

128 FERC ¶ 61,119
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

FirstEnergy Solutions Corp.	Docket Nos. ER09-134-001 ER09-134-002
FirstEnergy Generation Corporation	ER09-135-001 ER09-135-003
FirstEnergy Nuclear Generation Corporation	ER09-136-001 ER09-136-002
FirstEnergy Generation Mansfield Unit 1 Corp.	ER09-137-001 ER09-137-002

ORDER DENYING REHEARING AND CONDITIONALLY ACCEPTING
COMPLIANCE FILING

(Issued July 31, 2009)

1. In this order, the Commission denies a request for rehearing of the Commission's December 23, 2008 order,¹ in which the Commission granted a request filed by FirstEnergy Solutions Corp., FirstEnergy Generation Corporation, FirstEnergy Nuclear Generation Corporation, and FirstEnergy Generation Mansfield Unit 1 Corp. (collectively, FirstEnergy) for a Commission determination that the Order No. 697²

¹ *FirstEnergy Solutions Corp.*, 125 FERC ¶ 61,356 (2008) (December 23 Order).

² *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, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, 73 Fed. Reg. 79,610 (Dec. 30, 2008), FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, 74 Fed. Reg. 30,924 (June 29, 2009), FERC Stats. & Regs. ¶ 31,291 (2009).

requirement to obtain prior approval for affiliate sales of electric energy or capacity does not apply to FirstEnergy's power sales to its affiliated, regulated franchised public utilities in Ohio.

2. Also in this order, the Commission conditionally accepts FirstEnergy's proposed revisions to its market-based rate tariffs, to be effective December 24, 2008, as requested, subject to the compliance filing directed herein.

I. Background

3. On October 24, 2008, as supplemented October 28, 2008, FirstEnergy filed a 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 FirstEnergy's power sales to its affiliated, regulated franchised public utilities in Ohio.³

4. In the December 23 Order, the Commission granted FirstEnergy's request and directed it to make a compliance filing revising the limitations and exemptions sections of its market-based rate tariffs to list the waiver granted therein.

5. The Commission based its determination on the policy articulated in Order No. 697. In Order No. 697, the Commission codified certain restrictions that govern the relationship between franchised public utilities with captive customers and their market-regulated power sales affiliates. As a condition of receiving and retaining market-based rate authority, the Commission required sellers to comply with these affiliate restrictions unless otherwise permitted by Commission rule or order.⁴ The Commission explained that customers who have retail choice are not included under the definition of "captive customers" in the Commission's regulations.⁵

³ FirstEnergy's affiliated, regulated franchised public utilities in Ohio include Cleveland Electric Illuminating Company, Ohio Edison Company, and Toledo Edison Company (collectively, Ohio Regulated Utilities).

⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 549; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 233.

⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 479 and 18 C.F.R. 35.36(a)(6) (2008).

II. Request for Rehearing and Additional Pleadings

6. On January 21, 2009, as amended on January 22, 2009, the Public Utilities Commission of Ohio (Ohio Commission) filed a request for rehearing of the December 23 Order.⁶

7. The Ohio Commission asserts that the Commission erred in the December 23 Order by allowing a waiver of affiliate transaction rules for FirstEnergy to continue past April 1, 2009, without justification, and by failing to require a new showing by FirstEnergy that waiver is justified for future transactions. In this regard, the Ohio Commission argues that the Commission should clarify that the waivers granted are temporary and FirstEnergy must justify any future waiver of affiliate transaction rules. It argues that the December 23 Order creates a risk that the wholesale rates charged by FirstEnergy to the Ohio Regulated Utilities will be unjust and unreasonable.

8. The Ohio Commission explains that the issue of how the Ohio Regulated Utilities will provide retail power to end-use customers has been the subject of litigation before the Ohio Commission. Ohio law provides two alternative mechanisms by which this can occur: (1) a market rate offer, which is a competitive bidding process; and (2) an electric security plan, which is a negotiated rate without any necessary bidding component. The Ohio Commission explains that, on November 25, 2008, it rejected the Ohio Regulated Utilities' application for a market rate offer and, later, on December 19, 2008, it approved a modified electric security plan. However, as is the Ohio Regulated Utilities' right under state law, on December 22, 2008, the Ohio Regulated Utilities withdrew the modified electric security plan. The Ohio Commission states that the Ohio Regulated Utilities obtained power via a backstop competitive solicitation, without the Ohio Commission's prior approval, despite FirstEnergy's representations to the Commission that the Ohio Commission's prior approval was necessary.⁷ The Ohio Commission states

⁶ The Northeast Ohio Public Energy Council, the Ohio Consumers' Counsel, and Ohio Partners for Affordable Energy also filed requests for rehearing, which they subsequently withdrew on May 4, 2009, May 6, 2009, and May 18, 2009, respectively. Pursuant to Rule 216 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.216 (2008), each withdrawal became effective at the end of 15 days from the date of the filing of the notice of withdrawal.

