

126 FERC ¶ 61,032
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.

Commonwealth Edison Company
Exelon Generation Company, LLC

Docket No. ER08-412-002

ORDER DENYING REHEARING

(Issued January 15, 2009)

1. In this order, the Commission denies a request for rehearing filed by the Illinois Commerce Commission (Illinois Commission) of the Commission's March 4, 2008 order, in which the Commission dismissed an application under section 205 of the Federal Power Act (FPA)¹ by Exelon Generation Company, LLC (Exelon) and Commonwealth Edison (ComEd) (collectively, Applicants) seeking authorization for Exelon to make sales to its affiliate, ComEd, on the grounds that the Commission had previously granted Applicants waiver of the affiliate power sales restriction.²

I. Background

2. On January 4, 2008, Exelon and ComEd filed an application under section 205 of the Federal Power Act seeking authorization for Exelon to make sales to its affiliate, ComEd, if it is selected as a winning bidder in the context of a competitive solicitation.

3. In the March 4, 2008 Order, the Commission dismissed Applicants' application because the Commission had previously granted Applicants waiver of the affiliate power sales restriction and thus, had already authorized Applicants to make the affiliate sale that was the subject of the filing. The Commission noted that Order No. 697 clarified that sellers that have previously demonstrated and been found not to have captive customers will not be required to request another waiver of the affiliate restrictions and that "to the extent a seller is not bound by the affiliate restrictions because neither the seller nor the

¹ 16 U.S.C. § 824d (2006).

² *Commonwealth Edison Company and Exelon Generation Company, LLC*, 122 FERC ¶ 61,200 (2008) (March 4, 2008 Order).

buyer has captive customers ... the *Edgar*³ principles do not apply and the seller does not need to make a filing with regard to a proposed competitive solicitation.”⁴

II. Request for Rehearing

4. On March 27, 2008, the Illinois Commission filed a request for rehearing of the March 4, 2008 Order. The Illinois Commission asserts that it was arbitrary and capricious for the Commission to dismiss Applicants’ request for authorization to make affiliate sales without evaluating the components of the competitive solicitation. The Illinois Commission specifies that the Commission was arbitrary and capricious in dismissing Applicants’ request for authorization to make affiliate sales and finding that Applicants did not need to file their request for authorization to make affiliate sales on the basis that the Commission had previously in a November 2, 2000 Order⁵ granted Applicants a waiver of the affiliate restrictions.⁶

5. The Illinois Commission argues that without an express waiver, the Commission’s regulations prohibit any wholesale sale of electric energy between a franchised public utility with captive customers and a market-regulated power sales affiliate without first receiving Commission authorization for such transaction.⁷ The Illinois Commission states that the Commission’s November 2000 Order did not expressly waive the requirement for prior filing and approval under section 205 for wholesale power contracts between an Exelon affiliate and ComEd. The Illinois Commission notes that the relevant section of the November 2000 Order states:

The Commission agrees that there are adequate pricing safeguards in place to permit the Applicants to engage in inter-affiliate transactions at market-based rates. This

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

⁴ *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 540, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh’g*, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268 (2008), *order on reh’g*, Order No. 697-B, 73 Fed. Reg. (Dec. 30, 2008), FERC Stats. & Regs. ¶ 31,xxx (2008).

⁵ *Exelon Generation Company, L.L.C.*, 93 FERC ¶ 61,140 (2000) (November 2000 Order).

⁶ Illinois Commission Request for Rehearing at 4.

⁷ *Id.* at 5.

includes removing the requirement that ComEd make sales to its affiliates at rates that are no lower than the rates charged to non-affiliates.

While the Illinois Commission does acknowledge that the November 2000 Order “authorized [Exelon and ComEd] to engage in inter-affiliate transactions at market-based rates,” it contends that the Commission did not specifically waive the requirement for prior filing and authorization of affiliate sales under section 205 of the FPA.⁸

6. The Illinois Commission asserts that between the date of the November 2000 Order and March 4, 2008, when the Commission dismissed Applicants’ request for authorization to make affiliate sales, the Commission did not assert that the section 205 filing requirement had been waived by the Commission. It further argues that Applicants did not act as if the filing requirement had been waived by the Commission. The Illinois Commission argues that the March 4, 2008 Order provided no rationale for dismissing Applicants’ request for authorization to make affiliate sales and processing it differently from a previous application by Applicants.⁹

7. The Illinois Commission also requests that the Commission apply the affiliate sales restrictions outlined in Order No. 697 to the transaction between ComEd and its affiliates regardless of any prior waivers that the Commission may have granted to the Applicants.

