

155 FERC ¶ 61,102  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

Electric Power Supply Association,  
Retail Energy Supply Association,  
Dynegy Inc., Eastern Generation, LLC  
NRG Power Marketing LLC and  
GenOn Energy Management, LLC

Docket No. EL16-33-000

v.

AEP Generation Resources, Inc. and  
Ohio Power Company

ORDER GRANTING COMPLAINT

(Issued April 27, 2016)

1. On January 27, 2016, the Electric Power Supply Association, the Retail Energy Supply Association, Dynegy, Inc., Eastern Generation, LLC, NRG Power Marketing LLC, and GenOn Energy Management LLC (collectively, Complainants) filed a complaint pursuant to sections 206, 306 and 309 of the Federal Power Act (FPA),<sup>1</sup> and Rule 206 of the Commission's Rules of Practice and Procedure<sup>2</sup> against AEP Generation Resources, Inc. (AEP Generation) and Ohio Power Company (AEP Ohio) (collectively Respondents).<sup>3</sup> Complainants request that the Commission rescind the waiver of its

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<sup>1</sup> 16 U.S.C. §§ 824e, 825e, and 825h (2012).

<sup>2</sup> 18 C.F.R. § 385.206 (2015).

<sup>3</sup> AEP Generation and AEP Ohio are subsidiaries of American Electric Power Company, Inc.

affiliate power sales restrictions that it previously granted to Respondents as that waiver relates to a particular power sales contract. As discussed below, we grant the complaint.<sup>4</sup>

## **I. Background**

2. Under the Commission's affiliate power sales restrictions, no wholesale sale of electric energy or capacity may be made between a franchised public utility with captive customers<sup>5</sup> and a market-regulated power sales affiliate without first receiving Commission authorization under section 205 of the FPA.<sup>6</sup> The Commission evaluates market-based affiliate transactions based on the standards set forth in *Boston Edison Co. Re: Edgar Electric Energy Co. and Allegheny Energy Supply Co., LLC*.<sup>7</sup>

3. In *Edgar*, the Commission provided the following examples of ways to demonstrate lack of affiliate abuse: (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, terms, and conditions of sales made by non-affiliated sellers, which could include purchases made

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<sup>4</sup> Complainants brought a similar complaint against First Energy Solutions Corporation and its market-regulated power sales affiliates in Ohio (FirstEnergy) in Docket No. EL16-34-000, and we address that complaint in a concurrently issued order. See *Electric Power Supply Association v. AEP Generation Resources, Inc.*, 155 FERC ¶ 61,101 (2016).

<sup>5</sup> Captive customers are wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation. 18 C.F.R. § 35.36(a)(6) (2015).

<sup>6</sup> 18 C.F.R. § 35.39(b) (2015). 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, *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).

<sup>7</sup> 55 FERC ¶ 61,382, at 62,167 (1991) (*Edgar*); 108 FERC ¶ 61,082, at P 18 (2004) (*Allegheny*).

by the utility itself or by other buyers in the relevant market.<sup>8</sup> In *Allegheny*, the Commission outlined principles as to how it will evaluate a competitive solicitation process.<sup>9</sup>

4. Applicants may seek “waiver” of the affiliate power sales restrictions by requesting a Commission determination that the Order No. 697 requirement to obtain prior approval for affiliate sales of energy or capacity does not apply. On February 5, 2014, Respondents received waiver of the Commission’s affiliate power sales restrictions based on the representation that Ohio is a retail choice state and that AEP Ohio does not have captive retail customers needing the protections afforded by those restrictions.<sup>10</sup>

## II. Complaint

5. Complainants argue that there have been fundamental changes in circumstances since the Commission granted waiver of the affiliate restrictions to AEP Ohio and its affiliates such that it would be unjust, unreasonable and unduly discriminatory to allow Respondents to enter into a particular power sales contract (Affiliate PPA) pursuant to their blanket market-based rate authorization. Accordingly, Complainants ask that the Commission rescind the waiver as it relates to the Affiliate PPA, and thus ensure that the Affiliate PPA is reviewed under section 205 of the FPA and in accordance with the standards set forth in *Edgar* and *Allegheny*.<sup>11</sup>

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<sup>8</sup> *Edgar*, 55 FERC ¶ 61,382 at 62,168-69.

<sup>9</sup> *Allegheny*, 108 FERC ¶ 61,082 at PP 23-35 (the principles are : (1) transparency, a requirement that the solicitation process be open and fair; (2) definition, a requirement that the product, or products, sought through the competitive solicitation be precisely defined; (3) evaluation, a requirement that the evaluation criteria be standardized and applied equally to all bids and bidders; and (4) oversight, a requirement that an independent third party design the solicitation, administer bidding, and evaluate bids prior to selection).

<sup>10</sup> *AEP Energy Partners, Inc.*, Docket No. ER14-593-000, *et al.* (Feb. 5, 2014) (delegated letter order).

<sup>11</sup> *Edgar*, 55 FERC ¶ 61,382 at 62,167; *Allegheny* at 108 FERC ¶ 61,082 at P 18.

6. Complainants state that under the Affiliate PPA, AEP Ohio, a franchised public utility, would purchase the output of certain generation facilities owned by its market-regulated power sales affiliate, AEP Generation.<sup>12</sup> According to Complainants, the power purchased under the Affiliate PPA would not be used to serve retail consumers in AEP Ohio's service territory but would instead be resold into the markets administered by PJM Interconnection, L.L.C. (PJM). Complainants allege that any losses from the PJM sales under the Affiliate PPA would be recoverable through a distribution rate rider (PPA Rider) that was pending before the Ohio Commission at the time the complaint was filed.<sup>13</sup>

7. Complainants argue that retail choice is effectively absent as it concerns the Affiliate PPA because the PPA Rider would compel all customers, even those that opt to take service from a competitive retail supplier, to pay for the costs associated with the Affiliate PPA. Therefore, Complainants argue that retail customers in AEP Ohio's service territory are in fact captive and that this case involves the extreme example of affiliate abuse: "a holding company that siphons funds from a franchised public utility to support its failing market-regulated power sales affiliate."<sup>14</sup>

8. Complainants allege that the Affiliate PPA would impose "hundreds of millions or even billions of dollars in above-market costs" on Ohio customers and would artificially distort prices in PJM by subsidizing the continued operation of generation that would otherwise retire.<sup>15</sup> Specifically, Complainants estimate the costs of the PPA Rider to be a

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<sup>12</sup> According to Complainants, in connection with the implementation of retail choice in Ohio, AEP Ohio divested virtually all of its generation to AEP Generation, including interests in various coal-fired units at the Cardinal, Conesville, Stuart, and Zimmer Stations in Ohio, which represent an aggregate generating capacity of approximately 2,671 MW (PPA units). Complaint at 8.

