

UNITED STATES OF AMERICA 100 FERC ¶ 61.345
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

Ontario Energy Trading International
Corporation

Docket No. ER02-1021-001

ORDER ON REHEARING

(Issued September 26, 2002)

1. On May 9, 2002, Consumers Energy Company (Consumers) sought rehearing of the Commission's order issued in this proceeding on April 11, 2002.¹ For the reasons discussed below, we will deny rehearing.

Background

2. On February 14, 2002, Ontario Energy Trading International Corp. (Ontario Energy) filed an application seeking authority to sell energy, capacity and ancillary services, and to resell transmission capacity, at market-based rates. In the April 11 Order, the Commission granted Ontario Energy's application. We found, among other things, that Ontario Energy's application satisfied the Commission's requirements regarding the absence or mitigation of market power, including transmission market power.

3. Our findings were based, in part, on Ontario Energy's corporate structure. By way of background, we noted that Ontario Hydro, a government-owned utility formerly providing generation, transmission, and distribution services within the Province of Ontario on a bundled basis, had been structurally unbundled. Specifically, we noted that Ontario Hydro had transferred its generation assets to Ontario Power Generation Inc. (OPG), an affiliated entity of Ontario Energy, and had transferred its transmission assets to Hydro One, Inc. (Hydro One). We further noted that all shares of OPG and Hydro One are held in the name of the Provincial Government of Ontario (Ontario).

¹Ontario Energy Trading Corp., 99 FERC ¶ 61,039 (2002) (April 11 Order).

4. We also noted, however, that while Ontario was responsible for appointing the directors of both Hydro One and OPG, the two boards were intended to function independent of each other and that Ontario intended to privatize Hydro One. We further noted that Ontario Energy had transferred the operational control over its transmission assets to the Ontario Independent Electricity Market Operator (IMO), a not-for-profit transmission and market operator whose duties and functions would be similar to a regional transmission organization in the United States.²

5. Based on these facts, we rejected Consumers' argument that Ontario Energy, Hydro One, and the IMO were affiliated entities (a consideration relevant to our assessment of transmission market power). Given this finding, moreover, we did not rule on Consumers' additional assertion that the IMO does not provide transmission service on a reciprocal, non-discriminatory basis (another consideration relevant to the assessment of transmission market power in those cases where a market-based rates applicant is affiliated with a transmission provider).

6. On rehearing, Consumers argues that the Commission erred in granting Ontario Energy market-based rate authority, given its failure to consider the relevant facts relating to transmission market power. First, Consumers asserts that while Ontario has functionally unbundled the former Ontario Hydro, it has done so in a way that has permitted it to retain control of that formerly integrated entity's assets. Consumers argues, for example, that it is Ontario alone (the sole-shareholder of both Hydro One and Ontario Energy's parent, OPG) who appoints the IMO's Board. Second, Consumers argues that Ontario Energy has not demonstrated that the IMO will provide reciprocal, open access transmission service comparable to the standards established by Order No. 888.³

²The IMO began operation on May 1, 2002.

³Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in part and rev'd in part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom., New York v. FERC, 70 U.S.L.W. 4166 (U.S. March 4, 2002).

Briefing Procedures and Responsive Pleadings

7. In a procedural order issued by the Commission on July 1, 2002, we noted that Consumers' assertions, on rehearing, regarding Ontario Energy's affiliated entity status would, if accepted, require the Commission to address the related issue not addressed by the April 11 Order and not sufficiently addressed in the record itself, *i.e.*, whether the IMO offers non-discriminatory access to Hydro One's transmission system on a through and out basis for purposes of reaching United States loads.⁴ Accordingly, the July 1 Order established additional briefing procedures on this issue. In response, briefs were timely filed by the IMO, Ontario Energy, and Consumers. On July 31, 2002, motions to intervene out-of-time were filed by the New York Independent System Operator, Inc. (New York ISO) and DTE Energy Company (DTE).

8. In its brief, Ontario Energy asserts that its parent, OPG, is not affiliated with Hydro One because OPG and Hydro One do not share a single employee, a single officer or a single board member. Ontario Energy also asserts that it is not affiliated with the IMO, because the IMO Board is comprised of a broad pool of stakeholders and non-stakeholders who can be removed by Ontario only for cause, and who alone are responsible for selecting the Board Chairman and the Chief Executive Officer of the IMO. With respect to the nature and quality of the transmission service provided by the IMO, Ontario Energy submits for the record a complete set of the IMO's Market Rules and all relevant Market Manuals addressing the terms and conditions for acquiring through and out transmission service.

9. The IMO, in its brief, takes issue with Consumers' assertion that the IMO does not provide non-discriminatory open access transmission service. Among other things, the IMO notes that there are numerous United States-based companies that are actively participating in the IMO-administered markets. Finally, Consumers' brief reiterates its position, on rehearing, that Ontario Energy is an affiliated entity and that the IMO does not provide non-discriminatory open access transmission service.

Discussion

Procedural Matters

⁴Ontario Energy Trading Corp., 100 FERC ¶ 61,016 (2002) (July 1 Order).

10. The New York ISO asserts that as the administrator of a system that, like the IMO's, does not employ the Order No. 888 "physical reservation model," it has a unique perspective to bring to this proceeding, and that it was not aware and could not have anticipated that the open access issue would arise in this proceeding until the Commission issued the July 1 Order. DTE asserts that the Commission's decisional process will benefit from DTE's historical and current experiences with the IMO and its predecessor entities.

11. We will deny the motions to intervene out-of-time filed by the New York ISO and DTE. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. We find that this burden has not been met here.

Analysis

12. Consumers asserts that Ontario Energy is affiliated with both Hydro One and the IMO. We agree and therefore will clarify the April 11 Order as to this issue. Because Ontario owns all of the shares of Ontario Energy's parent company, OPG, all of the shares of Hydro One, and is responsible for appointing the IMO's Board, we find that Ontario Energy is an affiliated entity. This clarification, however, does not support a grant of rehearing in this case, given our finding, below, regarding the second issue raised by Consumers in its rehearing request, *i.e.*, whether the IMO provides non-discriminatory open access transmission service. Accordingly, we will deny rehearing.

13. Consumers argues that the transmission service provided by the IMO is not comparable to that provided under the open access tariff. We disagree. In prior market-based cases involving power marketer affiliates of Canadian utilities, the Commission has applied the same general standards that we use for reviewing requests for market-based rates by power marketers affiliated with United States utilities.⁵ In Energy Alliance Partnership, for example, we stated that the marketer must be able to show that its transmission-owning utility affiliate offers non-discriminatory access to its transmission system that can be used by competitors of the power marketer to reach the

⁵See H.Q. Energy Services (U.S.) Inc., 79 FERC ¶ 61,152 (1997).

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United States.⁶ Thus, we do not require Order No. 888 tariffs in cases such as this, but tariffs that satisfy our comparability principles. Applying this standard here, we find that the IMO provides open access transmission service on a comparable, non-discriminatory basis for wheeling through and out of the Province of Ontario, sufficient to satisfy our concerns regarding transmission market power and consistent with our precedent.

The Commission orders:

Consumers' request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Deputy Secretary.

⁶See 73 FERC ¶ 61,019 at 61,030-31 (1995).