

145 FERC ¶ 61,214
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Commonwealth Edison Company

Docket No. ES14-7-000

ORDER AUTHORIZING ISSUANCES OF SECURITIES

(Issued December 16, 2013)

1. On October 28, 2013, Commonwealth Edison Company (Commonwealth Edison or Applicant) filed an application, as supplemented on November 21, 2013, pursuant to section 204 of the Federal Power Act (FPA)¹ seeking Commission authorization to issue short-term debt securities in an aggregate principal amount not to exceed \$2.5 billion. The short-term debt securities will be in the form of short-term unsecured promissory notes, commercial paper notes, open account advances, and guarantees or assumptions of liabilities or obligations (Debt Securities). We will grant the authorization, as discussed below.

I. Background

2. Commonwealth Edison is an indirect subsidiary of Exelon Corporation (Exelon), and a public utility that owns transmission and distribution systems that provide electric utility services in northern Illinois.

3. Exelon is a public utility holding company that distributes electricity to customers in Illinois, Pennsylvania, and Maryland, and natural gas to customers in the Philadelphia area and Maryland. Its operations include energy generation, power marketing, and energy delivery through its principal subsidiaries, which include, among others, Commonwealth Edison, PECO Energy Company (PECO), and Baltimore Gas and Electric (BG&E).²

¹ 16 U.S.C. § 824c (2012).

² *Exelon Corp.*, 138 FERC ¶ 61,167, at PP 3-11 (2012).

II. Application

4. Commonwealth Edison states that the proceeds from the issuance of the Debt Securities requested in this application will be used to fund its working capital requirements and other short-term financing needs incurred in connection with the transmission, distribution, purchase and sale of electricity.
5. Applicant seeks Commission approval to issue Debt Securities on or before December 31, 2015, not to exceed \$2.5 billion in aggregate principal amount outstanding at any time. It states that it will issue the Debt Securities in the form of short-term unsecured promissory notes, commercial paper notes, open account advances, and guarantees or assumptions of liabilities or obligations.³
6. Applicant states that the interest rate applicable to the Debt Securities in the form of commercial paper or borrowings under a bank credit facility would not be greater than the highest of: (i) the prime rate of interest announced from time to time by JPMorgan Chase Bank, N.A. (or any successor administrative agent under the Company's credit facilities) plus a credit spread of up to 65 basis points; (ii) the federal funds effective rate from time to time in effect plus 50 basis points plus a credit spread of up to 65 basis points; (iii) the one-month London Interbank Offered Rate (LIBOR) (as published by the Wall Street Journal) plus 100 basis points plus a credit spread of up to 65 basis points; or (iv) the seven-day, fourteen-day, one-month, two-month, three-month or six-month LIBOR rate (as published by the Wall Street Journal) plus a credit spread of up to 165 basis points.
7. Applicant states that the *Pro Forma* Interest and Interest Coverage calculations in Exhibits C, D, and E of its Application apply the maximum interest rate for multi-day borrowing using the methodology described above to a hypothetical borrowing of the full amount of the requested authorization. According to Applicant, these calculations result in an interest coverage ratio of 1.59. Applicant states, however, that, if it excludes a \$289,426,360 non-cash interest expense related to a tax dispute involving a like-kind exchange transaction from the computation of the interest coverage, the interest coverage becomes 2.45 for the twelve months ended June 30, 2013, before giving *pro forma* effect to the issuance of the Debt Securities and becomes 2.08 for the 12 months ended June 30, 2013, after giving *pro forma* effect to the issuance of the full amount of the Debt Securities.
8. With regard to this exclusion, Applicant states in its amended Exhibit E, the computation of interest coverage, that the interest charges for the year ended June 30, 2013 include the non-cash interest expense described above, recorded as of March 31, 2013 as part of the accounting for a tax controversy related to a like-kind exchange

³ October 28, 2013 Application at 2 (Application).

transaction completed by Applicant in 1999. Applicant states that, in that transaction, it sold its fossil generating assets and reinvested a portion of the proceeds in qualifying replacement property under the like-kind exchange provisions of the Internal Revenue Code of 1986. Applicant states that the Internal Revenue Service challenged the tax position taken by Exelon, Applicant's parent corporation, with respect to that exchange and asserted that the relatable gain was taxable in 1999. For this reason, Applicant states that, under applicable accounting standards, it has recorded this interest charge in its financial statements. Because, according to Applicant, Exelon plans to "litigate the [tax position disagreement] fully" Applicant has not made such a cash payment, and no such payment is currently required.⁴ Applicant notes that non-cash interest charges associated with this tax matter were partially offset by income recorded as a result of the accounting for other tax matters, resulting in a net charge of \$278,206,287. While it recognizes that resolution of this question will not occur for three to five years, Applicant emphasizes that Exelon "has committed in writing to indemnify and hold [Applicant] harmless from any and all charges to [its] equity for the interest charges and penalties (all on an after-tax basis) in respect of the like-kind exchange transaction tax matter."⁵ Consequently, Applicant states that it will not be out-of-pocket for the charges if it ultimately has to pay them.

