

135 FERC ¶ 61,027  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

EnerNOC, Inc.

v.

Docket No. EL10-63-000

FirstEnergy Corp.

ORDER DENYING COMPLAINT

(Issued April 12, 2011)

1. On April 30, 2010, EnerNOC, Inc. (EnerNOC) filed a complaint pursuant to section 206 of the Federal Power Act (FPA),<sup>1</sup> naming FirstEnergy Corp. (FirstEnergy) as the respondent.<sup>2</sup> In its complaint, EnerNOC requests that the Commission open an investigation into EnerNOC's allegations that FirstEnergy and/or its affiliates violated certain rules applicable to the capacity procurement auctions conducted in March 2010 by PJM Interconnection, L.L.C. (PJM), namely, (i) the Fixed Resource Requirement (FRR) Integration Auction Rules, a protocol formulated in a PJM stakeholder forum to govern the March 2010 FRR integration auctions; and (ii) the terms and conditions of the market-based rate authorizations granted by the Commission to FirstEnergy Solutions Corp. (FirstEnergy Solutions) and its affiliates.

2. The FRR integration auctions, as explained below, were held to satisfy the capacity obligations in connection with a proposal made by FirstEnergy's transmission-owning affiliate, American Transmission Systems, Inc. (ATSI) to withdraw from the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) and join PJM. The rule violations alleged by EnerNOC concern FirstEnergy's conduct in the period leading up to the FRR integration auctions, involving FirstEnergy's contemporaneous participation in a retail rate proceeding before the Ohio Public Utilities Commission (Ohio Commission), specifically, FirstEnergy's participation in multi-party settlement negotiations. EnerNOC alleges that these settlement negotiations involved non-public

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<sup>1</sup>16 U.S.C. § 824e (2000).

<sup>2</sup> On July 1, 2010, EnerNOC filed a supplemental complaint.

communications that affected, or may have affected, the integrity and competitiveness of the FRR integration auctions.

3. FirstEnergy, in its answer, disputes EnerNOC's allegations and moves that EnerNOC's complaint be summarily dismissed. FirstEnergy asserts that no harm to the market has been alleged. In addition, FirstEnergy argues that the settlement negotiations in the Ohio Commission Proceeding did not involve prohibited, non-public communications because: (i) the retail rate proposals at issue represented a known contingency subject to the determination of the Ohio Commission, not FirstEnergy; (ii) the settlement negotiations produced no agreement or proposed settlement prior to the close of the FRR integration auctions; (iii) EnerNOC could have intervened in the proceeding and, had it done so, participated in the settlement negotiations; and (iv) EnerNOC monitored the proceeding and knew that settlement discussions were being held. FirstEnergy also disputes EnerNOC's claim that FirstEnergy violated the Commission's market-based rate authorizations. FirstEnergy asserts that its settlement negotiations in the Ohio Commission Proceeding did not give rise to market information that it was prohibited from sharing with its affiliates because the settlement negotiations involved only publicly-known information. FirstEnergy argues that, regardless, the Commission has granted FirstEnergy's affiliates a waiver of this non-disclosure requirement as part of the grant of market-based rate authorization.

4. For the reasons discussed below, we deny EnerNOC's request to open an investigation into FirstEnergy's purported non-compliance with the FRR Integration Auction Rules and purported non-compliance with the Commission's market-based rate authorizations. We also decline to grant forward-looking relief regarding integration auction procedures not before us here. Finally, as the Commission has already waived the affiliate restrictions on information sharing as to FirstEnergy, we decline to find that FirstEnergy, or its affiliates, have violated those restrictions.

## **I. Background**

### **A. The Parties**

5. EnerNOC, Inc. is a publicly-traded energy management services company that provides demand response services in the State of Ohio. EnerNOC was a participant in the March 2010 FRR integration auctions.

