145 FERC ¶ 61,275
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

AEP Generation Resources Inc. Docket Nos. ER13-232-000
ER13-232-001

ORDER CONDITIONALLY ACCEPTING TARIFF REVISIONS

(Issued December 24, 2013)

1. On October 31, 2012, American Electric Power Service Corporation (AEPSC), on behalf of AEP Generation Resources Inc. (AEP Genco), filed pursuant to section 205 of the Federal Power Act (FPA),[1] the tariff record associated with the Ohio Power Supply Agreement (PSA) between AEP Genco and Ohio Power Company (Ohio Power).[2] On November 15, 2013, AEPSC filed the tariff record associated with an amended version of the PSA.[3]

2. In this order, the Commission conditionally accepts the amended PSA subject to further revisions, effective January 1, 2014, as requested, and grants the request for waiver of certain Commission regulations.[4]

I. Background

3. The Public Utilities Commission of Ohio (Ohio Commission) has approved a corporate reorganization of Ohio Power for the purpose of implementing retail restructuring in Ohio, facilitating a transition to an auction-based standard service offer

---

[1] 16 U.S.C. § 824d (2012).

[2] Filed as AEP Genco Rate Schedule No. 2 in Docket No. ER13-232-000.

[3] Filed as AEP Genco Rate Schedule No. 2 in Docket No. ER13-232-001.

[4] The initially filed PSA, filed as AEP Genco Rate Schedule No. 2 in Docket No. ER13-232-000, is rejected as moot.

(SSO), and promoting retail competition in Ohio Power's service territory. The reorganization will result in the separation of Ohio Power's generation and power marketing businesses from its transmission and distribution businesses, consistent with Ohio restructuring law.

4. AEPSC states that the PSA is a component of the broader Ohio Commission-approved restructuring plan that will implement full market-based pricing of generation service for retail customers in Ohio after a short transition period. The PSA is a 17-month partial requirements wholesale power sales agreement under which AEP Genco will provide energy and capacity to its affiliate, Ohio Power. Both parties are wholly-owned subsidiaries of American Electric Power Company Inc. (AEP). The PSA enables Ohio Power to obtain from AEP Genco a supply of capacity and energy to meet the needs of Ohio Power's retail customers during a transition period that runs from January 1, 2014 through May 31, 2015, after which the PSA will end and all of Ohio Power's SSO customers' capacity and energy will be procured though a competitive bidding process.

5. During the transition period, the PSA provides for AEP Genco to 1) provide energy to enable Ohio Power to meet the energy requirements of its SSO customers (an obligation that steadily decreases during the transition period, as discussed below), 2) provide all of the capacity necessary to meet the requirements of Ohio Power's SSO Customers, and 3) provide the Fixed Resource Requirement (FRR) capacity obligations related to Ohio Power's shopping (non-SSO) customers who take service from competitive providers.[5]

II. <u>The PSA</u>

6. Under the PSA, Default Generation Service is defined as the supply, during the transition period, of (1) all capacity associated with the requirements of Ohio Power's SSO customers; and (2) energy to meet a diminishing portion of the requirements of Ohio Power's SSO customers. Capacity Service is defined as the supply of capacity to meet shopping (non-SSO) load pursuant to Ohio Power's FRR commitments through May 31, 2015.[6] Under the transition approved by the Ohio Commission, Ohio Power will conduct

---

[5] Ohio Power will not be responsible for meeting the energy requirements of its non-SSO customers, and the PSA does not require AEP Genco to provide Ohio Power with energy for those customers.

[6] The FRR provisions were added to the PJM Reliability Assurance Agreement in connection with PJM's Reliability Pricing Model (RPM). PJM developed the FRR alternative, under which a load-serving entity (an FRR Entity) has the option to submit an FRR Capacity Plan and meet a fixed capacity resource requirement rather than participate

(continued…)

competitive energy-only auctions to meet an increasing portion of the energy requirements associated with Ohio Power's SSO customers, beginning on April 1, 2014.

