145 FERC ¶ 61,269
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. ER14-95-000

ORDER CONDITIONALLY GRANTING REQUEST FOR WAIVER OF AFFILIATE RESTRICTIONS

(Issued December 23, 2013)

1. On October 15, 2013, American Electric Power Service Corporation (American Electric Power), on behalf of its public utility affiliate Kentucky Power Company (Kentucky Power) and AEP Generation Resources Inc. (AEP Generation, collectively with American Electric Power and Kentucky Power, Applicants), filed a request for waiver of the information sharing provision, the asymmetrical pricing rule, and the separation of functions requirement to permit Applicants to continue their existing practices with respect to the Mitchell Power Generation Facility (Mitchell Plant). 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

2. 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. Applicants explain that those AEP operating companies that are located within the footprint of PJM Interconnection, L.L.C. (PJM) are referred to as the AEP East Operating Companies (AEP Operating Companies).[1]

[1] For purposes of this request, the AEP Operating Companies are Appalachian Power Company (Appalachian Power), Kentucky Power, Ohio Power Company (Ohio Power), Indiana Michigan Power Company, AEP Generating Company, Kingsport Power Company, and Wheeling Power Company. AEP also has four other operating companies (referred to as the AEP West Operating Companies) that are located in the Southwest

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3. Applicants state that American Electric Power is a service company that provides to AEP and its utility operating subsidiaries management and professional services including accounting, administrative, information systems, engineering, financial, legal, maintenance, and other services at cost. According to Applicants, 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.[2]

4. Applicants state that Kentucky Power is a public utility that engages in the generation, transmission, and distribution of electric power in Kentucky. According to Applicants, Kentucky Power serves about 173,000 retail customers in eastern Kentucky and makes sales to two wholesale customers under cost-based formula rate agreements. Applicants state that Kentucky Power's total owned generating capacity is currently about 1,080 megawatts (MW). Applicants note that Kentucky Power is a franchised public utility with captive customers.

5. Applicants state that AEP Generation is an indirect, wholly-owned subsidiary of AEP, which 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 related to 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). According to Applicants, 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.[3] Applicants state

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Power Pool and the Electric Reliability Council of Texas. However, the AEP West Operating Companies are not affected by the Corporate Reorganization or by this request.

[2] 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.

[3] 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.

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

7. Applicants explain that this request is closely related and similar to a request in Docket No. ER13-1874-000, which American Electric Power submitted on June 28, 2013 on behalf of the AEP Operating Companies and AEP Generation.[4] Applicants explain that Ohio Power's generation assets have been operated and maintained along with the generation assets of the other AEP Operating Companies as part of a single, integrated generation fleet, and this arrangement has produced benefits and cost savings to customers for over 60 years. Applicants submit that after Ohio Power's generation assets are transferred to AEP Generation pursuant to the Corporate Reorganization, Applicants seek to preserve some of the efficiencies and cost savings under the current arrangement in a manner that is consistent with the Commission's requirements.

8. Applicants state that they are submitting this request because of a recent decision by a state regulatory commission that had the effect of modifying a key aspect of the proposed Corporate Reorganization, namely Appalachian Power's intent to obtain from AEP Generation a 50 percent undivided interest in the Mitchell Plant,[5] which the Commission had previously approved.[6]

9. Applicants state that in response to the Virginia Commission's ruling, instead of Appalachian Power and Kentucky Power each owning an undivided 50 percent interest in the Mitchell Plant, beginning December 31, 2013, AEP Generation and Kentucky Power will be the joint owners of the plant, with each holding an undivided 50 percent interest.

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[4] The Commission is conditionally granting this request in an order being issued concurrently. *See American Elect. Power Serv. Corp.*, 145 FERC ¶ 61,268 (2013).

[5] The Mitchell Plant is a two-unit coal-fired power plant located in Moundsville, West Virginia, with an average annual capacity rate of 1,560 MW. Ohio Power currently owns the entire station.

