

134 FERC ¶ 61,138
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Public Service Electric and Gas Company
PSEG Energy Resources & Trade LLC
PSEG Power Connecticut LLC
PSEG Fossil LLC
PSEG Nuclear LLC

Docket No. ER10-1743-000

ORDER ON AFFILIATE RESTRICTIONS

(Issued February 25, 2011)

1. In this order, we grant Public Service Electric and Gas Company's (PSE&G), PSEG Energy Resources & Trade LLC's (PSEG ER&T), PSEG Fossil LLC's (PSEG Fossil), PSEG Nuclear LLC's (PSEG Nuclear) and PSEG Power Connecticut LLC's (PSEG Connecticut) (collectively, PSEG Companies) request for waiver of the Commission's affiliate restrictions.¹

I. Background

2. On July 9, 2010, the PSEG Companies filed a request for waiver of the affiliate restrictions as set forth in section 35.39 of the Commission's regulations.²

¹ 18 C.F.R. § 35.39 (2010).

² *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 467-468, 549, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010).

3. The PSEG Companies state that PSE&G is a public utility operating company engaged primarily in the transmission of electricity and the provision of gas and electric distribution service in New Jersey. Additionally, the PSEG Companies state that PSE&G is a member of the PJM Interconnection, L.L.C. (PJM), and has made all of its transmission available for open access transmission service pursuant to the Open Access Transmission Tariff (OATT) administered by PJM. The PSEG Companies state that PSE&G operates within a full retail access jurisdiction. They also explain that, pursuant to the Electric Discount and Energy Competition Act of 1999,³ which initiated the transition from a regulated to a competitive retail power market in New Jersey, the New Jersey Board of Public Utilities annually approves statewide auctions to determine the entities that will supply Basic Generation Service in New Jersey.⁴ The PSEG Companies state that PSE&G and other New Jersey electric utilities with franchised service territories are required to obtain all electric supply requirements through this auction on an annual basis for retail customers that do not purchase electric supply from third-party suppliers.

4. The PSEG Companies represent that PSEG ER&T does not own or operate any generation, transmission or distribution facilities, and was formed to market the power that it purchases from its affiliates, including PSEG Fossil and PSEG Nuclear, which are wholly-owned subsidiaries of PSEG Power LLC, as well as from other sources. The PSEG Companies explain that PSEG ER&T engages in wholesale marketing, brokering and physical and financial trading and hedging activities, and engages in the sale of electric energy, capacity and ancillary services at market-based rates.⁵

5. The PSEG Companies state that PSEG Connecticut is a Connecticut limited liability company and exempt wholesale generator (EWG) that owns and operates electric generation facilities, and is authorized to sell power at market-based rates.⁶ They represent that both of PSEG Connecticut's generation facilities, Bridgeport Harbor and New Haven Harbor, are located in Connecticut within the market administered by ISO New England Inc. (ISO-NE), and that PSEG Connecticut sells the output of these

³ PSEG Companies July 9 Filing at 3 (citing N.J.S.A. § 48:3-49 *et seq.*).

⁴ The PSEG Companies explain that Basic Generation Service is known in other states as “provider of last resort” service or “default” service, and is electric generation service provided to the customers of an electric distribution facility that have not chosen an alternative power supplier. PSEG Companies July 9 Filing at 3.

⁵ *Public Service Electric & Gas Co.*, 78 FERC ¶ 61,119 (1997).

⁶ PSEG Companies July 9 Filing at 3 (citing *Wisvest Corp.*, 101 FERC ¶ 61,166 (2002)).

generation facilities to its affiliate, PSEG ER&T, under an agreement entered into pursuant to PSEG Connecticut's market-based rate authority.

6. The PSEG Companies also represent that PSEG Fossil and PSEG Nuclear are both EWGs that own and operate electric generation facilities in PJM.⁷ The PSEG Companies explain that PSEG Fossil and PSEG Nuclear sell the entire output of their facilities to their affiliate PSEG ER&T pursuant to cost-based contracts approved by the Commission.⁸

7. The PSEG Companies request waiver of the affiliate restrictions codified in the Commission's regulations at 18 C.F.R. § 35.39. In support of their request, the PSEG Companies state that PSE&G, the only franchised public utility among the PSEG Companies, does not have any captive retail customers as a result of the introduction of retail competition in New Jersey more than a decade ago. The PSEG Companies represent that all of PSE&G's retail customers have the ability to choose an alternative service provider. Thus, the PSEG Companies conclude that PSE&G does not have any "captive customers" under the definition set forth in Order No. 697, and should not be subject to the affiliate restrictions.⁹ The PSEG Companies also assert that PSE&G's status as a provider of last resort does not warrant a conclusion that it has captive retail customers. The PSEG Companies, relying on Order No. 697, state that "retail customers in retail choice states who choose to buy power from their local utility at cost-based rates as part of that utility's provider-of-last resort obligation are not considered captive customers because, although they may choose not to do so, they have the ability to take service from a different supplier whose rates are set by the marketplace."¹⁰

8. The PSEG Companies also represent that PSE&G does not have any captive wholesale electric energy customers, and that PSE&G has no wholesale electric energy

⁷ *Id.* at 4 (citing *PSEG Fossil LLC*, 89 FERC ¶ 62,337 (1999); *PSEG Fossil*, 95 FERC ¶ 61,405 (2001); *PSEG Fossil LLC*, 99 FERC ¶ 62,167 (2002); *PSEG Nuclear LLC*, 97 FERC ¶ 62,191 (2001)).

