

135 FERC ¶ 61,199
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.

Allegheny Energy Supply Company, LLC

Docket No. ER11-2942-000

ORDER GRANTING AUTHORIZATION TO MAKE AFFILIATE SALES

(Issued May 31, 2011)

1. In this order, we grant Allegheny Energy Supply Company, LLC's (AE Supply) request to make power sales to The Cleveland Electric Illuminating Company, The Toledo Edison Company, and Ohio Edison Company (collectively, the FirstEnergy Ohio Companies), pursuant to a competitive solicitation that we find satisfies the Commission's concerns regarding the potential for affiliate abuse.

Background

2. On February 23, 2011, AE Supply submitted, pursuant to section 205 of the FPA,¹ the instant request that the Commission authorize it to make wholesale power sales to its affiliates, the FirstEnergy Ohio Companies, which are wholly-owned subsidiaries of FirstEnergy Corp. AE Supply states that the sales will be made pursuant to the terms of a Master Standard Service Offer Agreement (Service Agreement) and certain transaction confirmations between AE Supply and FirstEnergy, which are to become effective June 1, 2011.

3. In its request, AE Supply explains that FirstEnergy is considered an affiliate of AE Supply because a merger was at that time pending between FirstEnergy's parent, FirstEnergy Corp., and AE Supply's parent company, Allegheny Energy, Inc.² AE Supply states that the Commission has explained that for purposes of considering potential affiliate abuses, "companies proposing to merge will be treated as affiliates under their market-based rate tariffs while their proposed merger is pending. The

¹ 16 U.S.C. § 824d (2006).

² AE Supply February 23, 2011 Filing at n.1 (citing *First Energy Corp.*, 133 FERC ¶ 61,222, at P 1-4 (2010) (authorizing merger and disposition of jurisdictional facilities).

Commission will adopt the proposal to use the date a merger is announced as the triggering event for considering two non-affiliates as merger partners.’’³ The merger was announced on February 11, 2010 and was consummated on February 25, 2011.⁴

4. AE Supply is a wholly-owned subsidiary of Allegheny Energy, Inc.⁵ AE Supply owns and operates electric generating facilities, and is authorized to make sales at market-based rates.⁶

5. AE Supply states that FirstEnergy is defined in this filing to include three Ohio operating companies of FirstEnergy Corp., the FirstEnergy Ohio Companies, which are considered affiliates of AE Supply. The FirstEnergy Ohio Companies are public utilities serving customers in portions of Ohio. AE Supply states that FirstEnergy is authorized to sell at market-based rates,⁷ and has divested its generation assets to a merchant affiliate.⁸

³ *Id.* (citing *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 501, *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)), *also* citing FirstEnergy and Allegheny Energy, Application for Authorization of Disposition of Jurisdictional Assets, Docket No. EC10-68-000 (filed May 11, 2010). In any event, as stated above, the Commission has now authorized the merger.

⁴ *FirstEnergy Corp.*, Letter, Docket No. EC10-68-000, (filed Feb. 25, 2011); FirstEnergy and Allegheny Energy, Application for Authorization of Disposition of Jurisdictional Assets, Docket No. EC10-68-000, at n.1 (filed May 11, 2010).

⁵ *Id.* at 5. AE Supply states that Allegheny Energy owns three electric utility operating companies: Monongahela Power Company, Potomac Edison Company and West Penn Power Company that operate under the trade name of Allegheny Power. Allegheny Power has transferred functional control over its transmission system to PJM Interconnection, L.L.C. (PJM). *Id.* (citing *PJM Interconnection, L.L.C.*, 98 FERC ¶ 61,072, *clarified*, 98 FERC ¶ 61,235 (2002)).

⁶ *Id.* at 5 (citing *Allegheny Energy Supply Co.*, 88 FERC ¶ 61,303 (1999)).

⁷ *Id.* (citing *FirstEnergy Operating Companies*, Docket No. ER01-1403-010 (Aug. 26, 2009) (delegated letter order). AE Supply states that the FirstEnergy Ohio Companies received market-based rate authorization, along with other First Energy subsidiaries. *Id.* at n.15 (citing *MEP Investments, LLC*, 87 FERC ¶ 61,209 (1999)).

