145 FERC ¶ 61,268
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

American Electric Power Service Corporation | Docket No. ER13-1874-000

ORDER CONDITIONALLY GRANTING REQUEST FOR WAIVER OF AFFILIATE RESTRICTIONS

(Issued December 23, 2013)

1. On June 28, 2013, American Electric Power Service Corporation (American Electric Power), on behalf of its public utility affiliates referred to as the AEP East Operating Companies[1] (AEP Operating Companies) and AEP Generation Resources Inc. (AEP Generation, collectively with American Electric Power and AEP Operating Companies, Applicants**)**, filed a request for waiver of certain market-based rate affiliate restrictions to permit Applicants to continue their existing practices, as described herein.

2. In this order, we conditionally grant Applicants' request for limited waiver of certain affiliate restrictions, effective the date of issuance of this order.

I. Background

3. Applicants state that American Electric Power Company, Inc. (AEP) is a multi-state electric utility holding company system whose operating companies provide electric service at wholesale and retail in parts of 11 states.[2] Applicants explain that the AEP

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[1] For purposes of this request, the AEP Operating Companies are Appalachian Power Company (Appalachian Power), Kentucky Power Company (Kentucky Power), Ohio Power Company (Ohio Power), Indiana Michigan Power Company, AEP Generating Company, Kingsport Power Company (Kingsport), and Wheeling Power Company (Wheeling). Kingsport and Wheeling do not own or operate generating facilities, so aspects of Applicants' request do not directly apply to them.

[2] Applicants explain that of the states in which the AEP Operating Companies operate, there is full retail choice in Ohio and limited retail choice in Virginia and Michigan. For purposes of this waiver request, Applicants state that the AEP Operating

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Operating Companies are those AEP operating companies that are located within the footprint of PJM Interconnection, L.L.C. (PJM).[3] Applicants further note that each of the AEP Operating Companies that owns and operates generating facilities has entered into one or more long-term cost-based wholesale power sales agreements.

4. Applicants state that American Electric Power is a service company that provides management and professional services to AEP and its utility operating subsidiaries, including accounting, administrative, information systems, engineering, financial, legal, maintenance, and other services at cost. Applicants further note that American Electric Power also performs various marketing, generation dispatch, outage and maintenance coordination, fuel procurement, and power-related risk management and trading activities on behalf of the AEP Operating Companies.[4]

5. Applicants state that AEP Generation is an indirect, wholly-owned subsidiary of AEP. According to Applicants, AEP Generation was formed on December 8, 2011, as a direct subsidiary of Ohio Power for the purposes of owning and operating the generating assets of Ohio Power.

6. Applicants submit that their waiver request is necessitated by a state-mandated corporate reorganization that will result in the separation of Ohio Power's generation and power marketing businesses from its transmission and distribution business (Corporation Reorganization). Applicants state that the Corporate Reorganization is taking place in accordance with Ohio restructuring law and Ohio Power's structural corporate separation plan approved by the Public Utilities Commission of Ohio.[5] Applicants state that under

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Companies (other than AEP Generation) are treated as franchised public utilities with captive customers and their interactions with AEP Generation are subject to the Commission's affiliate restrictions.

[3] Applicants note that AEP also has four other operating companies (referred to as the AEP West Operating Companies) that are located in the Southwest Power Pool and the Electric Reliability Council of Texas. However, according to Applicants, the AEP West Operating Companies are not affected by the Corporate Reorganization or by this request.

[4] Applicants state that in the provision of these services to its public utility affiliates, American Electric Power charges its costs consistent with the Commission's affiliate pricing rules.

[5] Applicants state that the Commission has granted various approvals under section 203 of the Federal Power Act (FPA), 16 U.S.C. § 824b (2012), in connection with this Corporation Reorganization. June 28, 2013 Filing at 2 (citing *Ohio Power Co.*, 143

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the Corporation Reorganization, on or about December 31, 2013, Ohio Power will transfer its generation assets to AEP Generation.

