

143 FERC ¶ 61,127
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Market-Based Rate Affiliate Restrictions

Docket No. RM10-20-001

ORDER DENYING REHEARING

(Issued May 16, 2013)

1. On February 22, 2011, Ameren Services Company (Ameren) filed a request for rehearing of the Commission's January 20, 2011 order withdrawing and terminating the Market-Based Rate Affiliate Restrictions rulemaking proceeding.¹ In the Withdrawal Order, the Commission found that the current regulations setting forth the market-based rate affiliate restrictions 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. The Commission therefore withdrew the Market-Based Rate Affiliate Restrictions NOPR.² For the reasons discussed below, we will deny Ameren's request for rehearing of the Withdrawal Order.³

¹ *Market-Based Rate Affiliate Restrictions*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,567 (2010) (Market-Based Rate Affiliate Restrictions NOPR), Withdrawal of Notice of Proposed Rulemaking and Termination of Rulemaking Proceeding, FERC Stats. & Regs. ¶ 32,671 (2011) (Withdrawal Order).

² Withdrawal Order, FERC Stats. & Regs. ¶ 32,671 at P 22.

³ 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.

I. 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 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

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).

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.

power sales affiliates must operate separately from employees of affiliated franchised public utilities with captive customers.⁸

4. On April 15, 2010, in response to a request for clarification submitted by the Compliance Working Group,⁹ the Commission provided guidance regarding which employees may not be shared under the affiliate restrictions unless otherwise permitted by Commission rule or order.¹⁰ 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.¹¹ 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

⁸ 18 C.F.R. § 35.39(c)(2)(i) (2012).

⁹ The Compliance Working Group stated that it consists of 27 energy companies, which include integrated electric businesses, merchant generators, marketing and trading businesses, and natural gas distributors, and explained that the group was formed in mid-2008 “to develop a model [Commission] compliance program guide.” Compliance Working Group March 9, 2009 Request, Docket No. RM04-7-007 at 2; Compliance Working Group October 28, 2009 Amended Request, Docket No. RM04-7-007 at 3. The members of the Compliance Working Group that took part in its request for clarification were: Allegheny Energy, Inc.; American Electric Power Company, Inc.; Cleco Corporation; Consumers Energy Company; Dominion Resources, Inc.; Duke Energy Corporation; Edison International; El Paso Electric Company; Energy East Corp.; 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.

¹⁰ 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.

¹¹ April 15 Clarification Order, 131 FERC ¶ 61,021 at P 40.

revise the affiliate restrictions in order to reflect the guidance provided in the April 15 Clarification Order.¹²

5. 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, 2011.¹³ On January 20, 2011, the Commission also withdrew the Market-Based Rate Affiliate Restrictions NOPR, finding that the current regulations are sufficient because 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. The Commission explained that while the Market-Based Rate Affiliate Restrictions NOPR was intended to provide additional clarity to the industry by identifying in the regulatory text certain employees who cannot be shared, codifying these clarifications in the regulatory text is unnecessary because the separation of functions requirement in the existing regulations already requires 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.”¹⁴ The Withdrawal Order also explained that the existing regulations also provide that a franchised public utility with captive customers may not share market information with a market-regulated power sales affiliate if the sharing could be used to the detriment of captive customers, unless simultaneously disclosed to the public.¹⁵ Based on its finding that codifying the clarifications provided in the April 15 Clarification Order in the regulatory text is unnecessary, the Commission concluded that it was not necessary to adopt the amendments to the regulations proposed in the Market-Based Rate Affiliate Restrictions NOPR and stated that sellers are required to comply with the guidance provided in the April 15 Clarification Order within 90 days of the date of issuance of the Order Denying Rehearing.¹⁶

¹² See Market-Based Rate Affiliate Restrictions NOPR, FERC Stats. & Regs. ¶ 32,657.

¹³ Order Denying Rehearing, 134 FERC ¶ 61,046 at P 28.

¹⁴ *Id.* (quoting 18 C.F.R. § 35.39(c)(2)(i) (2012)).

¹⁵ *Id.* (citing 18 C.F.R. § 35.39(c)(2)(i) (2012)).