9. According to Applicant, its principal purposes for issuing the Debt Securities are to provide it flexibility for short-term liquidity, to take advantage of refunding opportunities, to finance capital expenditures on an interim basis, and to provide funds for other general corporate purposes.⁶ Applicant states that it will secure the Debt Securities with its utility assets and will use proceeds from the Debt Securities for utility purposes consistent with the Commission's decision in *Westar Energy, Inc.*⁷ More specifically, Applicant states that it will use the Debt Securities' proceeds to fund its working capital requirements and other short-term financing needs incurred in connection with the transmission, distribution, purchase, and sale of electricity, all "proper and lawful objects within the corporate purposes set forth in [Applicant's] Restated Articles of Incorporation, as amended."⁸ Furthermore, Applicant states that issuing the Debt Securities is "reasonably necessary and appropriate" to accomplish those corporate purposes and will not impair its ability to fulfill its public service obligations. It also

⁴ November 21, 2013 Supplement. at Ex. E(1)(ii) (Supplement).

⁵ *Id.* at Ex. E(1)(i).

⁶ *Id.*

⁷ *Id.* (citing *Westar Energy, Inc.*, 102 FERC ¶ 61,186 (2003), *order on reh'g*, 104 FERC ¶ 61,018 (2003) (*Westar*)).

⁸ *Id.*

asserts that these issuances are compatible with the public interest, as they furnish financial resources that enable it to perform its public utility service in a cost effective manner.⁹

10. Finally, Applicant states that issuance of any Debt Securities will be subject to the restrictions set forth in *Westar*.¹⁰

III. Notices of Filing, Interventions, and Protests

11. Notice of the Application was published in the *Federal Register*, 78 Fed. Reg. 67,134 (2013), with interventions and protests due on or before November 18, 2013. No interventions or protests were filed.

12. Notice of the Supplement was published in the *Federal Register*, 78 Fed. Reg. 72,671 (2013), with interventions and protests due on or before December 2, 2013. No interventions or protests were filed.

IV. Discussion

A. Analysis Under Section 204

13. FPA section 204(a) provides that requests for authorization to issue securities or to assume obligations or liabilities shall be granted if the Commission finds that the issuance or assumption: “(a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service; and (b) is reasonably necessary or appropriate for such purposes.”¹¹

14. In *Westar*, the Commission explained that in reviewing filings under FPA section 204, “the Commission evaluates a utility’s financial viability based on a review of the financial statements submitted in the application and the utility’s interest coverage ratio. An interest coverage ratio is a measure of the utility’s ability to meet future debt and interest payments.”¹² The interest coverage ratio is the sum of income before interest and income taxes divided by total interest expense.¹³ The Commission generally requires

⁹ *Id.* at 5.

¹⁰ *Id.* at 4.

¹¹ 16 U.S.C. § 824c(a) (2012).

¹² *Westar*, 102 FERC ¶ 61,186 at P 15.

¹³ *Id.* n.15

that FPA section 204 applicants demonstrate, on a *pro forma* basis in accordance with its regulations, that net income will equal or exceed twice total interest expense. This is a screen test used primarily to provide the Commission with comfort that the financing authorized will not impair an applicant's ability to perform public utility service.¹⁴ Nevertheless, the Commission has stated that whether or not an applicant meets this interest coverage screen does not by itself determine whether the Commission will authorize or deny the application,¹⁵ and the Commission has approved section 204 applications that have not met this threshold.¹⁶

15. Applicant has filed, as Exhibits C, D and E to the Application, *pro forma* financial statements as of June 30, 2013. Exhibit E of the Application indicates that Commonwealth Edison has an interest coverage ratio of 1.59, which is below the Commission's benchmark interest coverage ratio of 2.0. Applicant states that it only meets the Commission's interest coverage ratio if it excludes a \$289,426,360 non-cash interest expense related to a like-kind exchange transaction tax matter from the computation of the interest coverage, as discussed above. With this exclusion, Commonwealth Edison asserts that its resulting interest coverage ratio would be 2.08 even if it issues the full amount of the Debt Securities.

16. We do not consider it appropriate to selectively exclude certain expense items from the interest coverage calculation. To allow applicants to make selective adjustments to their published financial statements in order to meet the 2.0 times interest coverage test calls into question whether the applicant has, in fact, made all appropriate adjustments.

17. Commonwealth Edison has, however, presented an alternative basis upon which the Commission may conclude that Commonwealth Edison may reasonably service its proposed debt and interest expenses while continuing to provide service as a public utility. In support of its position in this proceeding, Commonwealth Edison states that Exelon, the parent of Commonwealth Edison (and PECO and BG&E, among others), has committed to indemnify and hold Applicant harmless from any and all charges to equity for the interest charges and penalties resulting from this tax matter.¹⁷ Additionally, Applicant makes similar representations in its 2013 FERC Form 3-Q for both the second

¹⁴ *Montana Alberta Tie Ltd.*, 128 FERC ¶ 61,217, at P 16 (2009) (citing *Startrans IO, L.L.C.*, 122 FERC ¶ 61,253, at P 18 (2008)).

