

146 FERC ¶ 61,141  
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 No. ER14-899-000

ORDER GRANTING AUTHORIZATION TO MAKE AFFILIATE SALES AND  
ACCEPTING TARIFF FILING

(Issued February 28, 2014)

1. In this order, we accept the power supply agreement (Assigned Contract) filed on December 30, 2013 by AEP Generation Resources Inc. (AEP Generation), effective January 1, 2014. In light of the totality of the facts and circumstances of this case, we grant AEP Generation's request for authorization to make wholesale power sales to its affiliate Wheeling Power Company (Wheeling) for an initial term, effective January 1, 2014 and expiring on or before December 31, 2014, as discussed below. We also grant AEP Generation's request for waiver of 18 C.F.R. §§ 35.11, 35.13, and 35.39(b), as discussed below.

**I. Background**

2. Ohio Power Company (Ohio Power), AEP Generation, and Wheeling are subsidiaries of American Electric Power Company, Inc. AEP Generation states that Wheeling serves retail customers in West Virginia but does not own or operate any generating facilities, and that Ohio Power entered into a full requirements contract (Existing Contract) with Wheeling on November 29, 2009. The Existing Contract was accepted on January 8, 2010.<sup>1</sup>

3. AEP Generation states that the Existing Contract was to terminate upon the merger of Wheeling into Appalachian Power Company (Appalachian) (Wheeling-Appalachian merger), which was expected to take place on or about December 31, 2013. AEP Generation states, however, that the Public Service Commission of West Virginia (West Virginia Commission) issued an order on December 13, 2013 deferring its ruling on the

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<sup>1</sup> *Ohio Power Co.*, Docket No. ER10-275-000 (Jan. 8, 2010) (delegated letter order). See Ohio Power Company First Revised Rate Schedule FERC No. 18.

merger subject to further evaluation of alternatives to serve Wheeling's load.<sup>2</sup> As a result of the West Virginia Commission's deferral, the Wheeling-Appalachian merger was not consummated by December 31, 2013.

4. AEP Generation states that it was formed to take ownership of and operate generation resources previously owned by Ohio Power. AEP Generation explains that those generation resources were transferred to AEP Generation on or about December 31, 2013 as part of Ohio Power's state-mandated corporate reorganization approved by the Commission on April 29, 2013<sup>3</sup> under section 203 of the Federal Power Act.<sup>4</sup> AEP Generation states that because the Wheeling-Appalachian merger did not close as originally proposed, Wheeling needs the power provided under the Existing Contract to serve its retail customers on and after January 1, 2014. Accordingly, AEP Generation states that the Existing Contract was assigned to AEP Generation who would begin serving Wheeling on January 1, 2014 under the Assigned Contract. As a result of the assignment of the Existing Contract from Ohio Power Company to AEP Generation, AEP Generation has requested authority to make sales to its affiliate, Wheeling (Proposed Transaction), as well as acceptance of the Assigned Contract.

## **II. Request for Waiver and Authorization to Make Affiliate Sales**

5. AEP Generation notes that section 35.39(b) of the Commission's regulations<sup>5</sup> provides that sales of electric energy and capacity between a franchised public utility with captive customers and a market-regulated power sales affiliate must receive prior Commission approval. AEP Generation submits that good cause exists for the Commission to waive the requirements under section 35.39(b) of its regulations. AEP Generation states that it did not know with certainty until mid-December that the Wheeling-Appalachian Merger would not close on December 31, 2013 as originally proposed and that Ohio Power would thus need to transfer the Existing Contract to AEP

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<sup>2</sup> See *Appalachian Power Co. and Wheeling Power Co.*, Docket No. 11-1775-E-P (Public Service Commission of West Virginia, Dec. 13, 2013). AEP Generation notes that the Virginia State Corporation Commission approved the Wheeling-Appalachian merger, subject to certain conditions, and that the transaction was submitted to the Commission and approved in *Appalachian Power Co. and Wheeling Power Co.*, 143 FERC ¶ 62,072 (2013).

<sup>33</sup> *Ohio Power Co. and AEP Generation Resources, Inc.*, 143 FERC ¶ 61,075 (2013) (*Ohio Power*), order on reh'g, 146 FERC ¶ 61,016 (2014).

<sup>4</sup> 16 U.S.C. § 824b (2012).

<sup>5</sup> 18 C.F.R. § 35.39(b) (2013).

