

125 FERC ¶ 61,356  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

FirstEnergy Solutions Corp.	Docket Nos. ER09-134-000
FirstEnergy Generation Corporation	ER09-135-000
FirstEnergy Nuclear Generation Corporation	ER09-136-000
FirstEnergy Generation Mansfield Unit 1 Corp.	ER09-137-000

ORDER ACCEPTING TARIFF REVISIONS AND GRANTING WAIVER OF  
AFFILIATE SALES RESTRICTIONS

(Issued December 23, 2008)

1. In this order, we accept proposed market-based rate tariff amendments filed on October 24, 2008, as supplemented on October 28, 2008, by First Energy Solutions Corp. (Solutions), FirstEnergy Generation Corporation (GenCorp), FirstEnergy Nuclear Generation Corporation (Nuclear GenCorp), and FirstEnergy Generation Mansfield Unit 1 Corp. (Mansfield) (collectively, Applicants), effective December 24, 2008. We grant Applicants' request for a Commission determination that the Order No. 697<sup>1</sup> requirement to obtain prior approval for affiliate sales of electric energy or capacity does not apply to the Applicants' power sales to their affiliated regulated franchised public utilities in Ohio.

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<sup>1</sup> *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, clarified, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268, *order on reh'g and clarification*, 124 FERC ¶ 61,055 (2008).

## I. Background

2. Applicants are market-regulated power sales affiliates, i.e., they make power sales at market-based rates and are non-franchised affiliates of franchised public utilities.<sup>2</sup> Applicants' affiliated regulated franchised public utilities in Ohio<sup>3</sup> include Cleveland Electric Illuminating Company, Ohio Edison Company, and Toledo Edison Company (collectively, Ohio Regulated Utilities). The Ohio Regulated Utilities serve retail load in Ohio as providers-of-last-resort.<sup>4</sup> Applicants state that this means that all of the Ohio Regulated Utilities' retail customers can choose alternative suppliers under state law, and hence are not captive customers.

3. Applicants request a Commission determination that the provisions of section 35.39 of the Commission's regulations<sup>5</sup> related to power sales and other restrictions between affiliates do not apply in relation to Applicants' sales to the Ohio Regulated Utilities. Applicants state that, to the extent necessary, they also seek waiver of the corresponding restriction on affiliate sales of electric energy of section 35.44(a), and the restrictions governing sales of non-power goods and services of section 35.44(b), adopted

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<sup>2</sup> See Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 490.

<sup>3</sup> The Commission approved waiver of the affiliate restrictions for transactions between Solutions and affiliated regulated franchised utilities in Pennsylvania, New Jersey, and New York. See *FirstEnergy Services Co.*, 117 FERC ¶ 61,081 (2006); *Pennsylvania Power Co.*, Docket No. ER07-434-000 (Mar. 21, 2007) (unpublished delegated letter order).

<sup>4</sup> Applicants explain that, in 1999, the Ohio General Assembly passed legislation which restructured the model for the provision of electric service in Ohio to a structure where the generation function was separated, removed from regulation, and supplied by the utility only on a provider-of-last-resort basis, "in an environment where retail customers can shop for their generation service from competitive suppliers." In order to complete the corporate separation required by the statute, the Ohio Regulated Utilities transferred all of their operating generating plants to GenCorp, Nuclear GenCorp and Mansfield. Therefore, the Ohio Regulated Utilities no longer own any generation and rely upon purchased power to serve their entire load. Applicants' October 24, 2008 Filing at 7.

<sup>5</sup> 18 C.F.R. § 35.39 (2008).

by the Commission in Order Nos. 707 and 707-A.<sup>6</sup> In this regard, Applicants propose to insert language into their market-based rate tariffs stating that the provisions of sections 35.39, 35.44(a), and 35.44(b) of the Commission's regulations are waived for power sales and other affiliate interactions between the Applicants and the Ohio Regulated Utilities. Applicants request an effective date of December 15, 2008.

4. Solutions currently provides the wholesale power required by the Ohio Regulated Utilities for provider-of-last-resort service, as well as certain wholesale obligations, under an affiliate power supply agreement, which is the result of a Commission-approved settlement.<sup>7</sup> This agreement is set to expire December 31, 2008.

