

123 FERC ¶ 61,167
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 May 15, 2008)

1. By this order, the Commission grants Exelon Corporation's (Exelon) request for a waiver of the standards of conduct to permit the ComEd Energy Acquisition Department (ComEd EA) to calculate and provide certain information to PJM Interconnection (PJM) as described below. We also grant a temporary waiver to permit ComEd EA to meet provider of last resort (POLR) customers daily energy balancing needs and procure energy covered by a financial swap with Exelon Generation Company, LLC (ExGen). The temporary waiver shall expire 30 days after the final rule in the current standards of conduct rulemaking proceeding becomes effective.¹

I. Background

2. On November 25, 2003, the Commission issued a Final Rule adopting standards of conduct for Transmission Providers.² The standards of conduct govern the relationship

¹ *Standards of Conduct for Transmission Providers – Notice of Proposed Rulemaking*, FERC Stats. & Regs. ¶ 32,630, 73 Fed. Reg. 16,228 (March 27, 2008).

² 18 C.F.R. Part 358 (2007); *Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Statutes & Regulations, Regulations Preambles 2001-2005 ¶ 31,155 (2003), *order on reh'g*, Order No. 2004-A, FERC Statutes & Regulations., Regulations Preambles 2001-2005 ¶ 31,161 (2004), *order on reh'g*, Order No. 2004-B, FERC Statutes & Regulations, Regulations Preambles 2001-2005 ¶ 31,166 (2004), *order on reh'g*, Order No. 2004-C, FERC Statutes & Regulations., 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 sub nom., 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

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.³

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.⁴ 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.⁵ In Order No. 2004-A, the Commission declined to modify the definition of marketing, sales or brokering to create a generic exemption for a division that provides POLR service.⁶ Rather, the Commission stated that it would entertain case-by-case requests for exemption of a POLR unit based on relevant facts and circumstances.⁷

4. In 2005, the Commission granted ComEd a limited waiver from the standards of conduct with respect to ComEd EA, allowing ComEd EA to engage in administrative services and ministerial functions related to POLR services.⁸ At that time, ExGen supplied all the POLR load requirements. The waiver allowed ComEd EA to provide 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, do not engage in

(Jan. 19, 2007), FERC Statutes & Regulations, Regulations Preambles 2006-2007 ¶ 31,237 (2007), Notice of Proposed Rulemaking, 72 Fed. Reg. 3,958 (Jan. 29, 2007), FERC Stats & Regs. ¶ 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).

³ Order No. 2004 at P 5.

⁴ 18 C.F.R. § 358.3(e)(2).

⁵ Order No. 2004 at P 79.

⁶ Order No. 2004-A at P 127.

⁷ *Id.*

⁸ See *Cinergy Servs., Inc.*, 111 FERC ¶ 61,512 (2005) (Cinergy) and *High Island Offshore Sys., L.L.C.*, 116 FERC ¶ 61,047 (2006) (HIOS).

competitive functions (indeed the purchasing and sales function had been separated from the transmission functions via ExGen) and do not schedule or reserve transmission service.⁹ 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.”¹⁰

6. The ExGen POLR supply arrangements (including their pricing terms) ended on December 31, 2006. In August 2007, Illinois enacted new legislation governing future procurement by Illinois utilities of the power needed to supply their POLR load.¹¹ 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 2009.¹² For the 2008 planning year,¹³ the Illinois legislation required the Illinois utilities to develop a procurement plan, hire an independent Administrator and execute a hedge.

7. On September 12, 2007, Exelon, on behalf of its subsidiary ComEd, filed a request that the Commission expand ComEd’s previous standards of conduct waiver.¹⁴ According to Exelon, in order to implement certain aspects of the new legislation related to the supply of POLR service going forward, ComEd plans to rely on the same ComEd EA employees to perform additional functions and requests that the Commission expand its existing waiver also to cover these additional functions.

8. Exelon explained that for the 2008 planning year, ComEd needed to develop a procurement plan (Initial Procurement Plan) and make arrangements to hire an independent procurement administrator (Administrator) to procure the power. According to Exelon, given that the IPA will assume procurement responsibilities after 2008, procurement by the Administrator will be a one time event under the Illinois legislation.

⁹ *HIOS* at P 16.

¹⁰ *Id.* at P 27.

¹¹ Laws of Illinois, Public Act No. 095-0481, 95th Session. The legislation was signed into law on August 28, 2007.

¹² Planning year 2009 is defined to be June 1, 2009 through May 31, 2010.

¹³ Planning year 2008 is defined to be June 1, 2008 through May 31, 2009.

¹⁴ *See Cinergy* and *HIOS*.

9. 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 Procurement Plan for the 2008 planning year as well as to provide assistance and expertise to the Administrator during the RFP process.¹⁵ Exelon also proposed that these ComEd employees will assist the Administrator with respect to the power procurement RFP process design.

