

121 FERC ¶ 61,092  
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.

Exelon Corporation

Docket No. TS04-286-003

ORDER ON REQUEST FOR EXPANSION OF WAIVER  
FROM THE STANDARDS OF CONDUCT

(Issued October 26, 2007)

1. On September 12, 2007, Exelon Corporation (Exelon), on behalf of its subsidiary Commonwealth Energy Company (ComEd), filed a request that the Commission expand ComEd's previous standards of conduct waiver<sup>1</sup> Exelon submitted a supplemental filing on Oct. 16, 2007. By this order, we partially grant Exelon's waiver request and direct Exelon to submit additional information so that the Commission can properly consider certain aspects of the waiver request.

**I. Background**

2. On November 25, 2003, the Commission issued a Final Rule Adopting Standards of Conduct for Transmission Providers.<sup>2</sup> The standards of conduct govern the

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<sup>1</sup> See, *Cinergy Servs., Inc.*, 111 FERC ¶ 61,512 (2005) (Cinergy) and *High Island Offshore Sys., L.L.C.*, 116 FERC ¶ 61,047 (2006) (HIOS).

<sup>2</sup> 18 C.F.R. Part 358 (2007); *Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,155 (2003), *order on reh'g*, Order No. 2004-A, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,161 (2004), *order on reh'g*, Order No. 2004-B, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,166 (2004), *order on reh'g*, Order No. 2004-C, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,172 (2004), *order on reh'g*, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), *vacated and remanded as it applies to natural gas pipelines, National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C.Cir. 2006). See also *Standards of Conduct for Transmission Providers*, Interim Rule, Order No. 690, 72 Fed. Reg. 2,427 (Jan. 19, 2007), FERC Stats. & Regs. ¶ 31,237 (2007), Notice of Proposed Rulemaking, 72 Fed. Reg. 3,958 (Jan. 29, 2007) FERC Stats & Regs.

(continued)

relationship between Transmission Providers and certain of their affiliates. More specifically, for electric public utility Transmission Providers the standards of conduct require separation of transmission functions from energy and marketing affiliates.<sup>3</sup>

3. For electric Transmission Providers, section 358.3(e)(2) of the Commission's regulations provides that a Transmission Provider's energy sales unit is considered an energy or marketing affiliate unless such unit engages solely in bundled retail sales.<sup>4</sup> However, where a Transmission Provider is in a state that requires retail choice, the Commission determined that the retail function of the Transmission Provider will be considered a marketing or energy affiliate.<sup>5</sup> In Order No. 2004-A, the Commission declined to modify the definition of marketing, sales or brokering to allow exemptions for provider of last resort (POLR) service on a generic basis.<sup>6</sup> Rather, the Commission stated that it would entertain case-by-case requests for exemption of a POLR service based on relevant facts and circumstances.<sup>7</sup> In addition, in Order No. 2004, the Commission authorized Transmission Providers to request waivers or exemptions from all or some of the requirements of Part 358 for good cause.<sup>8</sup>

4. In 2005, the Commission granted ComEd a waiver from the standards of conduct with respect to ComEd's retail division, ComEd Energy Acquisition Department (ComEd EA) thereby allowing ComEd EA to engage in administrative services and ministerial functions related to POLR supply.<sup>9</sup> At that time, Exelon Generation Company (ExGen) supplied all the POLR load requirements. The waiver allowed ComEd EA to provide

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¶ 32,611 (2007) (NOPR seeking comment on, among other things, whether or not the standards of conduct should govern the relationship between electric utility transmission providers and their energy affiliates).

<sup>3</sup> Order No. 2004 at P 5.

<sup>4</sup> 18 C.F.R. § 358.3 (e)(2).

<sup>5</sup> *Id.* at P 79.

<sup>6</sup> Order No. 2004-A at P 127.

<sup>7</sup> *Id.*

<sup>8</sup> *See* 18 C.F.R. § 358.1(d) (2007).

<sup>9</sup> *See HIOS and Cinergy.*

aggregate operational data and other information to ExGen so as to ensure reliable POLR service without ComEd EA becoming subject to the standards of conduct.