⁸ *Id.*

6. AE Supply submits that FirstEnergy's January 25, 2011 solicitation (January Solicitation) satisfies the competitive solicitation process requirements established by the Commission for affiliate power sales in *Edgar*⁹ as well as the four requirements outlined by the Commission in *Allegheny* (i.e., Transparency, Definition, Evaluation, and Oversight).¹⁰

7. In support of its request, AE Supply states that FirstEnergy accepted offers on January 26, 2011, in response to the January Solicitation, which is part of FirstEnergy's competitive bidding process. The January Solicitation sought offers for full requirements service for FirstEnergy's Service Agreement customers (i.e., load that is not being served by a competitive retail electric service supplier and excluding load associated with customers on the Percentage of Income Payment Plan). AE Supply states that the competitive bidding process was supervised by the Public Utilities Commission of Ohio (Ohio Commission), and was conducted to secure power to serve portions of FirstEnergy's Service Agreement customers under an electric security plan and several stipulations (Combined Stipulations) by parties in a proceeding approved by the Ohio Commission.¹¹ Pursuant to the terms of the Ohio Commission's August 25, 2010 Order, FirstEnergy selected suppliers in a uniform procurement solicitation process approved by the Ohio Commission.

8. AE Supply states that it bid in the January Solicitation solely on the basis of price in a "descending clock auction," and was not permitted to negotiate the non-price terms and conditions of the bidding rules or the Service Agreement. AE Supply also states that as a result of the January Solicitation, it was selected as the winning bidder to serve four 12-month blocks, four 24-month blocks, and four 36-month blocks of Service Agreement load. AE Supply states that the procurement was conducted in accordance with the bidding rules, and under the supervision of the competitive bidding process manager, CRA International, Inc. AE Supply states that independent monitoring of the bidding process by the competitive bidding process manager afforded no opportunity for affiliate abuse or preference by FirstEnergy in favor of AE Supply. AE Supply also states that as the winning bidder to serve portions of FirstEnergy's Service Agreement loads, it is

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

¹⁰ *Id.* at 10-11 (citing *Allegheny Energy Supply Co.*, 108 FERC ¶ 61,082 (2004) (*Allegheny*)).

¹¹ *Id.* at 3 (citing *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Opinion and Order*, Case No. 10-388-EL-SSO (filed Aug. 25, 2010)).

required to execute the Service Agreement with the terms set forth in transaction confirmations. AE Supply therefore requests that the Commission grant it authorization to make wholesale power sales as reflected in the transaction confirmations with FirstEnergy.¹²

Notice of Filing and Responsive Pleadings

9. Notice of AE Supply's filing was published in the *Federal Register*, 76 Fed. Reg. 12,352 (2011) with motions to intervene and comments due on or before March 16, 2011. None was filed.

Discussion

Analysis

Affiliate Abuse Analysis

10. At issue in this case is whether AE Supply'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.¹³

11. 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.¹⁴

¹² *Id.* at 4.

¹³ 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).

¹⁴ *Edgar*, 55 FERC ¶ 61,382 at 62,168.

12. In *Allegheny*, the Commission provided guidance as to how it will evaluate whether a competitive solicitation process satisfies the *Edgar* criteria.¹⁵ 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.

13. As discussed below, the Commission concludes that the competitive solicitation described by AE Supply satisfies the Commission's concerns regarding affiliate abuse and results in just and reasonable rates. Accordingly, the Commission will grant AE Supply's request for authorization to make affiliate sales to the FirstEnergy Ohio Companies pursuant to the January Solicitation, effective June 1, 2011, as requested.

Transparency Principle

14. AE Supply argues that the instant process was consistent with the Transparency guideline because it was based on the Ohio Commission-approved process in an on-the-record, public Ohio Commission proceeding. In addition, AE Supply states that information regarding FirstEnergy's January Solicitation was publicized and related documentation was made available to all potential bidders at the same time through a website established by FirstEnergy.¹⁶

15. Based on AE Supply's representations, we find that the competitive solicitation is consistent with the Commission's Transparency guideline.

Definition Principle

16. AE Supply argues that FirstEnergy's January Solicitation met the Definition guideline by clearly stating the products sought by FirstEnergy. It states that the bidding rules explained the nature of the service sought, and also explained the "Products Being Procured" as full requirements service for Service Agreement customers, and directed

¹⁵ See also Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 540.