7. Following the transfer of Ohio Power's generation interests to AEP Generation, Applicants state that AEP Generation will own approximately 9,200 megawatts (MW) of generation, and the AEP Operating Companies will own approximately 15,700 MW of generation. According to Applicants, AEP Generation will also own Unit Nos. 2 and 4 at the Philip Sporn Plant (Sporn Plant), both of which will be operated by Appalachian Power. Applicants state that they expect that at the time the Corporate Reorganization closes, AEP Generation will be a public utility that will have authority from the Commission to make wholesale power sales at market-based rates. Applicants state that upon receipt of market-based rate authority, AEP Generation will be a market-regulated power sales affiliate of the AEP Operating Companies. Applicants submit that although AEP Generation will not be a traditional franchised public utility with captive customers, it will have a contractual obligation to supply capacity and energy to Ohio Power through May 31, 2015, to enable Ohio Power to provide service to retail customers who are not served by alternative retail electric service providers.[6]

8. Applicants state that for over 60 years, Ohio Power has been a party to a system interconnection agreement (Pool Agreement) under which it and the other generation-owning AEP Operating Companies have engaged in the integrated planning and operation of their generation facilities. According to Applicants, under the Pool Agreement, Ohio Power's generation assets and those owned by the other AEP Operating Companies have been operated and maintained as part of a single, comprehensive generation fleet. Applicants further state that in connection with the integrated operation of the fleet, American Electric Power, as the centralized service corporation, has provided various administrative, technical, and engineering services to the AEP Operating Companies, including the coordination of outage scheduling, repair and maintenance services, and fuel procurement and transportation services. Applicants submit that the

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FERC ¶ 61,075 (2013) (granting section 203 approval for the transfer of Ohio Power's generation assets and power marketing businesses to AEP Generation); *Appalachian Power Co.*, 143 FERC ¶ 61,074 (2013) (granting section 203 approvals for the transfer of certain AEP Generation's generating facilities to Kentucky Power and Appalachian Power); and *Appalachian Power Co.*, 143 FERC ¶ 62,072 (2013) (granting section 203 approval for the merger of Appalachian Power and Wheeling, with Appalachian Power as the surviving entity)).

[6] AEP Generation's Power Supply Agreement with Ohio Power is currently pending in Docket No. ER13-232-000.

integrated operation of the AEP Operating Companies' generation assets as part of a single generation fleet has resulted in efficiencies and cost-savings that have benefited the AEP Operating Companies' retail and wholesale customers through more reliable service and lower rates.

9. Applicants assert that they seek certain limited waivers of the Commission's affiliate restrictions in order to preserve some of the efficiencies and cost savings associated with the existing arrangement after the Corporate Reorganization. Applicants submit that granting the requested waivers will not harm captive customers, and in fact will result in benefits to those customers, and therefore is consistent with Commission policy and precedent in a number of recent cases.[7]

10. Specifically, Applicants request waiver: (1) of the separation of functions requirement to permit certain employees of American Electric Power to continue to provide outage planning and resource allocation functions to the AEP Operating Companies and AEP Generation; (2) of the affiliate pricing rule in order for the AEP Operating Companies and AEP Generation to continue a capital spare parts sharing arrangement; and (3) with respect to the Sporn Plant of: (a) the information sharing provision to permit the sharing of limited information related to the operation of the plant; (b) the asymmetrical pricing rule for the operation & maintenance (O&M) services provided by Appalachian Power to AEP Generation; and (c) the separation of functions requirement to permit the sharing of employees engaged in fuel procurement.

11. On August 29, 2013, the Director of the Division of Electric Power Regulation-West issued a letter under delegated authority directing Applicants to clarify certain aspects of their filing and to submit additional information.[8] On September 19, 2013, Applicants submitted their response to the Data Request (September 19 Response).

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[7] June 28, 2013 Filing at 3 (citing *FirstEnergy Corp.*, 136 FERC ¶ 61,216, at P 17 (2011) (*FirstEnergy*); *Entergy Servs., Inc.*, 136 FERC ¶ 61,218 (2011) (*Entergy*); *Virginia Elec. & Power Co.*, 136 FERC ¶ 61,215 (2011) (*Virginia Elec.*); *Cleco Power LLC*, 130 FERC ¶ 61,102 (2010) (*Cleco Power*); and *Allegheny Energy, Inc.*, 119 FERC ¶ 61,025 (2007) (*Allegheny Energy*)).

[8] *American Elec. Power Serv. Corp.*, Docket No. ER13-1874-000 (Aug. 29, 2013) (delegated letter order) (Data Request).

II. Request for Waiver

A. Outage Planning and Resource Allocation Services

12. Applicants state that under their current practice, American Electric Power employees perform routine and emergency maintenance services for the entire AEP Operating Companies' generation fleet through engineering support, a capital spare parts arrangement, shared maintenance crews, major project support, and establishment of outage schedules. Maintenance is conducted in three stages according to schedules prepared and established by the AEP Operating Companies for their respective generators in consultation with American Electric Power. The second stage of this maintenance process (outage planning and resource allocation) is the subject of this request.