8. Additionally, the Illinois Commission notes that “the Commission cited as a secondary reason for not reviewing the Applicants’ filing the fact that ‘no state regulatory authority has asked us in this proceeding to deem that its retail customers are captive.’”¹⁰ The Illinois Commission states that the first time the Commission “imposed that obligation on state commissions” was in Order No. 707,¹¹ which was issued on February 21, 2008, after the January 16, 2008 original comment date in this proceeding passed; thus, “applying that rationale to the instant proceeding is unreasonable.”¹² The Illinois Commission notes that in its comments filed in Docket No. ER00-3251-015, *et al.*, Exelon’s updated market power analysis proceeding, it filed a petition for declaratory

⁸ *Id.* at 5-6.

⁹ *Id.*

¹⁰ *Id.* at 10 (quoting March 4, 2008 Order, 122 FERC ¶ 61,200 at P 14).

¹¹ *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, 73 Fed. Reg. 11,013 (Feb. 29, 2008), FERC Stats. & Regs. ¶ 31,264 (2008).

¹² Illinois Commission Request for Rehearing at 10.

order requesting that the Commission treat ComEd residential customers as captive for purposes of applying the affiliate restrictions.¹³

III. Answer to Request for Rehearing

9. On April 3, 2008, Exelon filed in this docket a copy of its answer to the Illinois Commission's comments in Docket No. ER00-3251-015, *et al.*, the Exelon triennial update filed with the Commission on March 27, 2008.

IV. Discussion

A. Procedural Issues

10. Rule 713(d) of the Commission's Rules of Practice and Procedure¹⁴ prohibits an answer to a request for rehearing. We will, therefore, reject Exelon's answer.¹⁵

B. Commission Determination

11. We will deny the Illinois Commission's request for rehearing. We find that the March 4, 2008 Order properly followed and implemented the Commission's policy and regulations regarding requests for authorization to make affiliate sales by market-based rate sellers that have received a waiver of the affiliate restrictions.

12. In the March 4, 2008 Order, we explained that the Commission's regulations prohibit the sale of wholesale electric energy between a franchised public utility with captive customers and a market-regulated power sales affiliate unless the Commission grants prior authorization for such a transaction under section 205 of the FPA. We then explained that, in Order No. 697, the Commission stated that "to the extent a seller is not bound by the affiliate restrictions because neither the seller nor the buyer has captive

¹³ *Id.* at 11.

¹⁴ 18 C.F.R. § 385.713(d) (2008).

¹⁵ We also note that, although the Illinois Commission references comments it filed in the Exelon triennial update docket asking that the Commission deem ComEd's customers to be captive for purposes of applying the affiliate restrictions, it did not list that issue as a specification of error or in its statement of issues to be addressed on rehearing. Therefore, that issue is not properly before us in this docket. See 18 C.F.R. § 713(c) (2008). However, we address the Illinois Commission's comments in that regard in an order in the triennial update docket that is being issued concurrently with this order. *Exelon Generation Company, et al.*, Docket No. ER00-3251-015, *et al.*, 126 FERC ¶ 61,031, issued January 15, 2009.

customers, we find that the *Edgar* principles do not apply and the seller does not need to make a filing with regard to a proposed competitive solicitation.”¹⁶

13. The March 4, 2008 Order found that Applicants previously received a waiver of the affiliate power sales restriction in the November 2000 Order. Applicants explained in their February 21, 2008 supplement that ComEd no longer serves any wholesale customers as of December 31, 2007. As such, the Commission concluded that because Applicants have previously received a waiver of the affiliate power sales restriction, they were already authorized to make the affiliate sale that was the subject of the filing in this proceeding. Based upon that waiver, and the Commission’s explanation in Order No. 697, the Commission found that Applicants did not need to file with the Commission their request for authorization to make affiliate sales.

14. We disagree with the Illinois Commission’s assertion that the November 2000 Order did not clearly grant Applicants a waiver of the affiliate power sales restrictions, including a waiver of the requirement to file a request for authorization to make affiliate sales for prior Commission approval of such sales. The November 2000 Order granted Applicants’ request to engage in affiliate transactions at market-based rates.¹⁷ Of particular relevance for the instant case is whether the potential seller, Exelon, has been granted waiver of the requirement to file for Commission authorization prior to making an affiliate sale. The Commission noted in the November 2000 Order that Exelon had proposed not to include an affiliate sales prohibition in its market-based rate tariff. In accepting Exelon’s proposed market-based rate tariff with no affiliate sales prohibition, the Commission placed no limitations on Exelon’s ability to make inter-affiliate sales at market-based rates and did not require that Exelon make any additional filing prior to engaging in any such sales.¹⁸

15. While ComEd and other entities that had a waiver of the affiliate power sales restrictions may have continued to file for authorization to make affiliate sales, they were not required to do so. Order No. 697 intended to clarify this very situation when the

¹⁶ March 4, 2008 Order, 122 FERC ¶ 61,200 at P 11-12 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 540).