⁷ The Ohio Commission maintains that, in the December 23 Order, the Commission relied on a misrepresentation by FirstEnergy concerning the Ohio Commission's role in the prior approval of the Ohio Regulated Utilities' purchases, citing the Commission's statement in the December 23 Order that FirstEnergy asserted that, "even if the requested authorization is granted, the Ohio Regulated Utilities could not make any purchases from Applicants [FirstEnergy] without the prior approval of the Public Utilities Commission of Ohio," 125 FERC ¶ 61,356 at P 6.

that, prior to the withdrawal of the modified electric security plan, it conditionally supported FirstEnergy's request for waiver of the affiliate restrictions, given the exigency of time to effectuate the electric security plan.

9. On February 5, 2009, FirstEnergy submitted a pleading acknowledging that it should have been more precise when discussing the Ohio Commission's role in prior approval of purchases. FirstEnergy explains that its statement regarding prior Ohio Commission approval of purchases only addressed purchases under an electric security plan or market rate offer, which would have been approved by the Ohio Commission before the fact. FirstEnergy acknowledges that its statement did not cover affiliate purchases pursuant to the backstop competitive procurement process for the interim period. According to FirstEnergy, it did not state that the backstop procurement plan, or affiliate purchases pursuant to the backstop plan, required prior Ohio Commission approval.⁸

10. Subsequent to the Ohio Regulated Utilities withdrawal of the modified electric security plan, on February 19, 2009, they filed an amended application with the Ohio Commission setting forth a stipulated electric security plan.⁹ On March 25, 2009, the Ohio Commission issued an order approving the Ohio Regulated Utilities' stipulated electric security plan, which includes a competitive bid process to procure power needed to meet their standard service offer supply requirements for the period June 1, 2009 through May 31, 2011.¹⁰ In approving the Ohio Regulated Utilities' stipulated electric

⁸ We note that FirstEnergy's statement about prior state approval was not dispositive for purposes of the waiver request, as the Commission's determination to grant the waiver was based on the policy articulated in Order No. 697. However, we emphasize that we expect sellers to provide accurate and clear information in their filings.

⁹ *See 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*, Second Opinion and Order, Case No. 08-935-EL-SSO, March 25, 2009 at 6 (March 25 Ohio Order).

¹⁰ March 25 Ohio Order at 23. Additionally, on March 4, 2009, the Ohio Commission approved a proposal under which the Ohio Regulated Utilities purchase from FirstEnergy Solutions Corp. the power needed to meet their retail standard service offer load and the load for special contracts during April and May of 2009. *See 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*, Second Finding and Order, Case No. 08-935-EL-SSO, March 4, 2009.

security plan, the Ohio Commission stated that the rates customers are charged will be established through a competitive bidding process; therefore, the rates in the electric security plan will be equivalent to the results which would be obtained by Ohio Regulated Utilities under Section 4928.142 of the Ohio Code (i.e., through a market rate offer).¹¹ Additionally, the Ohio Commission found that the stipulated electric security plan, including its pricing and all other terms and conditions, “is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, [Ohio] Code.”¹²

11. On May 15, 2009, FirstEnergy submitted a pleading describing these recent actions of the Ohio Commission. FirstEnergy states that the process approved by the Ohio Commission in the March 25 Ohio Order was “*Allegheny* compliant” in all respects.¹³ As the Ohio Commission stated in the March 25 Ohio Order, under the approved process, there will be a fair and transparent process for submitting and evaluating bids; there will be a transparent product definition which allows bidders to accurately price their product; bids will be judged solely on the basis of price; and the process will be monitored for openness, fairness, transparency and competitiveness by an independent third party.¹⁴ Finally, although the Ohio Commission had the right to reject the results of the bidding process, FirstEnergy points out that the competitive solicitation has been completed and the Ohio Commission accepted the results.¹⁵

12. On May 27, 2009, the Ohio Commission filed an answer to FirstEnergy’s May 15, 2009 pleading. The Ohio Commission states that it continues to believe that the

¹¹ March 25 Ohio Order at 19.

¹² *Id.* at 23.

¹³ FirstEnergy’s May 15 filing at 2, citing *Allegheny Energy Supply Company*, 108 FERC ¶ 61,082 (2004) (*Allegheny*). We note that, in *Allegheny*, the Commission stated that the following four guidelines help determine if a competitive solicitation process satisfies the principle that no affiliate should receive undue preference: (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.

¹⁴ March 25 Ohio Order at 20-21.