Generation. Therefore, AEP Generation states that it could not submit the Assigned Contract for prior approval 60 days before January 1, 2014. AEP Generation submits that by granting the waiver, the Commission will promote a seamless transition under the reorganization and enable Wheeling's load requirements to continue to be met under the same rates, terms, and conditions that have been accepted by the Commission.

6. AEP Generation further notes that parties to such transactions must demonstrate that their agreement does not show evidence of affiliate abuse such that the traditional franchised utility provided an undue preference (i.e., agreed to sell power at a price below-market or to purchase power at a price above-market) to its market-regulated power sales affiliate.<sup>6</sup> AEP Generation states that this concern is not present here for the following reasons. AEP Generation states that it had no role in drafting the Existing Contract, because AEP Generation did not exist and there were no plans for corporate reorganization at the time. Additionally, AEP Generation states that the Existing Contract was negotiated between two franchised public utilities (Wheeling and Ohio Power). Moreover, AEP Generation represents that the Existing Contract was the result of a Joint Stipulation entered into by Wheeling, the West Virginia Commission staff and the Consumer Advocate Division of the West Virginia Commission.

7. AEP Generation notes that the Commission recognized in *Ohio Power* that if the Wheeling-Appalachian merger did not close by December 31, 2013, AEP Generation would assume Ohio Power's obligations under the Existing Contract. Further, AEP Generation explained in its section 203 application that "if the [Existing] Contract were assigned to AEP Generation Resources, there would be no adverse impact on Wheeling and its retail customers because the non-fuel components of the contract are fixed and the fuel charges will reflect the actual cost of the fuel consumed to serve Wheeling's load."<sup>7</sup>

### **III. Notice of Filing and Responsive Pleadings**

8. Notice of AEP Generation's filing was published in the *Federal Register*, 79 Fed. Reg. 1374 (2014), with motions to intervene and protests due on or before January 21, 2014. None was filed.

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<sup>6</sup> See *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (1991) (*Edgar*).

<sup>7</sup> Application at 2 (citing Application for Authorization to Transfer Jurisdictional Assets under section 203 of the Federal Power Act, Docket No. EC13-26 (Oct. 31, 2012) at 24).

#### IV. Discussion

##### A. Affiliate Sales Analysis

9. In *Edgar*, the Commission stated that, in cases where affiliates are entering into market-based rate sales agreements, it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is not distorted.<sup>8</sup> According to *Edgar*, parties to such transactions must demonstrate that their agreement does not evidence affiliate abuse (i.e., that the traditional franchised utility did not provide an undue preference to its market-regulated power sales affiliate). The Commission extended the *Edgar* criteria in *Southern California Edison Company, On behalf of Mountainview Power Company, LLC*<sup>9</sup> to apply to all affiliate long-term (one year or longer) power purchase agreements, whether cost-based or market-based.<sup>10</sup>

10. In *Edgar*, the Commission further provided “[t]he following examples of ways to demonstrate lack of affiliate abuse,” noting that the list was not necessarily all-inclusive: (1) evidence of head-to-head competition; (2) evidence of prices which non-affiliated buyers were willing to pay for similar services from the project; and (3) benchmark evidence that shows the prices, and terms and conditions of sales made by nonaffiliated sellers, which could include purchases made by the utility itself or by other buyers in the relevant market.<sup>11</sup>

11. We do not agree with AEP Generation that the affiliate abuse concern is not an issue in this case. However, under the totality of the facts and circumstances of this particular case, we will grant AEP Generation’s request for waiver of section 35.39(b) of the Commission’s regulations and grant AEP Generation limited authorization to make

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<sup>8</sup> *Edgar*, 55 FERC at 62,167.

<sup>9</sup> *Southern California Edison Company, On behalf of Mountainview Power Company, LLC*, 106 FERC ¶ 61,183, *order on reh’g*, 109 FERC ¶ 61,086 (2004), *order on reh’g*, 110 FERC ¶ 61,319 (2005).

<sup>10</sup> *Id.* P 58.

<sup>11</sup> *Edgar*, 55 FERC at 62,168. See also *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 540, *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. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012).

sales to Wheeling under the terms of the Assigned Contract for the initial Assigned Contract term, i.e., from January 1, 2014 through December 31, 2014.