13. Applicants request waiver of the separation of functions requirement in section 35.39(c)(2) of the Commission's regulations[9] to permit certain employees of American Electric Power to continue to provide outage planning and resource allocation functions to the AEP Operating Companies and AEP Generation for their facilities following the implementation of the Corporate Reorganization. Applicants assert that the process that American Electric Power proposes to use in performing outage planning and resource allocation would not harm but rather would benefit captive customers due to the increased efficiency for the AEP Operating Companies and reduced outage duration for the work requested for their generating plants. Applicants state that none of the American Electric Power employees involved in this process has any marketing responsibilities for any of the companies and all will be subject to and fully trained on the Commission's affiliate restrictions.

14. Applicants state that in the first step of this process, the AEP Operating Companies and AEP Generation independently provide to American Electric Power personnel the requested seasonal outage schedules for their respective generating units. Applicants explain that the seasonal outage schedules are determined independently by the AEP Operating Companies and AEP Generation and are based upon the owners' assessment of, among other things, each unit's cycle for repairs and maintenance as specified by the manufacturer and consistent with American Electric Power's operating history. Applicants further explain that the AEP Operating Companies and AEP Generation also may independently consider market conditions and other external factors

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[9] "To the maximum extent practical, the employees of a market-regulated power sales affiliate must operate separately from the employees of any affiliated franchised public utility with captive customers." 18 C.F.R. § 35.39(c)(2)(i) (2013).

in developing their respective schedules. Applicants state that in the next step of the process, American Electric Power personnel will evaluate the outage schedules that they receive from the owners for the respective generating units to ascertain whether American Electric Power will have sufficient manpower and equipment to accommodate the requested schedules. Applicants state that American Electric Power will agree to the proposed outage schedules submitted by the AEP Operating Companies or AEP Generation, except in circumstances where American Electric Power determines that it cannot accommodate the schedules for technical reasons.

15. Applicants explain that American Electric Power will institute a priority ranking system that includes consideration of such factors as the maintenance histories, availability of capital spare parts, the need to rotate equipment, technical complexity, environmental requirements and other equipment-related requirements. Applicants state that in the event that there remain scheduling conflicts even after applying these analytics, American Electric Power will resolve any deadlock involving an AEP Generation unit by giving preference to the schedule requested by an AEP Operating Company, and if AEP Generation determines that it needs to adhere to its requested schedule, AEP Generation will be free to use external resources at its cost. Applicants add that American Electric Power is in the process of preparing written standards and guidelines that will set out the factors for the priority ranking system. Applicants state that their plan is for the guidelines to be in place on or about the time of the implementation of the Corporate Reorganization, i.e., January 1, 2014.

16. In reviewing and evaluating the requested outage schedules, Applicants represent that American Electric Power will not use financial considerations, i.e., American Electric Power employees will not consider the potential financial impacts of an outage schedule, such as energy market conditions and/or the potential opportunities for power sales that could be impacted under the recommended outage schedule. Applicants also represent that the American Electric Power personnel engaged in the outage planning and allocation function are employees who perform technical/engineering functions and have no responsibility for wholesale power sales marketing functions. Applicants represent that those American Electric Power personnel will perform their tasks subject to strict protocols that prohibit sharing of information between the groups and they will undergo additional training on the affiliate restriction rules. Applicants further represent that they will retain written documentation and records showing how the priority ranking system was applied should one unit's proposed outage schedule be given priority over another unit's proposed schedule.

17. Applicants contend that having American Electric Power provide the outage planning and resource allocation function for the generating assets owned and operated by (or on behalf of) the AEP Operating Companies and AEP Generation will ensure that the facilities continue to operate efficiently. Applicants assert that requiring the AEP Operating Companies and AEP Generation to utilize separate American Electric Power

outage planning and resource allocation personnel would result in increased personnel costs for duplicative functions, decreased procurement leverage, and decreased levels of experience and expertise. Applicants contend that this waiver request is consistent with Commission precedent.[10]

B. Capital Spare Parts

18. Applicants state that under their current practice, Ohio Power has participated in a spare parts pooling and centralized machine shop arrangement under which it and other AEP Operating Companies have access to capital spare parts and a machine shop, the Central Machine Shop, which is operated by Appalachian Power employees and which refurbishes and repairs many of those parts.

19. Applicants request waiver of the Commission's affiliate pricing rule in section 35.39(e) of the Commission's regulations[11] in order for the AEP Operating Companies and AEP Generation to continue this capital spare parts sharing arrangement and for AEP Generation to have access to capital spare parts that are repaired and refurbished at the Central Machine Shop.

20. Applicants contend that waiver of the asymmetrical pricing rules will allow the AEP Operating Companies to transfer spare parts to AEP Generation, and vice-versa, using the current booked value of those parts, as well as allow AEP Generation to have access to the Central Machine Shop at the cost of the parts that are refurbished and repaired at that facility. Applicants further contend that allowing the access to the spare parts under the arrangement proposed by the Applicants will create a larger pool of spare parts available to the AEP Operating Companies due to AEP Generation's participation.