5. Applicants state that they base their request for waiver of the Commission's affiliate rules on the Commission's policy of granting such relief where no captive customers exist or where such customers are otherwise protected against affiliate abuse. Applicants state that both of those concerns are satisfied here. First, there will be no wholesale customers served by the Ohio Regulated Utilities at the time any affiliate sales authorized by the proposed tariff amendments become effective, as the Ohio Regulated Utilities' single power sales agreement with a wholesale customer will be cancelled at the end of 2008.<sup>8</sup> Additionally, Applicants state that retail ratepayers in Ohio are not "captive" for purposes of determining whether the Order No. 697 restrictions on affiliate sales and other rules governing affiliate relationships should apply because all retail customers have retail choice under Ohio's restructuring law.

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<sup>6</sup> *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, 73 Fed. Reg. 11,013 (Feb. 29, 2008), FERC Stats. & Regs. ¶ 31,264 (2008), *order on reh'g*, Order No. 707-A, 73 Fed. Reg. 43,072 (July 24, 2008), FERC Stats. & Regs. ¶ 31,272 (2008).

<sup>7</sup> *FirstEnergy Solutions Corp.*, 117 FERC 61,278 (2006) (order approving settlement). The settlement stemmed from Solutions' 2005 request for authorization to make affiliate sales, which the Commission set for hearing in *FirstEnergy Solutions Corp.*, 113 FERC ¶ 61,338 (2005).

<sup>8</sup> Applicants state that the Ohio Regulated Utilities currently serve one wholesale customer, American Municipal Power-Ohio, Inc., at fixed rates, thus ensuring that no costs associated with any affiliate power sale, sale of non-power goods or services, or other affiliate interaction could be flowed through to wholesale customers without Commission approval. In any event, this agreement will be cancelled on December 31, 2008. *See Toledo Edison Company*, 125 FERC ¶ 61,348 (2008).

6. Applicants add that, even if the requested authorization is granted, the Ohio Regulated Utilities could not make any purchases from Applicants without the prior approval of the Public Utilities Commission of Ohio (Ohio Commission), which is fully empowered to protect the interests of Ohio's retail customers.

7. Applicants state that new Ohio legislation makes available two mechanisms to address how generation supply for provider-of-last-resort service will be made available to customers in Ohio in 2009. One approach is a Market Rate Offer, which provides for a competitive solicitation process to establish a utility's price for the standard service offer available to customers taking provider-of-last-resort service, and the other is an Electric Security Plan, which allows a utility to enter into generation contracts to supply energy. The Ohio Commission decides if the Electric Security Plan, considered as a whole, is more favorable to customers than the result that would be expected under the Market Rate Offer. If the Ohio Commission concludes that the Electric Security Plan is more favorable, the Ohio Commission-administered competitive solicitation process envisioned by the Market Rate Offer will not go forward. Applicants state that under either option, however, Ohio retail customers retain their right to select alternative retail electric suppliers.

8. The Ohio Regulated Utilities filed applications with the Ohio Commission requesting approval of an Electric Security Plan and a Market Rate Offer. Applicants state that the Ohio Regulated Utilities' ability to implement either a Market Rate Offer or Electric Security Plan is dependent upon approval by the Ohio Commission. The Ohio Commission can choose to reject the Electric Security Plan or Market Rate Offer, or delay implementation of a plan. Applicants state that, in either case, the matter of generation supply beginning January 1, 2009 still must be addressed because the Ohio Regulated Utilities do not own generation, and current Commission authorization for affiliate sales from Solutions expires at the end of 2008. Applicants state that Commission approval of the market-based rate tariff revisions would provide the necessary flexibility to ensure the availability of power to the Ohio Regulated Utilities at stable prices beyond 2008 in the event that a Market Rate Offer is rejected or delayed.

