

Order Denying Rehearing, the Commission denied Edison Electric Institute's (EEI) motion for stay or rescission of the April 15 Clarification Order and denied EEI's request for rehearing of that order. The Commission affirmed its clarification that, to the maximum extent practical, a market-regulated power sales affiliate may not share employees that engage in fuel procurement or resource planning with an affiliated franchised public utility with captive customers under the affiliate restrictions. For the reasons discussed below, we reject the request for rehearing submitted by Ameren.³

Background

2. In Order No. 697, the Commission codified certain affiliate restrictions in its regulations to protect captive customers from the potential for a franchised public utility to interact with a market-regulated power sales affiliate, i.e., affiliates whose power sales are regulated in whole or in part at market-based rates, in ways that transfer benefits to the affiliate and its stockholders to the detriment of the captive customers.⁴ Captive customers are defined as "any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation."⁵ The affiliate restrictions govern, among other things, the separation of functions, the sharing of market information, sales of non-power goods or services, and power brokering. The Commission requires that, as

Entergy Corporation; Exelon Corporation; FirstEnergy Corp.; FPL Group, Inc.; Pacific Gas and Electric Co.; Progress Energy, Inc.; Public Service Enterprise Group Incorporated; and Westar Energy, Inc.

³ In its rehearing request, Ameren states that the Ameren Companies are Union Electric Company d/b/a Ameren Missouri, Ameren Illinois Company d/b/a Ameren Illinois, Ameren Energy Marketing Company, Ameren Energy Generating Company and AmerenEnergy Resources Generating Company. Ameren Request for Rehearing at n.1.

⁴ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at PP 467, 490, 513, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert denied sub nom. Public Citizen, Inc. v. FERC*, 133 S. Ct. 26 (2012).

⁵ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 202; 18 C.F.R. § 35.36(a)(6) (2012).

a condition of receiving and retaining market-based rate authority, sellers comply with these affiliate restrictions unless explicitly permitted by Commission rule or order granting waiver of the affiliate restrictions.⁶ Failure to satisfy the conditions set forth in these affiliate restrictions constitutes a violation of a seller's market-based rate tariff.⁷

3. Under the separation of functions requirement in the affiliate restrictions (section 35.39(c)(2)(i)), to the maximum extent practical, employees of market-regulated power sales affiliates must operate separately from employees of affiliated franchised public utilities with captive customers.⁸ On April 15, 2010, in response to a request for clarification, the Commission provided guidance regarding which employees may not be shared under the affiliate restrictions unless otherwise permitted by Commission rule or order.⁹ Specifically, the Commission clarified that, consistent with Order No. 697-A, a franchised public utility with captive customers and its market-regulated power sales affiliate may not share employees that make economic dispatch decisions or that determine the timing of scheduled outages.¹⁰ The Commission also clarified that franchised public utilities with captive customers are prohibited from sharing employees that engage in fuel procurement or resource planning with their market-regulated power sales affiliates. Concurrently, the Commission issued a Notice of Proposed Rulemaking (NOPR) in Docket No. RM10-20-000 in which it proposed to revise the affiliate restrictions in order to reflect the guidance provided in the April 15 Clarification Order.¹¹

⁶ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 131 FERC ¶ 61,021 at P 2 (April 15 Clarification Order) *order granting in part request for extension of time to comply*, 132 FERC ¶ 61,014 (2010) (July 2 Order), *order denying reh'g*, 134 FERC ¶ 61,046 (2011) (Order Denying Rehearing).

⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 549-550.

⁸ 18 C.F.R. § 35.39(c)(2)(i) (2012).

⁹ April 15 Clarification Order, 131 FERC ¶ 61,021 at P 2. In Order No. 697-A, the Commission clarified that “shared employees may not be involved in decisions regarding the marketing or sale of electricity from the facilities, may not make economic dispatch decisions, and may not determine the timing of scheduled outages for facilities.” Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 253.

¹⁰ April 15 Clarification Order, 131 FERC ¶ 61,021 at P 40.

¹¹ *Market-Based Rate Affiliate Restrictions*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,657 (2010) (Market-Based Rate Affiliate Restrictions NOPR),

(continued...)

4. On January 20, 2011, the Commission denied rehearing of the April 15 Clarification Order, and required that market-based rate sellers comply with the guidance in the April 15 Clarification Order within 90 days, or by April 20, 2011.¹² The Commission also withdrew the Market-Based Rate Affiliate Restrictions NOPR on January 20, 2011, explaining that the current regulations are sufficient insofar as they already require that employees of a market-regulated power sales affiliate operate separately from the employees of any affiliated franchised public utility with captive customers, to the maximum extent practical.¹³ The Commission also explained that, to the extent that affected entities believe they need additional guidance concerning compliance with the currently effective affiliate restrictions, they may submit a request for a no-action letter regarding specific proposed transactions, practices or situations¹⁴ or may seek waiver of the affiliate restrictions on a case-by-case basis.¹⁵

5. Ameren submitted a request for rehearing of the Order Denying Rehearing in which it challenges the Commission's determination to affirm its clarification that resource planning employees may not be shared under the affiliate restrictions.¹⁶ Ameren argues that the Order Denying Rehearing failed to respond to the argument that the prohibition on sharing resource planning employees is unnecessary given the lack of evidence of any harm, thus making it contrary to *National Fuel Gas Supply Corp. v. FERC*,¹⁷ and that this prohibition will result in the imposition of unnecessary costs without justification. Ameren also argues that the Commission erred by failing to provide any examples of actual harm resulting from the sharing of resource planning employees, and by failing to balance the potential harm from such sharing against the cost of prohibiting such sharing. Ameren contends that the Order Denying Rehearing

Withdrawal of Notice of Proposed Rulemaking and Termination of Rulemaking Proceeding, FERC Stats. & Regs. ¶ 32,671 (2011) (Withdrawal Order).