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[10] June 28, 2013 Filing at 18 (citing *FirstEnergy*, 136 FERC ¶ 61,216 at PP 8,16; *Entergy*, 136 FERC ¶ 61,218 at PP 28-29; and *Cleco Power*, 130 FERC ¶ 61,102 at P 22).

[11] "Unless otherwise permitted by Commission rule or order, sales of any non-power goods or services by a franchised public utility with captive customers, to a market-regulated power sales affiliate must be at the higher of cost or market price." 18 C.F.R. § 35.39(e)(1). "Unless otherwise permitted by Commission rule or order, sales of any non-power goods or services by a market-regulated power sales affiliate to an affiliated franchised public utility with captive customers may not be at a price above market." 18 C.F.R. § 36.39(e)(2). These two rules are collectively referred to as the asymmetrical pricing rules.

21. Applicants submit that their proposal benefits captive ratepayers and is reasonable for several reasons. They assert first that it is not clear that there is even a “market price” for a capital spare parts sharing arrangement. Second, Applicants explain that the AEP Operating Companies are not in the business of providing this service to third parties, so there is no concern that the AEP Operating Companies will be foregoing higher-priced market opportunities in favor of AEP Generation. Third, Applicants state that the parts pooling promotes economies of scale by creating a larger pool of spare parts and note that if AEP Generation decided not to participate in an asymmetrical pricing arrangement, it would simply reduce the pool of spare parts that otherwise would be available to the AEP Operating Companies, which could lead to increased outage times and increased costs for replacement parts. Finally, Applicants state that any application of asymmetrical pricing in this case could actually raise the cost to the captive customers of the AEP Operating Companies. Applicants assert that cost to captive customers could increase if the Central Machine Shop, which uses cost-based pricing (with no mark-up) for its services to the AEP Operating Companies, were required to charge AEP Generation a higher “market price” for its services, which higher price would be capitalized and become part of the booked cost of the spare part.

22. Applicants also maintain that this waiver request is consistent with Commission precedent.[12] Applicants state that, consistent with the Commission’s requirement in *Allegheny Energy*, they commit to maintain sufficient records in order to allow the Commission to audit their compliance.

C. <u>Sporn Plant</u>

23. Applicants state that the Sporn Plant has five generating units located on the same site in Appalachian Power’s service territory along the Ohio River near New Haven, West Virginia. Appalachian Power owns Unit Nos. 1 and 3 and Ohio Power owns Unit Nos. 2, 4, and 5. Applicants state that because the Sporn Plant is located in Appalachian Power’s service territory, Appalachian Power has operated and maintained the Sporn Plant, including the three units owned by Ohio Power, under the terms of an existing arrangement between Appalachian Power and Ohio Power. Applicants state that under the Corporate Reorganization, Ohio Power will transfer its interests in Unit Nos. 2, 4, and 5 to AEP Generation. According to Applicants, after the transfer, Appalachian Power will continue to operate and maintain the Sporn Plant. Applicants note that Unit No. 5

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[12] June 28, 2013 Filing at 23-24 (citing *Allegheny Energy*, 119 FERC ¶ 61,025 at PP 24-25).

was retired on February 13, 2012, and Unit Nos. 1-4 are scheduled to be retired in June 2015.[13]

24. As discussed below, with respect to the Sporn Plant, to be jointly owned by Appalachian Power and AEP Generation, Applicants request waiver of: (1) the information sharing provision in section 35.39(d)[14] to permit the sharing of limited information related to the operation of the plant; (2) the asymmetrical pricing rule in section 35.39(e)(1) related to the provision of O&M services by Appalachian Power to those Sporn units owned by AEP Generation; and (3) the separation of functions requirement in section 35.39(c)(2), to permit the sharing of employees engaged in fuel procurement. Applicants further submit that these waiver requests are consistent with Commission precedent.[15]

Information Sharing

25. Applicants state that under the Sporn Operating Agreement (Sporn Agreement), Appalachian Power employees will provide O&M services to the Sporn Plant, including those units owned by AEP Generation. For these services, Appalachian Power proposes to charge AEP Generation its fully loaded costs. Further, there will be an Operating Committee, composed of senior managers of American Electric Power, Appalachian Power and AEP Generation, that will not have any day-to-day responsibility for wholesale marketing functions. Applicants state that in carrying out their responsibilities under the Sporn Operating Agreement, the Operating Committee necessarily will discuss

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[13] As such, the coordinated operation of the Sporn Plant between Appalachian Power and AEP Generation under the Sporn Operating Agreement (and Applicants' related waiver requests) will be for a limited period from the closing of the Corporate Reorganization on December 31, 2013 through June 2015.