10. Thus, Exelon requested a waiver of the standards of conduct to enable ComEd EA employees to draft the Initial Procurement Plan, help the Administrator design the power procurement RFP, and provide information to the Administrator. Exelon argued 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.

11. Additionally, Exelon also pointed out that the 2008 RFP process will not supply the full needs of ComEd's POLR customers. Exelon proposed that ComEd EA would also procure "daily balancing purchases from PJM spot markets . . . to procure necessary energy, capacity and ancillary services."¹⁶ Therefore, Exelon sought 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.

12. While Exelon acknowledged that these activities are energy affiliate activities, it argued that they are purely passive and are not the competitive market activity that the standards of conduct should regulate. Specifically, according to Exelon, ComEd EA will submit an e-schedule 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

¹⁵ 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 7.

¹⁶ Exelon Initial Pleading at 14. ComEd EA will be permanently responsible for these purchases.

Exelon, ComEd EA will be responsible for all of these spot market transactions during 2008 and even after the IPA takes over procurement.¹⁷

13. In addition, as required by the Illinois legislation, ComEd will provide price stability for the “base load portion” of its POLR needs with a five-year financial swap with ExGen.¹⁸ According to Exelon, the portion of POLR load covered under this arrangement is not covered under the RFP. However, 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 type of “passive” purchases and sales in the PJM spot market.¹⁹ Exelon also states that ComEd EA will be responsible for all of these spot market transactions even after the IPA takes over procurement. Exelon seeks expansion of the waiver to cover all of these “passive” market purchase and sales activities.

14. On October 16, 2007, Exelon filed a “Supplement to Request for Limited Waiver Expansion.” According to Exelon, the purpose of this filing was 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.²⁰ However, Exelon continued to contend that this activity is purely passive, involving no discretion on the part of ComEd EA.

15. To summarize, Exelon requested that the Commission expand ComEd’s previous waiver to permit ComEd EA to: (1) prepare and file the Initial Procurement 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.

16. On October 26, 2007, the Commission issued an order partially granting the request.²¹ The Commission allowed ComEd EA to prepare and file the Initial Procurement Plan, aid the Administrator in designing the procurement RFP, and to provide information to the Administrator during the RFP process. However, the

¹⁷ The IPA will procure blocks of power, but ComEd EA would acquire power at PJM’s spot market to make up the difference between the IPA procured blocks of power and the actual load requirements for the POLR customers.

¹⁸ *Id.* at 12.

¹⁹ *Id.* at 14.

²⁰ Exelon Supplement at 2.

²¹ *Exelon Corp.*, 121 FERC ¶ 61,092 (2007) (October 26 Order).

Commission did not decide whether ComEd should be granted additional waivers for ComEd EA's activities in PJM's spot market and requested further information to enable the Commission to better understand why ComEd EA, and not a marketing affiliate, should serve as the "passive" PJM market participant.

17. On November 26, 2007, Exelon submitted additional information in response to the October 26 Order.

18. On March 21, 2008, the Commission issued a Notice of Proposed Rulemaking (NOPR) proposing to revise the standards of conduct for transmission providers to refocus the rules on the areas where there is the greatest potential for affiliate abuse.²² The NOPR also proposes to create a generic exemption that would allow employees to engage in POLR activities without being treated as marketing affiliate employees.²³

II. Exelon's Supplemental Filing

19. On November 26, 2007, Exelon submitted additional information in response to the October 26 Order, explaining in more detail exactly what ComEd EA would be doing. Exelon explained that the waivers would permit ComEd EA to: (1) calculate the network service peak load contribution²⁴ and the capacity peak load contribution and provide this information to PJM; (2) submit to PJM load responsibility schedules (e-schedules); (3) submit to PJM meter data for the 60-day true-up; and (4) participate in the "large QF" purchases and sales as requested. According to Exelon, ComEd EA would perform these activities on a permanent basis.

20. Furthermore, Exelon elaborated on ComEd EA's procurement of the energy covered by the five-year financial swap (with ExGen) in the PJM spot market. Exelon also explained that ComEd EA also will be responsible for daily energy balancing because the contracts entered into under the 2008 RFP will not procure full requirements

²² *Standards of Conduct for Transmission Providers – Notice of Proposed Rulemaking*, FERC Stats. & Regs. ¶ 32,630 (2008).

²³ *Id.* P 38 and proposed § 358.3 (c)(1).

²⁴ According to Exelon, on an annual basis, ComEd EA calculates a network service peak load contribution (NSPL) that represents the load of each customer at the time of the service territory peak load that occurred during the prior year. Exelon states that ComEd EA submits the NSPL for each load serving entity for each delivery day to PJM because PJM uses this figure to track and allocate costs for transmission, ancillary services and capacity obligations. According to Exelon, ComEd EA submits separate figures for ComEd's Hourly and other POLR customers so that PJM and ComEd can separately bill, settle and track costs.

service, but only standard block energy products.²⁵ According to Exelon, ComEd will continue to be billed automatically by PJM for capacity and ancillary services.