7. After AEPSC filed the initial version of the PSA, the Ohio Commission modified the transition-period auction schedule.[7] AEPSC filed the amended PSA with this Commission on November 15, 2013 to reflect these scheduling changes. The amended PSA provides that AEP Genco will provide one-hundred percent of the energy requirements of Ohio Power's SSO customers from January 1, 2014 through March 31, 2014; ninety percent of the energy requirements of Ohio Power's SSO Customers commencing on April 1, 2014; and forty percent of those energy requirements beginning on November 1, 2014. Commencing on January 1, 2015, no energy will change hands under the PSA because all of the energy requirements associated with Ohio Power's SSO customers will be competitively procured. While the rates set forth in the PSA will be effective as of January 1, 2014, in its November 15, 2013 Filing, AEPSC states that, in addition to changing the auction schedule, the Ohio Commission also revised Ohio Power's retail price proposal for SSO customers. AEPSC states that if any further amendments to the PSA are needed as a result of the Ohio Commission's order, AEPSC will file such amendments with this Commission.[8]

8. The PSA provides that Ohio Power shall pay to AEP Genco the sum of various non-fuel generation charges billed to Ohio Power's SSO customers under applicable retail rate schedules approved by the Ohio Commission, as well as AEP Genco's actual fuel costs and PJM charges. The Ohio Commission-approved non-fuel charges include charges and credits under Ohio Power's retail generation rates (as shown in exhibit B to the PSA) and a Retail Stability Rider (RSR) Charge, which is equal to the sum of the RSR charges (excluding certain amounts allocated to Ohio Power under an Ohio Commission-approved deferral recovery mechanism)[9] billed and/or accrued during a

---

through the RPM capacity auction. In addition to meeting its own load obligations, an FRR Entity is required to meet the capacity requirements of its shopping retail customers.

[7] The Ohio Commission did so in a November 13, 2013 order in Case No. 12-3254-EL-UNC.

[8] November 15, 2013 Filing at fn. 2. In its February 12, 2013 filing, AEPSC made a similar commitment with respect to changes to the PSA that might be required by the Ohio Commission order in Case No. 11-364-EL-SSO.

[9] Specifically, the Ohio Commission has directed that $1/MWh of the RSR charge be allocated to Ohio Power deferral recovery; therefore, this amount will not be remitted to AEP Genco.

month by Ohio Power. In addition, Ohio Power will pay AEP Genco $188.88/MW-day for the FRR capacity provided for non-SSO customers.

9. AEPSC and AEP Genco request waiver of the requirement to provide estimates of first-year transactions and revenues under the PSA (18 C.F.R. § 35.12(b)(1) (2013)) and the requirement to provide certain rate design documents (18 C.F.R. § 35.12(b)(2)–(5) (2013)). In addition, Ohio Power requests waiver of the 60-day notice requirements to allow the amended PSA, filed on November 15, 2013, to become effective January 1, 2014.

III. Notice, Intervention, Protests and Responsive Pleadings

10. Notice of the October 31, 2012 PSA was published in the *Federal Register*, 77 Fed. Reg. 67,357 (2012), with protests and interventions due on or before November 30, 2012.

11. Notices of intervention were filed by Public Service Commission of West Virginia, Public Service Commission of Kentucky, and Virginia State Corporation Commission. Timely motions to intervene were filed by Industrial Energy Users of Ohio (IEU), Exelon Corporation, Duke Energy Corporation (Duke), Blue Ridge Power Agency, Indiana and Michigan Municipal Distributors Association, Old Dominion Committee for Fair Utility Rates and East Tennessee Energy Consumers, FirstEnergy Service Corporation, Office of the Ohio Consumers' Counsel (OCC), Ohio Energy Group, and Kentucky Office of Attorney General (Kentucky Attorney General). Protests were filed by IEU, Ohio Energy Group, and OCC. Answers were filed by AEPSC and Duke, with an answer in response filed by IEU, to the extent the Commission allows the answers filed by AEPSC and Duke.

12. Notice of the November 15, 2013 amended PSA was published in the *Federal Register*, 78 Fed. Reg. 70,297 (2013) with protests and interventions due on or before December 6, 2013. No additional protests were received.

13. IEU and OCC argue that the proposed PSA is subject to the Commission's affiliate transaction standards, as articulated in *Edgar*.[10] These parties characterize the

[10] *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (1991) (*Edgar*). IEU also relies on Order No. 697, in which the Commission reaffirmed these affiliate standards as clarified by *Allegheny Energy Supply Company, LLC*, 108 FERC ¶ 61,082 (2004). *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities,* Order No. 697, FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B,