[14] "A franchised public utility with captive customers may not share market information with a market-regulated power sales affiliate if the sharing could be used to the detriment of captive customers, unless simultaneously disclosed to the public." 18 C.F.R. § 35.39(d)(1). "Permissibly shared support employees, field and maintenance employees and senior officers and board of directors under § 35.39(c)(2)(ii) may have access to information covered by the prohibition of § 35.39(d)(1), subject to the no-conduit provision in § 35.39(g)." 18 C.F.R. § 35.39(d)(2).

[15] September 19 Response at 6 (citing *Cleco Power*, 130 FERC ¶ 61,102); *id.* at 7 (citing *FirstEnergy*, 136 FERC ¶ 61,216 at P 15; *Entergy*, 136 FERC ¶ 61,218 at P 26; *Virginia Elec.*, 136 FERC ¶ 61,215 at PP 29-31; and *Florida Power & Light Co.*, 136 FERC ¶ 61,217, at PP 22, 25 (2011)).

key operational matters relating to the Sporn Plant, and there exists the potential for the exchange of what could be deemed "market information," such as outage schedules and the cost of fuel to be procured for the plant. Applicants represent that the Operating Committee will not be discussing the actual marketing of the output of the owners' respective units.

26. Applicants state that to the extent that the Operating Committee includes Appalachian Power and/or AEP Generation employees who are not "senior managers," Applicants seek waiver of the affiliate restrictions to enable those employees to access the information that necessarily will be shared in connection with the implementation of the Sporn Operating Agreement. Applicants represent that any such employees will not be marketing employees or have any marketing responsibilities.

O&M Services

27. Applicants also seek a waiver of the asymmetrical pricing rule related to the provision of O&M services by Appalachian Power to those Sporn units that will be owned by AEP Generation. Applicants state that Appalachian Power seeks to charge AEP Generation its fully-allocated cost of service. Applicants submit that using at-cost pricing cannot give rise to inappropriate cross-subsidization concerns.

28. Applicants further state that Appalachian Power does not generally provide O&M services to third parties; thus, it cannot be said that Appalachian Power will be foregoing profits that it could earn from third parties when it provides such services to AEP Generation at cost. Applicants contend that it would be purely speculative to estimate a market price for Appalachian Power's O&M services. Further, Applicants contend that because of the co-owned nature of the Sporn units, which are located at the same site, for operational and cost efficiencies, it makes sense for a single company to provide O&M services to the Sporn units.

Fuel Procurement

29. Applicants also seek a waiver of the Commission's affiliate restrictions so as to permit American Electric Power to procure fuel for the Sporn units owned by Appalachian Power and AEP Generation. Applicants state that Appalachian Power and AEP Generation will each pay the same average monthly unit cost for its allocated share of fuel purchases (including the cost of transportation and any carrying costs) for the Sporn units that each owns. Applicants state that Sporn coal and fuel oil purchases will be allocated to each owner based on the combination of actual and forecasted fuel consumed by each respective owner and each owner will pay for and own its proportionate amount of shared inventory levels. Applicants contend that the fact that Appalachian Power and AEP Generation will pay the same per unit cost for fuel at the Sporn Plant protects captive customers against the possibility of cheaper fuel being diverted to AEP Generation at the expense of Appalachian Power's captive customers.

30. Applicants further state that the employees who will be engaged in fuel procurement for the Sporn Plant on behalf of Appalachian Power and AEP Generation will be American Electric Power employees who will not be involved or have responsibility for marketing the output of the Sporn Plant or procuring fuel for any other AEP Generation plants. They represent that the American Electric Power personnel responsible for these functions will undergo training on the affiliate restrictions, including the no-conduit rule. Applicants argue that allowing American Electric Power to perform the fuel procurement function for the jointly-owned Sporn Plant will benefit Appalachian Power's captive customers by reducing costs and will increase efficiencies. Applicants state that upon six months' notice to Appalachian Power and subject to no adverse impact to the operation of Appalachian Power's units, AEP Generation has the option to supply the fuel necessary to operate one or more of the units it owns at the Sporn Plant.[16]

III. Notice of Filing and Responsive Pleadings

31. Notice of Applicants' June 28 Filing was published in the *Federal Register*, 78 Fed. Reg. 41,051 (2013), with interventions and comments due on or before July 19, 2013. The Consumer Advocate Division of West Virginia filed a timely motion to intervene. Buckeye Power, Inc. filed a timely motion to intervene and comments in support of Applicants' filing.

