129 FERC ¶ 61,059
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Allegheny Energy Supply Company, LLC Docket No. ER09-1382-000

ORDER GRANTING AUTHORIZATION TO MAKE AFFILIATE SALES

(Issued October 23, 2009)

1. In this order, we grant Allegheny Energy Supply Company, LLC's (Allegheny) request to make power sales to its affiliate, West Penn Power Company (West Penn).[1] Allegheny explains that it responded to West Penn's Request for Proposals (RFP) to procure residential and non-residential Provider of Last Resort (POLR) load and was selected as the winning bidder for four bid blocks, each for the term January 1, 2011 through May 31, 2012. As discussed below, we find that the competitive solicitation satisfies the Commission's concerns regarding the potential for affiliate abuse. Accordingly, we will authorize the affiliate sales discussed herein, effective January 1, 2011, as requested.

Background

2. On June 30, 2009, as supplemented on September 9, 2009, Allegheny submitted, under section 205 of the Federal Power Act (FPA),[2] a request for authorization to make power sales to its affiliate, West Penn.

3. Allegheny and West Penn are wholly-owned subsidiaries of Allegheny Energy, Inc. Allegheny owns and operates generating facilities in the PJM Interconnection, L.L.C. (PJM) market and sells energy and energy products in the wholesale markets at market-based rates.[3] West Penn operates an electric transmission and distribution system

[1] West Penn and its affiliates, the Potomac Edison Company and Monongahela Power Company, transact under the trade name Allegheny Power.

[2] 16 U.S.C. § 824d (2006).

[3] Allegheny is authorized to make sales at market-based rates. *See Allegheny*

(continued…)

serving customers in Pennsylvania. In 1999, West Penn transferred to Allegheny all of the generating assets that West Penn previously used to serve its Pennsylvania customers.[4]

4. In its RFP dated March 13, 2009, as revised on March 14, 2009, West Penn requested bids for contracts to serve load in West Penn's Pennsylvania service territory from January 1, 2011 to May 31, 2013.[5] West Penn held two procurements for these contracts, on April 13, 2009 and on June 1, 2009.

5. Allegheny responded to the RFP and was selected as the winning bidder for four 17-month bid blocks (each for the term January 1, 2011 through May 31, 2012). Specifically, as a result of the April 13, 2009 RFP, Allegheny won two of the bid blocks to serve 3.33 percent of West Penn's Type-10 residential load per each of these two bid blocks. As a result of the June 1, 2009 RFP, Allegheny won one of the bid blocks to serve eight percent of West Penn's Type-20 small non-residential load; and one of the bid blocks to serve 11 percent of West Penn's Type-30 medium non-residential load.

6. Allegheny maintains that its RFP satisfies the competitive solicitation process requirements established by the Commission for affiliate power sales in *Edgar*[6] as well as the four guidelines outlined by the Commission in *Allegheny* (i.e., Transparency, Definition, Evaluation, and Oversight).[7] In support, as described below, Allegheny states that West Penn used an independent consultant to monitor all phases of the RFP, including the selection of the winning bidders.

Energy Supply Company, 88 FERC ¶ 61,303 (1999).

[4] Allegheny's Filing at 3, citing *Allegheny Energy Supply Co.*, 89 FERC ¶ 62,063 (1999).

[5] Allegheny states that West Penn requested bids for fifteen 17-month term blocks, nine 29-month blocks, fifteen 12-month blocks, and six spot blocks for portions of its available Type-10 residential POLR load. West Penn also requested bids for eight 17-month blocks, three 29-month blocks, eight 12-month blocks, and one spot block for its Type-20 non-residential POLR load. For its Type-30 non-residential POLR load, West Penn requested bids for eight 17-month blocks, eight 12-month blocks, and one spot block. Allegheny's Filing at 4-5.

[6] Allegheny's Filing at 5, citing *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (1991) (*Edgar*).

[7] Allegheny's Filing at 5-6, citing *Allegheny Energy Supply Co.*, 108 FERC ¶ 61,082 (2004) (*Allegheny*).

7. As the winning bidder to serve a portion of West Penn's residential and non-residential load, Allegheny states that it is required to execute the Provider of Last Resort Supply Master Agreement. Allegheny adds that the terms of this agreement are included in their transaction confirmations. Allegheny requests authorization to enter into these transactions scheduled to commence on January 1, 2011.

Notice of Filing and Responsive Pleadings

8. Notice of Allegheny's filing was published in the *Federal Register*,[8] with motions to intervene and protests due on or before July 21, 2009. None was filed.

Discussion

Affiliate Abuse Analysis

9. At issue here is whether Allegheny's filing satisfies the Commission's concerns regarding the potential for affiliate abuse. In *Edgar*, the Commission 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. Under *Edgar*, 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 suppliers.[9]

10. When an entity presents evidence seeking to satisfy the *Edgar* criteria, 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.[10]

11. In *Allegheny*, the Commission provided guidance as to how it will evaluate whether a competitive solicitation process such as the RFP in the instant proceeding

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[8] 74 Fed. Reg. 34,332 (2009).

[9] *See Edgar*, 55 FERC ¶ 61,382 at 62,167-69. *See also Connecticut Light & Power 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).

