

133 FERC ¶ 61,257
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. ER10-1773-000

ORDER GRANTING AUTHORIZATION TO MAKE AFFILIATE SALES

(Issued December 29, 2010)

1. In this order, we grant Allegheny Energy Supply Company, LLC's (AE Supply) request to make power sales to Pennsylvania Electric Company (Penelec), pursuant to a competitive solicitation that we find satisfies the Commission's concerns regarding the potential for affiliate abuse.

I. Background

2. On May 11, 2010, AE Supply's parent company, Allegheny Energy, Inc. (Allegheny Energy) and Penelec's parent company, FirstEnergy Corp. (FirstEnergy), filed, in Docket No. EC10-68-000, an application for authorization of disposition of jurisdictional assets and merger under section 203 of the Federal Power Act (FPA).¹ Allegheny Energy and Penelec requested that the Commission approve a transaction pursuant to which FirstEnergy will acquire Allegheny Energy. Subsequently, on July 14, 2010, AE Supply submitted, under section 205 of the FPA,² the instant request for

¹ 16 U.S.C. § 824b (2006). We note that on February 11, 2010, Allegheny Energy announced that it entered into a merger agreement with FirstEnergy. FirstEnergy Operating Companies, Notice of Pending Merger, Docket No. ER01-1403-000 (filed Mar. 12, 2010). On December 16, 2010, the Commission issued an order authorizing the proposed transaction. *FirstEnergy Corp.*, 133 FERC ¶ 61,222 (2010).

² 16 U.S.C. § 824d (2006).

authorization to make power sales to Penelec, which is treated as an affiliate of AE Supply while the merger is pending.³

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

4. Penelec is a wholly-owned subsidiary of FirstEnergy. Penelec is a franchised public utility company serving residential, commercial and industrial customers in portions of Pennsylvania. Penelec is authorized to make sales at market-based rates.⁶ With the exception of a 19 MW hydro facility, Penelec has divested its generation and neither owns nor operates any other generation facilities.

5. Penelec, in solicitations held during March of 2010 (March Solicitation) and May of 2010 (May Solicitation) (collectively, Solicitations), invited bids for full requirements provider of last resort service (Default Service) for various supply periods between January 1, 2011 and May 31, 2013. As a result of the March Solicitation,

³ AE Supply notes that the Commission has explained that, for purposes of affiliate abuse, companies proposing to merge will be treated as affiliates under their market-based rate tariffs while their proposed merger is pending. AE Supply's July 14, 2010 Filing at 1 & n.1 (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 noted above, the Commission has now authorized the merger.

⁴ 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). AE Supply's July 14, 2010 Filing at 5 (citing *PJM Interconnection, L.L.C.*, 98 FERC ¶ 61,072, *clarified*, 98 FERC ¶ 61,235 (2002)).

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

⁶ *See FirstEnergy Operating Companies*, Docket No. ER01-1403-010 (Aug. 26, 2009) (delegated letter order) (accepting Penelec's updated market power analysis).

AE Supply won four 5-month residential blocks and three 5-month commercial blocks, each for the term January 1, 2011 through May 31, 2011. As a result of the May Solicitation, AE Supply won two 24-month residential blocks for the term June 1, 2011 through May 31, 2013; three 12-month commercial blocks for the term June 1, 2011 through May 31, 2012; and one 5-month commercial block for the term January 1, 2011 through May 31, 2011.⁷

6. AE Supply explains that the competitive solicitation process it participated in was conducted to secure power to serve portions of Penelec's residential and commercial customers pursuant to a settlement agreement (Settlement) approved by the Pennsylvania Public Utility Commission (Pennsylvania Commission) on November 6, 2009. The Pennsylvania Commission found that the competitive procurement process is permitted by the Pennsylvania Commission's Default Service regulations and is in the public interest because it will increase the number of potential bidders to competitively supply full requirements service and block energy.⁸ Under the terms of the Settlement, Penelec and its affiliate, Metropolitan Edison Company (Met Ed), select suppliers in procurement solicitations approved by the Pennsylvania Commission.⁹ The Settlement contains the default service program (DSP) auction process and rules (DSP Rules). Under the DSP Rules, a supplier is required to use a non-negotiable Default Service Supplier Master Agreement (Master Agreement) if it wins a solicitation.

7. AE Supply responded to Penelec's Solicitations and won a total of 13 bid blocks. The Independent Evaluator¹⁰ submitted the bid results from the Solicitations to the Pennsylvania Commission and the Pennsylvania Commission found that further investigation was not warranted for the Solicitations.

8. AE Supply maintains that the competitive solicitation satisfies the competitive solicitation process requirements established by the Commission for affiliate power sales

⁷ The commercial class has monthly billing demands of less than 400 kW.

⁸ AE Supply's July 14, 2010 Filing at 7 (citing *Joint Petition of Metropolitan Edison Company and Pennsylvania Electric Company for Approval of Their Default Service Programs*, Docket No. P-2009-2093053 (Pennsylvania Commission Nov. 6, 2009) (Pennsylvania Commission Order)).

⁹ Met Ed and Penelec will hold ten solicitations to procure Default Service Supply for the period January 1, 2011 to May 31, 2013. Solicitations were held in January 2010, March 2010, and May 2010, and will also be held in October 2010, January 2011, March 2011, May 2011, October 2011, January 2012, and March 2012.

¹⁰ National Economic Research Associates served as the Independent Evaluator.

in *Edgar*¹¹ as well as the four guidelines outlined by the Commission in *Allegheny* (i.e., Transparency, Definition, Evaluation, and Oversight).¹²

9. In support, as described below, AE Supply explains 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 Pennsylvania Commission and supervised by an Independent Evaluator. Accordingly, AE Supply requests that the Commission grant AE Supply authorization to make wholesale power sales as reflected in the transaction confirmations with Penelec.