¹⁵ *Id.* n.7.

¹⁶ *See, e.g., Westar*, 102 FERC ¶ 61,186 at P 15; *Aquila, Inc.*, 107 FERC ¶ 61,044, at P 15 (2004).

¹⁷ Supplement at Ex. E(1)(i).

and third quarter, dated August 28, 2013 and November 25, 2013, respectively.¹⁸ This indemnification of Commonwealth Edison supports a finding that the proposed issuances will not impair Commonwealth Edison's ability to provide service as a public utility.

18. We find, based on the facts set forth in the Application, that the proposed issuance of securities sought in this Application: (1) will be for lawful objects within Applicant's corporate purposes, and compatible with the public interest, is necessary or appropriate for, or consistent with the proper performances by Applicant of service as a public utility, and will not impair Applicant's ability to perform that service; and (2) remains reasonably necessary or appropriate for such purposes.

19. In *Westar*, the Commission announced four restrictions on all future public utility issuances of secured and unsecured debt.¹⁹ First, public utilities seeking authorization to issue debt backed by a utility asset must use the proceeds of the debt for utility purposes. Second, if any utility assets that secure debt issuances are divested or "spun off," the debt must follow the asset and also be divested or spun off. Third, if any of the proceeds from unsecured debt are used for non-utility purposes, the debt must follow the non-utility assets. Specifically, if the non-utility assets are divested or spun off, then a proportionate share of the debt must follow the divested or spun off non-utility asset. Finally, if utility assets financed by unsecured debt are divested or spun off to another entity, then a proportionate share of the debt must also be divested or spun off. Applicant states it will comply with the *Westar* conditions.²⁰

¹⁸ In its second quarter FERC Form 3-Q, Commonwealth Edison states that, "Exelon intends to hold [Commonwealth Edison] harmless from any unfavorable impacts of the after-tax interest amounts on [Commonwealth Edison's] equity" and that Exelon and Commonwealth Edison will continue to "accrue interest on the uncertain tax position, and the charges arising from future interest accruals are not expected to be material to the annual operating earnings of Exelon or [Commonwealth Edison]." Commonwealth Edison, FERC Form 3-Q (August 28, 2013) at P 123.16-123.17. Commonwealth Edison further states that it "will continue to record a receivable and non-cash equity contribution from Exelon in amounts equal to the additional interest recorded by [Commonwealth Edison] on the uncertain tax position." Commonwealth makes identical statements in its third quarter 2013 FERC Form 3-Q. Commonwealth Edison, FERC Form 3-Q (November 25, 2013) at P 123.16-123.17.

¹⁹ *Westar*, 102 FERC ¶ 61,186 at PP 20-21.

²⁰ Application at 5.

20. Accordingly, we authorize the following:
- a. Applicant is authorized to issue short-term debt securities in an aggregate amount not to exceed \$2.5 billion, subject to the interest rate limitation below. The debt securities may consist of short-term unsecured promissory notes, commercial paper notes, open account advances, and guarantees or assumptions of liabilities or obligations.
 - b. The short-term debt securities issued in the form of commercial paper or borrowings under a bank credit facility will be issued at rates not to exceed the highest of: (i) the prime rate of interest announced from time to time by JPMorgan Chase Bank, N.A. (or any successor administrative agent under the Company's credit facilities) plus a credit spread of up to 65 basis points; (ii) the federal funds effective rate from time to time in effect plus 50 basis points plus a credit spread of up to 65 basis points; (iii) the one-month LIBOR rate (as published by the Wall Street Journal) plus 100 basis points plus a credit spread of up to 65 basis points; or (iv) the seven-day, fourteen-day, one-month, two-month, three-month, or six-month LIBOR rate (as published by the Wall Street) plus a credit spread of up to 165 basis points.

The Commission orders:

(A) Applicant is hereby authorized to issue short-term debt securities in the form of short-term unsecured promissory notes, commercial paper notes, open account advances, and guarantees or assumptions of liabilities or obligations in an aggregate amount not to exceed \$2.5 billion at the interest rates stated in the body of this order.

(B) The authorization granted in this order is effective as of the date of this order and terminates on December 31, 2015.

(C) The authorization granted is subject to the restrictions specified in the body of this order and the restrictions on secured and unsecured debt as outlined in *Westar*.

(D) The authorization granted in Ordering Paragraph (A) is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determination of cost or any other matter whatsoever now pending or which may come before this Commission.

(E) Nothing in this order shall be construed to imply any guarantee or obligation on the part of the United States with respect to any security to which this order relates.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.