¹² Order Denying Rehearing, 134 FERC ¶ 61,046 at P 28.

¹³ Withdrawal Order, FERC Stats. & Regs. ¶ 32,671 at P 22.

¹⁴ See July 2 Order, 132 FERC ¶ 61,014 at P 5 (citing *Obtaining Guidance on Regulatory Requirements*, Interpretative Order Modifying No-Action Letter Process and Reviewing Other Mechanisms for Obtaining Guidance, 123 FERC ¶ 61,157 (2008)).

¹⁵ See *id.* (citing *Cleco Power LLC*, 130 FERC ¶ 61,102 (2010)).

¹⁶ Ameren Request for Rehearing at 2.

¹⁷ 468 F.3d 831 (D.C. Cir. 2006) (*National Fuel*).

misconstrues the Commission's prior orders, which, according to Ameren, did not prohibit the sharing of resource planning employees. Ameren therefore contends that the Commission should grant rehearing of the Order Denying Rehearing and find that resource planning employees may be shared notwithstanding the Commission's affiliate restrictions.

Discussion

6. We will reject Ameren's request for rehearing of the Order Denying Rehearing. Ameren's arguments that the Commission erred in affirming its clarification that resource planning employees may not be shared under the affiliate restrictions, and that the Commission's clarification is a departure from Commission precedent and is contrary to *National Fuel*, were previously rejected by the Commission in responding to EEI in the Order Denying Rehearing.¹⁸ In the Order Denying Rehearing, the Commission explained that "[t]o the maximum extent practical, the employees of a market-regulated power sales affiliate must operate separately from the employees of any affiliated franchised public utility with captive customers."¹⁹ The Commission therefore found that the clarifications provided in the April 15 Clarification Order that employees that determine the timing of scheduled outages, or that engage in economic dispatch, fuel procurement, or resource planning may not be shared is not a departure from Commission precedent.²⁰

7. The Commission does not allow rehearing of an order denying rehearing.²¹ Any other result would lead to never-ending litigation as every response by the Commission to

¹⁸ Order Denying Rehearing, 134 FERC ¶ 61,046 at P 20; *see also* EEI Request for Rehearing, Docket No. RM04-7-009, at 10-11 (filed May 17, 2010).

¹⁹ *Id.* (citing 18 C.F.R. § 35.39(c)(2)(i) (2011)).

²⁰ *Id.*

²¹ *See, e.g., Cargill Power Markets, LLC*, 114 FERC ¶ 61,093 (2006); *KeySpan-Ravenswood, LLC v. New York Independent System Operator, Inc.*, 112 FERC ¶ 61,153 (2005); *Southern Company Services, Inc.*, 111 FERC ¶ 61,329 (2005); *AES Warrior Run, Inc. v. Potomac Edison Company d/b/a Allegheny Power*, 106 FERC ¶ 61,181 (2004); *Southwestern Public Service Co.*, 65 FERC ¶ 61,088, at 61,533 (1993).

a party's arguments would allow yet another opportunity for rehearing unless presumably that response were word-for-word identical to what the Commission earlier said.²² Litigation before the Commission cannot be allowed to drag on indefinitely – at some point it must end – and so the Commission does not allow parties to seek rehearing of an order denying rehearing. Further, as the District of Columbia Circuit has stated, even “an improved rationale” would not justify a further request for rehearing.²³ Consequently, Ameren's expansion of prior arguments raised by EEI and addition of new arguments that it could have raised on rehearing of the April 15 Clarification Order does not warrant revisiting this issue yet again.²⁴

8. Rehearing of an order on rehearing lies only when the order on rehearing modifies the result reached in the original order in a manner that gives rise to a wholly new objection.²⁵ In fact, a second rehearing request is required in instances when the later order modifies the results of the earlier order in a significant way.²⁶

9. Here, the Order Denying Rehearing affirmed the findings in the April 15 Clarification Order and denied rehearing of that order. In these circumstances, Ameren's request for rehearing of the Order Denying Rehearing is neither required nor appropriate. The fact that, in responding to EEI's arguments that the April 15 Clarification Order is a departure from precedent in the Order Denying Rehearing, the Commission pointed out an additional weakness in those arguments does not modify the results of the April 15 Clarification Order, and does not otherwise constitute a significant modification of that

²² *Accord, e.g., Canadian Association of Petroleum Producers v. FERC*, 254 F.3d 289, 296 (D.C. Cir. 2001) (rejecting the notion of “infinite regress” that would “serve no useful end”).

²³ *See Southern Natural Gas Co. v. FERC*, 877 F.2d 1066, 1073 (D.C. Cir. 1999) (*Southern*) (citing *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1109-10 (D.C. Cir. 1988)).

²⁴ *See* 18 C.F.R. § 385.713(c)(3) (2012); *see also Keyspan-Ravenswood LLC v. New York Indep. Sys. Operator Inc.*, 119 FERC ¶ 61,319, at n.12 (2007); *Trans Alaska Pipeline Sys.*, 67 FERC ¶ 61,175, at 61,531 (1994).

²⁵ *See Southern*, 877 F.2d at 1073.

²⁶ *See California Department of Water Resources v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002); *Town of Norwood, Massachusetts v. FERC*, 906 F.2d 772, 775 (D.C. Cir. 1990).

order. This being the case, consistent with the precedent cited above, we will reject Ameren's request for rehearing of the Order Denying Rehearing.

The Commission orders:

Ameren's request for rehearing is hereby rejected.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.