6. FirstEnergy is a publicly-traded, diversified energy company whose affiliates include the ATSI Utilities, namely, The Cleveland Electric Illuminating Company (The Illuminating Company), Ohio Edison, the Toledo Edison Company (Toledo Edison), and Pennsylvania Power Company (Penn Power). In 1999, ATSI was established as a

consolidation of the ATSI Utilities' transmission assets.<sup>3</sup> The ATSI Utilities' historical generation assets are owned by FirstEnergy's subsidiary, First Energy Solutions.<sup>4</sup>

**B. ATSI's Integration into PJM**

7. On August 17, 2009, ATSI submitted a conditional proposal requesting authorization to withdraw from the Midwest ISO and join PJM. On December 17, 2009, the Commission conditionally granted ATSI's request.<sup>5</sup> Among other things, the Commission granted ATSI's proposal allowing the ATSI-zone load serving entities to satisfy their interim, integration-related capacity obligations by utilizing a modified version of PJM's FRR alternative.<sup>6</sup> Specifically, the Commission granted ATSI's request to: (i) permit the use of the FRR option on an out-of-time basis; and (ii) authorize the use of two integration auctions to procure the forecasted pool requirement.

**C. ATSI Utilities' FRR Integration Auctions**

8. In preparation for the FRR integration auctions, PJM and the ATSI Utilities convened a stakeholder forum in December 2009. During the course of these deliberations, the FRR Integration Auction Rules were formulated. PJM also posted auction-related information on its website, including answers to Frequently Asked Questions (FAQ), which the ATSI Utilities provided to PJM. The FRR integration auctions were held on March 15-19, 2010, with PJM acting as the Auction Manager and Monitoring Analytics, LLC, acting in its capacity as the independent market monitor for PJM (PJM MMU), providing the same monitoring role as it does during a Reliability

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<sup>3</sup> *FirstEnergy Operating Cos.*, 89 FERC ¶ 61,090, at 61,260 (1999).

<sup>4</sup> *FirstEnergy Corp.*, 112 FERC ¶ 61,243 (2005); *FirstEnergy Corp.*, 94 FERC ¶ 61,179 (2001). In addition to the ATSI Utilities, FirstEnergy is affiliated with utilities that are currently members of PJM, namely, GPU, Inc., the parent company of Jersey Central Power & Light Company, Metropolitan Edison Company, and Pennsylvania Electric Company.

<sup>5</sup> *American Transmission Systems, Inc.*, 129 FERC ¶ 61,249 (2009) (ATSI Integration Order), *reh'g pending, in part*. See also *American Transmission Systems, Inc.*, 130 FERC ¶ 61,171 (2010) (order addressing expedited partial requests for clarification and rehearing).

<sup>6</sup> See PJM RA Agreement at Schedule 8.1.A ("The [FRR] Alternative provides an alternative means, under the terms and conditions of this Schedule, for an eligible Load-Serving Entity to satisfy its obligation hereunder to commit Unforced Capacity to ensure reliable service to loads in the PJM Region.").

Pricing Model (RPM) auction.<sup>7</sup> On March 25, 2010, the PJM MMU certified the FRR integration auctions as competitive, finding that no undue preference for any participant had occurred and that no market violations had occurred.

#### **D. Ohio Commission Proceeding**

9. On October 20, 2009, ATSI's Ohio Utilities submitted a rate case filing to the Ohio Commission, proposing to allow two interruptible service contracts previously approved by the Ohio Commission as part of a retail demand response program, namely, an Economic Load Response Rider and an Optional Load Response Rider (collectively, ELR Riders), to expire at the end of their terms on May 31, 2011.<sup>8</sup> ATSI's Ohio Utilities proposed that, in place of the ELR Riders, a request for proposal (RFP) be conducted to procure the required demand response resources (400 MW of capacity) to satisfy the ATSI Ohio Utilities' peak load reduction requirements under Ohio Rev. Code § 4928 (Ohio's retail restructuring law).<sup>9</sup>

10. Over thirty parties intervened in the Ohio Commission Proceeding and a hearing was held, followed by the submission of post-hearing comments and reply briefs in January 2010. The ATSI Ohio Utilities' RFP proposal was not supported by other parties involved in the Ohio Commission Proceeding, including Nucor Marion Steel, Inc. and The Ohio Energy Group, and, as conveyed in a recommendation issued November 24, 2009, was not supported by the Ohio Commission trial staff. On December 1, 2009, a prehearing conference was convened to discuss trial staff's recommendation and the potential filing of a revised proposal. Settlement negotiations began on December 15, 2009.

11. On March 23, 2010, following the close of the FRR Integration Auctions, the ATSI Ohio Utilities filed a proposed multi-party settlement agreement with the Ohio Commission, pursuant to which the ELR Riders would be continued in a modified form through June 1, 2011 and May 31, 2014, respectively. The settlement agreement was not finalized until after the FRR integration auctions were held.