(continued…)

transaction under the PSA as a wholesale sale between a regulated utility (Ohio Power) and a market-regulated affiliate (AEP Genco), to which the Commission's affiliate standards apply.[11] Because AEPSC has not submitted evidence that the PSA satisfies the *Edgar* criteria, these parties argue that the PSA should be rejected. IEU avers that all Ohio Power customers are "captive" to Ohio Power for their capacity, because the proposed PSA obligates Ohio Power to receive and pay for all capacity and energy necessary to provide service to SSO retail customers as well as capacity supplied to alternative suppliers (known in Ohio as Competitive Retail Electric Service or CRES providers) for non-SSO customers.[12] In addition, IEU argues that while SSO and non-SSO customers will remain captive to Ohio Power for capacity during the term of the PSA, low-income customers will remain captive for both energy and capacity during the term of the PSA.[13]

14. OCC objects particularly to the RSR charge, arguing that AEP Genco should not receive the RSR revenues that are charged by Ohio Power to both SSO customers and

---

73 Fed. Reg. 79,610 (Dec. 30, 2008), FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, 74 Fed. Reg. 30,924 (June 29, 2009), FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g and clarification, Order No. 697-D*, FERC Stats. & Regs. ¶ 31,305, *reh'g denied*, 134 FERC ¶ 61,046 (2010) (codified at 18 C.F.R. pt. 35).

[11] In addition, OCC argues that under section 205 of the FPA, no wholesale sale of energy or capacity can occur between an incumbent regulated utility and a market-regulated power sales affiliate without first receiving FERC approval. OCC Protest at 7, citing *Duke Energy Indiana, Inc.*, 136 FERC ¶ 61,001 (2011).

[12] IEU argues that while RPM rules provide an alternative method for CRES providers to satisfy their capacity obligation, the timing associated with exercising this option provides CRES providers with no viable alternative to Ohio Power.

[13] According to IEU, the Ohio Commission has adopted rules prohibiting CRES providers from enrolling low-income customers who receive funding to pay their electric bills (these customers are known as "percentage of income payment plan" or PIPP customers). IEU states that while Ohio law authorizes the director of development to aggregate the load of PIPP customers for the purpose of competitively auctioning the supply of retail electric generation service to them, he has not exercised this authority.

non-SSO customers.[14] According to OCC, the RSR charge is intended to make Ohio Power "whole" primarily for lost revenue from discounted capacity offered to CRES providers. OCC argues that under the PSA, this collection of money from retail customers will be passed to an unregulated subsidiary (AEP Genco), such that retail customers will subsidize an unregulated subsidiary. OCC argues that these provisions could result in customers making double payments for capacity—once at $188.88/MW-day and a second time, through the RSR, for the difference between $188.88/MW-day and the RPM price. In addition, protestors argue that the capacity charges under the PSA for SSO and non-SSO customers do not track the Ohio-Commission approved charges. On the other hand, IEU argues that the capacity charge for SSO and non-SSO customers should be equivalent, as these customers are identically situated relative to an undifferentiated product. Finally, IEU argues that the PSA is unreasonable because it does not contain a mechanism to revise the generation, RSR, or non-SSO capacity charges if the Ohio Commission's orders are modified.

15. Both AEPSC and Duke respond that protestors are attempting to relitigate issues before this Commission that were decided unfavorably to protestors before the Ohio Commission. Protestors caution the Commission against second-guessing the Ohio Commission's retail ratemaking decisions. AEPSC argues that OCC's objection to the RSR charge is a collateral attack on Ohio Commission rulings, because the Ohio Commission approved the recovery of the RSR charge from Ohio Power's retail customers, and further approved AEP Genco's recovery of revenues from "the RSR which are not allocated to recovery of the deferral."[15]

16. According to AEPSC, the PSA is simply a conduit to enable Ohio Power to flow through to AEP Genco the revenues that Ohio Power collects under the Ohio Commission-approved rates and to enable AEP Genco to recover from Ohio Power the FERC-approved transmission and ancillary services charges assessed by PJM. AEPSC contends that the Commission has accepted transitional contracts such as the PSA, which reflect state-approved restructuring plans. AEPSC argues that the Commission has, for example, approved a contract very similar to the PSA in *Public Serv. Elec. and Gas Co.*,

[14] OCC also argues that because the Ohio Commission order that approved the RSR charge was not yet final, the Commission should make an independent determination of this issue.

[15] AEPSC Answer at 15 (quoting *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Docket Nos. 11-346-EL-SSO and 11-348-EL-SSO, at 60 (Public Utilities Commission of Ohio, Aug. 8, 2012)).

finding that it "serves as the conduit to flow through revenues for what would have been retail transactions if the Applicants had not also implemented a corporate reorganization."[16] AEPSC contends this is the exact situation here, and that protestors' failure to confront this precedent is fatal to their arguments.

