

130 FERC ¶ 61,095
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Exelon Corporation

Docket Nos. EC09-32-000
EC09-32-001

ORDER DENYING MOTION TO VACATE ORDER
AND DISMISSING REQUEST FOR REHEARING

(Issued February 11, 2010)

1. On May 21, 2009, the Commission issued an order authorizing Exelon Corporation (Exelon) to acquire voting securities of NRG Energy, Inc. (NRG Energy) through a tender offer, and to subsequently acquire control over, and merge with, NRG Energy.¹ On June 22, 2009, Public Citizen Energy Program (Public Citizen) filed a request for rehearing.² Ultimately, the transaction was not consummated, and Public Citizen moved to vacate the Initial Order. We deny the motion for vacatur and dismiss the request for rehearing as moot.

I. Background

2. In the Initial Order, the Commission reviewed Exelon's application under Federal Power Act section 203³ to acquire NRG Energy and found the proposed transactions consistent with the public interest. On July 28, 2009, however, Exelon filed a letter stating that it had terminated its offer to acquire all of the issued and outstanding shares

¹ *Exelon Corp.*, 127 FERC ¶ 61,161 (2009) (Initial Order).

² NRG Energy also filed a request for rehearing or, in the alternative, clarification of the Initial Order. After Exelon "abandon[ed] the transaction," NRG Energy withdrew its request for rehearing as moot. NRG Energy, Inc., July 28, 2009 Notice.

³ 16 U.S.C. § 824b (2006).

of NRG Energy.⁴ As a consequence, the transaction authorized in the Initial Order will not be consummated.

3. Public Citizen moves to vacate the Initial Order in light of the cancellation of the transaction. It contends that the Commission has commonly granted motions to vacate portions of certificates granted under the Natural Gas Act where the applicant decided not to build the pipeline for which it had applied, as well as motions to vacate decisions regarding electricity matters that have been settled and the pleadings have been withdrawn.⁵ In addition, Public Citizen argues that equity considerations support vacatur of the order, as it is unlikely that a court would review the case on the merits because the transaction was abandoned.

II. Discussion

4. The determination to vacate orders is an equitable one, requiring exceptional circumstances.⁶ The Commission expends valuable time and resources in its consideration of cases.⁷ Even cases that have become moot provide useful information to the public.⁸ Public Citizen has not persuaded us that exceptional circumstances are present here.

5. We also dismiss Public Citizen's request for rehearing as moot. The transaction will not be consummated, so the Commission need not reconsider its decision authorizing the transaction. Further, although the Initial Order may provide guidance to future merger applicants and to the Commission, in any future proceeding, the Commission will

⁴ Exelon Corp., July 28, 2009 Letter.

⁵ Public Citizen, August 10 Motion for Vacatur at 2 n.3 (citing *Metropolitan Dade Cty., Florida v. Energy Systems Div., et al.*, 76 FERC ¶ 61,283 (1996) (citing *Florida Power & Light Co.*, 30 FERC ¶ 61,230 (1985); *Southern California Edison Co.*, 55 FERC ¶ 61,258 (1991))).

⁶ See, e.g., *East Kentucky Power Cooperative, Inc.*, 121 FERC ¶ 61,255, at P 10 (2007); *Vermont Yankee Nuclear Power Corporation*, 96 FERC ¶ 61,286, at 62,086 (2001) (letter order) (denying vacatur of Commission order authorizing sale of Vermont Yankee's nuclear power station and other jurisdictional facilities, which was not completed due to lack of approval by Vermont Public Service Board).

⁷ *KeySpan Energy*, 108 FERC ¶ 61,201, at P 4 (2004).

⁸ *New PJM Companies*, 110 FERC ¶ 61,009, at P 14 n.12 (2005).

have to support application of the decision based on the specific facts and circumstances of that case.⁹

The Commission orders:

- (A) The motion for vacatur is denied.
- (B) The request for rehearing is dismissed as moot.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁹ *Id.* P 15; *American Electric Power Service Corp.*, 103 FERC ¶ 61,369, at P 11 (2003).