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<sup>7</sup> As required by the ATSI Integration Order, the FRR integration auction was subject to all current market power mitigation rules for PJM's auctions. *See* ATSI Integration Order, 129 FERC ¶ 61,249 at P 82. *See also* FRR Integration Auction Rule IX.5.3.

<sup>8</sup> *See In re Application of Ohio Edison Co., et al.*, Public Utilities Commission of Ohio, Case No. 09-906-EL-SSO (Ohio Commission Proceeding).

<sup>9</sup> As proposed, the RFP's would have been conducted annually for the period of interruption June 1 through May 31 of each year.

### **E. EnerNOC's Initial Complaint**

12. EnerNOC's initial complaint alleges that FirstEnergy violated the FRR Integration Auction Rules and the terms and conditions of the Commission's market-based rate authorizations granted to FirstEnergy Solutions and its affiliates. The violations alleged by EnerNOC relate, specifically, to FirstEnergy's participation in settlement negotiations in the Ohio Commission Proceeding in the weeks leading up to the FRR integration auctions. EnerNOC alleges that these settlement negotiations involved non-public communications that affected the integrity and competitiveness of the auctions. EnerNOC requests that the Commission open an investigation into these matters and apply such remedies as are appropriate to assure that such allegedly improper conduct does not reoccur with respect to PJM's future integration auctions.<sup>10</sup>

13. EnerNOC asserts that FirstEnergy violated a number of the FRR Integration Auction Rules, including Article III.1.1, which states: "[r]elevant documents, data and information related to [the FRR auctions] are available on the Auction Manager's [i.e., PJM's] Internet website." This claim appears to have been later withdrawn by EnerNOC, given EnerNOC's clarification in its answer that it alleges no violation of the FRR Integration Auction Rules attributable to FirstEnergy's FAQ answer postings or to FirstEnergy's failure to update these postings.

14. EnerNOC next alleges that FirstEnergy violated Article III.2.11 of the FRR Integration Rules, which addresses communications prohibitions.<sup>11</sup> Article III.2.11 provides:

Offerors are prohibited from communications with each other in ways that would compromise the integrity and competitiveness of the Auctions.

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<sup>10</sup> The guidance EnerNOC seeks would not be applicable to PJM's RPM auctions.

<sup>11</sup> See also EnerNOC supplemental complaint, at 9-11, citing additional related Article III.2 provisions addressing communications matters, including Article III.2.1 (providing that "[e]xcept as provided in this Section III.2, all communications to prospective and actual Offerors shall be conducted through the Auction Manager using only those communications mechanisms established and approved by the Auction Manager."); Article III.2.3 (addressing offerors' communications with the Auction Manager); Article III.2.4 (addressing Auction Manager responses to inquiries); Article III.2.7 (addressing offerors' communications regarding the auction); Article III.2.8 (prohibiting certain non-public communications with the ATSI Utilities regarding the auction); Article III.2.9 (providing that, "[e]xcept as provided in this Section III.2, the ATSI Utilities will not communicate either directly or indirectly with actual or potential Offerors, including any of their affiliates, with regard to any Auction-related matters"); and Article III.2.10 (addressing offerors' communications with the ATSI Utilities).

Sanctions will be applied if these rules are violated, including, among other things, possible disqualification of Offerors found to have violated the Auction rules or otherwise compromised the Auction results.

EnerNOC argues that these communications prohibitions were violated when FirstEnergy entered into settlement negotiations in the Ohio Commission Proceeding that resulted in relevant auction information being shared and even negotiated among potential bidders themselves and between potential bidders and FirstEnergy on a non-public basis. EnerNOC further alleges that FirstEnergy's FAQ answer postings addressing its RFP proposal demonstrate that settlement negotiations regarding the proposal had a bearing on the auctions and, more specifically, allegedly "would compromise the integrity and competitiveness of the Auctions."<sup>12</sup>

15. EnerNOC next asserts that FirstEnergy violated Article IV.2.1 of the FRR Integration Auction Rules. Article IV.2.1 provides:

Upon submitting its Attestation Form, each Offeror must disclose to the Auction Manager and PJM Market Monitor any bidding agreement or any other arrangement, including, but not limited to, the amount to offer at certain prices, which the Offeror may have entered into with one or more other Offerors or other suppliers or other Market Participants and which is related to its participation in the Auction. An Offeror that has entered into such an agreement or arrangement must name the entities with which the Offeror has entered into such bidding agreement, including any joint venture, bidding consortium or other arrangement pertaining to participating in the Auction.<sup>[13]</sup>

EnerNOC argues that, at a minimum, the spirit and intent of this rule was violated as a result of FirstEnergy's failure to disclose the ongoing, evolving status of its RFP proposal in the state proceeding. EnerNOC further argues that the communications that would have transpired in the settlement negotiations represented "arrangements" as contemplated by Article IV.2.1, thus triggering a disclosure obligation on the part of FirstEnergy.