<sup>13</sup> Complainants state that the Ohio Commission has approved the PPA Rider on a placeholder basis at an initial rate of zero and that AEP is awaiting action from the Ohio Commission on its request to recover the costs of the Affiliate PPA through the PPA Rider. Complaint at 10-12. On March 31, 2016, the Ohio Commission issued an order approving the proposal, with modifications. *See In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider, Order and Opinion, Case No. 14-1693-EL-RDR et al., (Mar. 31, 2016).*

<sup>14</sup> Complaint at 15 (citing Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at n.280).

<sup>15</sup> *Id.* at 13-14.

cumulative of \$1.9 billion or \$1.5 billion on a net present value.<sup>16</sup> Additionally, they assert that a competing supplier, not affiliated with Respondents, has offered to supply AEP Ohio the same amount of energy and capacity at prices that would save consumers \$2.5 billion over the contract term. Complainants argue that this offer removes any doubt as to the magnitude of the above-market costs that retail customers in AEP Ohio's service territory would bear under the Affiliate PPA.<sup>17</sup>

9. Complainants argue that the Affiliate PPA and the PPA Rider will harm PJM's wholesale markets. They state that this case involves "uneconomic non-exit"—i.e., subsidized retention of resources that would otherwise have left the market.<sup>18</sup> Under these circumstances, Complainants argue that it would be unjust, unreasonable and unduly discriminatory if the Affiliate PPA were allowed to evade Commission review.<sup>19</sup> Therefore, they request that the Commission rescind the waiver of the affiliate power sales restrictions previously granted to AEP Ohio and its affiliates, as that waiver relates to the Affiliate PPA. They ask that the rescission be made effective as of the date of their complaint, pursuant to section 206(b) of the FPA.

10. Finally, Complainants request that the Commission clarify that, when AEP Generation files the Affiliate PPA pursuant to FPA section 205, the Commission will not entertain any request for waiver of the prior notice filing requirements based on claims that AEP Generation anticipated being able to enter into the Affiliate PPA pursuant to its blanket market-based rate authorization.<sup>20</sup>

### **III. Notice, Interventions, and Responsive Pleadings**

11. Notice of the complaint was published in the *Federal Register*, 81 Fed. Reg. 5730 (2016), with answers, interventions, and protests due on or before February 23, 2016.<sup>21</sup>

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<sup>16</sup> *Id.* at 17.

<sup>17</sup> *Id.* at 18-19.

<sup>18</sup> *Id.* at 18.

<sup>19</sup> *Id.* at 20. Complainants note that the Ohio Commission also lacks the authority to review the Affiliate PPA.

<sup>20</sup> *Id.* at 22-23.

<sup>21</sup> See *Electric Power Supply Association*, Notice Granting Extension of Time, Docket No. EL16-33-000 (Feb. 9, 2016).

Timely motions to intervene were submitted by: Apex Clean Energy Management, LLC, Industrial Energy Users-Ohio, the PSEG Companies,<sup>22</sup> the Environmental Law and Policy Center, Public Citizen, Inc., Duke Energy Corporation, the Ohio Energy Group (Ohio Energy Group),<sup>23</sup> Dominion Resources Services, Inc., Buckeye Power Inc., Old Dominion Electric Cooperative (Old Dominion), FirstEnergy Service Company, LS Power Associates, L.P., and American Municipal Power, Inc. (American Municipal Power). The Pennsylvania Public Utility Commission (Pennsylvania Utility Commission) filed a notice of intervention. The Ohio Commission filed a notice of intervention and a separate notice indicating that it would not be filing comments at this time due to related cases pending at the state level. Timely motions to intervene were filed by the Ohio Consumers' Counsel, the Ohio Manufacturers' Association Energy Group (Ohio Manufacturers), and Panda Power Funds (Panda), PJM, the Independent Market Monitor for PJM (PJM Market Monitor), PJM Power Providers Group (P3), Calpine Corporation (Calpine), and Oregon Clean Energy LLC (Oregon Clean Energy) and the Talen PJM Companies.<sup>24</sup> Navopache Electric Cooperative, Inc. (Navopache), PCS Nitrogen Ohio, L. P. (PSC Nitrogen), the Maryland Public Service Commission (Maryland Commission), Environmental Defense Fund, CPV Power Holdings, LP (CPV Power), Castleton Commodities Merchant Trading, L.P. (Castleton), and the Ohio Environmental Council each filed motions to intervene out-of-time. The Environmental Defense Fund and Ohio Environmental Council also filed joint comments in support of the complaint. Hardwood Flooring & Paneling, Inc. and Ohio Citizen Action and filed comments in support of the complaint.

12. On February 23, 2016, Respondents filed an Answer. Also on February 23, 2016, Ohio Energy Group filed comments in support of Respondents. Comments in support of

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<sup>22</sup> The PSEG Companies include the Public Service Electric and Gas Company, PSEG Power LLC, and PSEG Energy Resources & Trade LLC.

<sup>23</sup> The Ohio Energy Group consists of AK Steel Corporation, Alcoa, Inc., Amsted Rail Company, Inc., Ford Motor Company, GE Aviation, Linde, Inc., POET Biorefining, Praxair Inc., TimkenSteel Corporation, and Worthington Industries.

<sup>24</sup> The Talen PJM Companies (Talen) include Talen Energy Marketing, LLC; Brunner Island, LLC; Holtwood, LLC; Martins Creek, LLC; Montour, LLC; Susquehanna Nuclear, LLC; Lower Mount Bethel Energy, LLC; Raven Power Marketing LLC; Brandon Shores LLC; Sapphire Power Marketing LLC; Bayonne Plant Holding, L.L.C.; York Generation Company, LLC; Newark Bay Cogeneration Partnership, L.P.; Camden Plant Holding, L.L.C.; Pedricktown Cogeneration Company LP; H.A. Wagner LLC; C.P. Crane LLC; and Elmwood Park Power, LLC.

the complaint were filed by Ohio Consumers' Counsel, Ohio Manufacturers, the Pennsylvania Commission, Panda, PJM, PJM Market Monitor, P3, Calpine, and Oregon Clean Energy and Talen (jointly); and Environmental Defense Fund and Ohio Environmental Council (jointly).