[6] Specifically, on July 31, 2013, the Virginia State Corporation Commission (Virginia Commission) issued a decision denying authorization for Appalachian Power to obtain an undivided 50 percent ownership in the Mitchell Plant, as originally proposed under the Corporate Reorganization. The Kentucky Public Service Commission authorized Kentucky Power's acquisition of an undivided 50 percent interest in the Mitchell Plant by order issued on October 7, 2013.

Accordingly, Applicants explain that the Mitchell Plant will be co-owned by a traditional franchised public utility with captive customers (Kentucky Power) and a market-regulated power sales affiliate (AEP Generation).[7] Applicants further state that as a result of this change, Kentucky Power, AEP Generation and American Electric Power will enter into the Mitchell Plant Operating Agreement (Mitchell Agreement), under which Kentucky Power and American Electric Power will provide certain O&M services, including fuel procurement, to the Mitchell Plant.[8]

10. Applicants state that the Mitchell Agreement, which is proposed to become effective on January 1, 2014, sets forth the terms under which Kentucky Power will operate and maintain the Mitchell Plant, and American Electric Power, as agent for Kentucky Power and AEP Generation, will provide various services to the owners. Applicants state that under the Mitchell Agreement, there will be an Operating Committee consisting of representatives of each owner and American Electric Power, as agent, that will meet annually. Applicants further state that in carrying out their responsibilities, the Operating Committee will discuss key operational matters relating to the Mitchell Plant, and there exists the potential for the exchange of information that could be deemed "market information," such as outage schedules and the cost of fuel to be procured for the plant.

11. Applicants state that they seek certain waivers of the Commission's affiliate restrictions in connection with the proposed services that will be provided under the Mitchell Agreement. Applicants submit that granting the requested waivers will not harm captive customers and is consistent with Commission policy and precedent.

II. **Requests for Waiver**

12. In accordance with the Mitchell Agreement, Applicants request limited waiver of: (1) the affiliate restrictions in section 35.39 (d)[9] to permit the sharing of limited

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[8] On October 31, 2013, American Electric Power filed the Mitchell Agreement in Docket No. ER14-86-000. In an order being issued concurrently, the Commission conditionally accepts the Mitchell Agreement. *See Appalachian Power Co.*, 145 FERC ¶ 61,270 (2013) (MOA Order).

[9] "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."

(continued…)

information related to the operation of the Mitchell Plant; (2) the asymmetrical pricing rule in section 35.39(e)(1)[10] related to the provision of O&M services by Kentucky Power on behalf of AEP Generation; and (3) the separation of functions requirement in section 35.39(c)(2),[11] to permit the sharing of employees engaged in fuel procurement.

Information and Employee Sharing

13. Applicants state that under the Mitchell Agreement, Kentucky Power and American Electric Power employees will provide O&M services, including fuel procurement, to the Mitchell Plant. Applicants note that the Kentucky Power and American Electric Power employees who will provide services to the Mitchell Plant will be technical/engineering personnel and will not be engaged in marketing functions or have marketing responsibilities, and as such, the proposed sharing of such employees is permitted under Commission regulations and precedent.

14. Further, Applicants state that the Operating Committee will be composed of senior managers of American Electric Power, Kentucky Power, and AEP Generation, who will not have any day-to-day responsibility for wholesale marketing functions. Applicants state that in carrying out their responsibilities under the Mitchell Agreement, the Operating Committee necessarily will discuss key operational matters relating to the

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18 C.F.R. § 35.39(d)(1) (2013). "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 non-conduit provision in § 35.39(g)." 18 C.F.R. § 35.39(d)(2).

[10] "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 rule.

[11] "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).

Mitchell 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 state that the Operating Committee will not be discussing the actual marketing of the output of the owners' respective interests in the plant.

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

16. Applicants state that Kentucky Power and AEP Generation will each have sole responsibility for marketing its respective share of the output of the Mitchell Plant and that American Electric Power, as agent for Kentucky Power, and AEP Generation will separately communicate with PJM to bid their respective shares of output from the Mitchell Plant into the PJM market.

