

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Public Service Electric & Gas Company and
PSEG Energy Resources & Trade LLC

Docket No. ER05-703-000

ORDER GRANTING AUTHORIZATION TO MAKE SALES

(Issued May 5, 2005)

1. In this order, the Commission grants an application under section 205 of the Federal Power Act (FPA)¹ by Public Service Electric and Gas Company (PSE&G) and PSEG Energy Resources & Trade LLC (PSEG Trade) (collectively, Applicants) requesting Commission authorization for PSEG Trade to make market-based rate sales to its affiliate, PSE&G, pursuant to PSEG Trade's market-based rate tariff. PSEG Trade will make these sales as part of Applicants' participation in the statewide auction bidding process (statewide bidding process) approved by the New Jersey Board of Public Utilities (New Jersey Board). This order concludes that this competitive solicitation, as described below, satisfies the Commission's concerns regarding affiliate abuse. This order benefits customers by assuring that sales among affiliates fall within the Commission's guidelines for evaluating market-based rate affiliate sales resulting from competitive solicitation processes.

Background

2. On March 14, 2005, Applicants filed the instant application under section 205 of the Federal Power Act. Applicants request waiver, to the extent necessary, of the applicable provisions in their codes of conduct and market-based rate tariffs to permit PSEG Trade to make sales to PSE&G pursuant to contracts entered into as a result of the statewide bidding process.

¹ 16 U.S.C. § 824d (2000).

3. PSE&G is a public utility that, among other things, serves retail customers in New Jersey. PSE&G's transmission facilities are under the operational control of PJM Interconnection, L.L.C. (PJM).² PSEG Trade is a power marketing affiliate of PSE&G.

4. Applicants state that, pursuant to state electric restructuring legislation,³ the New Jersey Board approved two statewide bidding auctions as the means for procuring Basic Generation Service (BGS)⁴ for electric customers in New Jersey. Applicants state that on December 1, 2004, the New Jersey Board approved auctions to determine the suppliers of the BGS load for the period beginning on June 1, 2005.⁵ Applicants further state that the BGS auction allowed potential suppliers to bid for the right to supply products in two auctions: BGS-Commercial Industrial Energy Pricing (BGS-Commercial), a variable hourly-priced product; and BGS-Fixed Energy Pricing (BGS-Fixed), a seasonally fixed-price product.

5. Applicants state that the auction ended on February 15, 2005, and the New Jersey Board reviewed and certified the results, granting the distribution companies authority to enter into standardized contracts with the winning bidders. PSEG Trade won tranches for both types of BGS service for PSE&G load.⁶ Applicants state that PSEG Trade therefore executed with PSE&G the standard *pro forma* Master Supplier Agreements approved by the New Jersey Board for services commencing on June 1, 2005.

² See *Pennsylvania-New Jersey-Maryland Interconnection, L.L.C.*, 81 FERC ¶ 61,257 (1997), *order on reh'g*, 92 FERC ¶ 61,282 (2000).

³ Electric Discount and Energy Competition Act of 1999, *N.J.S.A.* §§ 48:3-49 *et seq.*, which provides the framework for the transition from a regulated to a competitive marketplace in New Jersey.

⁴ BGS is electric generation service that is provided by a New Jersey electric distribution company to any customer who has not chosen an alternative power supplier. BGS is known in other states as provider of last resort service or default service.

⁵ Applicants state that the 2005 auction design is substantially identical to the auction design that was approved by the New Jersey Board, and used by the New Jersey utilities, for BGS auctions held in 2002, 2003, and 2004.

⁶ Applicants state that PSEG Trade won 7 of 67 total tranches for BGS-Commercial and 8 of 85 total tranches for BGS-Fixed available for the entire PSE&G service territory, and that PSEG Trade also won tranches for BGS load in the service territories of other New Jersey utilities.

Notice and Pleadings

6. Notice of Applicants' filing was published in the *Federal Register*, 70 Fed. Reg. 15,077 (2005), with motions to intervene and protests due on or before April 4, 2005. None was filed.

Discussion

7. As noted above, Applicants ask the Commission to waive, to the extent necessary, applicable provisions in their codes of conduct and market-based rate tariffs to permit PSEG Trade to make market-based rate sales to PSE&G pursuant to contracts entered into as a result of the BGS auction. Applicants state that the BGS auction has previously been found to satisfy the Commission's concerns regarding affiliate abuse in 2003.⁷ In order to meet the Commission's requirements for sales between affiliates, Applicants offer evidence that the 2005 BGS auction falls within the Commission's guidelines for determining when a competitive bidding process satisfies the Commission's concerns regarding affiliate abuse.⁸

8. The Commission has stated that, in cases where affiliates are entering into market-based rate sales agreements, it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is not distorted.⁹ The Commission has approved affiliate sales resulting from competitive bidding processes after the Commission has determined that, based on the evidence, the proposed sale was a result of direct head-to-head competition between affiliated and competing unaffiliated

⁷ *Consolidated Edison Energy, Inc.*, 102 FERC ¶ 61,097 (2003) (*Con Edison*). Applicants note that PSE&G intervened in *Con Edison*, arguing that provision of BGS service did not constitute a sale of power for resale in interstate commerce. The Commission assumed (without deciding) that it had jurisdiction over the sale. *Con Edison*, 102 FERC ¶ 61,097 at P 12. Applicants state that the instant filing is without prejudice to taking that position again in the future.

⁸ *See Allegheny Energy Supply Co., LLC*, 108 FERC ¶ 61,082 (2004) (*Allegheny*).