9. As part of their Market Rate Offer, the companies proposed a competitive solicitation process to acquire generation required for provider-of-last-resort service. This process would result in a standard service offer for generation services derived from a competitive solicitation process managed by an independent third party. The Ohio Commission, however, will select the winning bidder(s) and determine if the auction meets the relevant statutory criteria. Applicants state that they intend to participate in any competitive solicitation approved by the Ohio Commission. And, given the magnitude of the Ohio Regulated Utilities' generation needs relative to the amounts of uncommitted capacity in the regional bulk power market, it is virtually certain that Applicants will be selected to provide at least a portion of this power supply. Applicants state that approval of the market-based rate tariff revisions in this proceeding would permit the Market Rate

Offer to be implemented by the Ohio Regulated Utilities without the necessity of a further section 205 filing requesting Commission authorization regarding affiliate sales.

10. On November 28, 2008, Applicants informed the Commission that on November 25, 2008, the Ohio Commission issued an order “not approving” the Ohio Regulated Utilities’ Market Rate Offer filing (essentially rejecting it without prejudice to amend the Market Rate Offer plan).<sup>9</sup> Applicants state that the Ohio Commission has not yet taken action on the Electric Security Plan. Applicants also state that the Ohio Regulated Utilities publicly announced that they may need to pursue a “backstop” competitive procurement option so as to ensure, on an interim basis, that their Ohio customers have a secure supply of power at the beginning of 2009, while more permanent supply options can be addressed before the Ohio Commission.

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

11. Notice of Applicants’ filing was published in the *Federal Register*<sup>10</sup> with interventions and protests due on or before November 14, 2008. Nucor Steel Marion, Ohio Partners for Affordable Energy, Citizen Power, Inc., FPL Energy Power Marketing, Inc., and Industrial Energy Users-Ohio filed motions to intervene. The Northeast Ohio Public Energy Council and Ohio Consumers’ Counsel filed motions to intervene and protests. Ohio Energy Group filed a motion to intervene, protest, and motion to dismiss, or in the alternative, request for hearing. The Ohio Commission filed a motion to intervene out-of-time. On November 28, 2008, Applicants filed an answer to the responsive pleadings of Northeast Ohio Public Energy Council, Ohio Consumers’ Counsel and Ohio Energy Group. On December 3, 2008, Northeast Ohio Public Energy Council filed an answer to Applicants’ answer. On December 8, 2008, Ohio Consumers’ Counsel filed supplemental comments, which included a copy of the Ohio Commission’s November 25, 2008 order on the Ohio Regulated Utilities’ Market Rate Offer filing. On December 11, 2008, Ohio Consumers’ Counsel filed an answer to Applicants’ answer. On December 12, 2008, Applicants filed an answer to Ohio Consumers’ Counsel’s December 11, 2008 answer. On December 16, 2008, Ohio Consumers’ Counsel filed an answer to Applicants’ December 12, 2008 answer. On December 16, 2008, the Ohio Commission filed comments.

12. Northeast Ohio Public Energy Council, Ohio Consumers’ Counsel, and Ohio Energy Group disagree with assertions in Applicants’ filing. In particular, they argue that the ratepayers of the Ohio Regulated Utilities may be captive customers. For example, Ohio Energy Group argues that, under new Ohio law, consumers do not have an

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<sup>9</sup> Applicants’ November 28, 2008 Answer at 3.

<sup>10</sup> 73 Fed. Reg. 65,844 (2008).

unqualified right to shop for electric generation services. They state that, while consumers can take generation services at rates approved by the Ohio Commission as part of a utility's Electric Security Plan and they may be able to shop for generation, that right to shop may be restricted. Northeast Ohio Public Energy Council argues that electric shopping is non-existent.

13. Ohio Consumers' Counsel and Northeast Ohio Public Energy Council also argue that competition is lacking. Ohio Consumers' Counsel argues that conditions in the Midwest Independent Transmission System Operator, Inc. market impose limits on the quantity of wholesale supplies able to compete with the supply owned by the Applicants and this raises concerns about the potential for affiliate abuse. Additionally, Northeast Ohio Public Energy Council argues that the Electric Security Plan proposal includes provisions that would create barriers to competition. It states that these barriers include: (1) providing the benefit of a three-year payment deferral to the Ohio Regulated Utilities' customers but denying the benefit to customers who choose an alternative supplier; (2) imposing a minimum default service charge on shopping customers; (3) imposing other non-bypassable charges that would force shopping customers to pay twice for the same services and costs. Ohio Consumers' Counsel states that, under the Electric Security Plan, the proposed unregulated affiliated contract provides for increased prices of 34 percent.