¹⁶ *Id.*

II. Request for Rehearing

6. In its request for rehearing of the Withdrawal Order, Ameren asserts that the Withdrawal Order failed to respond to comments on the Market-Based Rate Affiliate Restrictions NOPR that the restrictions proposed in the NOPR were contrary to *National Fuel Gas Supply Corp. v. FERC*,¹⁷ and would result in the imposition of unnecessary costs without justification. Ameren argues that to the extent the Commission relies on its statement in the NOPR that “strategic decision making by a shared employee could result in generation being built or acquired for the benefit of the market-regulated power sales affiliate, and at the expense of the captive customers of the franchised public utility,” the Commission’s conclusion is based on mere speculation and is inconsistent with *National Fuel’s* directive to show that the potential for harm justifies the imposition of costly restrictions.¹⁸ Ameren next argues that the Commission failed to satisfy the requirements of *National Fuel* because the Commission did not provide an analysis of how the potential danger justifies the imposition of costly prophylactic measures, and explain why other mechanisms, such as the Commission’s complaint procedures, are not adequate to protect against the potential harm. Again citing *National Fuel*, Ameren asserts that the Commission erred in failing to provide any examples of actual harm resulting from the sharing of resource planning personnel, and in failing to balance any potential harm from such sharing against the cost of its broad restrictions prohibiting such sharing.

7. Ameren also argues that the Commission erred in holding that its prior precedent prohibited the sharing of resource planning personnel. Ameren claims that the Commission attempts to justify its restrictions on the sharing of resource planning employees and the NOPR’s withdrawal by asserting that its current regulations “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.”¹⁹ Ameren states that none of the precedent cited by the Commission directly involves resource planning personnel or explains how resource planning differs from the types of support functions (e.g., legal, accounting) the Commission has found may be shared.

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

¹⁸ Ameren Request for Rehearing at 14 (citing Market-Based Rate Affiliate Restrictions NOPR, FERC Stats. & Regs. ¶ 32,567 at P 9).

¹⁹ *Id.* at 19 (citing Market-Based Rate Affiliate Restrictions NOPR, FERC Stats. & Regs. ¶ 32,567 at P 22).

8. Ameren also argues that the Commission erred in failing to meaningfully respond to Ameren Services' statements that the Commission should exempt from the market-based rate affiliate restrictions arrangements that have been approved by a state commission. Ameren further asserts that the Commission rejected without explanation Ameren's request for an additional 180-day compliance period.

III. Discussion

9. We will deny Ameren's request for rehearing of the Withdrawal Order, for the reasons discussed below.

10. In arguing that the Commission did not respond to its comments on the NOPR, Ameren attempts to litigate issues on rehearing that were rendered moot by the Withdrawal Order. In the Withdrawal Order, the Commission explained that codifying in the regulatory text the clarifications provided in the April 15 Clarification Order as proposed by the Market-Based Rate Affiliate Restrictions NOPR is unnecessary because the separation of functions requirement in the existing regulations, as codified in Order No. 697, already requires 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."²⁰ Based on this requirement, the Commission in the Order Denying Rehearing also rejected arguments similar to those raised by Ameren in this proceeding. Thus, Ameren's arguments constitute a collateral attack on Order No. 697 and the Order Denying Rehearing.

11. Ameren also argues the Commission failed to respond to Ameren's arguments raised in comments on the NOPR. However, as the Commission explained in the Withdrawal Order, commenters' arguments objecting to the amendments to the regulatory text proposed in the NOPR and their arguments that adequate notice and opportunity for comment were not provided on the amendments to the regulatory text were rendered moot by the Withdrawal Order. In a rulemaking proceeding, the Commission is "accorded considerable deference in evaluating information presented and reaching decisions based upon its expertise."²¹ Further, an "agency's decision to refrain from amending the elaborate, established regulatory scheme cannot be disturbed absent a

²⁰ Withdrawal Order, FERC Stats. & Regs. ¶ 32,671 at P 22 (quoting 18 C.F.R. § 35.39(c)(2)(i) (2011)).

²¹ *Professional Drivers Council v. Bureau of Motor Safety*, 706 F.2d 1216, 1220-21 (D.C. Cir. 1983) (discussing agency's decision not to promulgate new rules in an area already subject to agency regulation) (*Professional Drivers*); *Maier v. EPA*, 114 F.3d 1032, 1043 (10th Cir. 1997).

strong showing that such action was unreasonable.”²² Therefore, we reject Ameren’s arguments that the Commission failed to respond to Ameren’s arguments raised in comments on the NOPR.