[10] *Edgar*, 55 FERC ¶ 61,382 at 62,168.

satisfies the *Edgar* criteria.[11] As the Commission stated in *Allegheny*, 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 stated that the following four guidelines will help the Commission determine if a competitive solicitation process satisfies that underlying principle: (1) Transparency: the competitive solicitation process should be open and fair; (2) Definition: the product or products sought through the competitive solicitation should be precisely defined; (3) Evaluation: evaluation criteria should be standardized and applied equally to all bids and bidders; and (4) Oversight: an independent third-party should design the solicitation, administer bidding, and evaluate bids prior to the company's selection. The *Edgar* criteria and *Allegheny* guidelines are designed to ensure that the transactions between affiliates do not unduly favor affiliates, and thereby protect captive customers from affiliate abuse. As discussed below, the Commission concludes that the RFP described by Allegheny satisfies the Commission's concerns regarding affiliate abuse and results in just and reasonable rates.

Transparency Principle

12. Allegheny states that the process was transparent because it was designed so that there was a free flow of information to all parties and no party had an informational advantage in any part of the solicitation process. Allegheny states that this was accomplished by widely publicizing all aspects for the RFP; all information on the RFP, including bid eligibility rules, associated documents, and RFP milestones, was available via a public website.

13. Based on Allegheny's representations, the Commission finds that the RFP was consistent with the Commission's transparency guideline.

Definition Principle

14. Allegheny states that West Penn clearly defined the products it sought to purchase: full requirements wholesale supply POLR services in its Pennsylvania Service Territory for the period January 1, 2011 through May 31, 2013.[12] Additionally, Allegheny states

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[11] *See also 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 P 540, *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).

[12] Allegheny was the winning bidder for four 17-month bid blocks, although the RFP included bid blocks for longer lengths of time.

that the products were defined in the Pennsylvania Public Utility Commission's (Pennsylvania Commission) July 25, 2008 order[13] and West Penn's RFP documents which were made available to the public.

15. Based on these representations, the Commission finds that the RFP was consistent with the Commission's definition guideline.

Evaluation Principle

16. Allegheny states that West Penn used standardized evaluation criteria that were applied equally to all bidders and bids. It states that the RFP clearly specified the price and non-price criteria under which bids were evaluated, and all bidders were required to accept the non-price terms, which were not subject to change or negotiation. In addition, Allegheny asserts that the awards made pursuant to the RFP were based entirely on price, and that publicly available RFP documents notified potential participants of the evaluation criteria.

17. Based on these representations, the Commission finds that the RFP was consistent with the Commission's evaluation principle guideline.

Oversight Principle

18. Allegheny states that an independent entity administered the bidding and evaluated bids prior to the selection of the winner. Allegheny represents that this entity, Boston Pacific Company, Inc., had no financial interest in the outcome of the RFP, or in any of the bidders, and does not own any facilities that participate in the PJM market. The administrator monitored all phases of the RFP, including all bid day activities, and made its own evaluation of the bids that were submitted. Allegheny asserts that the bidding companies had no role in selecting this consultant or in determining the consultant's compensation. Moreover, Allegheny states that, on July 25, 2008, the Pennsylvania Commission approved the RFP Process.[14] Lastly, Allegheny states that the Pennsylvania Commission also approved the bid results.[15]

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[13] Allegheny's Filing at 6, citing *In re Petition of West Penn Power Co. for approval of its Retail Electric Default Service Program and Competitive Procurement Plan for Service at the Conclusion of the Restructuring Transition Period Order*, Docket No. P-00072342 (Pennsylvania Commission, July 25, 2008).

[14] Allegheny's Filing at 3.

[15] Allegheny's Filing at 7.

19. Based on these representations, the Commission finds that the RFP was consistent with the Commission's oversight principle guideline.

20. Accordingly, the Commission will grant Allegheny's request for authorization to make affiliate sales to West Penn pursuant to the RFP, effective January 1, 2011.

Other Issues

21. This order satisfies the requirement that Allegheny and West Penn first receive Commission authorization, pursuant to section 205 of the FPA, before engaging in power sales at market-based rates with an affiliate for the instant affiliate sales.[16] However, Allegheny and West Penn must receive prior approval from the Commission under section 205 of the FPA for any other sales to affiliates with a franchised electric service territory and captive customers pursuant to any subsequent RFPs.

22. Consistent with the procedures the Commission adopted in Order No. 2001, Allegheny must file electronically with the Commission an Electric Quarterly Report containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or longer) market-based

[16] Allegheny included with its filing the transaction confirmations it entered into with West Penn, noting that it is not requesting that the Commission accept the transaction confirmations for filing because it is not required to file market-based rate agreements. We agree with Allegheny that it need not file all of the documentation for the parties' agreement. Order No. 2001, which implemented Section 35.1(g) of the Commission's regulations, obviates the need to file with the Commission service agreements under market-based power sales tariffs. *See* 18 C.F.R. § 35.1(g) (2009) ("[A]ny market-based rate agreement pursuant to a tariff shall not be filed with the Commission.").

power sales during the most recent calendar quarter.[17] Public utilities must file Electric Quarterly Reports no later than 30 days after the end of the reporting quarter.[18]

23. Finally, we will direct Allegheny to submit a compliance filing, within 30 days of the date of this order, revising the limitations and exemptions sections of its market-based rate tariff to list the waiver granted herein and include a citation to this order.[19]

The Commission orders:

(A) Allegheny's request for authorization to make power sales to its affiliate, West Penn, pursuant to West Penn's 2009 RFP, is granted, effective January 1, 2011, as discussed in the body of this order.

(B) Allegheny is hereby directed to submit a compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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[17] *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003). Attachments B and C of Order No. 2001 describe the required data sets for contractual and transaction information. Public utilities must submit Electric Quarterly Reports to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at http://www.ferc.gov/docs-filing/eqr.asp.

[18] The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2009). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

[19] Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 385 n.517; Order No. 697, FERC Stats. & Regs. ¶ 31,252 at Appendix C.