32. Notice of the Applicants' September 19 Response was published in the *Federal Register*, 78 Fed. Reg. 61,941 (2013), with interventions and protests due on or before October 10, 2013. None was filed.

IV. Discussion

A. Procedural Matters

33. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the timely, unopposed motions to intervene filed by Buckeye Power and the Consumer Advocate Division of West Virginia serve to make them parties to this proceeding.

B. Substantive Matters

34. As discussed below, we will conditionally grant Applicants' request for limited waiver of the separation of functions and affiliate pricing rule in 18 C.F.R. §§ 35.39(c)(2)(i) and 35.39(e) to permit Applicants to continue their existing practices.

[16] Waiver Request at n.34.

We will also conditionally grant Applicants' request for limited waiver of the information sharing provision in 18 C.F.R. § 35.39(d), separation of function provision, and affiliate pricing rule with respect to the Sporn Plant. However, we note that this limited waiver does not affect Applicants' obligation to comply with the no-conduit provisions of section 35.39(g).[17]

35. In Order No. 697, the Commission codified certain affiliate restrictions in its 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.[18] Captive customers are defined as "any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation."[19] The affiliate restrictions govern, among other things, the separation of functions, the sharing of market information, and power brokering. The Commission requires that, as a condition of receiving and retaining market-based rate authority, sellers comply with these affiliate restrictions unless explicitly permitted by Commission rule or order granting waiver of the affiliate restrictions.[20] Failure to satisfy the conditions set forth in these affiliate restrictions constitutes a violation of a seller's market-based rate tariff.[21]

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[17] 18 C.F.R. § 35.39(g).

[18] *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 513, *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), *aff'd sub nom. Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub nom. Pub. Citizen, Inc. v. FERC*, 133 S. Ct. 26 (2012).

[19] Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 202; 18 C.F.R. § 5.36(a)(6) (2013).

[20] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 131 FERC ¶ 61,021, at P 2 (April 15 Clarification Order), *order granting in part request for extension of time to comply*, 132 FERC ¶ 61,014 (2010) (July 2 Order), *order denying reh'g*, 134 FERC ¶ 61,046 (2011) (Rehearing Order).

[21] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 549-550.

36. Under the separation of functions requirement in the affiliate restrictions (section 35.39(c)(2)(i)), employees of market-regulated power sales affiliates must operate separately, to the maximum extent practical, from employees of affiliated franchised public utilities with captive customers.[22] Under the affiliate pricing rule in the affiliate restrictions (section 35. 39(e)), sales of any non-power goods or services by a franchised public utility that has captive customers to a market-regulated power sales affiliate or non-utility affiliate must be at the higher of cost or market price and a franchised public utility that has captive customers may not purchase or receive non-power goods and services from a market-regulated power sales affiliate or a non-utility affiliate at a price above market. Under the information sharing provisions in the affiliate restrictions (section 35.39(d)(1)), a franchised public utility with captive customers may not share market information with a market-regulated power sales affiliate if the sharing could be used to the detriment of captive customers, unless simultaneously disclosed to the public. Section 35.39(d)(2) generally provides that permissibly shared support employees, field and maintenance employees and senior officers and board of directors may have access to information covered by the prohibition of section 35.39(d)(1), subject to the no-conduit provision in section 35.39(g), which provides that a franchised public utility with captive customers and a market-regulated power sales affiliate are prohibited from using anyone as a conduit to circumvent the affiliate restrictions.

37. With respect to the separation of functions requirement, on April 15, 2010, in response to a request for clarification, the Commission provided guidance regarding which employees may not be shared under the affiliate restrictions unless otherwise permitted by Commission rule or order.[23] Specifically, the Commission clarified that, consistent with Order No. 697-A, a franchised public utility with captive customers and its market-regulated power sales affiliate may not share employees that make economic dispatch decisions or that determine the timing of scheduled outages.[24] The Commission also clarified that franchised public utilities with captive customers are prohibited from sharing employees who engage in fuel procurement.[25] With respect to fuel procurement

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[22] 18 C.F.R. § 35.39(c)(2)(i).

[23] April 15 Clarification Order, 131 FERC ¶ 61,021 at P 43. In Order No. 697-A, the Commission stated that "shared employees may not be involved in decisions regarding the marketing or sale of electricity from the facilities, may not make economic dispatch decisions, and may not determine the timing of scheduled outages for facilities." Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 253.

[24] April 15 Clarification Order, 131 FERC ¶ 61,021 at P 40.

