

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Dynegy Midwest Generation, Inc. and
Dynegy Power Marketing, Inc.

v.

Docket No. EL02-6-001

Commonwealth Edison Company

Illinois Power Company

Docket No. EL03-32-001

ORDER DISMISSING REHEARING REQUESTS

(Issued August 9, 2004)

1. In this order, we will dismiss the pending rehearing requests in two proceedings involving the same general issue, *i.e.*, whether certain power sales contracts are contracts for the sale of firm power (which may be designated as a network resource) or for interruptible power (which may not be designated as a network resource).

2. In the proceeding in Docket No. EL02-6-001, we will grant a motion by Commonwealth Edison Company (ComEd) to dismiss requests for rehearing by Dynegy Midwest Generation, Inc. and Dynegy Power Marketing, Inc. (collectively, Dynegy) and by Illinois Power Company (Illinois Power) of our order issued on December 18, 2002.¹ That order addressed whether the designation of power obtained under certain contracts could be designated as network resources under ComEd's open access transmission tariff (OATT). We will grant the motion to dismiss the rehearing requests because it is undisputed that ComEd's OATT has since been cancelled.

¹ Dynegy Midwest Generation, Inc. and Dynegy Power Marketing, Inc. v. Commonwealth Edison Company, 101 FERC ¶ 61,295 (2002) (December 2002 Order).

3. In the proceeding in Docket No. EL03-32-001, we will dismiss Illinois Power's request for rehearing of the Commission's order issued on March 3, 2003 denying Illinois Power's request for a declaratory order,² in light of Illinois Power's letter indicating a "willing[ness] to forego resolution of those issues." In addition, we note that the declaratory order was sought in reference to a then pending Illinois state court proceeding that has now been terminated.

DISCUSSION

A. Dynegy's Complaint in Docket No. EL02-6-000

4. Dynegy's complaint challenged ComEd's business practice governing the designation of new network resources under ComEd's OATT. Dynegy argued that the business practice at issue improperly allowed power obtained under certain power sales contracts to be designated as a network resource under ComEd's OATT; Dynegy maintained that the power should have been treated as interruptible power and thus not eligible for designation as a network resource.

5. In the December 2002 Order, we denied Dynegy's complaint and found that the power sales contracts at issue in that case were not interruptible for economic reasons and thus properly could be designated as network resources under ComEd's OATT.

6. Dynegy filed a request for rehearing that argued that the Commission misinterpreted the contracts at issue. Dynegy's affiliate, Illinois Power, also filed a request for rehearing.

7. On May 4, 2004, ComEd filed a motion to dismiss the requests for rehearing as moot. ComEd's motion points out that the complaint in this proceeding concerned the interpretation of ComEd's OATT and that following ComEd's integration into PJM Interconnection, LLC on May 1, 2004, ComEd no longer provides transmission service under its OATT, which has been cancelled.

8. On May 19, 2004, Dynegy filed an answer to ComEd's motion stating that it does not oppose ComEd's motion and agreeing that the question of whether certain power service contracts can validly be designated as network resources under ComEd's OATT is moot for the reasons stated by ComEd in its motion. Illinois Power did not object to ComEd's motion.

² Illinois Power Company, 102 FERC ¶ 61,257 (2003) (March 2003 Order).

Commission Finding

9. We will grant ComEd's unopposed motion to dismiss the rehearing requests given that the OATT at issue has since been cancelled.

B. Illinois Power's Request for a Declaratory Order in Docket No. EL03-32-000

10. On March 31, 1999, Corn Belt entered into a power sales agreement with Constellation Power Source (Constellation) for the purchase of firm energy from Constellation. Subsequently, during the summer of 2000, Illinois Power concluded that, as a consequence of transmission line loading relief (TLR) procedures, it had to curtail transmission service to Corn Belt on thirteen days. Corn Belt filed suit in an Illinois state court seeking approximately \$7 million in damages that Corn Belt claimed resulted from Illinois Power's curtailment of transmission service.³ In response to this lawsuit, Illinois Power filed a request with the Commission asking the Commission to issue a declaratory order finding that the Commission had primary jurisdiction over this matter and that Illinois Power's curtailment of transmission service to Corn Belt was proper.

11. In the March 2003 Order, we denied Illinois Power's request for a declaratory order and found that Corn Belt's energy purchases from Constellation qualified as a network resource.

12. Illinois Power filed a request for rehearing disputing, among other things, the contractual interpretation in the March 2003 Order.

13. In response to an inquiry from the Commission's General Counsel, Illinois Power informed the Commission, in a letter dated June 7, 2004, that it was "willing to forego resolution" of the issues raised in its request for rehearing.

Commission Finding

14. Based on Illinois Power's letter stating that it is willing to forego resolution of the issues in its request for rehearing, we will dismiss Illinois Power's rehearing request.

³ The clerk's office for the Illinois Eleventh Circuit Court (McLean County) reports that this lawsuit was dismissed with prejudice on November 13, 2003 and that that proceeding is now terminated.

The Commission orders:

The pending requests for rehearing in Docket Nos. EL02-6-001 and EL03-32-001 are hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.