16. EnerNOC also alleges that these settlement communications and the understandings they conveyed were contrary to FirstEnergy's fixed, unequivocal public pronouncements regarding these matters, specifically, that these non-public

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<sup>12</sup> The ATSI Utilities' FAQ postings are cited and discussed *infra* at notes 16-17.

<sup>13</sup> EnerNOC, in its Supplemental Complaint, also cites Article IV.2.2, which further addresses the submittal of Attestation Forms. EnerNOC argues that Article IV.2.2 makes the intent manifested in Article IV.2.1 doubly clear.

communications contradicted and rendered false: (i) ATSI's verbal representations at the stakeholder forum that preceded the FRR integration auctions; and (ii) ATSI's FAQ answer postings on January 21, 2010<sup>14</sup> and January 26, 2010.<sup>15</sup> EnerNOC further alleges that the entities that participated in the settlement negotiations were, as a result, better equipped to assess the risks attributable to the ATSI Ohio Utilities' proposals before the Ohio Commission and better able to influence the outcome of that proceeding.

17. EnerNOC also alleges that FirstEnergy violated 18 C.F.R. § 35.39(d), the Commission's restriction on information sharing between a franchised public utility with

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<sup>14</sup> The ATSI Utilities' January 21, 2010 FAQ answer postings, which, according to FirstEnergy, were originally posted on December 21, 2009, answered the following two questions: (i) "How will PJM treat behind the meter generation and interruptible load for the 2011/2012 and 2012/2013 [delivery years] for the ATSI zone?" (ii) "Will such resources be treated as existing or planned resources?" ATSI responded, in relevant part, as follows:

[1] These resources will be allowed to participate in the RPM auctions as [demand resources] . . . .

[2] To the extent the behind the meter generation or interruptible load capability already exists, it will be treated as existing [demand response]. The ATSI [Ohio Utilities] are planning to hold an RFP to procure demand response resources. To utilize these resources in the integration auctions, the ATSI [Ohio Utilities] will be required to submit a plan to PJM that demonstrates to PJM that the RFP product will meet the PJM requirements for planned [demand response] resources. The plan will also include a timeline including the milestones that demonstrate[] to PJM's satisfaction that the [demand response] resources will be available before the start of the delivery year.

<sup>15</sup> The ATSI Utilities' January 26, 2010 FAQ response posting answered the following question: "What standards are being used to determine which demand resources are considered existing resources for the purpose of the FRR Integration Auctions?" ATSI responded, in relevant part, as follows:

Existing Demand Resources are defined as those resources that are currently linked to emergency load reduction customers registered in PJM's Load Response application for the current Delivery Year. Since demand response customers located in the ATSI Zone for the current Delivery Year do not yet exist in the PJM Load Response application, PJM will consider sites currently participating in the ATSI [Ohio Utilities' demand response] program via [the ELR Rider] as Existing Demand Resources. These resources total approximately 400 MW[.]

captive customers and its market-regulated affiliates. EnerNOC alleges that this regulation was violated because one of the parties that participated in the settlement negotiations in the Ohio Commission Proceeding was FirstEnergy's affiliate, FirstEnergy Solutions, a potential bidder in the FRR integration auctions. EnerNOC asserts that because neither FirstEnergy nor FirstEnergy Solutions publicly disclosed the fact that they were participating together in settlement negotiations in the Ohio Commission Proceeding, or disclosed the contents of these deliberations, both are in violation of section 35.39. EnerNOC alleges that FirstEnergy's actions harmed the competitiveness of the market. According to EnerNOC, FirstEnergy provided its affiliate with preferential access to market information not shared with the public in the context of an auction designed to procure service for captive customers, which "could clearly" have been used to the ultimate detriment of FirstEnergy's captive customers.

