

122 FERC ¶ 61,200
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 Nos. ER08-412-000
ER08-412-001

ORDER ON REQUEST FOR AUTHORIZATION TO MAKE AFFILIATE SALES

(Issued March 4, 2008)

1. In this order, we dismiss an application under section 205 of the Federal Power Act (FPA),¹ by Exelon Generation Company (ExGen) requesting Commission authorization to make sales of power at market-based rates to its affiliate, Commonwealth Edison Company (ComEd) (collectively, Applicants), because the Commission has previously granted Applicants waiver of the affiliate power sales restriction.

I. Background

2. ComEd and ExGen previously received Commission authorization to make wholesale sales at market-based rates.² In *Exelon*, the Commission granted ComEd and ExGen authority to engage in inter-affiliate transactions at market-based rates.³ The Commission agreed that there were adequate safeguards in place to permit ComEd and ExGen to engage in inter-affiliate transactions at market-based rates.

3. On January 4, 2008, Applicants submitted for filing an application under section 205 of the FPA requesting that the Commission authorize ExGen to make affiliate sales

¹ 16 U.S.C. § 824d (2000).

² *Commonwealth Edison Co.*, 82 FERC ¶ 61,317 (1998); *Exelon Generation Co., LLC*, 93 FERC ¶ 61,140 (2000) (*Exelon*).

³ *Exelon*, 93 FERC ¶ 61,140 at 61,425 (2000).

at market-based rates to ComEd if it is selected as a winning bidder in a competitive Request for Proposals (ComEd RFP) required by a new Illinois statute.

4. Applicants state that their filing is being made to facilitate the implementation of the ComEd RFP, a one-time competitive procurement that ComEd is required to engage in to obtain the energy required to satisfy its provider of last resort (POLR) obligations in Illinois. Applicants explain that they will enter into a service agreement to permit ExGen to participate in the ComEd RFP and, in the event that ExGen is a winning bidder in the ComEd RFP, Applicants would execute one or more standard contracts. Applicants add that the mechanism for this competitive procurement has been specified by the Illinois legislature.

5. Applicants state that on May 31, 2008, a significant portion of ComEd's current power supply contracts that are needed to satisfy ComEd's POLR obligations, executed as a result of a 2006 Illinois auction, will expire. In order to continue to meet its POLR obligations, ComEd must purchase energy on behalf of its customers for the period of June 2008 through May 2009. According to Applicants, the ComEd RFP would be "for 24 monthly on-peak and off-peak standard wholesale block energy products for delivery during the June 2008 – May 2009 period."

6. Applicants note that Illinois is a retail choice state and that the Illinois General Assembly recently passed legislation that creates the Illinois Power Agency (IPA) and empowers the IPA to oversee three major tasks: (1) development of procurement plans on behalf of the state's four largest utilities (including ComEd); (2) implementation of a competitive procurement process consisting of a request for proposals for standard block wholesale products with pay-as-bid settlement and subject to post-bid negotiation of the price term; and (3) development of new electric generation resources. Applicants explain that, since the IPA has not yet been established, ComEd is required to retain oversight responsibility for developing its individual procurement process for the period of June 1, 2008 through May 31, 2009.

7. Applicants state that the ComEd RFP will be conducted under the supervision of an independent procurement administrator, National Economic Research Associates, Inc. (NERA). Applicants explain that NERA "worked with" ComEd to design an initial procurement plan, which identified the wholesale products to be procured and described the portfolio that will be acquired to serve the needs of ComEd's POLR customers. The Illinois Commission issued a December 19, 2007 order that "largely approved the mix of products to be procured," and "approved ComEd's proposal to retain NERA" as the administrator "to design and manage the RFP process." Applicants contend that any competitive procurement process that follows the Illinois statutory mandate will satisfy the principles established by this Commission in the *Edgar*⁴ and *Allegheny*⁵ cases.

⁴ *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (1991) (*Edgar*).