II. Notice and Responsive Pleadings

10. Notice of AE Supply's filing was published in the *Federal Register*,¹³ with motions to intervene and protests due on or before August 4, 2010. American Municipal Power, Inc. filed a timely motion to intervene.

III. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), American Municipal Power, Inc.'s timely, unopposed motion to intervene serves to make it a party to this proceeding.

B. Analysis

1. Affiliate Abuse Analysis

12. At issue here 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,

¹¹ AE Supply's July 14, 2010 Filing at 13 (citing *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (1991) (*Edgar*)).

¹² AE Supply's July 14, 2010 Filing at 13-14 (citing *Allegheny Energy Supply Co.*, 108 FERC ¶ 61,082 (2004) (*Allegheny*)).

¹³ 75 Fed. Reg. 43,960 (2010).

based on the evidence, the proposed sale was a result of direct head-to-head competition between affiliated and competing unaffiliated suppliers.¹⁴

13. 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.¹⁵

14. In *Allegheny*, the Commission provided guidance as to how it will evaluate whether a competitive solicitation process satisfies the *Edgar* criteria.¹⁶ 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.

15. 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 Penelec pursuant to the instant competitive solicitations, effective January 1, 2011 and June 1, 2011, as requested.

¹⁴ 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).

¹⁵ *Edgar*, 55 FERC ¶ 61,382 at 62,168.

¹⁶ See also Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 540.

a. Transparency Principle

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

17. Based on AE Supply's representations, the Commission finds that the competitive solicitation is consistent with the Commission's Transparency guideline.

b. Definition Principle

18. AE Supply argues that Penelec's Solicitations meet the Definition guideline because they clearly stated the products sought by Penelec; the DSP Rules explained the nature of the service sought. The DSP Rules also stated that a product in the Fixed Auction is the Default Service Supply of a given Class (residential, commercial, industrial) for a given supply period. Each product was identified by four elements: the Company (Met Ed or Penelec); the Class; the duration of the supply period in months; and the month and year of the start of that supply period. A supplier selected through the auction process would be responsible for fulfilling all the requirements of a PJM Load Serving Entity for the portion of Default Service Supply that it serves, including, without limitation, energy, capacity, ancillary services, any applicable Transmission Services, and any other service as required by PJM.

19. In the Solicitations, Penelec sought bidders to serve Penelec's residential and commercial customers in bid blocks of approximately 50 MW each. The terms of the Master Agreement and DSP Rules, including bidder qualification criteria, were available to all bidders via a website.

20. Based on these representations, the Commission finds that the competitive solicitation is consistent with the Commission's Definition guideline.

c. Evaluation Principle

21. 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 Solicitations used standardized evaluation criteria that were applied equally to all bidders and bids. The Solicitations clearly specified the price and non-price criteria under which bids were evaluated. All bidders were required to accept the non-price terms of the Master Agreement, which were not subject to change or negotiation. In addition, the awards made pursuant to the DSP Rules were based entirely on price with no individualized negotiation of the Master

Agreement between any party and Penelec. Potential participants were put on notice of the importance of the relevant bid criteria in the publicly available documents.

22. AE Supply explains that each round of the Fixed Auction proceeded in three phases: (1) a bidding phase when bids are placed; (2) a calculation phase when the Independent Evaluator tabulates the results of that round's bidding phase and calculates the prices for the next round; and (3) a reporting phase when the Independent Evaluator informs the Bidders of the results of that round's bidding phase, including the prices for the next round's bidding phase and a range of excess supply in the Fixed Auction. A Bidder also receives the results of its own Bid from that round, but a Bidder receives no information regarding any other Bidder's Bid. Based on the publicly-available evaluation criteria contained in the DSP Rules, AE Supply states that it was awarded the wholesale supply contracts solely due to the relatively low cost of its bids compared to other competitors.

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

d. Oversight Principle

24. AE Supply argues that the instant process satisfies the Oversight guideline. In support, it notes that the process used for the Solicitation was a result of discussions among interested parties and proceeded under the supervision of the Pennsylvania Commission. AE Supply states that the Pennsylvania Commission approved the Settlement and concluded that the provisions of the DSPs as set forth in the Settlement include "prudent steps necessary to negotiate favorable generation supply contracts;" "competitive procurement plans that provide for a prudent mix of spot market purchases, short-term contracts and long term contracts;" and "a prudent mix of supply resources that is designed to obtain least cost generation supply contracts on a long-term, short-term and spot market basis[.]"¹⁷ AE Supply further states that the Pennsylvania Commission found that the DSPs provided for "competitive procurement plans designed to secure a prudent mix of contracts which will ensure adequate and reliable service, at

¹⁷ AE Supply's July 14, 2010 Filing at 18, citing Pennsylvania Commission Order at 43-44.

the least cost to customers over time;” and “specific steps by which the Companies will pursue the described competitive procurement plans.”¹⁸ AE Supply states that the results of the Solicitations were reviewed by an independent consultant and the Pennsylvania Commission.

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

2. Other Issues

26. 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.¹⁹ We note that AE Supply must 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.

27. 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.²⁰

The Commission orders:

(A) AE Supply’s request for authorization to make power sales to Penelec, pursuant to Penelec’s 2010 March Solicitation and May Solicitation, is granted, effective January 1, 2011 and June 1, 2011, as discussed in the body of this order.

¹⁸ *Id.*

¹⁹ AE Supply included with its filing the transaction confirmations it entered into with Penelec, 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 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) (2010) (“[A]ny market-based rate agreement pursuant to a tariff shall not be filed with the Commission.”).

²⁰ 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.

(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)

Nathaniel J. Davis, Sr.,
Deputy Secretary.