[25] *Id.* P 41.

employees, the Commission explained that a shared employee who procures fuel for both the franchised public utility and the market-regulated power sales affiliate may have the incentive to allocate purchases of lower priced fuel supplies to the market-regulated power sales affiliate while allocating purchases of higher priced fuel supplies to the franchised public utility.[26] The Commission denied rehearing of the April 15 Clarification Order, and required that market-based rate sellers comply with the guidance in the April 15 Clarification Order within 90 days, or by April 20, 2011.[27] The Commission has also explained that, to the extent that affected entities believe they need additional guidance concerning compliance with the currently effective market-based rate affiliate restrictions, they may submit a request for a no-action letter regarding specific proposed transactions, practices, or situations[28] or may seek waiver of the market-based rate affiliate restrictions on a case-by-case basis.[29]

1. <u>Outage Planning and Resource Allocation Services</u>

38. We will conditionally grant Applicants' request for limited waiver of the separation of functions requirements of section 35.39(c)(2)(i) and the affiliate pricing rule in section 35.39(e) to permit certain employees of American Electric Power to provide outage-related services and resources to the AEP Operating Companies and AEP Generation, based on their representation that their practices ensure that captive customers will not be harmed. We interpret this representation to be a commitment that captive customers will not be harmed.

39. With respect to outage scheduling services by American Electric Power employees to the AEP Operating Companies and AEP Generation, Applicants represent that, among other things, none of the American Electric Power employees involved in the outage scheduling process has any marketing responsibilities for any of the companies. Applicants further represent that in reviewing and evaluating the requested outage schedules, American Electric Power employees will not consider the potential financial impacts of an outage schedule, such as energy market conditions and/or the potential opportunities for power sales that could be impacted under the recommended outage schedule and those American Electric Power personnel will perform their tasks subject to

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[26] *Id.* P 42.

[27] Rehearing Order, 134 FERC ¶ 61,046 at P 28.

[28] *See* July 2 Order, 132 FERC ¶ 61,014 at P 5 (citing *Obtaining Guidance on Regulatory Requirements, Interpretative Order Modifying No-Action Letter Process and Reviewing Other Mechanisms for Obtaining Guidance*, 123 FERC ¶ 61,157 (2008)).

[29] *See id.* (citing *Cleco Power LLC*, 130 FERC ¶ 61,102 (2010)).

strict protocols that prohibit sharing of information between the groups. Applicants explain that the AEP Operating Companies and AEP Generation independently provide to American Electric Power personnel the requested seasonal outage schedules for their respective generating units and American Electric Power generally will agree to the proposed outage schedules submitted by the AEP Operating Companies or AEP Generation unless American Electric Power determines that it cannot accommodate the schedule for technical reasons. Applicants also represent that American Electric Power will institute a priority ranking system that includes consideration of such factors as the maintenance histories, availability of capital spare parts, the need to rotate equipment, technical complexity, and environmental requirements and other equipment-related requirements. Applicants add that American Electric Power is in the process of preparing written standards and guidelines that will set out the factors for the priority ranking system. Applicants further state that American Electric Power will retain written documentation and records showing how the priority ranking system was applied should one unit's proposed outage schedule be given priority over another unit's proposed schedule. Applicants state that in the event that there remain scheduling conflicts even after applying these analytics, American Electric Power will resolve any deadlock involving an AEP Generation unit by giving preference to the schedule requested by an AEP Operating company, and if AEP Generation determines that it needs to adhere to its requested schedule, AEP Generation will be free to use external resources at its cost. We also note Applicants' statements that the American Electric Power personnel will undergo additional training on the affiliate restriction rules. We find Applicants' claims above to be persuasive.

2. <u>Capital Spare Parts</u>

40. With respect to the capital spare parts and centralized machine shop arrangement between AEP Operating Companies and AEP Generation, Applicants represent that the AEP Operating Companies are not in the business of providing this service to third parties, so there is no concern that they will be foregoing higher-priced market opportunities in favor of providing service to AEP Generation. Moreover, we are persuaded by Applicants' argument that the capital spare parts pool and centralized machine shop create economies of scale and do not harm the AEP Operating Companies' captive customers. We interpret this representation to be a commitment that captive customers will not be harmed. We will therefore grant a limited waiver of 18 C.F.R. § 35.39(e) for the capital spare parts pool and centralized machine shop to the extent that AEP Generation's participation does not harm the AEP Operating Companies' captive customers. Applicants must maintain sufficient records to enable the Commission to audit their compliance.

3. Sporn Plant

41. With respect to the Sporn Plant, we will conditionally grant limited waiver of: (1) the information sharing provision in section 35.39(d) to permit the sharing of limited information related to the operation of the plant; (2) the asymmetrical pricing rule in section 35.39(e)(1) related to the provision of O&M services by Appalachian Power to those Sporn units owned by AEP Generation; and (3) the separation of functions requirement in section 35.39(c)(2), to permit the sharing of employees engaged in fuel procurement, based on Applicants' representation that captive customers will not be harmed. We interpret this representation to be a commitment that captive customers will not be harmed.