¹⁵ FirstEnergy’s May 15, 2009 filing at 2.

approval of a permanent waiver of the affiliate transactions rules is not warranted and that FirstEnergy should be required to make a showing as to why any future waiver is necessary.

III. Compliance Filing

13. On December 30, 2008, FirstEnergy submitted a compliance filing revising its tariffs to include a citation to the December 23 Order granting FirstEnergy's request for waiver of the affiliate restrictions.

14. Notice of FirstEnergy's December 30 compliance filing was published in the *Federal Register*,¹⁶ with interventions and protests due on or before January 21, 2009. None was filed.

IV. Discussion

A. Request for Rehearing

15. We will deny the request for rehearing. We find that, in the December 23 Order, the Commission properly followed and implemented the Commission's policy and regulations regarding requests for authorization to make affiliate sales by market-regulated power sales affiliates.

16. In the December 23 Order, the Commission explained that, 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.¹⁷ Captive customers are defined in the Commission's regulations as "any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation."¹⁸ As the Commission explained in the December 23 Order, customers in retail choice states do not fall under the definition of "captive." Accordingly, the Commission granted FirstEnergy's request for a Commission determination that the requirement to obtain prior approval for affiliate sales of electric energy or capacity does not apply to FirstEnergy's power sales to the Ohio Regulated Utilities.

¹⁶ 74 Fed. Reg. 1677 (2009).

¹⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 513.

¹⁸ 18 C.F.R. 35.36(a)(6) (2008).

17. Order No. 697-A 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, as part of its comments in a market-based rate proceeding, request that the Commission deem its retail customers to be captive for purposes of applying the affiliate restrictions.¹⁹ That is not what happened here.

18. However, even if the Ohio Regulated Utilities' retail customers met the definition of captive customers under the Commission's regulations, we would find that affiliate abuse is not a concern in this case, and that therefore the affiliate restrictions in section 35.39 should not apply. We note that Ohio has a state-mandated procurement process that is subject to the oversight of the Ohio Commission.

19. As explained above, Ohio law requires that electric utilities in Ohio provide retail customers with a standard service offer consisting of either a market rate offer (which is a competitive bidding process) or an electric security plan (which is a negotiated rate). Section 4928.142 of the Ohio Code (governing the market rate offer) provides that the competitive bidding process for the market rate offer must include the following: transparency; a clear product definition; standardized bid evaluation criteria; and oversight by an independent third party. In the event that an electric distribution utility chooses to file an application for the Ohio Commission's approval of an electric security plan, Section 4928.143 of the Ohio Code provides that the Ohio Commission is required to determine whether the electric security plan, including its pricing and all other terms and conditions, is more favorable in the aggregate as compared to the expected results that would otherwise apply under a market rate offer. The Ohio Regulated Utilities' ability to implement either a market rate offer or an electric security plan is dependent on approval by the Ohio Commission.²⁰

20. We find that the Ohio Commission's approval in its recent decisions indicates that the Ohio Commission now has, and will continue to have, the ability to ensure a properly developed procurement plan and to oversee a fair administration of such a plan in order to protect retail customers.²¹ For this reason, and in light of the procurement process in place under Ohio law, and the protections available under that process, we conclude that there is no need to apply the Commission's affiliate restrictions.

¹⁹ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 203.

²⁰ FirstEnergy's October 24, 2008 Filing at 9.

²¹ Moreover, we note that there is no evidence in the record to indicate that the Ohio Commission is not able to adequately protect retail customers.

21. Finally, we note that FirstEnergy is under the obligation to report to the Commission any changes in status that may affect the basis on which the Commission relied in granting a waiver of the affiliate restrictions. Additionally, FirstEnergy will be required to demonstrate that continued waiver of the affiliate restrictions is appropriate when it files its regularly scheduled updated market power analysis.²²

B. Compliance Filing

22. We will conditionally accept FirstEnergy's proposed tariff sheets, subject to FirstEnergy making a compliance filing as directed below. FirstEnergy's proposed market-based rate tariffs do not include revised limitations and exemptions sections listing the affiliate waiver granted in the December 23 Order. Accordingly, we will direct FirstEnergy to file revised market-based rate tariffs within 30 days of the date of this order to correct its tariffs consistent with Order No. 697 and the December 23 Order.

The Commission orders:

(A) The request for rehearing of the Commission's December 23 Order is hereby denied, as discussed in the body of this order.

(B) FirstEnergy is hereby directed to revise its market-based rate tariffs, within 30 days of the date of this order, as discussed in the body of this order.

(C) FirstEnergy's revisions to its market-based rate tariffs are hereby conditionally accepted for filing, effective December 24, 2008, subject to the compliance filing directed in Ordering Paragraph (B).

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 551.