 2007, PSEG Fossil LLC (PSEG Fossil), PSEG Nuclear LLC (PSEG Nuclear) and PSEG Energy Resources & Trade LLC (PSEG ER&T) (collectively, Applicants) filed an application for blanket authorization for the issuance of securities and assumption of liabilities under section 204 of the Federal Power Act (FPA).¹ As discussed herein, we deny PSEG Fossil's and PSEG Nuclear's requests for blanket authorization under FPA section 204 and grant PSEG ER&T's request for blanket authorization.

Background

2. PSEG Fossil and PSEG Nuclear are exempt wholesale generators who sell their entire output to their affiliated power marketer, PSEG ER&T, under a cost-based formula rate. According to Applicants, the formula rate covers operating costs, without any return. PSEG ER&T then sells the power pursuant to its market-based rate tariff.

3. At the time that PSEG ER&T was approved to sell power pursuant to its market-based rate tariff, it did not receive the usual waivers and blanket authorizations given to power marketers that make sales at market-based rates because PSEG ER&T had two power sales contracts, one with its affiliate Public Service Electric and Gas Company (PSE&G), then a traditional vertically integrated public utility, and the other with an unaffiliated buyer Old Dominion Electric Cooperative, Inc. (ODEC). These contracts

¹ 16 U.S.C. § 824c (2000).

had cost-based rate elements for which the Commission concluded that traditional regulation, and traditional cost-based accounting and reporting were still needed.²

4. Applicants state that the ODEC contract has since expired, and that sales to PSE&G are now made pursuant to a state-authorized competitive procurement process. Applicants explain that, pursuant to state legislation that implemented retail choice, PSE&G transferred all of its generation and generation-related assets, including wholesale trading contracts, to affiliated companies that are not regulated as public utilities under New Jersey law. PSEG Power, LLC was formed as a wholly-owned subsidiary of PSE&G's parent Public Service Enterprise Group, Inc., to be the intermediary holding company parent of PSEG Fossil, PSEG Nuclear and PSEG ER&T. PSEG Fossil was formed to acquire and operate the principal non-nuclear generation facilities of PSE&G. PSEG Nuclear was formed to acquire and operate all of the nuclear-fueled generation facilities of PSE&G. PSEG ER&T was formed to acquire the wholesale trading agreements of PSE&G and to serve as the power marketer for PSEG Nuclear and PSEG Fossil.³

5. Applicants state that, following New Jersey's adoption of retail choice, PSE&G is now a transmission and distribution-only company. As such, it provides basic generation service (BGS), also known as "provider of last resort service" or "default service." According to the Applicants, PSE&G acts as an agent for its retail load in acquiring supply for the BGS service through annual independently-administered auctions that are supervised by the BPU. Applicants further assert that the Commission has reviewed the New Jersey process and found it to be an example of a process that meets the Commission's principles of competitive solicitation.

6. In 2006, Applicants requested, and the Commission granted PSEG Fossil, PSEG Nuclear, and PSEG ER&T waiver of the Commission's accounting and reporting requirements that typically are given to companies with market-based rates.⁴ Applicants

² See *PSEG Fossil LLC*, 91 FERC ¶ 61,217 (2001), *reh'g denied*, 98 FERC ¶ 61,169 (2002).

³ See *Public Service Electric and Gas Co.*, 88 FERC ¶ 61,299 (1999).

⁴ *PSEG Fossil LLC*, 115 FERC ¶ 61,313 (2006). Specifically, the Commission granted waiver of Subparts B and C of Part 35 of the Commission's regulations requiring the filing of cost-of-service information, except for sections 35.12(a), 35.13(b), 35.15 and 35.16, which the Commission conditionally granted. See 18 C.F.R. Part 35 (2006). Waivers of Parts 41, 101, and 141 of the Commission's regulations, concerning accounting and reporting requirements, were also conditionally granted, with the exception of 18 C.F.R. §§ 141.14 and 141.15 (2006). See 18 C.F.R. Parts 41, 101, and 141 (2006).

state that the package of waivers sought and granted at that time followed the precedent in *Nevada Sun-Peak LP*.⁵ Applicants did not, however, request – and the Commission did not grant – blanket authorization to issue securities or assume liabilities.