13. On March 3, 2016, American Municipal Power filed a response to the comments provided by the PJM Market Monitor. On March 9, 2016, Complainants and the Ohio Consumers' Counsel filed separate responses to Respondents' answer. Also on March 9, 2016, AEP filed a response to the comments in support of the complaint.

14. On April 4, 2016, AEP filed a motion to lodge a March 31, 2016 Order and Opinion issued by the Ohio Commission, which approved a settlement relating to the Affiliate PPA Rider. On April 6, 2016, Complainants filed an answer indicating agreement that the Ohio Commission's March 31, 2016 Order should be made part of the record. On April 8, 2016, American Municipal Power and Old Dominion (jointly) filed a response.<sup>25</sup>

15. On April 11, 2016, the Ohio Commission filed comments out-of-time following the issuance of its March 31, 2016 Order and Opinion regarding the Affiliate PPA Rider. On April 13, 2016, Talen filed a response to the Ohio Commission's comments. Also on April 13, 2016, Complainants filed a response stating that they did not object to the acceptance of the Ohio Commission's out-of-time comments. On April 26, 2015 the Ohio Consumers' Counsel filed a response to the Ohio Commission's comments. On April 18, 2016, the Environmental Law & Policy Center filed an answer to Respondents' motion to lodge the Ohio Commission's order approving retail rate recovery for the Affiliate PPA through the PPA Rider.

**A. Respondents' Answer**

16. In their Answer, Respondents argue that the complaint poses the question of whether the Ohio Commission's approving a non-bypassable rate mechanism in AEP Ohio's service territory would render retail customers captive for purposes of the Commission's affiliate restrictions, thereby requiring the Commission to review the Affiliate PPA. Respondents argue that the answer to this question is "no" because Respondents' proposed retail rate mechanism would not impair the legal right of retail customers in Ohio to select an alternative power supplier. Therefore, Respondents argue that there are no changed circumstances that would justify granting the complaint.

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<sup>25</sup> American Municipal Power and Old Dominion's April 8, 2016 response pertains exclusively to a pleading filed by FirstEnergy in Docket No. EL16-34-000 and will not be summarized herein.

Respondents add that the Ohio Commission is undertaking a comprehensive review of the impact of Respondents' proposal on Ohio retail customers, and that the Commission should defer to the Ohio Commission's resolution.<sup>26</sup>

17. Respondents state that the Commission has previously concluded that (1) captive customers do not include those who have retail choice<sup>27</sup> and (2) Ohio customers are not captive because there is retail choice in Ohio.<sup>28</sup> Respondents state that the Commission's policy in determining whether a state has retail choice is to determine whether state law affords retail customers the legal right to choose alternative suppliers. Respondents state that if the state does have retail choice, Commission policy is that the Commission's affiliate rules are not needed to safeguard against the potential for affiliate abuse, and the Commission will not revisit that determination unless requested to do so by a state commission.

18. Respondents state that there is no basis for the Commission to undertake an *Edgar* analysis because AEP Ohio has no wholesale customers, and because the Ohio Commission is reviewing the Affiliate PPA to ensure it does not harm Ohio retail customers which, Respondents argue, is the type of review the Commission would undertake under *Edgar*.<sup>29</sup> Therefore, Respondents argue that Complainants are wrong in contending that the Affiliate PPA would evade meaningful review.

19. Respondents state that the PPA Rider creates a partial cost-based hedge against volatile market prices by netting revenues from the sale into PJM of AEP Ohio's entitlement to capacity and energy under the Affiliate PPA against the costs associated with those PPAs. Respondents agree that the PPA Rider would be non-bypassable to all retail customers, including those that choose a competitive retail supplier.

20. However, Respondents argue that the Commission rejected arguments that non-bypassable charges cause retail customers to become "captive" when it granted waiver of

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<sup>26</sup> AEP Answer at 1-3, 5-6.

<sup>27</sup> *Id.* at 14-15 (citing Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at PP 192-193 (May 7, 2008); *Pub. Serv. Elec. & Gas Co.*, 134 FERC ¶ 61,138, at P 12 (2011)).

<sup>28</sup> *Id.* at 15-16 (citing *Dayton Power & Light Co.*, 123 FERC ¶ 61,231, at P 21 (2008); *Duke Energy Retail Sales LLC*, 127 FERC ¶ 61,027 (2009); *Cincinnati Gas & Elec. Co.*, 113 FERC ¶ 61,197 (2005); *Cinergy Mktg. & Trading, LP*, 116 FERC ¶ 62,197 (2006)).

<sup>29</sup> *Id.* at 6-7.

the affiliate restrictions to certain market-regulated affiliates of FirstEnergy Corporation.<sup>30</sup> Respondents state that in the FirstEnergy Waiver Order, the Commission ruled that it would not evaluate Ohio's retail choice program and therefore rejected challenges to the effectiveness of retail competition in Ohio, instead deferring to the Ohio Commission.<sup>31</sup>

21. Respondents argue that the Complainants should not be permitted to expand this proceeding into an evaluation of the fairness of PJM's existing market rules, and that the Complainants' concerns about market distortion have nothing to do with the potential for affiliate abuse under the Affiliate PPA. Respondents state that, if the Commission believed PJM's market rules needed to be revised, it would be unduly discriminatory to do so in a way that applies only to AEP Ohio.<sup>32</sup> Respondents argue that there is no final Affiliate PPA that could be the subject of a section 205 filing, and that the order granting waiver of the Commission's affiliate restrictions is currently effective and AEP Generation and AEP Ohio are entitled to rely upon the waiver until the Commission rescinds it.<sup>33</sup>

22. Respondents argue that Complainants' concern that AEP Generation obtain authorization in advance of the May 2016 PJM capacity auction is pretext, and that Complainants' actual concern is the price at which AEP Ohio might offer capacity under the Affiliate PPA into that auction, and whether PJM's market rules should be modified to address that offer. Respondents argue that whether market rules need to be changed is a question better addressed in the PJM stakeholder process, and that issue does not justify fast track procedures to review the narrow affiliate question raised in the Complaint.<sup>34</sup>

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<sup>30</sup> *Id.* at 16-17 (citing *See FirstEnergy Solutions Corp.*, 125 FERC ¶ 61,356, at P 13 (2008) (First Energy Waiver Order), *reh'g denied*, 128 FERC ¶ 61,119 (2009) (FirstEnergy Rehearing Order).

<sup>31</sup> *Id.* at 17-18 (citing FirstEnergy Waiver Order, 125 FERC ¶ 61,356 at 28).

<sup>32</sup> *Id.* at 22-25.

<sup>33</sup> *Id.* at 25-26.

<sup>34</sup> *Id.* at 27.