17. Duke argues that while the Commission has established its affiliate restrictions in part to protect retail ratepayers, the Commission deems those ratepayers protected when a state has retail choice, as does Ohio.[17] Duke observes that the Ohio Commission "has not intervened in this proceeding, which it could have and presumably would have done had it been concerned with the rate being charged."[18]

---

[16] AEPSC Answer at 17, citing *Public Serv. Elec. and Gas Co.*, 88 FERC ¶ 61,299 at 61,917-18 (1999); *Baltimore Gas & Elec. Co.*, 90 FERC ¶ 62,222 at 64,321 (2000); *Baltimore Gas & Elec. Co.*, Docket No. ER00-3296-000 (2000) (delegated letter order).

[17] Duke Answer at 4, citing *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264, at P 45, n.40 (2008), *order on reh'g*, Order No. 707-A, FERC Stats. & Regs. ¶ 31,272 (2008) (codified at 18 C.F.R. pt. 35); *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, *order on reh'g and clarification*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, at P 203 (2008), *order on reh'g and clarification*, 124 FERC ¶ 61,055 (2008), *order on reh'g and clarification*, 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 and clarification*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *reh'g denied*, 134 FERC ¶ 61,046 (2011) (codified at 18 C.F.R. pt. 35).

[18] Duke Answer at 4, citing *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, *order on reh'g and clarification*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, at P 203 (2008), *order on reh'g and clarification*, 124 FERC ¶ 61,055 (2008), *order on reh'g and clarification*, 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 and clarification*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *reh'g denied*, 134 FERC ¶ 61,046 (2011) (codified at 18 C.F.R. pt. 35).

IV. Discussion

A. Procedural Matters

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[19] the notices of intervention and timely, unopposed motions to intervene serve to make the parties that filed them parties to this proceeding.

19. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority.[20] We accept the answers of AEPSC and Duke because they have aided us in our decision-making process, and reject the response of IEU.

B. Substantive Matters

20. We conditionally accept the tariff records associated with the November 15, 2013 amended PSA, subject to further revisions to the PSA to reflect the rates established by the Ohio Commission, as discussed below. The Ohio Commission has approved a corporate reorganization of Ohio Power for the purpose of implementing retail restructuring in Ohio. The PSA is a short-term, partial requirements wholesale power sales agreement under which AEP Genco will provide energy and capacity to its affiliate, Ohio Power during a transition period approved by the Ohio Commission. After this 17-month transition period, both the capacity and energy for Ohio Power's retail customers will be procured via competitive auctions.

21. The Commission has previously approved transitional contracts that reflect state-approved restructuring plans. In *Pub. Serv. Elec. & Gas Co.*, the Commission reviewed an agreement similar to the PSA under circumstances similar to those now before us:

> PSEG Energy will sell power to PSE&G to provide basic generation service to those of its retail delivery service customers that choose not to purchase their power supplies from alternative suppliers. Applicants propose that PSE&G will remit to PSEG Energy the generation portion of the retail rate that it assesses over the three year transaction period. The retail rates are, in turn, fixed over the three year period to reflect the resolution of the New Jersey Commission's retail access proceeding. As a result, the agreement

[19] 18 C.F.R. § 385.214 (2013).

[20] 18 C.F.R. § 385.213(a)(2) (2013).

> between PSE&G Energy and PSE&G serves as the conduit to flow through revenues for what would have been retail transactions if the Applicants had not also implemented a corporate reorganization. This arrangement is reasonable during the three-year transition period.[21]

22. We agree with AEPSC and find that because the PSA serves as the conduit to flow through revenues from Ohio Power to AEP Genco during a specified transition period for what would have been retail transactions if the Ohio Commission had not implemented a restructuring plan, the PSA establishes just and reasonable rates. The transition period provided by the PSA runs through May 31, 2015, after which the PSA will end and all of Ohio Power's SSO customers' capacity and energy requirements will be procured through a competitive bidding process. During this transition period, the obligations under the PSA steadily decrease. The November 15, 2013 amendments reflect revisions to the schedule established by the Ohio Commission resulting from the complex nature and litigation of the case before the Ohio Commission. We find this mechanism during the transition period, as established by the Ohio Commission, reasonable.