Request for Blanket Authorization

7. Applicants here request blanket authorization to issue securities or assume liabilities. They recognize that blanket authorization is typically only given to sellers with market-based rates. Applicants assert that PSEG ER&T clearly qualifies for blanket authorization because it has market-based rate authorization. They further assert that, while PSEG Fossil and PSEG Nuclear do not have market-based rate authorization, they would qualify for such authorization because the PSEG generation capacity holdings in each RTO market in which they are located are considerably less than the Commission's 20 percent threshold.

8. Applicants argue that granting them blanket authorization would be consistent with the purpose of section 204, as explained in Commission precedent, and also in *Nevada Sun-Peak*. Applicants contend that in *Nevada Sun-Peak*, while the Commission denied the company's request for market-based rate authority and instead accepted essentially cost-based rates, the Commission granted blanket authorization to issue securities or assume liabilities, along with granting certain other waivers typically granted only to market-based rate sellers. In particular, Applicants look to, in support of their request, the Commission's statement in *Nevada Sun-Peak* that there was no "compelling reason" to subject the company to the Commission's traditional regulatory requirements because the company operated a single facility, sold all of its output to one customer, and did so under a long-term, fixed rate contract.⁶

9. Applicants assert that the rationale in *Nevada Sun-Peak* applies equally here because in that case the utility was selling its entire output to one customer, and here PSEG Fossil and PSEG Nuclear are selling their entire output to PSEG ER&T. They also assert that the sales are an internal transaction: no retail ratepayers or third parties are affected by the sales price in the internal contracts among Applicants. Thus, there are no captive retail customers to be protected in this circumstance.

Notice of the Filing and Responsive Pleadings

10. Notice of Applicants' filing was published in the *Federal Register*, 72 Fed. Reg. 16,777 (2007), with interventions and protests due on or before April 14, 2007. None was filed.

⁵ 86 FERC ¶ 61,243 (1999).

⁶ *Id.* at 61,874.

Discussion

11. The Commission grants blanket authorization for the issuance of securities and assumption of liabilities to power sellers not subject to traditional cost-based rate regulation. PSE&G ER&T is a power marketer authorized to sell energy at market-based rates and, standing alone, qualifies for the blanket authorization sought here. Accordingly, we will grant it such blanket authorization. On the other hand, PSEG Fossil and PSEG Nuclear are not power marketers authorized to sell at market-based rates, and moreover, they make sales at cost-based rates.⁷

12. Applicants rely on *Nevada Sun-Peak*, but, as the Commission noted in *Ameren Energy Generating Company*,⁸ that case involved “a single facility selling its entire output to a non-affiliated entity under a fixed-rate, long-term contract,” which the Commission characterized as a “simple transaction between two non-affiliates.” Here, conversely, PSEG Fossil’s and PSEG Nuclear’s generation facilities are selling power to an affiliate and at formula rates. In essence, *Nevada Sun-Peak* involved a very particular circumstance where the Commission was granting, among other things, blanket authorization to a company that was selling to a non-affiliate and that would not be before the Commission again for a significant period of time given the long-term, fixed rate nature of the contract between the parties. That is simply not the case here. *Nevada Sun-Peak*, in short, does not justify our granting Applicants’ request with respect to PSEG Fossil and PSEG Nuclear. The Commission also observed in *Ameren Energy* that “[w]e did not intend that the factors enumerated in *Nevada Sun-Peak* . . . function as conditions precedent to other grants of waiver involving different, and more complex, cost-based transactions, such as those among Ameren Generating and its affiliates.”⁹

⁷ PSEG Fossil and PSEG Nuclear also give no justification as to why they each need blanket authorization, particularly when they are currently operating under specific grants of authority to issue securities and assume liabilities under section 204 and do not claim that they could not continue to obtain such authority. In this regard, PSEG Fossil’s and PSEG Nuclear’s current section 204 authorizations expire September 15, 2007 and December 14, 2008, respectively, 112 FERC ¶ 62,204 (2005) and 117 FERC ¶ 62,232 (2006)).