## **B. Comments**

### **1. Comments in Support of Complainants**

23. Parties filing comments in support of the complaint argue that the Affiliate PPA will have a detrimental effect on Ohio consumers. Ohio Consumers' Counsel estimates that if the involved generation clears the PJM capacity auction, the cost to Ohio's customers would be approximately \$700 per customer and approximately \$1.9 billion in total over its eight-year term. If the involved generation does not clear the auction, the cost to Ohio customers could balloon to \$1,000 per customer and approximately \$3.1 billion over the eight year term.<sup>35</sup> Hardwood Flooring adds that the costs being passed through to consumers are driving businesses away from Ohio, which in turn harms the state economy by driving away prospective homeowners, retail establishments, and other industries.

24. Supportive commenters agree with Complainants that circumstances have changed since Respondents received their waivers.<sup>36</sup> They argue that, regardless of whether retail choice exists in Ohio, Ohio ratepayers are captive because they will have no ability to avoid the subsidized costs incurred under the Affiliate PPA and the PPA Rider by choosing another provider.<sup>37</sup> Therefore, supportive customers argue that the justification for the waiver—i.e., that customers are not captive due to retail choice—no longer applies.

25. P3 states that accepting arguments that the existence of retail choice in Ohio justifies retention of the waiver, even when no choice is available where costs are incurred under the Affiliate PPA, would elevate form over substance.<sup>38</sup> They argue that the reason that “retail choice” has been found adequate to protect retail customers from affiliate power sales involving a franchised utility is that retail choice would ordinarily give customers the ability to choose not to bear the costs of an abusive affiliate

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<sup>35</sup> *Id.* at 2.

<sup>36</sup> *See* PJM Market Monitor Comments at 3; Oregon Clean Energy and Talen Comments at 12; Panda Comments at 3; P3 Comments at 5; Calpine Comments at 3.

<sup>37</sup> P3 Comments at 6; Ohio Consumers' Counsel Comments at 12; Ohio Manufacturers Comments at 7; PJM Market Monitor Comments at 3; Oregon Clean Energy and Talen Comments at 12; Environmental Defense Fund and Ohio Environmental Council Comments at 3-4.

<sup>38</sup> P3 Comments at 7.

transaction. P3 states that that is not the case here, where the costs of the abusive affiliate transactions are assessed to all retail customers, including those taking service from competitive suppliers.<sup>39</sup>

26. P3 argues that the PPA rider will be the product of “cost-based regulation” because it depends on the Ohio Commission’s determination whether (or to what extent) AEP Ohio should be permitted to pass on the net costs or benefits from the PPA to its retail customers.<sup>40</sup> Finally, P3 argues that the affiliate PPA is detrimental to wholesale market insofar as it is an above-market cost, non-bid contract designed to benefit one wholesale market participant to the disadvantage of others. According to P3 and Calpine, this is exactly the type of transaction that this Commission was suspect of in issuing the affiliate transaction requirements in Order No. 697 and the affiliate transactions standards as further articulated in *Edgar/Allegheny*.<sup>41</sup> The Environmental Defense Fund and Ohio Environmental Council argue further that the Commission should reject the Affiliate PPA.<sup>42</sup>

27. Several supportive commenters argue that Respondents’ Affiliate PPA is not needed for consumer protection and that the sole objective instead is to subsidize uneconomic generation of AEP Ohio’s marketing affiliate, to the benefit of shareholders.<sup>43</sup> Ohio Consumers’ Counsel disputes the argument that the Affiliate PPA is intended to hedge market volatility because it would not make sense for AEP Ohio to have investigated a single source of power for that purpose.<sup>44</sup> Calpine claims that non-affiliated competitors could provide the same amount of power at lower prices.<sup>45</sup> Calpine

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<sup>39</sup> *Id.* at 8.

<sup>40</sup> *Id.*

<sup>41</sup> P3 Comments at 11; Calpine Comments at 2, 5. *See also* Environmental Defense Fund and Ohio Environmental Council Comments at 3-4.

<sup>42</sup> Environmental Defense Fund and Ohio Environmental Council Comments at 4.

<sup>43</sup> *See* Ohio Manufacturers Comments at 7; Calpine Comments at 3-5.

<sup>44</sup> Ohio Consumers’ Counsel Comments at 14.

<sup>45</sup> Calpine Comments at 4 (citing Dynegy, News Release, *Dynegy Offers Superior Alternatives to the FirstEnergy and AEP PPA Subsidies*, Jan. 12, 2016, [http://phx.corporate-ir.net/phoenix.zhtml?c=147906&p=irol-newsArticle\\_Print&ID=2128549](http://phx.corporate-ir.net/phoenix.zhtml?c=147906&p=irol-newsArticle_Print&ID=2128549)).

adds that in a competitive procurement process, it would be able to offer something substantially more attractive than the Affiliate PPA.

28. Many supportive commenters argue that it is essential for the Commission to review the Affiliate PPA under section 205 of the FPA to ascertain whether it satisfies the Commission's requirements for fair dealing between affiliates in the supply of wholesale power.<sup>46</sup> Hardwood Flooring and Ohio Citizen Action assert that consumers in Ohio will be harmed unless the Commission exercises its jurisdiction to review the Affiliate PPA for abuse.<sup>47</sup> Panda adds that review of the Affiliate PPA is in the best interests of all parties involved, including Respondents who will benefit by establishing at the outset whether the Affiliate PPA complies with the requirements of Order No. 697.<sup>48</sup>

29. Ohio Manufacturers, PJM, and the Pennsylvania Commission are concerned that, without Commission review under section 205 of the FPA, there will be a regulatory gap in which the Affiliate PPA will escape review at both the state and federal levels.<sup>49</sup> Oregon Clean Energy and Talen add that Respondents cannot credibly on the one hand tell the Ohio Commission that it lacks jurisdiction and on the other hand tell the Commission that there is no problem because the Ohio Commission exercises jurisdiction.<sup>50</sup> They assert that the states are charged with curbing abusive practices in retail arrangements while the Commission's sphere is avoidance of wholesale contract abuse practices, and that one set of rules does not obviate the other.<sup>51</sup>

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<sup>46</sup> See Ohio Consumers' Counsel Comments at 13; Ohio Manufacturers Comments at 5; Panda Comments at 3; Environmental Defense Fund and Ohio Environmental Comments at 4.

<sup>47</sup> Hardwood Flooring Comments at 1; Ohio Citizen Action Comments at 1.

<sup>48</sup> Panda Comments at 3.