18. As a remedy, EnerNOC requests that the Commission open an investigation into the facts and circumstances set forth in its complaint. EnerNOC further requests that the Commission apply such sanctions or other remedies as may be appropriate to assure that such conduct does not recur. EnerNOC clarifies, however, that it does not seek to reverse or change the outcome of the Ohio Commission Proceeding, nor does it seek to nullify or modify the results of the FRR integration auction. It does, however, seek clarification and guidance regarding the conduct expected of participants in PJM's future integration auctions.

#### **F. EnerNOC's Supplemental Complaint**

19. EnerNOC's supplemental complaint addresses: (i) confidential and commercially sensitive information filed under seal in the Ohio Commission Proceeding;<sup>16</sup> (ii) additional provisions regarding prohibited communications under Article III.2 of the FRR Integration Auction Rules;<sup>17</sup> (iii) arguments made in EnerNOC's initial complaint, which it seeks to clarify and/or reiterate; and (iv) a new claim alleging that FirstEnergy engaged in market manipulation.<sup>18</sup>

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<sup>16</sup> As noted below, the parties have executed a protective agreement governing the use of this information in this proceeding.

<sup>17</sup> These provisions are cited above at note 10.

<sup>18</sup> Specifically, EnerNOC alleges that FirstEnergy's FAQ postings were left uncorrected, or unclarified, by FirstEnergy with the intent to manipulate market clearing prices. *See* EnerNOC Supplemental Complaint at 17 ("In short, [FirstEnergy] maintained false or misleading information on its website in order to manipulate market clearing prices."). Market manipulation is prohibited under the Commission's rules. 18 C.F.R. Part 1c (2010). Because this claim was later withdrawn by EnerNOC, in its August 19,

20. With respect to EnerNOC's claim that FirstEnergy violated the FRR Integration Auction Rules, EnerNOC claims that FirstEnergy knew, prior to the auctions, that its FAQ postings were false or misleading.<sup>19</sup>

21. EnerNOC also clarifies its position regarding FirstEnergy's rights to participate in settlement negotiations prior to the conclusion of the FRR integration auctions. In its initial complaint on this issue, EnerNOC states that the alleged violations attributable to the non-public information shared and disseminated in the settlement negotiations in the Ohio Commission Proceeding were "avoidable [and] could have been largely cured by timely disclosure or even prudent measures within the settlement process itself to mitigate the anti-competitive impact[.]"<sup>20</sup> EnerNOC's supplemental complaint clarifies this position. Specifically, EnerNOC asserts that, even if FirstEnergy had told bidders it was negotiating in private with potential bidders about the continuation of the ELR Riders, such a disclosure would not, alone, have made these private negotiations lawful under the FRR Integration Auction Rules, during the pendency of an auction.<sup>21</sup>

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2010 answer, neither EnerNOC's claim nor FirstEnergy's rebuttal arguments in its answer are further discussed in this order.

<sup>19</sup> As noted above, however, EnerNOC has clarified, in its answer, that it alleges no violations of the FRR Integration Auction Rules attributable to FirstEnergy's FAQ postings.

<sup>20</sup> EnerNOC Initial Complaint at 5. *Id.* at 12 ("FirstEnergy had the means to [resolve] the matter by making a correction or an update to the information it had placed in the ATSI integration FAQ document.") and 16 ("EnerNOC does not impute any improper activities to any parties other than FirstEnergy involved in the Ohio settlement discussions[;] [t]hese parties were not in control of the information posted publicly or the public statements by FirstEnergy.").

<sup>21</sup> EnerNOC further clarifies, in its answer at 23-34, that FirstEnergy had two options regarding its status in the settlement negotiations. First, it could have made "known that particular issues such as (in this case) its wholesale plans for [demand response] cannot be negotiated, at least during the pendency of the auction." Second, "if any such discussion took place that at least on those particular issues the Auction Manager would need to be involved in a setting similar to the public forums which provide information to all bidders in the auction."

## **II. Notice of Complaint and Responsive Pleadings**

22. Notice of EnerNOC's complaint was published in the *Federal Register*.<sup>22</sup> On May 11, 2010, a joint motion to suspend the answer date was filed by EnerNOC and FirstEnergy. In their joint motion, the parties stated that negotiations were underway that would permit the use in this proceeding of certain materials subject to protection in an ongoing matter pending before the Ohio Commission.