17. Applicants also note that the Commission has granted "waiver of the market-based rate code of conduct's information sharing restrictions for the limited purpose of allowing the continued sharing of information to the extent necessary to manage the physical operations at conjoined facilities, and to allow practical and efficient operation of conjoined facilities."[12]

18. Applicants further request that, based on the same rationale and subject to the same representations, representatives of AEP Generation be permitted to have access to plant operation and maintenance information ahead of the actual closing in order to prepare to assume ownership upon the closing. Applicants submit that the Commission has granted similar waiver requests in several other cases.[13]

[12] Waiver Request at 15 (quoting *Cleco Power LLC*, 130 FERC ¶ 61,102, at P 23, n.38 (2010) (*Cleco Power*)).

[13] *Id.* at 14-15 (citing *Cleco Power*, 130 FERC ¶ 61,102; *FirstEnergy Corp.*, 136 FERC ¶ 61,216, at PP 15-17 (2011) (*FirstEnergy*); *Entergy Services, Inc.*, 136 FERC ¶ 61,218, at P 26 (2011) (*Entergy*); and *Allegheny Energy, Inc.*, 119 FERC ¶ 61,025, at P 20 (2007)).

O&M Services

19. Applicants also seek waiver of the asymmetrical pricing rule related to the provision of O&M services to be provided by Kentucky Power on behalf of AEP Generation. Applicants state that the Mitchell Agreement apportions the monthly O&M costs in accordance with the ownership interests (which will be 50-50).[14] Applicants state that Kentucky Power seeks to charge AEP Generation Kentucky Power's fully-allocated cost of service, but submit that using at-cost pricing will not give rise to inappropriate cross-subsidization concerns that would harm captive customers.

20. Applicants state Kentucky Power does not provide generation-related O&M services to third parties; thus, it cannot be said that Kentucky Power will be foregoing profits that it could earn from third parties when it provides such services to AEP Generation at cost. Moreover, Applicants argue that because of the co-owned nature of the Mitchell Plant, it is not practicable to have two different groups provide O&M services. Applicants contend that this waiver request is consistent with the Commission's precedent.[15]

Fuel Procurement

21. Applicants also seek a waiver of the Commission's affiliate restrictions to permit American Electric Power to procure fuel for the Mitchell Plant on behalf of the two co-owners (Kentucky Power and AEP Generation). Applicants contend that under the Mitchell Agreement, for as long as American Electric Power procures fuel, Kentucky Power and AEP Generation will incur the same monthly per unit fuel cost. Applicants note that the Mitchell Agreement expressly provides that "[e]ach [o]wner's average fuel cost will be the same, and receipts and inventory available for consumption amounts will be allocated to each [o]wner based on monthly usage."[16] Applicants represent that during the time that American Electric Power procures fuel for the Mitchell Plant, Kentucky Power and AEP Generation will incur the same per unit fuel cost, which protects captive customers against the possibility of cheaper fuel being diverted to AEP Generation at the expense of Kentucky Power's captive customers. Applicants submit that allowing

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[14] *Id.* at 12 (citing Mitchell Agreement at § 6).

[15] *Id.* at 16 (citing *Cleco Power*, 130 FERC ¶ 61,102 at P 24).

[16] *Id.* at 17.