23. Protestors argue that AEPSC has failed to address affiliate concerns under *Edgar*. The purpose of the Commission's *Edgar* analysis is to prevent affiliate preference and distorted market outcomes.[22] Here, however, we do not see serious risks from this arrangement, and we will accept the agreement. Moreover, the PSA is a short-term agreement for a transition period that supports the Ohio Commission's restructuring efforts. Further, restructuring will enable customers to obtain energy and capacity through competitive market mechanisms.

---

[21] *Pub. Serv. Elec. & Gas Co.*, 88 FERC ¶ 61,299, at 61,917–18. The Commission also accepted a similar power sales arrangement during Maryland's restructuring by delegated letter order. *Baltimore Gas & Elec. Co.*, Docket No. ER00-3296-000 (Sept. 19, 2000). *See also Baltimore Gas & Elec. Co.*, 90 FERC ¶ 62,222, at 64,321 (2000) ("According to the [section 203] application, CPS will enter into power sales agreements with Constellation Generation and CCI to purchase all or a portion of the output from the transferred generating plants, and sell to BGE the capacity and energy required for BGE to meet its native load obligations for the first three years of retail competition until June 30, 2003.").

[22] *See Boston Edison Co. Re: Edgar Elec. Energy Co.*, 55 FERC ¶ 61,382, at 62,167 (1991) ("The Commission has stated that in cases where affiliates are entering agreements for which approval of market-based rates is sought, it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is not distorted.").

24. IEU argues that the PSA is unreasonable because it does not contain a mechanism to revise the generation and capacity charges for SSO customers, the RSR charges, or the non-SSO capacity charges if the Ohio Commission's orders are modified. AEPSC states that if any further amendments to the PSA are needed as a result of Ohio Commission orders, AEPSC will file such amendments with this Commission. We find this necessary. The PSA must serve as a conduit to pass through rates for what would have been retail transactions had the Ohio Commission not implemented restructuring. Therefore, AEPSC must submit a compliance filing within 30 days to ensure that the PSA reflects the Ohio Commission's underlying rates and rate structure, and similarly do so in the future to reflect any other, future changes to the Ohio Commission's underlying rates or rate structure.

25. OCC and IEU raise concerns with the terms for SSO and non-SSO customers under the PSA and argue that the PSA discriminates between SSO and non-SSO customers. At times, protestors argue that these charges are improper because they do not properly reflect Ohio Commission orders; at other times, such as when IEU argues that charges to SSO and non-SSO customers must be identical under the PSA, protestors argue the opposite - that the PSA is improper because it tracks Ohio Commission orders with which protestors disagree. As AEPSC notes, the PSA provides the charges for generation and capacity service to SSO customers, and those charges track the Ohio Commission-approved retail rates set out in Exhibit B to the PSA. The PSA also establishes the RSR charge and the capacity charge to non-SSO customers. These three charges reflect the Ohio Commission-approved rates for transactions that would have been retail transactions had the Ohio Commission not implemented restructuring. OCC and IEU comments attempt to relitigate the findings of the Ohio Commission, and we have found these rates to be just and reasonable during the transition period implementing the Ohio Power restructuring plans. Further, the development of retail choice in Ohio is not before us, and the OCC and IEU concerns go beyond the scope of this proceeding.

26. We grant the AEPSC and AEP Genco requests for waiver of the requirement to provide estimates of first-year transactions and revenues under the PSA (18 C.F.R. § 35.12(b)(1) (2013)) and of the requirement to provide certain rate design documents (18 C.F.R. § 35.12(b)(2)–(5) (2013)). As noted, the PSA includes rates for generation and other services that have been approved by the Ohio Commission, and the PSA includes these costs as a pass-through. Further, because SSO customers may shop for a competitive supplier, the estimates of first-year transactions are unknown.

27. In addition, we grant Ohio Power's request for waiver of the 60-day notice requirements for the amended PSA filed on November 15, 2013, to allow the amended

PSA to become effective January 1, 2014. Granting the waiver for the amendments will allow the restructuring plan to become effective on schedule, and the PSA, as originally filed, has been before the Commission since October 31, 2012.[23]

The Commission orders:

The PSA is conditionally accepted and the proposed tariffs are hereby conditionally accepted, to become effective January 1, 2014, subject to further revisions to be filed within 30 days of the date of this order to ensure that the PSA reflects the Ohio Commission's underlying rates and rate structure, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

[23] *See Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106, *order on reh'g*, 61 FERC ¶ 61,089 (1992).