12. We find that the following unique facts and circumstances in the totality warrant a waiver of section 35.39(b) of the Commission's regulations and limited authorization for the affiliate transaction: (1) the Proposed Transaction and related affiliate sale are the result of Ohio's state-mandated restructuring; (2) the affiliate sales authorization will be for a limited term (through no later than December 31, 2014), as noted below; (3) the rates, terms and conditions of the Assigned Contract have not changed from those in the Existing Contract; (4) the Existing Contract was the result of a Joint Stipulation involving, among others, the West Virginia Commission staff and the Consumer Advocate Division of the West Virginia Commission; (5) as stipulated in section 19.2 of the Assigned Contract, the West Virginia Commission is exploring options for meeting the future power supply requirements of Wheeling, and the Assigned Contract will terminate if some alternative supply mechanism is implemented for Wheeling, thus providing additional protection for captive retail customers; (6) Wheeling has an immediate requirement to supply power to its retail customers as of January 1, 2014; and (7) the parties did not know until mid-December that the Wheeling-Appalachian merger would not occur and that the Existing Contract would have to be assigned due to the actions of a third party, the West Virginia Commission.

13. As such, we will grant limited authorization for AEP Generation to make affiliate sales under the Assigned Contract until the earlier of: (1) the termination of the Assigned Contract upon consummation of the Wheeling-Appalachian merger; (2) the termination of the Assigned Contract upon the implementation of an alternative supply mechanism for the Wheeling load in accordance with section 19.2 of the Assigned Contract; or (3) the end of the initial term of the Assigned Contract on December 31, 2014.

14. In addition, we will require that if the Assigned Contract does not terminate prior to December 31, 2014 and AEP Generation intends to continue to make sales under the Assigned Contract to its affiliate, Wheeling, AEP Generation must request Commission authorization to continue performance under the Assigned Contract. Such request must be filed at least 60 days prior to December 31, 2014, and must include a traditional *Edgar* demonstration regarding affiliate abuse concerns as required by 18 C.F.R § 35.39 of the Commission's regulations.

#### **B. Power Supply Agreement**

15. The terms of the Assigned Contract provide that AEP Generation will serve Wheeling's full load requirements under fixed terms including firm power, surplus power, curtailable service, back-up service, and maintenance service. The contract includes a fuel clause that reflects fuel costs associated with the energy delivered to Wheeling. Changes from the Existing Contract have been made to reflect the change in name of the seller, and the fact that AEP Generation does not have a service territory,

franchised retail customers, or own or operate transmission facilities. There are no changes to the provisions setting out the non-fuel and fuel charge provisions, or the terms and charges for other various services from when the Existing Contract was accepted by the Commission on January 8, 2010.

16. We grant AEP Generation's request for waiver of the 60-day notice requirements to allow the Assigned Contract to become effective January 1, 2014.<sup>12</sup> Moreover, because the filing does not constitute a change in rates and there will be no impact on Wheeling's customers, to the extent 18 C.F.R. § 35.13(c) requires comparisons of "sales and services and revenues from sales and services under the rate schedule, tariff, or service agreement to be superseded," good cause exists to waive these requirements. We therefore grant AEP Generation's request for waiver of the provisions of 18 C.F.R. § 35.13 that would require it to provide cost-of-service information for this initial term ending on or before December 31, 2014, and 18 C.F.R. § 35.11 to the extent necessary to allow a January 1, 2014 effective date.

17. On the basis of the totality of the facts and circumstances of this case, as discussed above, we accept the Assigned Contract for filing effective January 1, 2014. We remind AEP Generation's affiliate, Ohio Power, that, pursuant to 18 C.F.R. § 35.15, it needs to make a filing to cancel the Existing Contract.<sup>13</sup>

The Commission orders:

(A) AEP Generation's request for waiver of sections 35.11, 35.13, and 35.39(b) is granted, as discussed in the body of this order.

(B) AEP Generation's request for authorization to make power sales to Wheeling under the Assigned Contract is granted effective January 1, 2014 until the earlier of: (1) the termination of the Assigned Contract upon consummation of the Wheeling-Appalachian Merger; (2) the termination of the Assigned Contract upon the implementation of an alternative supply mechanism for the Wheeling load in accordance with section 19.2 of the Assigned Contract; or (3) the end of the initial term of the Assigned Contract on December 31, 2014, as discussed in the body of this order.

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<sup>12</sup> See *Cent. Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, at 61,338 (1992).

<sup>13</sup> Ohio Power Company First Revised Rate Schedule FERC No. 18.

(C) The Assigned Contract is accepted for filing effective January 1, 2014, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.