American Electric Power to perform the fuel procurement function for the jointly-owned Mitchell Plant should benefit Kentucky Power's captive customers by reducing costs, as joint procurement enhances both Kentucky Power's and AEP Generation's leverage in contract negotiations with respect to fuel for the Mitchell Plant because the amount of generating capacity that needs fuel is doubled. Applicants note that the Mitchell Agreement provides that an owner may exercise its right to directly purchase fuel and make fuel transportation arrangements on its own behalf.[17] Applicants state that if an owner exercised this right, American Electric Power would no longer provide a shared fuel procurement service for the Mitchell Plant.[18] Applicants contend that granting this waiver request is consistent with the Commission's granting of similar waiver requests in a number of recent cases.[19]

22. Applicants further represent that the employees who will be engaged in joint fuel procurement for the Mitchell Plant on behalf of Kentucky Power and AEP Generation will be American Electric Power employees who will not be involved in or have responsibility for marketing the output of the Mitchell Plant. Applicants state that the American Electric Power personnel responsible for these functions will undergo training on the affiliate restrictions, including the no-conduit rule.

III. Notice of Filing and Responsive Pleadings

23. Notice of Applicants' October 15 Filing was published in the *Federal Register*, 78 Fed. Reg. 62,612 (2013), with interventions and comments due on or before November 5, 2013. On November 22, 2013, the Attorney General for the Commonwealth of Kentucky (Kentucky Attorney General) filed a motion to intervene out-of-time. On December 10, 2013, the Kentucky Attorney General filed an untimely

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[17] *Id.* at n.21 (citing Mitchell Agreement at § 5).

[18] *Id.*

[19] *Id.* at 19 (citing *FirstEnergy*, 136 FERC ¶ 61,216 at P 15; *Entergy*, 136 FERC ¶ 61,218 at PP 26-27; *Florida Power & Light Co.*, 136 FERC ¶ 61,217, at PP 22, 25 (2011); *Virginia Electric and Power Co.*, 136 FERC ¶ 61,215, at PP 29-31 (2011)).

protest.[20] On December 11, 2013, Applicants filed an answer to the Kentucky Attorney General's untimely protest.

A. Kentucky Attorney General's Protest

24. The Kentucky Attorney General protests the Mitchell Agreement and American Electric Power's accompanying waiver request on the following grounds: (1) the proposal to permit shared fuel procurement could allow the diversion of the lowest priced supply of fuel to AEP Generation at the expense of Kentucky Power's captive customers; (2) the proposals regarding replenishment of coal stock piles and treatment of operations and maintenance expenses may result in higher costs for Kentucky Power's captive customers to the benefit of AEP Generation; (3) the role of American Electric Power is unclear, providing opportunities for abuse of affiliate restrictions; (4) the role of the Operating Committee is unclear, providing opportunities for abuse of affiliate restrictions; and (5) American Electric Power has not proposed adequate safeguards against improper sharing of information. The second issue is discussed in the Commission's MOA Order, which is being issued concurrently, and the remaining issues are addressed herein.

25. The Kentucky Attorney General argues that the Commission should reject the waiver request because Applicants have not demonstrated that Kentucky Power's captive customers will not be harmed by the proposed operations, or that these transactions will not result in the transfer of benefits to the marketing affiliate and/or stockholders to the detriment of Kentucky Power's captive customers.[21] The Kentucky Attorney General states that the waiver request notes that the Mitchell Agreement allows each individual co-owner to elect to procure fuel for itself. The Kentucky Attorney General argues that allowing American Electric Power to procure fuel for both Kentucky Power and AEP Generation while also allowing the co-owners to opt out of the joint fuel procurement provides an opportunity for the diversion of the lowest-priced fuel sources to be directed to and acquired by AEP Generation before American Electric Power procures fuel for Kentucky Power. The Kentucky Attorney General further argues that the Mitchell

[20] We remind parties of the need to file timely comments so as to give the Commission adequate opportunity to address their concerns. It is disruptive to proceedings to have a protest filed over a month late and less than a week prior to a requested action date.

[21] Kentucky Attorney General Protest at 7.

