

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Allegheny Energy Supply Company, LLC

Docket No. ER06-801-000

ORDER GRANTING AUTHORIZATION TO MAKE AFFILIATE SALES

(Issued May 22, 2006)

1. In this order, we grant an application by Allegheny Energy Supply Company, LLC (Allegheny Supply) requesting Commission authorization for Allegheny Supply to make wholesale power sales to its affiliate, The Potomac Edison Company (Potomac), as the result of a request for proposal (RFP) process issued by Potomac and approved by the Maryland Public Service Commission (Maryland Commission). This order concludes that this competitive solicitation, as described below, satisfies the Commission's concerns regarding affiliate abuse and will result in rates that are just and reasonable.

**Background**

2. On March 29, 2006, Allegheny Supply filed the instant application under section 205 of the Federal Power Act<sup>1</sup> requesting authorization to make wholesale power sales to its affiliate, Potomac. Allegheny Supply states that it has been selected as a result of Potomac's RFP to supply full requirements service to portions of Potomac's standard offer service load in the state of Maryland. Through its RFP, Potomac sought supplies to serve three customer classes: (1) Type I Non-Residential standard offer service, (2) Type II Non-Residential standard offer service, and (3) Type II-A Non-Residential standard offer service. Allegheny Supply states that service under its full requirements service agreement with Potomac will commence on June 1, 2006.

3. Allegheny Supply and Potomac are wholly-owned subsidiaries of Allegheny Energy, Inc. Potomac is a franchised public utility company serving residential, commercial and industrial customers in Maryland, West Virginia and Virginia. Potomac and its affiliates, West Penn Power Company and Monongahela Power Company,

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<sup>1</sup> 16 U.S.C. § 824d (2000).

transact under the trade name Allegheny Power. Allegheny Power transferred functional control over its transmission system to PJM Interconnection, L.L.C. (PJM).<sup>2</sup> Allegheny Supply owns and operates electric generating facilities, and markets energy and energy products in the wholesale market at market-based rates.<sup>3</sup>

4. Allegheny Supply states that the Maryland Commission approved a settlement agreement which established an integrated wholesale competitive procurement methodology to implement utility-provided standard offer services for Maryland's retail electric customers after their utility-specific restructuring settlements expired.<sup>4</sup> The Maryland Commission approved another settlement agreement that defined the specific requirements and processes necessary to implement the competitive solicitation.<sup>5</sup> According to Allegheny Supply, some of the specific requirements outlined in the settlement agreement included; no negotiation of non-price terms and conditions, a requirement that all bidders accept the terms of the model full requirements service agreement, and that winning bidders were selected solely on the basis of price.<sup>6</sup> Allegheny Supply states that the Commission previously found that the "Maryland Commission competitive bid process...satisfies the Commission's concerns regarding affiliate abuse."<sup>7</sup>

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<sup>2</sup> *PJM Interconnection, L.L.C.*, 98 FERC ¶ 61,072, *Order on Clarification*, 98 FERC ¶ 61,235 (2002)

<sup>3</sup> *Allegheny Energy Supply Co.*, 88 FERC ¶ 61,303 (1999).

<sup>4</sup> Allegheny Supply Application at 4 *citing In re: Inquiry into the Competitive Selection of Electricity Supplier/Standard Offer Service*, Case No. 8908, Order No. 78400 (Maryland Commission, April 29, 2003). (Order No. 78400).

<sup>5</sup> *In re: Inquiry into the Competitive Selection of Electricity Supplier/Standard Offer Service*, Case No. 8908, Phase II, Order No. 78710. (Order No. 78170). On September 24, 2004, the Maryland Commission issued Order No. 79489 in Case No. 8908, addressing, *inter alia*, Maryland Commission staff improvements to the Request for Proposals, Utility Bid Plans, Full Requirements Service Agreement, and related documents of the Phase II Settlement previously approved by the Maryland Commission. (Order No. 79489).

<sup>6</sup> Allegheny Supply Application at 5 *citing* Order No. 78170 at 2-3.

<sup>7</sup> Allegheny Supply Application at 7 *citing Allegheny Energy Supply Co.*, 108 FERC ¶ 61,082 at P 21 (2004).

5. Allegheny Supply states that, on October 13, 2005, Potomac issued an RFP soliciting competitive bids for full requirements standard offer service for its industrial and commercial customers. Allegheny Supply states that Potomac requested bids for two terms of service to Type I customers in three blocks: 116 MW for two blocks for the term June 1, 2006 through May 31, 2007, and 61 MW for one block for the term June 1, 2006 through May 31, 2008. For Type II and Type II-A services, Potomac requested bids for a total of 167 MW for each service in three blocks for the terms June 1, 2006 through December 31, 2006, and January 1, 2007 through May 31, 2007, respectively. Allegheny Supply won bids to serve Type I customer load in quantities of approximately 116 MW and 61 MW, for terms June 1, 2006 through May 31, 2007, and June 1, 2006 through May 31, 2008, respectively, for a total service obligation for Type I customer load of approximately 177 MW. Allegheny Supply states that bidders were pre-qualified so that non-price factors were not a part of the evaluation process. Bids were evaluated on price alone and were binding. Further, no negotiation was allowed after winning bidders were selected. Allegheny Supply states that an independent consultant selected by the Maryland Commission monitored and supervised the solicitation and bid evaluation process.