⁸ *Id.* (citing *Public Service Electric and Gas Co.*, 88 FERC ¶ 61,299 (1999); *Public Service Electric and Gas Co.*, Docket No. ER99-3151-001 (Feb. 4, 2000) (delegated letter order)).

⁹ *Id.* at 5 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 479).

¹⁰ *Id.* (quoting Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 480).

customers at all.¹¹ Thus, the PSEG Companies request that the Commission find that PSE&G has no captive electric energy customers, either retail or wholesale, and therefore that the affiliate restrictions do not apply to any of the PSEG Companies.

II. Notice of Filing and Responsive Pleadings

9. Notice of the PSEG Companies' filing was published in the *Federal Register*, 75 Fed. Reg. 41,844 (2010), with interventions and comments due on or before July 30, 2010. Morris Energy Group, LLC (Morris Energy) filed a motion to intervene and protest. The North American Energy Alliance, LLC (NAEA) filed a motion to intervene and comments. The New Jersey Board of Public Utilities filed a notice of intervention. The New Jersey Division of Rate Counsel and Consolidated Edison Energy, Inc. filed motions to intervene out-of-time. On August 9, 2010, the PSEG Companies submitted an answer to the protest and comments. On December 27, 2010, Morris Energy filed a notice of withdrawal of its protest. On January 4, 2011, NAEA filed a notice of withdrawal of its motion to intervene and comments.¹²

III. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2010), the Commission will grant the late-filed motions to intervene submitted by the New Jersey Division of Rate Counsel and Consolidated Edison Energy, Inc. given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest unless otherwise ordered by the

¹¹ The PSEG Companies state that as part of their previous Order No. 697 compliance filing, they requested waiver of the affiliate restrictions. They explain that the Commission denied their request because PSE&G did not specifically address whether it had wholesale customers. *Id.* at 6 (citing *PSEG Energy Resources & Trade, LLC*, 125 FERC ¶ 61,073, at P 56 (2008)).

¹² The notices of withdrawal filed by Morris Energy and NAEA became effective by operation of Rule 216(b)(1) of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.216(b)(1) (2010).

decisional authority. Given the withdrawal of the protest and comments, we find that the PSEG Companies' answer is moot, and thus we reject it.

B. Commission Determination

12. In Order No. 697, the Commission codified in its regulations affiliate restrictions to protect captive customers from the potential for a franchised public utility to interact with a market-regulated power sales affiliate in ways that transfer benefits to the affiliate and its stockholders to the detriment of the captive customers.¹³ Captive customers are defined as “any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation.”¹⁴ In Order No. 697, the Commission stated that, “where a seller demonstrates and the Commission agrees that it has no captive customers, the affiliate restrictions will not apply.”¹⁵ The Commission explained that the definition of “captive customers” does not include those customers who have retail choice, i.e., the ability to select a retail supplier based on the rates, terms, and conditions of service offered. The Commission stated that retail customers who choose to be served under cost-based rates but have the ability, by virtue of state law, to choose one retail supplier over another, are not considered to be under “cost-based regulation” and therefore are not “captive.”¹⁶ The Commission went on to state that “retail customers in retail choice states who choose to buy power from their local utility at cost-based rates as part of that utility’s provider-of-last-resort obligation are not considered captive customers because, although they may choose not to do so, they have the ability to take service from a different supplier whose rates are set by the marketplace.”¹⁷

13. In Order No. 697-A the Commission explained that, if a seller has wholesale customers, the seller should explain why those customers are adequately protected against affiliate abuse.¹⁸

¹³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 513, 544, 549.

¹⁴ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 202; 18 C.F.R. § 35.36(a)(6) (2010).

¹⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 552.

¹⁶ *Id.* P 479.

¹⁷ *Id.* P 480.

¹⁸ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 201.

14. Based on the PSEG Companies' representations that all retail customers in PSE&G's franchised service territory have the ability to select a retail supplier based on rates, terms and conditions of service, and their representation that PSE&G does not have any wholesale electric customers at all, we find that PSE&G does not have any captive retail or wholesale customers. Accordingly, consistent with Order Nos. 697 and 697-A, we will grant the PSEG Companies' request for waiver of the affiliate restrictions. We will direct the PSEG Companies to submit a compliance filing within 30 days of the date of this order, revising the limitations and exemptions sections of their market-based rate tariffs to list the waiver granted herein and to include a citation to this order.¹⁹

The Commission orders:

(A) The PSEG Companies' request for waiver is hereby granted, as discussed in the body of this order.

(B) The PSEG Companies are hereby directed to make a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁹ *Id.* P 385 n.517; Order No. 697, FERC Stats. & Regs. ¶ 31,252 at Appendix C.