Applicants explain why they believe the ComEd RFP being developed will satisfy the *Edgar* and *Allegheny* requirements.

8. According to Applicants, NERA is currently in the process of designing the details of the ComEd RFP process that will be used to procure the products determined appropriate in the Illinois Commission's December 19, 2007 order. They note that they have filed their application with the Commission prior to NERA finalizing all the details of the ComEd RFP design. Applicants contend that pre-RFP authorization is analogous to the pre-auction authorization the Commission previously granted ComEd in connection with a 2006 Illinois auction.⁶ Applicants add that, "[a]s with the 2006 Illinois Auction approved by the Commission in *ComEd*, the Illinois legislation reserves to the [Illinois Commission] final decision-making on bid selection in the 2008 RFP."⁷

II. Notice and Interventions

9. Notice of Applicants' filing was published in the *Federal Register*⁸ with motions to intervene and protests due on or before January 16, 2008. The Illinois Commission filed a notice of intervention. On February 21, 2008, Applicants filed a supplement to the application stating that ComEd no longer has any wholesale customers as of December 31, 2007. Notice of the supplement was published in the *Federal Register* with motions to intervene and protests due on or before March 3, 2008. None was filed.

III. Discussion

A. Procedural Issues

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁹ the notice of intervention serves to make the Illinois Commission a party to this proceeding.

⁵ *Allegheny Energy Supply Co., LLC.*, 108 FERC ¶ 61,082 (2004) (*Allegheny*).

⁶ *See Commonwealth Edison Co.*, 113 FERC ¶ 61,278 (2005), *reh'g denied*, 115 FERC ¶ 61,133 (2006).

⁷ ComEd Application at P 20.

⁸ 73 Fed. Reg. 2905 (2008).

⁹ 18 C.F.R. § 385.214 (2007).

B. Waiver of Affiliate Restrictions

11. Under the Commission's regulations, no wholesale sale of electric energy may be made between a franchised public utility with captive customers and a market-regulated power sales affiliate without first receiving Commission authorization for the transaction under section 205 of the FPA.¹⁰

12. In Order No. 697, the Commission clarified that any 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.¹¹ The Commission further explained in Order No. 697 that "to the extent a seller is not bound by the affiliate restrictions because neither the seller nor the buyer has captive 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."¹²

13. We note, consistent with our recently issued Final Rule on Cross-Subsidization Restrictions on Affiliate Transactions, that if a state regulatory authority in a retail choice state is concerned that retail customers are insufficiently protected, and that this Commission's affiliate restrictions should apply to the local franchised public utility, the state regulatory authority may file a petition for declaratory order asking this Commission to deem its retail customers to be captive customers for purposes of applying this Commission's affiliate restrictions.¹³

¹⁰ See 18 C.F.R. § 35.39(b). We note that Order No. 697 defines captive customer as "any wholesale or retail electric energy customers served under cost-based regulation" and specifically excludes from the term captive customers "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." See *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252, at P 478, 479 (2007).

¹¹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 551. The Commission stated 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. *Id.*

¹² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 540.

¹³ *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, 73 Fed. Reg. 11,013 (February 29, 2008), 122 FERC ¶ 61,155 at P 45 (2008).

14. Because Applicants have previously received a waiver of the affiliate power sales restriction,¹⁴ they are already authorized to make the affiliate sale that is the subject of the instant filing. Moreover, for this reason and because no state regulatory authority has asked us in this proceeding to deem that its retail customers are captive, there is no reason for us to analyze the ComEd RFP.

The Commission orders:

For the reasons stated above, we dismiss Applicants' request for authorization to make affiliate sales pursuant to the proposed ComEd RFP because Applicants already have authority to make affiliate sales.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁴ *Exelon Generation Co., LLC*, 93 FERC ¶ 61,140 at 61,425 (2000) (order granting ExGen market-based rate authority and waiving code of conduct). Additionally, in their February 21, 2008 supplement, Applicants explain that ComEd no longer has any wholesale customers as of December 31, 2007.