12. We also find without merit Ameren’s assertion that the Commission erred in holding that its prior precedent prohibited the sharing of resource planning employees. In support of its argument, Ameren states that at no point did the Commission state that the delineation of permissibly shared employees set forth in Order Nos. 697 or 697-A represented the entire universe of employees that may be permissibly shared under the affiliate restrictions. Ameren further notes that in Order No. 697, the Commission specifically rejected requests that it provide “a non-exhaustive list of examples of permissible shared support employees” in section 35.39 of its regulations.²³ However, in declining to include a non-exhaustive list of examples of permissible shared support employees, the Commission clarified that the types of permissibly shared support employees under the Commission’s standards of conduct are the types of permissibly shared support employees that will be allowed under the affiliate restrictions in section 35.39. The Commission noted that such employees “include those in legal, accounting, human resources, travel and information technology.”²⁴ The fact that the Commission did not identify all or a more comprehensive list of permissibly shared employees cannot logically be taken to mean that resource planning employees would necessarily be permitted to be shared under the affiliate restrictions, particularly given Ameren’s failure to explain how resource planning would constitute a “support” function comparable to “legal, accounting, human resources, travel and information technology.”

13. We deny Ameren’s request that the Commission clarify that the sharing of employees pursuant to an existing agreement that has been approved by the relevant state authority may continue. Ameren contends that the Commission “responded to [this] request in a single sentence” in the Withdrawal Order.²⁵ As the Commission explained in the Withdrawal Order, while the Commission has granted waiver of its affiliate restrictions to permit the sharing of certain employees in certain circumstances, such waivers were based on case-specific circumstances and representations made by the

²² *Professional Drivers*, 706 F.2d at 1221.

²³ Ameren Request for Rehearing at 20 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 564).

²⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 564.

²⁵ Ameren Request for Rehearing at 21 (citing Withdrawal Order, FERC Stats. & Regs. ¶ 32,671 at P 24).

specific applicants in those cases.²⁶ Because Ameren does not provide any specific information concerning the employees that would be shared if its request were granted, and does not provide any specific information regarding the agreement approved by the state authority pursuant to which such employees would be shared,²⁷ we deny Ameren's request that we clarify that the sharing of employees pursuant to an existing agreement that has been approved by the relevant state authority may continue. We find that the Commission, for the purposes of the affiliate restrictions, should retain its authority to review on a case-by-case basis circumstances where affiliates seek to share employees.²⁸ To the extent that Ameren believes that it needs additional guidance concerning compliance with the affiliate restrictions, it may submit a request for a no-action letter regarding specific proposed transactions, practices or situations²⁹ or may seek waiver of the market-based rate affiliate restrictions on a case-by-case basis.³⁰

14. We also reject Ameren's arguments that the Commission failed to respond to Ameren's request that the prohibition on sharing of resource planning personnel apply prospectively beginning no earlier than 180 days after the issuance of any Final Rule in the proceeding in Docket No. RM10-20-000. In requiring sellers to comply with the guidance in the April 15 Clarification Order within 90 days of the date of issuance of the Order Denying Rehearing, the Commission explained in the Withdrawal Order that the existing regulations already require that "to the maximum extent practical, the employees of a market-regulated power sales affiliate must operate separately from the employees of

²⁶ Withdrawal Order, FERC Stats. & Regs. ¶ 32,671 at P 25. In *Cleco Power LLC*, for example, the waiver of certain affiliate restrictions was limited to three employees, was limited to the "specific facts and circumstances" presented by the applicants, and was conditioned on the requirement that the applicants maintain sufficient records to allow the Commission to audit their compliance with the conditions of the waiver. 130 FERC ¶ 61,102, at PP 22-25.

²⁷ Ameren's June 21, 2010 comments on the Market-Based Rate Affiliate Restrictions NOPR in Docket No. RM10-20-000 also do not include this information.

²⁸ See, e.g., *Virginia Electric and Power Co.*, 142 FERC ¶ 61,103, at P 17 (2013).

²⁹ 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)).

³⁰ See *id.* (citing *Cleco Power LLC*, 130 FERC ¶ 61,102 (granting Cleco Power LLC and its affiliate Acadia Power Partners, LLC limited waiver of certain affiliate restrictions)).

any affiliated franchised public utility.”³¹ Because the Commission’s existing affiliate restrictions regulations already require the separation of functions, we deny Ameren’s request that the Commission provide “affected public utilities with an additional 90 days to comply” with the restriction on sharing of resource planning employees.³² Ameren may submit a case-specific request for extension of time to comply with this requirement if it seeks additional time to comply.

The Commission orders:

Ameren’s request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³¹ Withdrawal Order, FERC Stats. & Regs. ¶ 32,671 at P 22; Order Denying Rehearing, 134 FERC ¶ 61,046 at P 28.

³² See Ameren Request for Rehearing at 22.