Agreement establishes no parameters or limitations for how and when the election to individually secure fuel by one of the affiliates is to be exercised. The Kentucky Attorney General argues that there is nothing to prevent American Electric Power from identifying possible sources of fuel and discussing the prices, terms and conditions of such purchases with the co-owners, and then allowing AEP Generation to "elect" to procure its own fuel supplies in advance of American Electric Power procuring supplies for Kentucky Power, leaving Kentucky Power with the higher-cost fuel supplies.[22]

26. The Kentucky Attorney General notes that the Applicants' waiver request states that "[American Electric Power] . . . will provide various services to the owners."[23] The Kentucky Attorney General contends that the only shared service identified in the waiver request that American Electric Power will provide is the shared fuel procurement service. The Kentucky Attorney General asserts that neither the waiver request nor the Mitchell Agreement identifies any other services, and thus it is difficult, if not impossible for the Commission to verify that American Electric Power will not be providing services to the co-owners in addition to the fuel procurement services that will adversely affect Kentucky captive customers.[24]

27. The Kentucky Attorney General also argues that the role of American Electric Power is unclear. The Kentucky Attorney General notes that Applicants propose that the Operating Committee will consist of senior managers; however, later in the waiver request, Applicants request a waiver for any American Electric Power employees that are not senior managers. The Kentucky Attorney General argues that although it is possible that this contradiction regarding non-senior manager employees is related to other services American Electric Power will provide as agent for Kentucky Power and AEP Generation in addition to shared fuel procurement, there is no clarity as to what the additional services may be. The Kentucky Attorney General also notes that Applicants state that the Operating Committee members will not have "day-to-day" responsibility for wholesale marketing functions and will not discuss marketing of the output of the Mitchell Plant. The Kentucky Attorney General argues that Applicants fail to clarify whether these employees will have some other type of less frequent responsibility for marketing or generation or dispatch decisions. The Kentucky Attorney General contends

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[22] *Id.* at 10-11.

[23] *Id.* at 16 (citing Waiver Request at 8).

[24] *Id.*

that use of the term "day-to-day" implies that such employees may have less frequent oversight of prohibited affiliate operations, leading to the potential for abuses to the detriment of Kentucky Power's captive customers.[25]

28. The Kentucky Attorney General notes that in the other waiver request submitted by American Electric Power in Docket No. ER13-1874-000, the applicants in that filing committed to make outage decisions based on "relevant technical factors" and that outage schedules would be separately developed by the franchised public utilities and AEP Generation "on a unit-by-unit basis, in consultation with technical staff from [American Electric Power] engineering services group who assist in devising a long-range (typically ten year) maintenance cycle of each unit."[26] The Kentucky Attorney General argues that Applicants place no similar limitations on the outage activities to be undertaken by shared employees under the Mitchell Agreement, or on the sharing of outage information. The Kentucky Attorney General argues that there are no limitations in the Mitchell Agreement for each co-owner to initially make outage scheduling decisions or for sharing of outage information after the outage schedule is in place, or restricting shared employees engaged in outage scheduling from making outage decisions based on market conditions or power sales opportunities for one of the co-owners.[27]

29. Lastly, the Kentucky Attorney General argues that Applicants do not commit to abide by the no-conduit rule, or to train American Electric Power employees in the no-conduit rule requirements, for any shared services other than fuel procurement.[28] The Kentucky Attorney General also argues that in other cases where the Commission has granted waiver requests that allow limited sharing of market information, those cases involved safeguards to protect captive customers from the potential for affiliate abuse. The Kentucky Attorney General argues that those safeguards are missing from Applicants' waiver request.[29]

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[25] *Id.* at 18-19.

[26] *Id.* at 21-22 (citing American Electric Power Response to Data Request at 9).

[27] *Id.* at 22.

[28] *Id.* at 17.

[29] *Id.* at 22-24.