42. With regard to their request for waiver of the information sharing restriction, Applicants represent that to the extent that the Operating Committee includes Appalachian Power and/or AEP Generation employees who are not senior managers, such employees will not be marketing employees or have any marketing responsibilities.

43. With regard to the waiver of the asymmetrical pricing rule related to the provision of O&M services by Appalachian Power to those Sporn units owned by AEP Generation, Applicants represent that Appalachian Power does not generally provide O&M services to third parties. Thus, Applicants claim that Appalachian Power will not be foregoing profits that it could earn from third parties when it provides such services to AEP Generation at cost. We note that in an order being issued concurrently, the Commission directs, to the extent that the Sporn Agreement's non-attributable O&M costs are variable, that American Electric Power file, within 30 days of the date of that order, revisions that apportion these costs to each plant owner according to each plant owner's use of its units.[30] We find that this proposed revision will ensure that Appalachian Power's captive customers will not be harmed and, on this basis, we will grant the requested waiver.

44. With regard to fuel procurement, Applicants represent that Appalachian Power and AEP Generation will each pay the same average monthly unit cost for its allocated share of fuel purchases (including the cost of transportation and any carrying costs) for the Sporn units that each owns. Applicants further represent that the employees who will be engaged in fuel procurement for the Sporn Plant on behalf of Appalachian Power and AEP Generation will be American Electric Power employees who will not be involved or have responsibility for marketing the output of the Sporn Plant or procuring fuel for any other AEP Generation plants. We find Applicants' claims above to be persuasive and we

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[30] In an order being issued concurrently, the Commission conditionally accepts the Sporn Agreement. *See Appalachian Power Co.*, 145 FERC 61,270 (2013) (MOA Order).

will grant waiver to permit joint fuel procurement. However, Applicants also represent that upon six months' notice to Appalachian Power and subject to no adverse impact to the operation of Appalachian Power's units, AEP Generation has the option to supply the fuel necessary to operate one or more of the units it owns at the Sporn Plant. While we grant waiver of the affiliate restrictions to permit joint fuel procurement, if either party elects to independently procure fuel, the waiver permitting joint fuel procurement will no longer be effective.[31] In addition, should Appalachian Power elect to independently procure fuel, AEP Generation would no longer be able to use American Electric Power to procure fuel. Any future plan to resume joint fuel procurement would require a new waiver request.

4. Conclusion

45. We will conditionally grant Applicants' request for limited waivers of sections 35.39(c)(2)(i), 35.39(d), and 39.39(e)(1) to permit Applicants to continue their current practices, based on their representation that their arrangements ensure that captive customers will not be harmed. As noted above, these limited waivers do not affect Applicants' obligation to comply with the no-conduit provisions of section 35.39(g).[32] Applicants must not implement the limited waivers granted herein in a manner that harms captive customers. As an additional condition of these waivers, Applicants will be required to maintain sufficient records to enable the Commission to audit whether the representations and commitments made in their request for waivers remain true and accurate, including their commitment that captive customers will not be harmed.

46. The waivers conditionally granted herein are limited to the specific facts, representations, policies and procedures Applicants presented in their June 28 Filing and September 19 Response, and apply only to the employees discussed in their June 28 Filing and September 19 Response. To the extent there is any material change in circumstances that would reflect a departure from the facts, representations, policies and procedures that we rely upon in granting the requested waiver, Applicants are required to inform the Commission within 30 days of any such change. With the exception of the limited waivers specifically granted herein, and any other previously granted waiver, all of the other affiliate restrictions continue to apply to Applicants.

[31] We note that as currently written, the Sporn Agreement appears to give only AEP Generation the unilateral option to individually procure fuel.

[32] 18 C.F.R. § 35.39(g).

47. Finally, 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 limited waivers granted herein and include a citation to this order.[33]

The Commission orders:

(A) Applicants' request for limited waiver of certain of the affiliate restrictions is hereby granted, effective the date of issuance of this order, subject to conditions, as discussed in the body of this order.

(B) Applicants are hereby directed to maintain records to enable the Commission to audit their compliance, as discussed in the body of this order.

(C) Applicants must inform the Commission within 30 days of any material change in circumstances that would reflect a departure from the facts, representations, policies, and procedures the Commission relied upon in granting the waiver granted herein.

(D) Applicants are hereby directed 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, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[33] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at Appendix C, *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 384.