5. The Commission based its decision to grant ComEd the waiver on the facts that ComEd EA's POLR employees do not market POLR service, POLR employees do not engage in competitive functions (indeed the purchasing and sales function had been separated from the transmission functions via ExGen) and the POLR employees do not schedule or reserve transmission service.<sup>10</sup> The Commission stated "[t]he Commission is granting such waiver because it appears ComEd has functionally separated its purchasing and sales functions from its transmission functions."<sup>11</sup>

## II. Exelon's Motion

6. The ExGen POLR supply arrangements (including their pricing terms) mentioned above ended on December 31, 2006. In August, 2007, Illinois enacted new legislation governing future procurement by Illinois utilities of the power needed to supply the POLR load.<sup>12</sup> Specifically, the legislation creates a new state agency, the Illinois Power Agency (IPA), with responsibility to, among other things, design and administer power procurement through a competitive request for proposal (RFP) process to serve POLR customers – with the utilities being required to sign the contracts with the winning bidders. The IPA will assume responsibility for these functions beginning with planning year 2009.<sup>13</sup>

7. According to Exelon, however, because the IPA will not be able to begin procurement immediately, ComEd is required to develop a procurement plan (Initial

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<sup>10</sup> *HIOS* at P 16.

<sup>11</sup> *Id.* at P 27.

<sup>12</sup> Illinois Public Act No. 95-0481. The legislation was signed into law on August 28, 2007. The Commission notes that on March 16, 2007, the Illinois Attorney General (AG) filed a complaint against certain wholesale suppliers who bid in the 2006 auction, alleging that the contracts contained rates that were not just and reasonable. In response to the passage of the Illinois legislation, the AG filed a motion to dismiss this complaint with prejudice. The Commission granted the motion on October 4, 2007. *People of the State of Illinois, ex rel. Illinois Attorney General Lisa Madigan v. Exelon Generation Co., LLC, et al.*, 121 FERC ¶ 61,015 (2007).

<sup>13</sup> Planning year 2009 is defined to be June 1, 2009 through May 31, 2010.

Plan) and make arrangements for procuring the power needed for planning year 2008.<sup>14</sup> By October 27, 2007, ComEd must file with the Illinois Commerce Commission (Illinois Commission) for consideration of the Initial Plan.

8. Exelon states that once the Initial Plan is approved by the Illinois Commission, ComEd must hire an Independent Procurement Administrator (Administrator) to design and administer the procurement RFP. The Administrator will design and implement the procurement RFP to procure either (a) block power purchase for ComEd's POLR customers or (b) financial instruments to be used as hedges for ComEd's daily purchases from the PJM market to cover its POLR load.<sup>15</sup> According to Exelon, given that the IPA will assume the procurement responsibilities after 2008, procurement by the Administrator will be a one time event under the Illinois legislation.

9. Exelon requests that the Commission expand the existing waivers to cover the additional activities required by the Illinois legislation. According to Exelon, ComEd plans to use employees from ComEd EA and ComEd's Load Forecasting and Regulatory Department to assist in drafting the Initial Plan as well as to provide assistance and expertise to the Administrator during the RFP process.<sup>16</sup> Exelon also proposes that these ComEd employees will assist the Administrator with respect to the power procurement RFP process design. According to Exelon, the Administrator will have final say on the design of the RFP, implement the RFP and independently select the winners. Exelon also notes that the Administrator is authorized to engage in post-bid negotiations with the winning bidder. Exelon contends that ComEd will have no discretion over executing contracts with successful bidders.

10. Thus, Exelon requests a waiver of the standards of conduct to enable ComEd EA employees to draft the Initial Plan, and help the Administrator design the power procurement RFP. Exelon argues that the ComEd EA employees serving in this role would merely be providing a support function which, according to Exelon, does not constitute energy affiliate activities under the standards of conduct.

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<sup>14</sup> Planning year 2008 is defined to be June 1, 2008 through May 31, 2009.

<sup>15</sup> Exelon states that the Administrator will determine whether to solicit proposals for block power or financial instruments.

<sup>16</sup> Previously, ExGen was responsible for doing the load forecasting related to ComEd's POLR customers. *See* Exelon Corporation Request for Waiver in Docket No. TS04-286-000 submitted September 22, 2004 at p. 7.