⁹ *See Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 at 62,167 (1991) (*Edgar*).

suppliers.¹⁰ When an entity presents this kind of evidence, the Commission has required assurance that: (1) a competitive solicitation process was designed and implemented without undue preference for an affiliate; (2) the analysis of bids did not favor affiliates, particularly with respect to non-price factors; and (3) the affiliate was selected based on some reasonable combination of price and non-price factors.¹¹

9. In *Allegheny*, the Commission provided guidance as to how the Commission will evaluate whether a competitive solicitation process such as the one in the instant proceeding meets the *Edgar* criteria. As the Commission stated, the underlying principle when evaluating a competitive solicitation process under the *Edgar* criteria is that no affiliate should receive undue preference during any stage of the process. The Commission indicated that the following four guidelines will help the Commission determine if a competitive solicitation process satisfies that underlying principle: transparency, definition, evaluation and oversight. As discussed below, the Commission finds that the New Jersey statewide bidding process is an example of a process that meets these guidelines.

Transparency Principle

10. The BGS auction achieved transparency in the design phase through a collaborative process involving informed parties with diverse interests and an on-the-record, public New Jersey Board proceeding. The terms of the BGS auction were provided on the auction website and are discussed at bidder information sessions open to all potential participants in the auction, such that all bidders were aware of the bid selection process.¹² This allows for easy access to critical information such as bidder requirements and auction rules. Further, the independent auction administrator answers questions from interested parties, posting the questions and answers on the BGS auction website where they can be accessed by all interested parties.¹³ Thus, the Commission

¹⁰ See *Connecticut Light & Power Co. and Western Massachusetts Electric Co.*, 90 FERC ¶ 61,195 at 61,633-34 (2000); *Aquila Energy Marketing Corp.*, 87 FERC ¶ 61,217 at 61,857-58 (1999); *MEP Pleasant Hill, LLC*, 88 FERC ¶ 61,027 at 61,059-60 (1999); *Edgar*, 55 FERC ¶ 61,382 at 62,167-69; *Allegheny*, 108 FERC ¶ 61,082.

¹¹ *Edgar*, 55 FERC ¶ 61,382 at 62,168.

¹² Information such as auction rules and *pro forma* BGS contracts was available at www.bgs-auction.com.

¹³ Answers are located at www.bgs-auction.com/bgs.faq.all.desc.asp.

believes that the design, administration, and bid evaluation phases of the BGS auction were transparent.

Definition Principle

11. The auction materials defined the products and the *pro forma* BGS–Commercial and BGS–Fixed contracts. By including information such as bidder qualification criteria and bid evaluation method in the BGS auction, the parameters of the competitive solicitation process were clearly defined prior to the solicitation of bids. Bidders had knowledge of the process through which they could bid and through which their bids would be evaluated before they were called upon to submit them. Thus, the Commission believes that the BGS auction was clearly defined.

Evaluation Principle

12. Potential bidders were pre-qualified before the auction began, eliminating the need to evaluate bids based on non-price factors. The BGS auction selected winning bidders based solely on price. Further, all bidders were required to accept the terms of the standard *pro forma* Master Supplier Agreements. Selecting bids based only on price ensured that affiliates were not given preferential treatment during the selection phase of the process. After the independent consultant evaluated the bids, the New Jersey Board reviewed and certified the results within 48 hours of the auction closing, and all companies are bound by the auction results. Thus, the Commission believes that the bids were evaluated in the BGS auction based on standardized criteria and that those criteria were applied equally to all bids regardless of affiliation.

Oversight Principle

13. The BGS auction was monitored by an independent consultant, who developed the auction design prior to the first auction in 2002 and was responsible for the administration of the auction. The New Jersey Board also exercised general oversight authority over the auction and retained a separate independent consultant as an advisor to oversee all aspects of the conduct of the auction. This independent advisor reported directly to the New Jersey Board. Thus, the Commission believes the presence of this independent third party, as well as the involvement of the New Jersey Board and its independent advisor, provided sufficient independent third-party oversight of the design, administration, and bid evaluation stages of the BGS auction.

14. Finally, we note that PSE&G's transmission facilities are under the operational control of the PJM regional transmission organization (RTO). Part of the Commission's concern about affiliate transactions is that competitors can be foreclosed from the market. However, in regions with an RTO-operated market, there is less risk of foreclosure if all

parties have the option of selling into that market. In this case, the fact that PSEG Trade's sales to PSE&G will take place in a region with an RTO-operated market satisfies our concern with regard to the effect on competition.

15. Accordingly, the Commission concludes that the competitive solicitation process described by Applicants satisfies the Commission's concerns regarding affiliate abuse. Therefore, the Commission grants Applicants' request for authorization to make affiliate sales, including granting waiver of applicable provisions in the codes of conduct and market-based rate tariffs of PSE&G and PSEG Trade, to the extent necessary to permit PSEG Trade to make market-based rate sales to PSE&G pursuant to contracts entered into as a result of the 2005 New Jersey statewide bidding process.

The Commission orders:

(A) The application for authorization for PSEG Trade to make market-based rate sales to its affiliate PSE&G, pursuant to PSEG Trade's market-based rate tariff, is hereby granted, as discussed in the body of this order.

(B) Waiver of applicable provisions in the codes of conduct and market-based rate tariffs, to the limited extent necessary, to permit PSEG Trade to make sales to PSE&G pursuant to contracts entered into as a result of the 2005 New Jersey statewide bidding process, is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.