<sup>49</sup> Ohio Manufacturers Comments at 5; PJM Comments at 5-7; Pennsylvania Commission at Comments at 9.

<sup>50</sup> Oregon Clean Energy and Talen Comments at 13 (quoting the following language from AEP's Initial Brief at the Ohio Commission, p. 134, "[t]he Affiliate PPA is a wholesale contract subject to FERC's exclusive jurisdiction, and AEP Ohio is not requesting that the [Ohio] Commission approve the Affiliate PPA itself or make any finding that the Affiliate PPA's rates and terms are just and reasonable – those are issues under FERC's jurisdiction.")

<sup>51</sup> Oregon Clean Energy and Talen Comments at 14.

30. Ohio Consumers' Counsel and Ohio Manufacturers venture that the Affiliate PPA would likely fail *Edgar*.<sup>52</sup> The Pennsylvania Commission echoes the concern that the Affiliate PPA raises the potential for self-dealing and the exercise of market power.<sup>53</sup>

31. Many commenters are concerned that the Affiliate PPA will distort wholesale markets in PJM by suppressing prices in PJM and will deter new entry from competitive generation suppliers.<sup>54</sup> The Pennsylvania Commission and others are concerned that the Affiliate PPA will harm organized wholesale markets through the retention of generation that should otherwise be retired and replaced by more economically efficient generation.<sup>55</sup> Calpine adds that the Affiliate PPA weakens the incentives in the "Capacity Performance" construct in PJM because shareholders and management will have less of an incentive to manage the performance of the units.<sup>56</sup>

32. Oregon Clean Energy and Talen disagree that Respondents' proposal is analogous to what is done in other fully regulated jurisdictions, such as Virginia. They note that where generation costs are recovered from ratepayers in Virginia subject to traditional cost-of-service rate regulation, Virginia utilities do not get to charge their captive customers the higher of cost or market.<sup>57</sup> Finally, Oregon Clean Energy and Talen are concerned that Respondents' proposal could have a "downward spiraling, domino effect" because when one generator receives cost-based payments, it "harms the next generator, which then requires a financial crutch, and so on and on."<sup>58</sup>

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<sup>52</sup> Ohio Consumers' Counsel Comments at 14; Ohio Manufacturers Comments at 9.

<sup>53</sup> Pennsylvania Commission Comments at 9.

<sup>54</sup> See PJM Market Monitor Comments at 3; Pennsylvania Commission Comments at 10; Oregon Clean Energy and Talen Comments at 6, 17-19; Ohio Manufacturers Comments at 6; Calpine Comments at 7-8; Ohio Consumers' Counsel Comments at 4; Environmental Defense Fund and Ohio Environmental Council at 4.

<sup>55</sup> Pennsylvania Commission Comments at 10. See also Oregon and Talen Comments at 6; Calpine Comments at 7-8; Ohio Consumers' Counsel Comments at 4 (arguing same).

<sup>56</sup> Calpine Comments at 7-8.

<sup>57</sup> Oregon Clean Energy and Talen Comments at 16.

<sup>58</sup> *Id.* at 18.

33. Finally, the PJM Market Monitor argues that waiver should be revoked as it applies to any agreement that imposes the non-bypassable charges through the PPA Rider.<sup>59</sup>

## 2. Comments in Support of Respondents

34. Ohio Energy Group urges the Commission to deny the complaint. Ohio Energy Group states that the complaint represents a premature collateral attack on a proposed PPA inasmuch as the Ohio Commission has not completed its review of the Affiliate PPA. Ohio Energy Group argues that denying the complaint would promote judicial economy and serve the interests of federal-state comity.<sup>60</sup>

35. Ohio Energy Group argues that the proposed Affiliate PPA does not “eliminate retail choice” in Ohio and does not create captive customers.<sup>61</sup> Ohio Energy Group points out that if the proposed Affiliate PPA is executed, retail customers in Ohio would still have the choice to purchase 100 percent of their physical energy and capacity from either AEP Ohio or from competitive retail suppliers.

36. Ohio Energy Group states that the Ohio Commission is able to protect Ohio customers from affiliate abuse associated with the proposed Affiliate PPA at the retail level because it has an expansive review before any retail costs associated with the Affiliate PPA could be recovered from AEP Ohio’s retail customers. It states that during the review, the Ohio Commission can disallow any costs related to affiliate abuse, if it is found. Furthermore, Ohio Energy Group states that AEP Ohio has voluntarily submitted to the state ratemaking jurisdiction and has agreed to absorb any costs deemed unreasonable. Ohio Energy Group further states that the proposed affiliate PPA is expected to provide many benefits to Ohio retail customers, including net positive projections for the PPA non-bypassable rider of \$721 million over eight years.<sup>62</sup>

37. Ohio Energy Group disputes Complainants’ statement that the PPA units would retire with certainty, absent the Affiliate PPA. It argues that this statement is a misrepresentation of the Ohio Commission record, which indicates only that the future of

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<sup>59</sup> PJM Market Monitor Comments at 3.

<sup>60</sup> Ohio Energy Group Comments at 2.

<sup>61</sup> *Id.* at 3.

<sup>62</sup> Ohio Energy Group Comments at 6-7.

the PPA units is “on the bubble.”<sup>63</sup> Ohio Energy Group contends that the proposed Affiliate PPA will not distort the price signals resulting from the PJM markets. Ohio Energy Group argues that that the PPA units are existing generators that previously were bid into the PJM markets and will continue to do so, regardless of whether the proposed Affiliate PPA is finalized. Ohio Energy Group also notes that it is commonplace for investor owned utilities in PJM to operate under cost-of service models while also participating in the PJM energy and capacity markets, and that this construct does not disturb the competitiveness of the PJM market.<sup>64</sup>

38. The Ohio Energy Group urges the Commission to defer to the state commission in this instance because there is no compelling reason for the Commission to second-guess its prior decisions by rescinding Respondents’ waivers, especially in light of the ongoing Ohio Commission investigation and the distinct possibility that a final PPA may never be executed.<sup>65</sup>

### C. Other Answers

39. American Municipal Power raises concerns about the Ohio Commission testimony that was appended to the PJM Market Monitor’s comments. It argues that the PJM Market Monitor should not be permitted to expand the scope of the dockets by including matters that it contends are irrelevant to the issues posed by the Complainants.<sup>66</sup>

40. Complainants object to Respondents’ characterization of them as “a group of generators that compete with AEP Generation . . . and AEP Ohio.” Complainants state that they have legitimate and legally cognizable interests in ensuring that wholesale markets are not distorted by abusive affiliate contracts. Complainants also point out that their complaint is supported by entities representing a wide range of interests. Complainants maintain that the Commission has a statutory duty to ensure that rates for wholesale sales are just and reasonable, adding that the Commission’s jurisdiction is exclusive and non-delegable.<sup>67</sup>

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<sup>63</sup> *Id.* at 8.