14. Ohio Consumers' Counsel and Ohio Energy Group argue that the Ohio Commission is not fully empowered to protect the interests of Ohio retail customers. For example, Ohio Energy Group argues that the Ohio Commission has no power to regulate the wholesale price. It also states that the Ohio Commission has no ability to dictate the terms of an Electric Security Plan; the Ohio Commission only has the authority to reject or approve modifications to an Electric Security Plan. Ohio Consumers' Counsel argues that the Ohio Commission's authority to review the prices set in any contract is limited by the filed rate doctrine.

15. In the event that the Commission does not deny the request for waiver of the affiliate restrictions, Northeast Ohio Public Energy Council requests that the Commission set for hearing the issue of whether the waiver is warranted and suspend the proposed tariff amendments and subject them to refund. Likewise, Ohio Energy Group argues that this matter should be set for hearing. Northeast Ohio Public Energy Council states that Applicants have not demonstrated why a blanket waiver of the affiliate restrictions is warranted. It states that the issues surrounding FirstEnergy Solution's 2005 request for authorization to make affiliate sales, which the Commission set for hearing, are still relevant.<sup>11</sup> Northeast Ohio Public Energy Council states that the hearing should be held

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<sup>11</sup> See Northeast Ohio Public Energy Council's November 13 Filing at 14, citing *FirstEnergy Solutions Corp.*, 113 FERC ¶ 61,338 (2005).

in abeyance until the Ohio Commission issues an order on a Market Rate Offer or Electric Security Plan.

16. Northeast Ohio Public Energy Council also argues that Applicants' request is premature. Northeast Ohio Public Energy Council states that, notwithstanding that, by its terms, the settlement expires by December 31, 2008, until a notice of termination of the settlement is filed, its provisions remain in effect.<sup>12</sup> Additionally, Northeast Ohio Public Energy Council maintains that the Commission should wait until the Ohio Commission issues a final order on the auction based Market Rate Offer or regulated Electric Security Plan, because the analysis is different depending on whether the Ohio Commission chooses the Market Rate Offer or Electric Security Plan.

17. Applicants respond that the protesters would have the Commission make an independent determination on the efficacy of the Ohio Commission's implementation of Ohio's retail access law, which would be contrary to the Commission's recent affirmation that it will not assume the role of evaluating the success or failure of state retail programs in analyzing whether retail customers are captive for purposes of waiver determinations. Applicants state that Ohio law provides for retail choice, meaning that customers are not captive, and the Ohio Commission retains sufficient oversight of any purchases by the Ohio Regulated Utilities to protect retail customers against abusive affiliate transactions, and may modify or otherwise revise its retail access programs as it deems appropriate in relation to retail competition. Additionally, Applicants state that, while the number of retail customers in Ohio currently receiving service from competing retail suppliers has declined, the trend does not indicate any anticompetitive actions by the Ohio Regulated Utilities. They also point out that their experience in Pennsylvania shows that the Commission's decision to grant affiliate waivers had no impact on retail choice in Pennsylvania.

18. Applicants maintain that their request for a waiver is not premature. They state that Northeast Ohio Public Energy Council is mistaken in arguing that Applicants' existing authorization to make sales to the Ohio Regulated Companies under the terms of the settlement agreement could be leveraged to allow sales beyond the December 31, 2008 expiration date of that agreement. Applicants state that the rule Northeast Ohio Public Energy Council cites, i.e., section 35.15(a) of the Commission's regulations,<sup>13</sup> is limited to a certain class of bundled contracts that were negotiated or executed prior to 1996. However, Applicants state that section 35.15(b)(2) of the Commissions'

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<sup>12</sup> See Northeast Ohio Public Energy Council's November 13 Filing at 10-11, citing 18 CFR § 35.15 (2008).

<sup>13</sup> 18 C.F.R. § 35(15)(a) (2008).

regulations<sup>14</sup> clearly states that post-1996 unbundled agreements are not subject to the requirement to file a notice of termination, and thus expire under their own terms.