6. Allegheny Supply states that Potomac submitted the bid results from its competitive solicitation to the Maryland Commission and that the independent monitor of the RFP process has provided its report to the Maryland Commission. Thus, by virtue of the Maryland Commission approved settlements, Allegheny Supply argues, Potomac's RFP results are deemed to be final and approved by the Maryland Commission because the Maryland Commission issued no order to the contrary within two business days as required by the settlement.<sup>8</sup>

### **Notice and Pleadings**

7. Notice of Allegheny Supply's filing was published in the *Federal Register*,<sup>9</sup> with motions to intervene or protests due on or before April 19, 2006. None was filed.

### **Discussion**

8. As noted above, Allegheny Supply seeks Commission authorization to make sales to its affiliate with a franchised electric service territory, Potomac, pursuant to a full requirements service agreement entered into as a result of a competitive solicitation process. In order to meet the Commission's requirements for sales between affiliates,

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<sup>8</sup> Allegheny Supply Application at 6 *citing* Order No. 78400 at ¶ 9.

<sup>9</sup> 71 Fed. Reg. 19,720 (2006).

Allegheny Supply states that Potomac's RFP is consistent with the Commission's guidelines for determining when a competitive bidding process satisfies the Commission's concerns regarding affiliate abuse.<sup>10</sup>

9. 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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

10. In *Allegheny*, the Commission provided guidance as to the factors the Commission will consider in determining whether a competitive solicitation process such as Potomac's RFP 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: (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. As discussed below, the Commission finds that the bidding process used here is an example of a process that meets these guidelines.

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<sup>10</sup> *Allegheny Energy Supply Co.*, 108 FERC ¶ 61,082 (2004) (*Allegheny*).

<sup>11</sup> *See Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 at 62,167 (1991) (*Edgar*).

<sup>12</sup> *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 at 62,167-69; *Allegheny*, 108 FERC ¶ 61,082.

<sup>13</sup> *Edgar*, 55 FERC at 62,168.

### **Transparency Principle**

11. Based upon Commission review of the supporting documents, the Commission finds that Potomac's RFP satisfies the Commission's guidelines regarding the transparency principle. The Commission finds that the design of Potomac's competitive solicitation was achieved through a collaborative process involving informed parties with diverse interests and an on-the-record, public Maryland Commission proceeding.<sup>14</sup> Potomac's RFP was part of the Maryland Commission's public record before it was issued, which allowed easier access to information such as the details of the bid selection process and potential supplier qualification criteria. Furthermore, Potomac provided a website which made information about the competitive solicitation available. All questions and answers were posted on the website.<sup>15</sup>

12. Based upon Allegheny Supply's assertion that the competitive solicitation in the above captioned case is identical to that described in *Allegheny*, and based upon Commission review of the supporting documents, the Commission finds that Potomac's RFP is consistent with the transparency principle guidelines.

### **Definition Principle**

13. Based upon Commission review of the supporting documents, the Commission finds that Potomac's RFP satisfies the Commission's guidelines regarding the definition principle. Potomac sought full requirements service including energy, capacity, and ancillary services to serve portions of Potomac's industrial and commercial customers in bid blocks of approximately 50 MW each.<sup>16</sup> Network integration transmission service would be supplied by Potomac.<sup>17</sup> The terms of the full requirements service agreement were available to all bidders via Potomac's website.<sup>18</sup> By including information such as bidder qualification criteria and bid evaluation method in the RFP, Potomac ensured that

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<sup>14</sup> Exhibit B to Allegheny Application (Potomac RFP), Potomac RFP § 7.

<sup>15</sup> Potomac RFP § 7.

<sup>16</sup> Potomac RFP §§ 2.2-2.3.

<sup>17</sup> Exhibit A to Allegheny Application, FSA, § 2.3.

<sup>18</sup> Potomac RFP §7.

the parameters of the RFP were clearly defined prior to the solicitation of bids.<sup>19</sup> 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.<sup>20</sup>

14. Based upon Allegheny Supply's assertion that the competitive solicitation in the above captioned case is identical to that described in *Allegheny*, and based upon Commission review of the supporting documents, the Commission finds that Potomac's RFP is consistent with the definition principle guidelines.