23. On July 6, 2010, following the conclusion of these negotiations, EnerNOC filed its supplemental complaint, as summarized above, a pleading for which it sought confidential and privileged treatment. In a notice issued by the Commission on July 8, 2010, the Commission directed EnerNOC to provide a proposed form of protective agreement governing the parties' access to privileged documents. The Commission's notice also established August 4, 2010 as the new due date for filing answers, protests, and/or comments.

24. In response to EnerNOC's complaint and supplemental complaint, an answer and motion for summary disposition was timely filed by FirstEnergy. Notices of intervention and timely filed motions to intervene were submitted by the Ohio Commission, PJM, the PJM MMU, American Municipal Power, Inc., Industrial Energy Users – Ohio, and the Office of the Ohio Consumers' Counsel. On August 19, 2010, EnerNOC submitted an answer to FirstEnergy's motion. On September 3, 2010, FirstEnergy submitted an answer to EnerNOC's answer.

### **A. FirstEnergy's Answer and Motion for Summary Disposition**

25. In its answer and motion for summary disposition, FirstEnergy disputes EnerNOC's allegations that FirstEnergy has violated the FRR Integration Auction Rules and the terms and conditions of its market-based rate authorizations. In addition, FirstEnergy argues that EnerNOC lacks standing because it has not pled that it was harmed as a result of FirstEnergy's actions or omissions.<sup>23</sup> FirstEnergy therefore moves that EnerNOC's complaint be summarily dismissed.

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<sup>22</sup> 75 Fed. Reg. 26,219 (2010).

<sup>23</sup> FirstEnergy also answers allegations that are not summarized herein because EnerNOC subsequently withdrew the claims and/or clarified these matters in EnerNOC's answer, discussed below. FirstEnergy's omitted arguments rebut: (i) a claim of market manipulation; (ii) a claim that FirstEnergy's FAQ responses were false and, as such, violated the FRR Integration Auction Rules; and (iii) allegations that new auction rules are required.

26. With respect to prohibited communications, under Article III.2.11 of the FRR Integration Rules, FirstEnergy argues that EnerNOC incorrectly assumes that the settlement talks at issue addressed matters not available to the public and/or not known by EnerNOC. FirstEnergy argues that the fact that the ELR Riders could have been extended was publicly known, regardless of one's intervention status in the Ohio Commission Proceeding. FirstEnergy adds that EnerNOC could have intervened and thus could have participated in these settlement negotiations. FirstEnergy asserts that, regardless, EnerNOC was monitoring the proceeding, understood that the RFP proposal was a contested issue, and that settlement talks were underway. FirstEnergy further argues that the settlement negotiations could not have compromised the integrity and competitiveness of the FRR integration auctions because the existence of the negotiations did not materially change the landscape for potential bidders and because EnerNOC does not even claim that its own bidding strategy was affected.

27. With respect to the disclosure requirements of Article IV.2.1 of the FRR Integration Rules that EnerNOC claims were triggered, FirstEnergy responds that there were no bidding agreements or any other arrangements pertaining to its participation in the FRR integration auctions. FirstEnergy thus concludes that Article IV.2.1 has no application here. FirstEnergy adds that, even assuming that the settlement agreement that was filed following the conclusion of the FRR integration auctions constituted such an arrangement, the settlement agreement was not finalized until after the close of the auctions and thus could not have been disclosed at any earlier date.

28. With respect to EnerNOC's knowledge regarding the ATSI Ohio Utilities' pending RFP proposal before the Ohio Commission, FirstEnergy notes that in a public filing submitted by the ATSI Ohio Utilities to the Ohio Commission in December 2009, in a proceeding in which EnerNOC was a party, the uncertain status of the RFP proposal was expressly made clear. FirstEnergy states:

As a component of the Market Rate Offer (Case No. 9-906-EL-SSO) filed in the fall of 2009, the Company proposed to substitute [an RFP] process to secure customer commitments to reduce loads, rather than continue the provisions included in the [ELR Riders]. This issue is currently the subject of litigation and therefore it is not yet known whether the [RFP] process will be incorporated in 2011 as currently contemplated.<sup>[24]</sup>

29. FirstEnergy also argues that EnerNOC's interpretation of the FRR Integration Auction Rules should be rejected as a matter of policy. Specifically, FirstEnergy argues that EnerNOC's interpretation of these rules would create an iron-bound mandate requiring all retail proceedings to grind to a halt whenever, and to whatever extent, they

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<sup>24</sup> FirstEnergy Answer at 19 and Attachment E.

may overlap with Commission-regulated capacity auctions open to eligible demand response resources. FirstEnergy submits that such a requirement is unnecessary and unwarranted here where the demand response issues pending before the Ohio Commission could have had only a tangential, insignificant effect on the strategies of potential bidders in the FRR integration auctions.