B. Applicants' Answer

30. Applicants argue that the Commission should reject the Kentucky Attorney General's protest because it would be highly prejudicial to the Applicants and that the Kentucky Attorney General failed to meet the standards for accepting a late-filed pleading under Commission Rule 214(a).[30]

31. In response to the protest regarding Applicants' waiver request to share certain American Electric Power personnel to perform the fuel procurement function for the Mitchell Plant, Applicants state that Kentucky Power and AEP Generation will incur the same per unit fuel cost. Applicants contend that this safeguard fully protects captive customers because there is no opportunity for the shared personnel to allocate lower-priced fuel to AEP Generation while allocating higher cost fuel to Kentucky Power.[31] Applicants further contend that the Kentucky Attorney General's argument that because the Mitchell Agreement affords each party the right to procure its own fuel supplies, American Electric Power may identify low-cost fuel opportunities and quietly pass them along to AEP Generation who then would elect to procure that fuel, leaving Kentucky Power with higher cost supplies is flawed for several reasons. Applicants state that under the Mitchell Agreement, the election to self-procure is not "at will," but rather subject to unanimous approval of the Operating Committee. Second, American Electric Power employees engaged in the fuel procurement process will undergo training on *all* the Commission's affiliate restrictions, including the requirement that they take no actions that would transfer benefits from Kentucky Power to AEP Generation. And finally, Kentucky Power has the right to obtain its own fuel, subject to the Mitchell Agreement, and may elect to do so if it determines this action would be in the best interest of its customers.[32]

32. In response to the Kentucky Attorney General's protest that the role of American Electric Power is unclear, Applicants state that they provided a full description of American Electric Power's role and the various management and professional services that it will provide under the Mitchell Agreement in its waiver request.[33] Applicants

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[30] Applicants Answer at 3.

[31] *Id.* at 5.

[32] *Id.* at 3-6.

[33] *Id.* at 6 (citing Waiver Request at 6).

argue that under the Commission's regulations, these services are considered to be support functions and, as the Attorney General concedes, there was no need for Applicants to obtain a waiver for American Electric Power to provide these support functions. Applicants contend that they sought waiver to allow American Electric Power to provide fuel procurement services for both Kentucky Power and AEP Generation and fully discussed the scope of those services and how they were being provided in a manner consistent with Commission policy and precedent.[34]

33. In response to the Kentucky Attorney General's protest relating to the functions of the Operating Committee, Applicants assert that their proposal is fully consistent with the Commission's regulations in that members of the Operating Committee will be senior managers of American Electric Power, Kentucky Power, and AEP Generation who will not have responsibility for wholesale marketing functions. Further, Applicants explain that the Operating Committee members will have the responsibility for establishing communication and coordination protocols for upcoming generation outages and for establishing economic dispatch and unit commitment procedures. Applicants note that the Operating Committee will not have any responsibility for making economic dispatch and unit commitment decisions. In addition, Applicants state that the use of the term "day-to-day" is intended to exclude those individuals who are engaged in the marketing function; i.e., the individuals who have responsibility for making decisions with respect to power sales transactions.

34. With respect to the Kentucky Attorney General's protest that Applicants failed to propose the type of safeguards for outage scheduling as were proposed in the waiver request pending in Docket No. ER13-1874-000, Applicants note that they stated in their waiver that "[i]f the Commission grants that request [in Docket No. ER13-1874-000], the outage planning for the Mitchell Plant would be subject to the procedures proposed in the [waiver request in Docket No. ER13-1874-000]." Applicants state that for purposes of applying the procedures and priorities proposed therein, the Mitchell Plant will be treated as a generator owned by a traditional utility with captive customers, as it will be operated by Kentucky Power, which will own an undivided interest in all of the plant's facilities.[35]

35. In response to the Kentucky Attorney General's protest relating to the sharing of market information, Applicants contend that their proposed safeguards are fully

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[34] *Id.* at 7.

[35] *Id.* at 8-9.

consistent with the Commission’s affiliate restrictions. Applicants note that with respect to the categories of shared functions that are expressly permitted under the Commission’s regulations, such shared personnel will undergo regular training with respect to the Commission’s affiliate restrictions, including the no-conduit rule.[36] Furthermore, Applicants state that they will maintain books and records relating to all transactions under the Mitchell Agreement, including fuel procurement and other purchase transactions. Applicants note that Kentucky Power’s fuel procurement will continue to be subject to monitoring and audit by the Commission and by the Kentucky Commission.