19. Northeast Ohio Public Energy Council responds to Applicants' answer by reiterating that there is no urgent need for the Commission to act on Applicants' filing at this time. It also argues that section 35.15(b)(2) does not apply in this case because the power sold is pursuant a settlement agreement, not an ordinary power sale contract.

20. Northeast Ohio Public Energy Council and Ohio Consumers' Counsel request that the Commission add to the record the Ohio Commission's November 25, 2008 order not approving the Ohio Regulated Utilities' Market Rate Offer filing. Northeast Ohio Public Energy Council states that the findings in the Ohio Commission's order raise concerns regarding affiliate abuse.

21. Ohio Consumers' Counsel states that Applicants fail "to acknowledge the Commission's invitation at paragraph 203 of Order No. 697 [sic] to seek captive customer status for retail customers with retail choice rights where state law provides inadequate protection for those customers."<sup>15</sup>

22. The Ohio Commission filed comments supporting approval of Applicants' filing, subject to certain conditions.

### **III. Commission Determination**

#### **A. Procedural Matters**

23. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

24. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R § 385.214(d) (2008), the Commission will grant the Ohio Commission's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

25. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest and/or answer unless otherwise

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<sup>14</sup> 18 C.F.R. § 35(15)(b)(2) (2008).

<sup>15</sup> Ohio Consumers' Counsel December 11, 2008 Filing at 9. We note that although Ohio Consumers' Counsel refers to paragraph 203 of Order. No. 697, this paragraph is actually in Order No. 697-A, not Order No. 697.

ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

**B. Analysis**

26. In Order No. 697, the Commission codified certain affiliate restrictions in our regulations to protect captive customers from the potential for a franchised public utility to interact with a market-regulated power sales affiliate in ways that transfer benefits to the affiliate and its stockholders to the detriment of the captive customers.<sup>16</sup> Captive customers are defined as “any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation.”<sup>17</sup>

27. Northeast Ohio Public Energy Council, Ohio Energy Group, and Ohio Consumers’ Counsel protest Applicants’ filing and argue that the Ohio Regulated Utilities’ customers are captive. We disagree. In Order No. 697, the Commission addressed the issue of whether customers are “captive” if they have retail choice. The Commission stated that the definition of “captive customers” does not include those customers who have retail choice, i.e., the ability to select a retail supplier based on the rates, terms, and conditions of service offered. The Commission stated that retail customers who choose to be served under cost-based rates but have the ability, by virtue of state law, to choose one retail supplier over another, are not considered to be under “cost-based regulation” and therefore are not “captive.”<sup>18</sup> The Commission went on to state that “retail customers in retail choice states who choose to buy power from their local utility at cost-based rates as part of that utility’s provider-of-last-resort obligation are not considered captive customers because, although they may choose not to do so, they have the ability to take service from a different supplier whose rates are set by the marketplace.”<sup>19</sup>

28. Moreover, we stated in Order No. 697 that:

[I]t is not the role of this Commission to evaluate the success or failure of a state’s retail choice program including whether sufficient choices are available for customers inclined to

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<sup>16</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 513.

<sup>17</sup> Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 202 and 18 C.F.R. 35.36(a)(6) (2008).

<sup>18</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 479.

<sup>19</sup> *Id.* P 480.

choose a different supplier. In this regard, the states are best equipped to make such a determination and, if necessary, modify or otherwise revise their retail access programs as they deem appropriate. Further, to the extent a retail customer in a retail choice state elects to be served by its local utility under provider-of-last-resort obligations, the state or local rate setting authority, in determining just and reasonable cost-based retail rates, would in most circumstances be able to review the prudence of affiliate purchased power costs and disallow pass-through of costs incurred as a result of an affiliate undue preference.<sup>[20]</sup>

29. In light of our determinations in Order No. 697, we grant Applicants' request for a Commission determination that the Order No. 697 requirement to obtain prior approval for affiliate sales of electric energy or capacity does not apply to the Applicants' power sales to the Ohio Regulated Utilities. We deny the motion to dismiss as well as the request to set this matter for hearing, suspend the tariff amendments and subject them to refund. We note that the Ohio Commission's November 25, 2008 order on the Ohio Regulated Utilities' Market Rate Offer does not change our determination in this order. We are granting Applicants' request consistent with Order No. 697.