¹⁷ The Commission further noted that ComEd stated that it had fixed-rate contracts with its wholesale requirements customers that did not allow it to pass through any costs resulting from affiliate abuse. On this basis, the Commission agreed that there were adequate pricing safeguards in place to permit ComEd and its affiliates to engage in inter-affiliate sales transactions at market-based rates. November 2000 Order, 93 FERC ¶ 61,140 at 61,425.

¹⁸ November 2000 Order, 93 FERC ¶ 61,140 at 61,426.

Commission explained that any sellers that had previously demonstrated and been found not to have captive customers will not be required to request another waiver of the affiliate restrictions. The Commission did note that such sellers are still under the obligation to report to the Commission any changes in status and also will be required to meet the requirements necessary to maintain their market-based rate authority when they file their regularly scheduled updated market power analyses. As a result, they will be required to demonstrate that they continue to lack captive customers in order to support a continued waiver of the affiliate restrictions in the regulations.¹⁹

16. The Commission also clarified in Order No. 697, and reiterated in the March 4, 2008 Order, that to the extent a seller is not bound by the affiliate restrictions because neither the seller nor the buyer has captive customers, the *Edgar* principles do not apply and the seller does not need to make a filing with regard to a proposed competitive solicitation, such as the filing at issue in this proceeding. As such, Order No. 697 provided notice that the Commission would no longer be reviewing applications for authorization to make affiliate sales for companies that had received a waiver of the affiliate restrictions.²⁰

17. Because the Commission explained in Order No. 697, as well as in the March 4, 2008 Order, that no filing was necessary under circumstances such as those in the instant docket, the Commission has not acted in an arbitrary and capricious manner. Rather, the Commission acted in accordance with the regulations and policy set forth in Order No. 697 and explained the basis for its decision in the March 4, 2008 Order to dismiss Applicants' application because Applicants previously received a waiver of the affiliate power sales restriction. Additionally, the Commission found that ComEd, which has previously been found not to have to captive retail customers²¹ and added in its supplemental filing that it no longer served wholesale customers as of December 31, 2007, continues to meet the requirements for a waiver of the affiliate restrictions.²²

18. We also deny the Illinois Commission's request for rehearing that the Commission apply the affiliate sales restrictions outlined in Order No. 697 to the transaction at issue here. As we have explained, the Commission followed the requirements outlined in Order No. 697. We explicitly stated in Order No. 697 that when a seller has received a

¹⁹ March 4, 2008 Order, 122 FERC ¶ 61,200 at P 12; Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 551.

²⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 540.

²¹ November 2000 Order, 93 FERC ¶ 31,140 at 61,425.

²² March 4, 2008 Order, 122 FERC ¶ 61,200 at n. 14.

waiver of the affiliate restrictions, *Edgar* principles do not apply to filings regarding a proposed competitive solicitation. Therefore, such seller is not required to make such a filing with the Commission.²³

19. The Illinois Commission states that it was unreasonable for the Commission to reference the fact that no state regulatory authority had asked the Commission to deem Applicants' retail customers captive given that Order No. 707, which first discussed this option, was not issued until February 21, 2008, past the January 25, 2008 comment date. While the Illinois Commission is correct that the initial comment date had passed prior to issuance of Order No. 707, Applicants filed a supplement on February 21, 2008 stating that ComEd no longer had wholesale customers as of December 31, 2007. This supplemental filing was separately noticed in the *Federal Register* with interventions and protest due on or before March 3, 2008, after issuance of Order No. 707. Therefore, the Illinois Commission was not precluded from making a filing in this docket in response to Applicants' supplemental filing.

20. Based on the information and explanation the Commission provided in the March 4, 2008 Order, we find that the Commission did not act arbitrarily and capriciously in dismissing Applicant's request for authorization to make affiliate sales in the March 4, 2008 Order. Accordingly, we deny the Illinois Commission's request for rehearing.

The Commission orders:

The Illinois Commission's request for rehearing of the Commission's March 4, 2008 Order dismissing Applicant's request for authorization to make affiliate sales is hereby denied, for the reasons stated above.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 540.