IV. Discussion

A. Procedural Matters

36. Pursuant to Rule 214(d) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2013), the Commission will grant the Kentucky Attorney General'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.

37. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Applicants’ answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

38. As discussed below, we will conditionally grant Applicants’ request for limited waiver of 18 C.F.R. § 35.39 (d) regarding the sharing of market information, § 35.39(e)(1) regarding the asymmetrical pricing rule related to the provision of O&M services by Kentucky Power, and § 39.39(c)(2)(1) regarding the separation of functions requirement to permit the sharing of employees engaged in fuel procurement with respect to the Mitchell 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).[37]

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[36] *Id.* at 9 (citing Waiver Request at 19). The Mitchell Agreement sets forth the parties’ functions, including maintaining the necessary books, records, and joint bank accounts for transactions relating to the Mitchell Plant.

[37] 18 C.F.R. § 35.39(g).

39. 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.[38] Captive customers are defined as "any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation."[39] 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.[40] Failure to satisfy the conditions set forth in these affiliate restrictions constitutes a violation of a seller's market-based rate tariff.[41]

40. 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.[42] Under the affiliate pricing rule in the affiliate

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[38] *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, *order on reh'g*, 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).

[39] Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 202; 18 C.F.R. § 35.36(a)(6) (2013).

[40] *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).

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

[42] 18 C.F.R. § 35.39(c)(2)(i).

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.

41. 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.[43] Specifically, the Commission clarified that franchised public utilities with captive customers are prohibited from sharing employees who engage in fuel procurement.[44] With respect to fuel procurement 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.[45] 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

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[43] 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.

[44] April 15 Clarification Order, 131 FERC ¶ 61,021 at P 41.

[45] *Id.* P 42.

Clarification Order within 90 days, or by April 20, 2011.[46] 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[47] or may seek waiver of the market-based rate affiliate restrictions on a case-by-case basis.[48]

42. We will conditionally grant Applicants' request for limited waiver of 18 C.F.R. § 35.39 (d) regarding the sharing of market information, § 35.39(e)(1) regarding the asymmetrical pricing rule related to the provision of O&M services by Kentucky Power, and § 35.39(c)(2)(1) regarding the separation of functions requirement to permit the sharing of employees engaged in fuel procurement with respect to the Mitchell Plant, based on their representations that captive customers will not be harmed.

43. With regard to the sharing of market information, we agree with Applicants that their proposed safeguards are fully consistent with the Commission's affiliate restrictions. Applicants represent that those Kentucky Power employees performing services at the Mitchell Plant will be field and maintenance personnel and they will not be engaged in the wholesale marketing function or have any marketing responsibilities. Furthermore, Applicants represent that under the Mitchell Agreement, there will be no joint marketing and neither party will share marketing information or personnel with the other party and American Electric Power, as agent for Kentucky Power, and AEP Generation will separately communicate with PJM to bid their respective shares of the output from the Mitchell Plant into the PJM markets.

44. With regard to the asymmetrical pricing rule related to the provision of O&M services to be provided by Kentucky Power on behalf of AEP Generation, Applicants represent that using at-cost pricing will not give rise to inappropriate cross-subsidization concerns that would harm captive customers. Applicants represent that Kentucky Power does not provide generation-related O&M services to third parties. Thus, Applicants claim that Kentucky Power will not be foregoing profits that it could earn from third