### **Evaluation Principle**

15. Based upon Commission review of the supporting documents, the Commission finds that Potomac's RFP satisfies the Commission's guidelines regarding the evaluation principle. The Commission finds that potential bidders were pre-qualified before the auction began, eliminating the need to evaluate bids based on non-price factors.<sup>21</sup> Specifically, bidders were required to: (1) submit an expression of interest form containing contact information; (2) execute a confidentiality agreement; (3) certify that they meet the PJM membership and Commission authorization requirements; (4) submit a credit application and associated financial information; (5) execute a binding bid agreement; and (6) provide liquid bid assurance collateral to assure commitment of the bidder to execute the full requirement service agreement for bid blocks it wins.<sup>22</sup> The pre-qualification criteria were contained in the public document describing the RFP process and were available to all potential bidders.<sup>23</sup>

16. The Commission finds, based on a review of the supporting documents, that by setting a standard for non-price factors, Potomac was able to select bids based on price alone.<sup>24</sup> This ensured that affiliates were not given preferential treatment during the selection phase of the process. In addition, the Commission finds, based on a review of

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<sup>19</sup> Potomac RFP §§ 3.1-3.9 and § 4.6.

<sup>20</sup> Potomac RFP § 7.

<sup>21</sup> Potomac RFP §§ 3.1-3.9.

<sup>22</sup> *Id.*

<sup>23</sup> Potomac RFP § 7.

<sup>24</sup> Potomac RFP § 4.6.

the supporting documents, that an independent consulting firm, selected by and reporting directly to the Maryland Commission, monitored all phases of the RFP with respect to pre-qualification of bidders and the price bid evaluation processes to ensure that Potomac treated all bidders equally and otherwise followed the procedures approved by the Maryland Commission.<sup>25</sup>

17. Based upon Allegheny Supply's assertion that the competitive solicitation in the above captioned case is identical to that described in *Allegheny*, and based upon Commission review of the supporting documents, the Commission finds that Potomac's RFP is consistent with the evaluation principle guidelines.

### **Oversight Principle**

18. Based upon Commission review of the supporting documents, the Commission finds that Potomac's RFP satisfies the Commission's guidelines regarding the oversight principle. The Commission finds, based on a review of the supporting documents, that the Potomac competitive solicitation was developed through a settlement of interested parties and approved by the Maryland Commission.<sup>26</sup> On this basis, the Commission determines that there can be no assertion that Potomac had any undue preference in the design phase of the competitive solicitation, including, but not limited to, the form of the agreement and the standards of qualifying bidders.

19. As described above, the Commission finds that Potomac's RFP was monitored by an independent consultant, who reported its findings directly to the Maryland Commission.<sup>27</sup> The Commission determines, based on a review of the supporting documents, that the fact that this consultant was selected by the Maryland Commission and that the consultant's compensation was determined by the Maryland Commission before the issuance of the RFP helped ensure the consultant's lack of financial interest in the outcome of the RFP.<sup>28</sup>

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<sup>25</sup> Order No. 78400 at 93 and Order No. 78710 at 31.

<sup>26</sup> Order No. 78400 at 93.

<sup>27</sup> Order No. 78400 at 53, ¶ 84.

<sup>28</sup> *Id.*

20. Based upon Allegheny Supply's assertion that the competitive solicitation in the above captioned case is identical to that described in *Allegheny*, and based upon Commission review of the supporting documents, the Commission finds that Potomac's RFP is consistent with the oversight principle guidelines.

21. Accordingly, the Commission concludes that the competitive solicitation process described by Allegheny Supply as identical to that described in *Allegheny* and specifically described in the supporting documents satisfies the Commission's concerns regarding affiliate abuse. Therefore, the Commission grants Allegheny Supply's request for authorization to make affiliate sales to Potomac as a result of the RFP discussed herein, effective June 1, 2006, as requested.

22. This order satisfies the requirement that Allegheny Supply first receive Commission authorization pursuant to section 205 of the FPA before engaging in power sales at market-based rates with an affiliate. In addition to requesting that we find that the proposed RFP is consistent with the *Allegheny* guidelines, Allegheny Supply also specifically requests that we accept for filing the agreement under which these sales will be made. However, the Commission's regulations provide that service agreements under market-based rate tariffs shall not be filed with the Commission.<sup>29</sup>

23. Consistent with the procedures the Commission adopted in Order No. 2001, Allegheny Supply 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

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<sup>29</sup> 18 C.F.R § 35.1(g) (2005) (“[A]ny market-based rate agreement pursuant to a tariff shall not be filed with the Commission.”). 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, and requires, among other things, that public utilities electronically file Electric Quarterly Reports which include a summary of the contractual terms and conditions in every effective service agreement for market-based power sales. *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002).

for effective short-term (less than one year) and long-term (one year or greater) market-based power sales during the most recent calendar quarter.<sup>30</sup> Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.<sup>31</sup>

The Commission orders:

The application for authorization for Allegheny Supply to make sales to its affiliate, Potomac, as a result of the Potomac RFP, is hereby granted, effective June 1, 2006, as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>30</sup> Required data sets for contractual and transaction information to be reported in Electric Quarterly Reports are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted 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>.

<sup>31</sup> The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2005). 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.