<sup>64</sup> *Id.* at 8-9.

<sup>65</sup> *Id.* at 9.

<sup>66</sup> American Municipal Power Response at 4-5.

<sup>67</sup> Complainants Response at 6.

41. Complainants take issue with Respondents' argument that the Ohio Commission is analyzing affiliate abuse concerns because they say that Respondents have consistently taken the position that the Ohio Commission is without jurisdiction to review the Affiliate PPA.<sup>68</sup>

42. Complainants state that it is "pure sophistry" for Respondents to claim that their waivers should remain intact simply because Ohio customers continue to have the right under state law to choose alternative suppliers.<sup>69</sup> They state that where the costs of the Affiliate PPA is concerned, the only "choice" left to the retail customer is the choice of which entity acts as the collection agent for Respondents and their shareholders.

43. In response to the comments filed in support of the complaint, Respondents maintain that Commission precedent for applying the affiliate restrictions turns on one question: whether the customers in the state enjoy retail choice. Respondents point out that the parties that filed comments in support of the complaint have failed to address this precedent.<sup>70</sup>

44. Countering Respondents' February 23 Answer, Ohio Consumers' Counsel asserts that the fact that Ohio law allows retail choice is not dispositive of the more narrow issue raised in the complaint. Ohio Consumers' Counsel argues that the Affiliate PPA and the PPA Rider constitute a return to cost-based regulation by providing a set rate of return that is guaranteed by captive customers regardless of how uneconomic the power plants may become.<sup>71</sup> Ohio Consumers' Counsel argues that the precedent Respondents cite for support is inapposite because, here, a non-bypassable surcharge allowing recovery of the costs of a particular Affiliate PPA effectively eliminates the protection of competition intended by Order No. 697, that is, retail customers' ability to choose a supplier for purposes of that contract, notwithstanding that state law allows retail choice.<sup>72</sup> Ohio

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<sup>68</sup> *Id.* at 7 (citing Complaint at 12 & n.39 (quoting Stipulation in Ohio Commission proceeding stating that the Ohio Commission "lacks jurisdiction over the rates and terms of the [] Affiliate PPA . . . ." and Ohio Commission Sept 28 Tr. At 274, which states that the Affiliate PPA "itself doesn't require [Ohio Commission] approval because the contract is a FERC jurisdictional contract.")).

<sup>69</sup> *Id.* at 8.

<sup>70</sup> AEP Response at 4-5.

<sup>71</sup> Ohio Consumers' Counsel March 9 Answer at 4.

<sup>72</sup> *Id.* at 6-11 (referring to FirstEnergy Waiver Order, 125 FERC ¶ 61,356).

Consumers' Counsel maintains that the fundamental issue is not merely whether customers have a right to choose a retail supplier under Ohio law, but whether customers are captive with respect to the specific Affiliate PPA costs.

45. Ohio Consumers' Counsel states that Respondents' argument that the Ohio Commission can adequately protect Ohio ratepayers regarding affiliate abuse is inapplicable to the context of the Affiliate PPA because (1) the Affiliate PPA is not being acquired under a state-mandated procurement process and (2) the Ohio Commission has no authority to review this wholesale affiliate contract.<sup>73</sup> Ohio Consumers' Counsel also argue that the Ohio Commission proceeding is focused on the PPA Rider whereas the complaint seeks this Commission's review of the Affiliate PPA, and its effects on both retail and wholesale customers.<sup>74</sup> Ohio Consumers' Counsel also maintains that the complaint properly raises concerns regarding the effect of the Affiliate PPA on wholesale markets. Ohio Consumers' Counsel argues that the underlying Affiliate PPA raises the potential for subsidies not only by Ohio retail consumers, but also for cross-subsidies among the different types of resources owned by AEP Generation that could affect the competitiveness of AEP Generation's resources in wholesale energy markets.<sup>75</sup>

46. Finally, Ohio Consumers' Counsel argues that there is no merit in Ohio Energy Group's allegation that the complaint is premature and a collateral attack on the Affiliate PPA or Ohio Commission rulings.<sup>76</sup>

47. Respondents disagree that Commission review of the PPA is required to avoid a "regulatory gap." Respondents argue that the Commission has already exercised its jurisdiction when it determined that additional contract-by-contract oversight is not needed.<sup>77</sup>

48. Respondents maintain that the Ohio Commission will not allow for the recovery of the Affiliate PPA through the PPA Rider unless it is in the best interests of Ohio

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<sup>73</sup> *Id.* at 11.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 12-14.

<sup>76</sup> In their joint April 6 answer, Ohio Consumers' Counsel and Complainants reiterate that the complaint is not premature, in light of the Ohio Commission's March 31, 2016 Order.

<sup>77</sup> *Id.* at 7.

customers. According to Respondents, there is no good policy reason for the Commission to duplicate the Ohio Commission's effort and delve into retail matters.<sup>78</sup>

49. Respondents argue that PJM market issues are beyond the scope of an *Edgar* analysis. Respondents are concerned that commenters will seek to use the *Edgar* proceeding as a vehicle to examine PJM's market rules, which have nothing to do with the relief sought by Complainants.<sup>79</sup> Instead, Respondents argue the proper forum to address market concerns in PJM is through the stakeholder process.<sup>80</sup>

50. In their April 11 comments, the Ohio Commission attaches comments it filed in Docket No. EL16-49-000, which cite portions of its March 31, 2016 Order and Opinion purportedly demonstrating that "robust competition currently exists in Ohio."<sup>81</sup> In its April 13 response, Talen counters that competition exists when sellers and buyers negotiate at arms'-length, which, it argues, is not true in the case of the Affiliate PPA. In its April 26 response, the Ohio Consumers' Counsel renews its request that the Commission rescind Respondents' waiver of the affiliate sales restrictions with respect to the Affiliate PPA.

51. In its April 18 answer, the Environmental Law & Policy Center disagrees with Respondents that the Commission should defer to the Ohio Commission's conclusion that Ohio customers are protected because they may shop for retail electric supply. The Environmental Law & Policy Center argues that AEP Ohio's customers are captive within the meaning of the Commission's regulations governing affiliate transactions, because they have no choice with respect to the non-bypassable charge under the PPA Rider.<sup>82</sup> The Environmental Law & Policy Center emphasizes that the Ohio Commission did not consider the concerns at the core of the Commission's affiliate sales restrictions and did not address the possibility that the Affiliate PPA represents an unreasonable subsidy and may be unduly favorable to AEP Generation.<sup>83</sup>

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<sup>78</sup> *Id.* at 8.