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

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

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

parties when it provides such services to AEP Generation at cost. However, we note that, as described by Applicants, the Mitchell Agreement apportions the monthly O&M costs in accordance with the ownership interests, which will be 50-50. As noted in the MOA Order, because certain O&M costs vary with output, if AEP Generation generates more power in a given period than Kentucky Power, AEP Generation's share of the O&M costs would likely be higher than those imposed by Kentucky Power. Requiring that these expenses be shared equally would thus benefit AEP Generation to the detriment of Kentucky Power's captive customers. The MOA Order, issued concurrently with this order, therefore accepts the Mitchell Agreement conditioned upon American Electric Power filing, within 30 days of the date of that order, revisions to the agreement that apportion those O&M expenses that vary with plant output according to each party's respective use of the plant during the relevant time period. We find that this proposed revision will ensure that Kentucky Power's captive customers will not be harmed and, on this basis, we will grant the requested waiver. . With regard to joint fuel procurement for the Mitchell Plant on behalf of the co-owners, Kentucky Power and AEP Generation, Applicants represent that granting such waiver will not harm captive customers. Applicants represent that, with American Electric Power as an agent, Kentucky Power and AEP Generation will incur the same per unit fuel cost, which protects captive customers against the possibility of cheaper fuel being diverted to AEP Generation at the expense of Kentucky Power's captive customers. Applicants also represent that allowing American Electric Power to act as an agent for the fuel procurement function reduces costs, as joint procurement enhances leverage in contract negotiations with respect to fuel for the Mitchell Plant because the amount of generating capacity that needs fuel is doubled. We find the above claims to be persuasive and we will grant waiver to permit joint fuel procurement. However, Applicants also represent that the Mitchell Agreement provides that an owner may exercise its right to directly purchase fuel and make transportation arrangements on its own behalf. Further, Applicants represent that if an owner exercised the right to directly procure fuel and make fuel transportation arrangements on its own, American Electric Power would no longer provide a shared fuel procurement service for the Mitchell Plant.[49] 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. In addition, should Kentucky 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.

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[49] Waiver Request at n.21.

45. With respect to the protest regarding the role of American Electric Power, Applicants describe American Electric Power's role as providing O&M services, including fuel procurement, for the Mitchell Plant and state that the employees providing such services are technical/engineering people that will not be engaged in marketing functions or have marketing responsibilities. Our affiliate restrictions expressly permit the sharing of support employees, and field and maintenance employees.[50] Thus, as noted by Applicants, no waiver is required to share such employees.

46. With respect to the protest regarding the role of the Operating Committee, we find the role of the Operating Committee is sufficiently clear. Applicants represent that members of the Operating Committee will be senior managers. Again, we note that our affiliate restrictions permit the sharing of senior officers provided that the shared officers not participate in directing, organizing, or executing generation or market functions.[51] Applicants represent that such is the case with respect to the senior officers involved in the Operating Committee.

47. Finally, with respect to the protest regarding Applicants' alleged failure to commit to abide by the no-conduit rule, Applicants do propose certain safeguards, such as training of shared employees regarding the affiliate restrictions including the no-conduit rule. Moreover, the no-conduit rule applies on its own terms regardless of any commitment to abide by it.

48. Accordingly, we conditionally grant Applicants' request for limited waiver of sections §35.39 (d), §35.39(e)(1), and § 35.39(c)(2)(i) of the Commission's regulations 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, this limited waiver does not affect Applicants' obligation to comply with the no-conduit provisions of section 35.39(g).[52] Applicants must not implement the limited waivers granted herein in a manner that harms captive customers. As an additional condition of this waiver, Applicants will be required to maintain sufficient records to enable the Commission to audit whether the representations and commitments made in their request

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[50] *See* 18 C.F.R. § 35.39(c)(2)(ii).

[51] *Id.*

[52] 18 C.F.R. § 35.39(g).

for waiver remain true and accurate, including their commitment that captive customers will not be harmed.

49. The waivers conditionally granted herein are limited to the specific facts, representations, policies and procedures Applicants presented in their October 15 Filing and apply only to the employees discussed in their October 15 Filing. To the extent there is any material change in circumstances that would reflect a departure from the facts, representations, policies and procedures that we have relied upon in granting the requested waiver, Applicants will be 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.

50. 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 waiver granted herein and include a citation to this order.[53]

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 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.

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[53] 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.

(D) 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.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.