⁸ 93 FERC ¶ 61,024 (2000), *reh’g denied* 95 FERC ¶ 61,009 (2001) (*Ameren Energy*). Ameren Energy Generating Company had requested the waivers and blanket authorization that the Commission grants to power marketers that are not subject to traditional cost-based rate regulation (*e.g.*, waivers of Parts 41, 101 and 141 of the Commission’s regulations and most of the cost-of-service filing requirements under Part 35). The Commission denied the request but did not separately and expressly address section 204 blanket authorization in these orders.

⁹ *Ameren Energy*, 95 FERC ¶ 61,009 at 61,014.

13. Applicants assert that, for purposes of their power sales, they can be viewed as a single operating unit with all sales into the market by the power marketer. The fact is, however, that they are not a single entity with market-based rates. They further explain that in the most recent auction to supply some of PSE&G's "provider of last resort" service customers, PSEG ER&T won in 12 of the 29 tranches. Therefore, insofar as the power ultimately sold to PSE&G is concerned, the sales from PSEG Fossil and PSEG Nuclear to PSEG ER&T are effectively not to a single customer because PSE&G is acting as agent for a portion of its retail customers. Moreover, the sales also are not for a single long-term transaction at fixed rates, given that in New Jersey the auction is re-run annually, resulting in a new sale by PSEG ER&T every year. In this regard, the Commission noted in *Ameren Energy* that the use of an affiliated marketer as a pass-through entity "is a significant difference from the situation presented in *Nevada Sun-Peak*, where the sales were to a non-affiliated customer that did not purchase power for the benefit of another affiliate's retail customers." In addition, the power is sold by PSEG Fossil and PSEG Nuclear to PSEG ER&T under a formula rate, which is computed based on fluctuating operating costs, unlike the sales at issue in *Nevada Sun-Peak*.

14. Finally, in *Ameren Energy*, the Commission explained that it traditionally has granted waivers and blanket authorization only to those entities that are not subject to traditional cost-based rate regulation, and that granting them for an entity subject to cost-based rate regulation would represent a departure from the Commission's comparatively longstanding practice.¹⁰ Yet that is what Applicants ask the Commission to do with respect to PSEG Fossil and PSEG Nuclear.

15. We note that our action here, in denying blanket authorization to PSEG Fossil and PSEG Nuclear, does not mean that they cannot obtain authorization to issue securities or to assume liabilities. Rather PSEG Fossil and PSEG Nuclear have the option of renegotiating their contract with PSEG ER&T in order to obtain market-based rate authority or— as they have done to date — of continuing to file for section 204 authorization, typically for two-year periods, as their current authorizations expire.¹¹

16. In conclusion, we will grant PSEG ER&T's request for blanket authorization under section 204 of the FPA, and we will deny PSEG Fossil's and PSEG Nuclear's request for blanket authorization under section 204 of the FPA.

¹⁰ *Id.* at 61,024.

¹¹ *See supra* note 9.

The Commission orders:

(A) PSEG ER&T's request for blanket authorization for the issuance of securities and assumption of liabilities pursuant to section 204 of the FPA is hereby granted.

(B) PSEG Fossil's request for blanket authorization for the issuance of securities and assumption of liabilities pursuant to section 204 of the FPA is hereby denied.

(C) PSEG Nuclear's request for blanket authorization for the issuance of securities and assumption of liabilities pursuant to section 204 of the FPA is hereby denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.