<sup>79</sup> *Id.* at 9.

<sup>80</sup> *Id.* at 10.

<sup>81</sup> Ohio Commission Comments at 3.

<sup>82</sup> Environmental Law & Policy Center Answer at 2-5.

<sup>83</sup> Environmental Law & Policy Center Answer at 6-7.

#### IV. Discussion

##### A. Procedural Matters

52. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We grant the late interventions filed by Navopache, PSC Nitrogen, the Maryland Commission, Environmental Defense Fund, CPV Power, Castleton, and the Ohio Environmental Council given their interests in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

53. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept the answers submitted in this proceeding because they have provided information that assisted us in our decision-making process.

54. We will grant AEP's motion to lodge the Ohio Commission's March 31, 2016 order, which approved the Affiliate PPA Rider, with modifications.<sup>84</sup>

##### B. Substantive Matters

55. For the reasons discussed below, we grant the complaint and find that the requirement in 18 C.F.R. § 35.39(b) to obtain prior approval for affiliate sales of electric energy or capacity applies to AEP Generation's power sales to AEP Ohio under the Affiliate PPA.<sup>85</sup> Accordingly, we hereby rescind Respondents' waivers as to the Affiliate PPA and find that, prior to transacting under the Affiliate PPA, Respondents must submit the Affiliate PPA for review and approval under *Edgar* and *Allegheny* in accordance with 18 C.F.R. § 35.39(b).

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<sup>84</sup> Rule 508(d) allows the Commission to "take official notice of any matter that may be judicially noticed by the courts of the United States ...." 18 C.F.R. § 385.508(d) (2015). The Commission also has the power to take official notice of the actions of a sister agency and has done so in the past. *See Nevada Power Co. and Sierra Pacific Power Co. v. Duke Energy Trading and Marketing, L.L.C. et al.*, 99 FERC ¶ 61,047, at 61,193 (2002).

<sup>85</sup> We note that, pursuant to this finding, no sales may be made with respect to the Affiliate PPA unless and until the Commission approves the Affiliate PPA under *Edgar* and *Allegheny*.

56. We agree with Complainants and the supportive commenters that the non-bypassable charges associated with the Affiliate PPA and the PPA Rider represent a reportable change in circumstances from the conditions under which the Commission granted waiver of the affiliate restrictions to AEP Ohio and its affiliates.<sup>86</sup>

57. While it is true that Ohio ratepayers will continue to have a statutory right to choose one retail supplier over another, we conclude, based on the record, that those AEP Ohio retail ratepayers are nonetheless captive in that they have no choice as to payment of the non-bypassable generation-related charges incurred under the Affiliate PPA. These non-bypassable charges present the “potential for the inappropriate transfer of benefits from [captive] customers to the shareholders of the franchised public utility,”<sup>87</sup> and, thus, could undermine the goal of the Commission’s affiliate restrictions.

58. We disagree that the Commission’s precedent regarding the definition of “captive customers” is as restrictive as Respondents have argued. Under section 35.36(a)(6) of the Commission’s regulations, captive customers are defined as “any wholesale or retail electric energy customer served by a franchised public utility under cost-based regulation.”<sup>88</sup> In Order No. 697, the Commission stated that:

the definition of “captive customers” does not include those customers who have retail choice, *i.e.* the ability to select a retail supplier based on the rates, terms, and conditions of service offered. Retail customers who choose to be served under cost-based rates but have the ability, by virtue of state law, to choose one retail supplier over another, are not

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<sup>86</sup> Respondents would have been obligated to file a notice of change in status with respect to their waivers after issuance of the Ohio Commission’s decision regarding the Affiliate Rider.

<sup>87</sup> Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 198; *see also Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264, at P 42, *order on reh’g*, Order No. 707-A, FERC Stats. & Regs. ¶ 31,272 (2008).

<sup>88</sup> 18 C.F.R. § 35.36(a)(6) (2015).

considered to be under “cost-based regulation” and therefore are not “captive.”<sup>89</sup>

59. The Commission further explained that “retail customers in retail choice states who choose to buy power from their local utility at cost-based rates . . . are not considered captive customers because, although they may choose not to do so, they have the ability to take service from a different supplier whose rates are set by the marketplace.”<sup>90</sup> In contrast, “[i]n a regulatory regime in which retail customers have no ability to choose a supplier, they are considered captive because they must purchase from the local utility pursuant to cost-based rates set by a state or local regulatory authority.”<sup>91</sup>

60. Respondents cite this language in Order No. 697 to argue that a customer is not “captive,” so long as it has a legal right to choose a competitive supplier, even if that customer has no choice but to pay its local utility a specific generation-related charge derived from the costs of an affiliate transaction. However, such a construction is too broad in light of the Commission’s overall discussion, in Order Nos. 697 and 697-A, of its purpose in categorizing certain customers as “captive.”

61. In Order No. 697, the Commission explained that “its fundamental goal in categorizing certain customers as ‘captive’ is to protect customers served by franchised public utilities from inappropriately subsidizing the market-regulated or non-utility affiliates of the franchised public utility or otherwise being financially harmed as a result of affiliate transactions and activities.”<sup>92</sup> The Commission added that “[w]here customers are served under market-based regulation as opposed to cost-based regulation, it is presumed that the seller has no market power over a customer and that the customer has a choice of suppliers; thus there is less opportunity for a customer to involuntarily be in a situation in which its rates subsidize or support another entity.”<sup>93</sup>

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<sup>89</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 479; *see also* Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at PP 192-193 (summarizing the Commission’s findings in Order No. 697).

<sup>90</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 480.

<sup>91</sup> *Id.*

<sup>92</sup> Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 198.