30. FirstEnergy adds that the statement made in the FAQ posting about the RFP proposal was a forward-looking plan subject to Ohio Commission approval, not a concrete commitment to take any specific action. FirstEnergy notes that any uncertainty EnerNOC may have had regarding the status of its RFP proposal could have been raised by EnerNOC as a posted question on the auction webpage.

31. FirstEnergy also argues that it did not violate 18 C.F.R. § 35.39(d), the Commission's restriction on information sharing between a franchised public utility with captive customers and its market-regulated affiliates. Specifically, FirstEnergy asserts that the settlement negotiations in which it considered and discussed the possible continuation of the ELR Riders did not constitute "market information" that could not, under this regulation, be shared with its affiliate, First Energy Solutions, absent public disclosure. FirstEnergy notes that "market information," in the context of this regulation, means "non-public information." FirstEnergy adds that the matters at issue in these negotiations were in the public domain and were, in fact, known by EnerNOC. FirstEnergy cites to the pleadings on file in the Ohio Commission Proceeding which were publicly posted by the Ohio Commission. FirstEnergy argues that the Commission's prohibitions against sharing market information with an affiliate do not apply to information that is publicly available.<sup>25</sup>

32. FirstEnergy adds that, even if the information at issue did constitute "market information" as defined in the regulations, the Commission had granted FirstEnergy Solutions a waiver of this requirement as part of its market-based rate authorization.<sup>26</sup> FirstEnergy adds that, in doing so, the Commission expressly rejected the arguments advanced by certain intervenors that the ATSI Ohio Utilities' customers were captive.<sup>27</sup>

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<sup>25</sup> FirstEnergy Answer at 9 (citing *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. By Pub. Utils.*, Order No. 697-A, FERC Stats & Regs. ¶ 31,268, at P 259 (2008)).

<sup>26</sup> *Id.* at 9 (citing *FirstEnergy Solutions Corp.* 125 FERC ¶ 61,356 (2008) (FirstEnergy Waiver Order), *order on rehearing*, 128 FERC ¶ 61,119 (2009)).

<sup>27</sup> First Energy Waiver Order, 125 FERC ¶ 61,356 at P 27.

33. Finally, FirstEnergy argues that EnerNOC has failed to allege any direct harm or injury to itself and therefore lacks standing to bring a complaint before the Commission. FirstEnergy asserts, for example, that EnerNOC has conceded that the alleged violations that are the subject of its complaint do not amount to a private dispute, normally redressable through dispute resolution, and that there is no recourse that can be achieved between and among the parties. FirstEnergy argues that the only injury that EnerNOC alleges is a vague and generalized harm to the competitive market.

**B. EnerNOC's Answer**

34. EnerNOC's answer responds to FirstEnergy's claim that EnerNOC lacks standing regarding the allegations presented in EnerNOC's initial and supplemental complaints. EnerNOC argues, in rebuttal, that while it does not claim or seek damages, it nonetheless pled harm as an entity that participated in the FRR integration auctions. EnerNOC asserts that its status, in this regard, satisfies the Commission's standards on standing.<sup>28</sup>

35. Citing to *Wabash Valley Power Association v. FERC*,<sup>29</sup> EnerNOC argues that where there are market effects attributable to a party's illegal actions, the consequent harm, although difficult or impossible to quantify in good faith, amounts to injury sufficient to establish standing. Finally, EnerNOC argues that its failure to seek remedies that would be disruptive of the market do not bar EnerNOC, as a matter of standing, from seeking forward-looking relief in the form of precedent applicable to future integration auctions.

36. EnerNOC also responds to FirstEnergy's argument that the settlement negotiations in the Ohio Commission Proceeding addressed matters that were in the public domain. EnerNOC argues that awareness that these settlement negotiations occurred cannot be equated with knowledge regarding the substance of the negotiations themselves. EnerNOC also responds to FirstEnergy's related allegation that EnerNOC knew that the status of FirstEnergy's RFP proposal was uncertain. EnerNOC acknowledges that it faced a regulatory risk attributable to FirstEnergy's RFP proposal and that it was aware

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<sup>28</sup> EnerNOC Answer at 20, (citing 18 C.F.R. § 385.206(b)(4)-(5) (2010):

A Complaint must . . . (4) Make good faith effort to quantify the financial impact or burden (if any) created for the complainant as a result of the action or inaction; (5) Indicate the practical, operational, or other nonfinancial impacts imposed as a result of the action or inaction, including, where applicable, the environmental, safety or reliability impacts of the action or inaction[.].