11. Additionally, Exelon also points out that this RFP process will not supply the full needs of ComEd's POLR customers regardless of whether the Administrator proceeds with a block power purchase or a financial procurement. Under either scenario, Exelon proposes that ComEd EA would also be responsible to procure "daily balancing purchases from PJM spot markets . . . to procure necessary energy, capacity and ancillary services."<sup>17</sup>

12. While Exelon acknowledges that these activities are energy affiliate activities, it seeks a waiver to allow ComEd EA to perform these activities arguing that they are purely passive and are not the competitive market activity that the standards of conduct should regulate.<sup>18</sup> Specifically, ComEd EA will submit an eSchedule to PJM with its load responsibility for the next day, then report its day-after load estimates to PJM. Exelon argues that ComEd EA (i) has no discretion in submitting estimates to PJM, (ii) will not enter into any bilateral transactions or transmission service purchase, reservations or schedules, (iii) will not alter the estimate based on spot prices, (iv) will be a passive price taker and (v) will not be affected by its access to non-public transmission information in making such purchases because it will merely be charged the real-time PJM market price. Exelon reasons there is no opportunity for ComEd to advantage its generating or marketing affiliates when passively conducting these transactions in the competitive PJM spot market. Finally, according to Exelon, ComEd EA will be responsible for all of these spot market transactions during 2008 and even after the IPA takes over procurement.

13. In addition, Exelon states that it will provide price stability for the "base load portion" of its POLR needs by entering into a five-year financial swap with ExGen.<sup>19</sup>

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<sup>17</sup> Exelon Motion at p. 14.

<sup>18</sup> According to Exelon, for certain classes of customers that ComEd does not serve as a result of its prior auction in 2006 (i.e., customers over 3 MW and customers that have generation with the total amount expected to be less than 500 MW), ComEd EA is already serving their POLR needs through such "passive" purchases in the PJM spot market. *Id.* at p. 7-8. Exelon neither sought nor obtained a waiver from the standards of conduct for these activities on ComEd's behalf. Although not clearly stated, Exelon's waiver request appears to cover these activities after the fact. We remind Exelon that it is required to seek a waiver prior to engaging in these types of activities.

<sup>19</sup> *Id.* at p. 12.

The portion of POLR load covered under this arrangement is not covered by the RFP procurement.<sup>20</sup> As this is a financial arrangement, Exelon proposes to have ComEd EA procure the actual energy products needed to serve this POLR load through the same “passive” purchases in the PJM spot market as it proposes for the POLR load to be covered under the RFP.<sup>21</sup> Exelon neither sought nor obtained a waiver from the standards of conduct to enable ComEd EA to engage in this activity.

14. On October 16, 2007, Exelon filed a “Supplement to Request for Limited Waiver Expansion.” According to Exelon, the purpose of this filing is to clarify its statements regarding “purchasing daily energy for balancing in the day-ahead and real-time PJM-administered energy markets.” Exelon explains that balancing activities will include sales as well as purchases.<sup>22</sup> However, Exelon continues to contend that this activity is purely passive, involving no discretion on the part of ComEd EA.

15. To summarize, Exelon requests that the Commission expand ComEd’s previous waiver to permit ComEd EA to: (1) prepare and file the Initial Plan with the Illinois Commission; (2) aid the Administrator in designing the procurement RFP; (3) provide information to the Administrator during the RFP process; and (4) purchase and sell daily energy for balancing in the day-ahead and real-time PJM-administered energy markets, as well as paying for capacity energy and ancillary services for 2008 and after the IPA takes over ComEd’s procurement.

### **III. Notice**

16. Notice of the filing was published in the Federal Register with comments, protests and interventions due on or before October 12, 2007. No comments, protests, or interventions were filed. Notice of the supplemental filing was published in the Federal Register with comments, protests and interventions due on or before Oct. 24, 2007. No comments, protests, or interventions were filed.

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<sup>20</sup> The Commission notes that Exelon on July 25, 2007, ComEd and Ex Gen entered into this agreement. *See* Exelon’s July 24, 2007 8K filing with the Securities and Exchange Commission. <http://www.sec.gov/Archives/edgar/data/22606/000095013707010444/c16992aae8vk.htm> (October 16, 2007).

<sup>21</sup> Exelon Motion at p.14.

<sup>22</sup> Exelon Supplement at p. 2.

#### IV. Discussion

17. Under Order No. 2004, the standards of conduct govern the relationship between electric public utility Transmission Providers and all of their marketing and energy affiliates. Thus, the standards of conduct restrict the sharing of employees and information by the public utility electric Transmission Provider and its energy affiliates that would give the energy affiliate undue advantage in the competitive energy market. In Order No. 2004, we found that the preferential sharing of information between Transmission Providers and energy affiliates undermines and frustrates the efforts of independent businesses to buy, sell, build, grow and provide competitive alternatives.<sup>23</sup> The standards of conduct are intended to foreclose affiliates' preferential access to non-public transmission or customer information.