<sup>93</sup> *Id.*

62. Here, while AEP Ohio's retail ratepayers retain a statutory right to choose one retail supplier over another, they are "involuntarily. . . in a situation in which [their] rates subsidize or support another entity"—i.e., they must pay a non-bypassable generation-related charge, through the PPA Rider, representing a contract for price differences in wholesale energy, capacity, and ancillary services, as determined by the state regulatory authority, irrespective of their retail provider.<sup>94</sup> In light of the PPA Rider, all of AEP Ohio's retail customers in its distribution service territory have no choice but to pay the non-bypassable generation-related charge. Further, as explained by Complainants, the proposed PPA Rider charge could be used to effectuate precisely the type of affiliate abuse that the Commission identified in Order No. 697-A:

As we explained in Order No. 697, we "are concerned that there exists the potential for a franchised public utility with captive customers to interact with a market-regulated power sales affiliate in ways that transfer benefits to the affiliates and its stockholders to the detriment of the captive customers" . . . [O]ne of our primary concerns in adopting affiliate restrictions is . . . to prevent the merchant affiliate from making above-market sales to its franchised utility affiliate.<sup>95</sup>

63. Consistent with these statements, we find that AEP Ohio's retail ratepayers are captive to the extent they are subject to the non-bypassable charge associated with the Affiliate PPA. Retail choice protects customers from affiliate abuse only to the extent they have a choice to undertake generation costs. Where, as here, circumstances demonstrate that a retail customer has no choice but to pay the costs of an affiliate transaction, they effectively are captive with respect to the transaction.

64. Accordingly, we find that the affiliate sales restrictions in section 35.39(b) apply to Respondents as to this Affiliate PPA, and we hereby rescind Respondents' waivers of that provision with respect to the Affiliate PPA. Therefore, we direct AEP Generation and AEP Ohio to modify their respective market-based rate tariffs to clarify that the affiliate restrictions codified at 18 C.F.R. § 35.39(b) will apply to this specific Affiliate PPA. To the extent AEP Generation wishes to make sales under the Affiliate PPA, it

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<sup>94</sup> *See id.*

<sup>95</sup> Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at PP 188-189 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 513); *id.* n.280 (explaining that "an extreme example would be a holding company that siphons funds from a franchised public utility to support its failing market-regulated power sales affiliate company. . . .").

must submit the agreement to the Commission under section 205 of the FPA for analysis under the *Edgar* and *Allegheny* standards.

65. Our decision here is not inconsistent with precedent in the FirstEnergy Waiver Order.<sup>96</sup> That order describes concerns raised by protesters regarding barriers to competition presented by the Electric Security Plan at issue in that proceeding, including the allegation that the Electric Security Plan imposes other non-bypassable charges that would force shopping customers to pay twice for the same services and costs.<sup>97</sup> However, contrary to Respondents' contention, that order did not make a specific finding as to whether a non-bypassable generation charge on shopping customers would cause Ohio retail customers to become "captive." Instead, the Commission addressed the more general concern raised by a protester that FirstEnergy's Electric Security Plan proposal would create barriers to competition. Citing Order No. 697, the Commission stated that "it is not the role of this Commission to evaluate the success or failure of a state's retail choice program including whether sufficient choices are available for customers inclined to choose a different supplier."<sup>98</sup> In other words, the Commission held that it was not poised to comment on whether barriers to competition existed in Ohio so as to eliminate retail choice. We are not disturbing that finding here. Importantly, the Commission did not specifically address the instant situation of whether the Commission's affiliate restrictions should apply to an Affiliate PPA whose generation-related costs are proposed to be recovered through a non-bypassable charge. We address that question squarely in this order and find that the affiliate restrictions apply in this instance.

66. Our determination to rescind Respondents' waivers as to the Affiliate PPA does not frustrate or usurp the Ohio Commission's role in protecting retail customers. Rather, this Commission has an independent role to ensure that wholesale sales of electric energy and capacity are just and reasonable and to protect against affiliate abuse. The Commission's affiliate restrictions protect against captive customers of franchised public utilities cross-subsidizing market-regulated power sales affiliates. The Affiliate PPA raises the potential for cross-subsidization from AEP Ohio's retail customers – who are captive in the sense that they cannot avoid the non-bypassable charge – to AEP Ohio's

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<sup>96</sup> While the Commission is not disturbing its findings in the FirstEnergy Waiver Order, we note that circumstances have changed with respect to certain statements that the Commission made on *rehearing* of that order, as discussed more fully in the concurrently issued order in Docket No. EL16-34-000. See *Electric Power Supply Association v. AEP Generation Resources, Inc.*, 155 FERC ¶ 61,101 (2016).

<sup>97</sup> FirstEnergy Waiver Order, 125 FERC ¶ 61,356 at P 13.

<sup>98</sup> *Id.* P 28 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 513).

market-regulated power sales affiliate, AEP Generation. While the Ohio Commission may have analyzed the effect of the PPA riders on retail customers, only this Commission can exercise jurisdiction to review the Affiliate PPA. We find that the Commission's affiliate sales restrictions will apply to the Affiliate PPA, and, as stated above, we accordingly rescind waiver of section 35.39(b) as to the Affiliate PPA.

67. In addition, the finding that AEP Ohio has captive customers with respect to the Affiliate PPA may impact other existing waivers of 18 C.F.R. § 35.39 granted to Respondents and their affiliates, including other provisions of the Commission's regulations, such as § 35.39(c) (separation of functions), § 35.39(d) (information sharing), § 35.39(e) (non-power goods or services) and § 35.39(f) (brokering of power). Therefore, we direct that Respondents and their affiliates file a notice of change in status addressing whether this change in circumstances affects any other waivers the Commission previously granted with respect to 18 C.F.R. § 35.39.

68. Finally, we agree with Respondents that PJM bidding behavior is not relevant to the affiliate abuse claim that is the sole basis for this complaint. The sole question before us in this complaint is whether Respondents' waiver of the affiliate sales restrictions should be rescinded in light of changed circumstances. Therefore, we dismiss as beyond the scope of this complaint any claims of potential adverse effects in the PJM markets.<sup>99</sup>

69. Consistent with our general policy of providing maximum protection to customers,<sup>100</sup> we will set the refund effective date at the earliest date possible, i.e., the date of the filing of the complaint, which is January 27, 2016.

The Commission orders:

(A) The complaint is hereby granted, as discussed in the body of this order.

(B) Respondents are hereby directed to revise their respective market-based rate tariffs within 30 days of the date of this order, as discussed in the body of this order.

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<sup>99</sup> We note that a complaint against PJM that is related, in part, to the Affiliate PPA and the PPA Rider is pending before the Commission and, by this order, we do not prejudge the outcome of that proceeding. *See Calpine Corp. et al. v. PJM Interconnection LLC*, Docket No. EL16-49-000 (filed Mar. 21, 2016).

<sup>100</sup> *See, e.g., Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539 (1989), *reh'g denied*, 47 FERC ¶ 61,275 (1989).

(C) Respondents and their affiliates are hereby directed to file a notice of change in status, as discussed in the body of this order.

(D) The refund effective date in Docket EL16-33-000, established pursuant to section 206 of the FPA, will be January 27, 2016.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.