<sup>29</sup> 268 F.3d 1105 (D.C. Cir. 2001).

that the acceptance, or rejection, of this proposal could have an effect on certain bidding strategies. EnerNOC asserts, however, that the existence, or degree, of this risk is irrelevant as it relates to the rights and obligations arising under the FRR Integration Auction Rules.

37. Finally, EnerNOC characterizes as irrelevant FirstEnergy's focus on the no-warranty clause set forth at Article III.1.3 of the FRR Integration Auction Rules. EnerNOC argues that this disclaimer has no application here because EnerNOC is not seeking damages based on its reliance on FirstEnergy's FAQ representations. EnerNOC adds that, in any event, the no-warranty clause would not waive the prohibitions applicable to communications between FirstEnergy and potential bidders on matters directly relevant to the FRR integration auctions.

### **C. FirstEnergy's Answer to EnerNOC's Answer**

38. FirstEnergy, in its answer to EnerNOC's answer, characterizes EnerNOC's clarified claims as a request for a broad prohibition on discussions of "market relevant information," a term that could include almost anything that any given auction participant considers relevant. FirstEnergy argues that any such standard would be vague, overbroad and otherwise unworkable.

## **III. Discussion**

### **A. Procedural Matters**

39. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>30</sup> the notices of intervention and timely, unopposed motions to intervene noted above serve to make the entities that filed them parties to this proceeding.

40. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to an answer, unless otherwise ordered by the decisional authority. We will accept FirstEnergy's answer to EnerNOC's answer because it has provided information that assisted us in our decision-making process.

### **B. Substantive Matters**

41. In the exercise of our discretion with respect to enforcement investigations, we have determined not to direct the Office of Enforcement to open an investigation in this case. While EnerNOC has alleged that FirstEnergy violated the FRR Integration Auction Rules when it engaged in settlement negotiations in the Ohio Commission Proceeding, the auction rules alleged to have been violated were not on file with the Commission.

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<sup>30</sup>18 C.F.R. § 385.214 (2010).

The Commission may only undertake an enforcement action and impose sanctions for the violation of a statute, regulation, filed tariff, or order. Accordingly, an investigation by the Office of Enforcement to determine whether FirstEnergy violated the FRR Integration Auction Rules could not lead to an enforcement action for their violation.<sup>31</sup> Therefore, we decline to refer the matter to the Office of Enforcement for an investigation into the alleged violation of the auction rules.<sup>32</sup>

42. We also decline to grant the forward-looking relief EnerNOC seeks. We decline to speculate about, or otherwise prejudge, issues related to any future integration auctions.

43. Finally, we reject EnerNOC's argument that FirstEnergy, and/or its affiliates, have violated the Commission's affiliate restrictions on information sharing.<sup>33</sup> The Commission has found that the affiliate restrictions on information sharing do not apply to communications between FirstEnergy Solutions and FirstEnergy's regulated affiliates, because the regulated affiliates do not have captive customers (a required showing giving rise to the Commission affiliate restrictions).<sup>34</sup> Accordingly, the Commission granted FirstEnergy Solutions' requested waiver of the Commission's affiliate restrictions. EnerNOC has not demonstrated, nor are we persuaded, that this waiver no longer applies, or should not apply, under the facts presented here.

The Commission orders:

EnerNOC's complaint is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>31</sup> Cf. *KeySpan-Ravenswood, LLC v. FERC*, 474 F.3d 804, 810-11 (D.C. Cir. 2007) (on the facts presented, parties were not bound by language in an unfiled manual).

<sup>32</sup> Given this determination, we need not reach and therefore dismiss as moot FirstEnergy's motion for summary disposition as it relates to EnerNOC's allegations regarding auction rules violations.

<sup>33</sup> 18 C.F.R. § 35.39(d) (2010).

<sup>34</sup> FirstEnergy Waiver Order, 125 FERC ¶ 61,356 at P 27.