18. Exelon claims that ComEd EA employees will only be performing a passive, information providing function, as all decisions will be made by the Administrator. Exelon contends that these employees will not be directly or indirectly involved in the selection of the winning bidders and will not negotiate with those winning bidders. Rather, these activities will be carried out by the Administrator.<sup>24</sup> Based on this description of ComEd EA's role in these matters, we grant Exelon's request for an expansion of the waiver of the standards of conduct with regard to ComEd EA's performance of the following activities. ComEd EA may: (1) aid in the preparation of the Initial Plan to be filed with the Illinois Commission; (2) aid the Administrator in designing the procurement RFP; and (3) provide information upon request of the Administrator during the selection process. To ensure that ComEd EA does not engage in marketing activities with respect to these aspects of the expanded waiver, ComEd EA shall not directly or indirectly negotiate with bidders or select the winning bidders.

19. With respect to Exelon's request relating to ComEd EA's activities in the PJM market and relating to load forecasting, the Commission is not ruling on the waiver request at this time because it is not clear that these activities are merely "passive" as claimed by Exelon. It appears that ComEd EA may be directing, executing or organizing marketing and energy affiliate activities by preparing the load forecasts and participating in the PJM spot market. Exelon must explain, in detail, exactly what the ComEd EA employees do with respect to these activities, including a specific discussion of what factors, including subjective factors, are considered in developing the load estimates. Exelon also needs to explain why it considers these activities to be "passive" and its basis for the claim that the activities are non-discretionary when ComEd EA will submit its

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<sup>23</sup> Order No. 2004 at P 11.

<sup>24</sup> Exelon Motion at p. 11-13 and n.14.

daily load responsibility with an eSchedule and be a “price taker bidding the full amount of its expected energy supply needs into the PJM day-ahead market each day.”<sup>25</sup> In addition, Exelon must articulate why the waiver for ComEd EA is appropriate and more efficient when its marketing affiliate, ComEd Direct Procurement, could perform these activities for ComEd’s POLR customers. Moreover, Exelon should explain how ComEd EA will be prevented from either overestimating or underestimating the load and the ramifications of this conduct. Finally, because ComEd EA employees have access to non-public transmission and customer information, Exelon must explain why the POLR provider needs access to this information and how this is consistent with previous cases where the Commission has denied similar requests.<sup>26</sup> Within 30 days of the date of this order, Exelon must submit this information.

20. In addition, we note that Exelon does not request waiver of the standards of conduct for its plans to use employees of its Load Forecasting and Regulatory Department. It is unclear whether those employees are directing, executing or organizing marketing and energy affiliate activities, by preparing load forecasts. It is also unclear, if they are engaged in marketing and energy affiliate activities, whether they have access to non-public transmission and customer information. Exelon must explain what the employees of its Load Forecasting and Regulatory Department intend to do with respect to its planned activities, and explain why it considers waiver unnecessary. Within 30 days of this order, Exelon must submit this information.

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<sup>25</sup> Exelon Motion at p. 14.

<sup>26</sup> See, *Allegheny Power Service Corp., et al.*, 85 FERC ¶ 61,390 (1998) (APS provided no compelling reason to allow a POLR provider making purchases in the wholesale market and scheduling transmission to have a special relationship with the transmission function). See, also, *PECO Energy Co.*, 89 FERC ¶ 61,014 (1999) (PECO’s transmission function is required to follow the standards of conduct in its dealings with PECO’s Supply Acquisition unit, which fulfills its POLR obligation by, among other things, arranging transmission service to deliver energy and capacity so that PECO will not have the opportunity to provide preferential transfers of transmission information); *Cinergy Services, Inc.*, 111 FERC ¶ 61,512 at P45 (2005) (National Grid’s request to exempt Granite State and Nantucket Energy is granted so long as wholesale energy market functions, including purchase and administration of transmission services and energy to serve unbundled retail load are contained in a separately functioning business unit).

21. Finally, we note that we base this order on the specific facts and circumstances in this case.

The Commission orders:

(A) The Commission grants in part and defers in part Exelon's request for expansion of previously granted waivers, as described in the body of this order.

(B) The Commission directs Exelon to file the information described in the body of this order within 30 days of the date of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Acting Deputy Secretary.