¹⁶ AE Supply February 23, 2011 Filing at 11.

participants to the competitive bidding process website for additional information regarding ““details about the products to be procured in a specific auction, including the delivery periods, the number of tranches, the nominal MW size of the tranches, and the seasonal price factors.””¹⁷ AE Supply states that a supplier selected through the auction process will be responsible for fulfilling all the requirements of a load serving entity for the portion of Service Agreement load that it serves. AE Supply states that winning bidders and retail suppliers will remain responsible for all other Commission/RTO imposed or related charges such as congestion, market-based ancillary services and losses.

17. AE Supply states that in the January Solicitation, FirstEnergy sought bidders to serve Service Agreement customers in tranches of approximately 115 MW each. AE Supply states that the terms of the Service Agreement and bidding rules, including bidder qualification criteria in Section 4.2 and the winning price determination methodology in Section 5.2 of the bidding rules, were available to all bidders via the competitive bidding process website. AE Supply submits that the bidding rules provide comparable information to all prospective bidders.¹⁸

18. Based on these representations, we find that the competitive solicitation is consistent with the Commission’s Definition guideline.

Evaluation Principle

19. AE Supply argues that the instant process is consistent with the Evaluation guideline because parties were pre-qualified before the auction began, eliminating the need to evaluate bids based on non-price factors. The January Solicitation used standardized evaluation criteria that were applied equally to all bidders and bids. AE Supply states that the January Solicitation clearly specified the price and non-price criteria, and that all bidders were required to accept the non-price terms of the Service Agreement, which were not subject to change or negotiation.¹⁹ In addition, the awards made pursuant to the bidding rules were based entirely on price with no individualized negotiation of the Service Agreement between any party and FirstEnergy. Potential participants were put on notice of the importance of the relevant bid criteria in the publicly available documents.

¹⁷ *Id.* at 11-12 (quoting Bidding Rules at 2).

¹⁸ *Id.* at 12 (citing *Allegheny Energy Supply Company*, 115 FERC ¶ 61,221, at P 13 (2006)).

¹⁹ *Id.* at 13.

20. AE Supply explains that FirstEnergy makes certain information available prior to the start of bidding to all bidders. It states that winning tranches, winning bidders and winning prices are determined by price under criteria applicable to all bidders and described in the bidding rules. AE Supply asserts that based on the publicly-available evaluation criteria contained in the bidding rules, AE Supply was awarded the wholesale supply contracts solely due to the relatively low cost of their bids compared to other competitors.²⁰

21. Based on these representations, the Commission finds that the competitive solicitation was consistent with the Commission's Evaluation guideline.

Oversight Principle

22. AE Supply argues that the instant process satisfies the Oversight guideline. It states that the process used for the January Solicitation was a result of discussions among interested parties and proceeded under the supervision of the Ohio Commission. AE Supply states that the Ohio Commission approved the process in the Combined Stipulation.²¹ AE Supply further states that the results of the January Solicitation under the bidding rules were reviewed by an independent consultant, the competitive bidding process manager, and the Ohio Commission. In addition, AE Supply states that as part of the qualification process, bidders make a number of certifications regarding associations to ensure that they are participating independently of other bidders.

23. AE Supply also submits that its winning bids were the result of head-to-head competition with non-affiliates in a competitive solicitation based solely on price that was approved by the Ohio Commission, and supervised by CRA International in its role as the competitive bidding process manager under the bidding rules.

24. Based on these representations, the Commission finds that the Competitive solicitation was consistent with the Commission's Oversight guideline.

Other Issues

25. This order satisfies the requirement that AE Supply must first receive Commission authorization, pursuant to section 205 of the FPA, before engaging in power sales at market-based rates for the instant affiliate sales.²² We emphasize that AE Supply must

²⁰ *Id.* at 14.

²¹ *Id.*

²² AE Supply included with its filing the transaction confirmations it entered into with FirstEnergy, 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

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.

26. Finally, we will direct AE Supply 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 specific, limited waiver granted herein and include a citation to this order.²³

The Commission orders:

(A) AE Supply's request for authorization to make affiliate sales to the FirstEnergy Ohio Companies, pursuant to FirstEnergy's January Solicitation, is granted, effective June 1, 2011, as discussed in the body of this order.

(B) AE Supply 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.

agreements. We agree with AE Supply 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) (2011) ("[A]ny market-based rate agreement pursuant to a tariff shall not be filed with the Commission.").

²³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at Appendix C; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 385 n.517.