21. Exelon contends that these activities are passive and do not constitute market participation. According to Exelon, ComEd EA will report into PJM's day-ahead market the estimated requirements of ComEd's POLR customers whose load is not being supplied through auction contracts.²⁶ Exelon explains that PJM will settle with ComEd in the day-ahead market, charging ComEd the day-ahead price for the estimated load ComEd EA reported, less the amount reported by the RFP providers on the bilateral schedules. Exelon further explains that two days later, ComEd EA will submit an e-schedule estimating the usage of ComEd's customers the previous day. PJM will settle in the real-time market by charging or crediting ComEd at the real-time price for any divergences of the day-after estimate from the day-ahead estimate. Finally, according to Exelon, in the 60-day reconciliation process, ComEd EA will report the difference between the actual metered usage and the amount reported in the day-after estimate. PJM will then charge or credit ComEd at the real-time price for any divergences of the actual metered usage from the day-after estimate.

22. Exelon also contends that the procurement of the estimated energy in the PJM day-ahead market required to serve this load will be non-discretionary. According to Exelon, ComEd EA will simply bid the full amount of its estimated energy requirements into the day-ahead market and will not alter the amount it procures based on changes in the spot market. Exelon claims that ComEd EA will have no incentive other than to schedule its best estimate of the hourly loads because ComEd does not earn a margin or profit associated with the procurement or cost recovery and the procurement and cost recovery does not have an impact on ComEd's income statements.

23. While Exelon concedes that ComEd Direct Procurement (ComEd DP)²⁷ could also undertake these activities, Exelon claims that relying on ComEd DP would be inefficient because existing systems would have to be redesigned or redundant systems would have to be put in place and additional personnel will be needed to perform these activities.

²⁵ Even after the IPA takes over procurement, Exelon explains that ComEd EA will continue to be responsible for daily energy balancing. Thus, ComEd envisions ComEd EA would permanently be responsible for this procurement.

²⁶ Exelon explains that ComEd's hourly customers will continue to be served exclusively through the PJM real-time market.

²⁷ ComEd DP is another division of ComEd, that performs marketing affiliate functions and is designated as a marketing affiliate.

24. Finally, Exelon contends that ComEd EA does not arrange for transmission service because the transmission service required for the retail load not covered by the auction contracts will be passively procured from PJM.

III. Notice

25. Notice of the original 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 October 24, 2007. No comments, protests, or interventions were filed.

26. Notice of the additional filing was published in the *Federal Register* with comments, protests and interventions due on or before April 24, 2008. No comments, protests, or interventions were filed.

IV. Discussion

27. 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.²⁸ The standards of conduct are intended to foreclose affiliates' preferential access to non-public transmission or customer information.

28. Throughout its supplemental filing, Exelon claims that ComEd EA employees will only be performing passive activities. 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) calculate the network service peak load contribution and the capacity peak load contribution and provide this information to PJM; (2) submit to PJM of load responsibility schedules (e-schedules); (3) submit to PJM meter data for the 60-day true-up; and (4) participate in the "large QF" purchases and sales as requested.

29. We grant the waiver with regard to these activities because, with the exception of the large QF purchases, these activities do not involve the sale and purchase of energy by ComEd EA. With regard to the QF sales, PURPA mandates that ComEd purchase this

²⁸ Order No. 2004 at P 11.

energy. To the extent that ComEd does not need the energy, it facilitates the associated sales from the QFs to PJM.²⁹ We find that this activity does not raise the type of affiliate abuse concerns that the standards of conduct are designed to remedy.

30. Exelon's request to waive the standards of conduct to permit ComEd EA to procure the daily energy balancing purchases and sales as well as to procure the energy covered by the financial swap presents a closer question with regard to whether a waiver should be granted. In evaluating the request for waiver, the Commission considered its proposal to create a generic exemption for POLR activities in the standard of conduct rulemaking proceeding. The Commission also relies on ComEd's commitment to bid the full amount of its estimated energy requirements into the day-ahead market.³⁰ The Commission is granting ComEd EA a temporary waiver to allow ComEd EA to perform these tasks.³¹ We believe that these restrictions, coupled with the fact that ComEd EA will not be purchasing or arranging transmission services, offer sufficient protections against affiliate abuse.

The Commission orders:

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

(B) The Commission also grants a temporary waiver of the standards of conduct, for the activities described in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁹ Supplemental filing at 13.

³⁰ Exelon Initial Pleading at 14.

³¹ In the event that the Commission does not adopt the POLR exemption in the final rule, ComEd EA will be required to comply with the requirements of the final rule. The waiver expires 30 days after the issuance of the final rule.