30. With regard to Ohio Consumers' Counsel reference to paragraph 203 of Order No. 697-A, we note that this paragraph provides that, if a state regulatory authority in a retail choice state does not believe that retail customers are sufficiently protected and that the Commission's affiliate restrictions should apply to the local franchised public utility, it may raise that argument as part of its comments in a market-based rate proceeding. We note that the Ohio Commission did not raise that argument, and Ohio Consumers' Counsel is not a state regulatory authority as defined in the Federal Power Act (FPA).<sup>21</sup>

31. We also note that the Ohio Commission supports the filing, subject to certain conditions,<sup>22</sup> including that it retain the authority to review the prudence of contracts

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<sup>20</sup> *Id.* P 481.

<sup>21</sup> Sections 3(15) and 3(21) of the FPA, 16 U.S.C. § 796(15) and (21) (2006), define "State regulatory authority" to mean the same as "State commission," which "means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the State or municipality."

<sup>22</sup> The Ohio Commission states that it encourages approval of the application "to the extent necessary to execute the Ohio Commission's decision in Case No. 08-935-EL SSO, which is slated for an Ohio Commission vote on December 19, 2008." *In the*

prior to submission to this Commission. Although the Ohio Commission appears to believe that Applicants will need to obtain approval from this Commission for individual contracts, our order here grants Applicants' request for a waiver of the need to obtain prior approval from the Commission for power sales to the Ohio Regulated Utilities. Of course, this order does not affect any state law or regulation applicable to purchases by the Ohio Regulated Utilities from Applicants.

32. We direct Applicants to submit a compliance filing, within 30 days of the date of this order, revising the limitations and exemptions sections of their market-based rate tariffs to list the waiver granted herein and include a citation to this order.<sup>23</sup>

33. We deny Applicants' request for an effective date of December 15, 2008. Applicants failed to request waiver of the Commission's 60-day prior notice requirement and failed to provide any justification for an earlier effective date. Instead, we will accept the proposed tariff sheets, to be effective December 24, 2008, which is after 60 days from the date of the filing.

34. Finally, we disagree with Northeast Ohio Public Energy Council's argument that Applicants' filing is premature and that, until a notice of termination of the settlement is filed, its provisions remain in effect. Section 35.15(b)(2) of the Commission's regulations provides that any power sales contract executed on or after July 9, 1996, that is to terminate by its own terms, shall not be subject to the prior notice provisions of section 35.15(a).<sup>24</sup> Instead, consistent with section 35.15(c), Applicants are required to notify the Commission of the date of termination of their contract within 30 days after such termination takes place. Accordingly, Applicants will be precluded from making

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*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 Ohio Revised Code 4928.143 in the Form of an Electric Security Plan.* Additionally, the Ohio Commission endorses our approval of the waiver requests "to the extent that the FirstEnergy Operating Companies proceed with the procurement of generation from [Applicants] for a limited period of time either pursuant to an Electric Security Plan of the Operating Companies' approved by the Ohio Commission or for 90 days, whichever is longer, and subject to the condition that the Ohio Commission retains the authority to review the prudence of those contacts [sic] for electricity prior to their submission to FERC." Ohio Commission December 17 Comments at 1.

<sup>23</sup> 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.

<sup>24</sup> Section 35.15(a) requires that notices of termination of certain rate schedules be filed at least 60 days prior to the date such termination is to take effect.

sales to the Ohio Regulated Utilities after December 31, 2008 because that is the date by which their contract with Ohio Regulated Utilities terminates by its own terms.

35. We also disagree with Northeast Ohio Public Energy Council's argument that section 35.15(b)(2) does not apply in this case because the power sold is pursuant to a settlement agreement, not an ordinary power sale contract. Whether the power supply agreement was established in the context of a settlement is irrelevant. Further, we do not find it necessary to wait for further determinations from the Ohio Commission because our determinations in this proceeding are not contingent upon determinations that the Ohio Commission may make regarding the Electric Security Plan.

The Commission orders:

(A) Applicants' revised tariff sheets are hereby accepted, effective December 24, 2008, as discussed in the body of this order.

(B) Applicants are 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 )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.