

155 FERC ¶ 61,101
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. EL16-34-000

v.

FirstEnergy Solutions Corporation, Ohio
Edison Company, The Cleveland Electric
Illuminating Company, and The Toledo
Edison 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 against FirstEnergy Solutions Corporation (FE Solutions) and FirstEnergy Corporation's Ohio regulated utilities¹ (collectively, Respondents), pursuant to sections 206, 306, and 309 of the Federal Power Act (FPA)² and Rule 206 of the Commission's Rules of Practice and

¹ FirstEnergy Corporation's affiliated, regulated franchised public utilities in Ohio include Cleveland Electric Illuminating Company, Ohio Edison Company, and Toledo Edison Company (collectively, FE Ohio Regulated Utilities).

² 16 U.S.C. §§ 824e, 825e, 825h (2012).

Procedure.³ Complainants request that the Commission rescind the waiver of its affiliate power sales restrictions that it previously granted to FirstEnergy Corporation's market-regulated power sales affiliates,⁴ as that waiver relates to a particular power sales contract. As discussed below, we grant the complaint.⁵

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 customers⁶ and a market-regulated power sales affiliate without first receiving Commission authorization under section 205 of the FPA.⁷ 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*.⁸

³ 18 C.F.R. § 385.206 (2015).

⁴ FirstEnergy Corporation's market-regulated power sales affiliates in Ohio, which we refer to collectively as FE Ohio Market Affiliates, include FE Solutions, FirstEnergy Generation Corporation, FirstEnergy Nuclear Generation Corporation, and FirstEnergy Generation Mansfield Unit 1 Corp. *See* 18 C.F.R. § 35.36(a)(7) (2015).

⁵ Complainants brought a similar complaint against AEP Generation Resources, Inc. and Ohio Power Company in Docket No. EL16-33-000, and we address that complaint in a concurrently issued order. *See Electric Power Supply Association v. AEP Generation Resources, Inc.*, 155 FERC ¶ 61,102 (2016).

⁶ 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).

⁷ 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).

⁸ 55 FERC ¶ 61,382, at 62,167 (1991) (*Edgar*); 108 FERC ¶ 61,082, at P 18 (2004) (*Allegheny*).

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 by the utility itself or by other buyers in the relevant market.⁹ In *Allegheny*, the Commission outlined principles as to how it will evaluate a competitive solicitation process.¹⁰

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 December 8, 2008, FE Ohio Market Affiliates received waiver of the Commission’s affiliate power sales restrictions based on the representation that Ohio is a retail choice state and that the FE Ohio Regulated Utilities do not have captive retail customers needing the protections afforded by those restrictions.¹¹

II. Complaint

5. Complainants argue that there have been fundamental changes in circumstances since the Commission granted FE Ohio Market Affiliates’ waiver that make it unjust, unreasonable, and unduly discriminatory to allow FE Solutions to enter into a particular

⁹ *Edgar*, 55 FERC ¶ 61,382 at 62,168-69.

¹⁰ *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).

¹¹ *FirstEnergy Solutions Corp.*, 125 FERC ¶ 61,356, at P 13 (2008) (FirstEnergy Waiver Order), *reh’g denied*, 128 FERC ¶ 61,119 (2009) (FirstEnergy Rehearing Order). FE Ohio Regulated Utilities have been authorized to sell power to FirstEnergy Generation Corp. and to FirstEnergy Nuclear Generation Corp., each of which is a market-regulated power sales affiliate as previously indicated in note 4. *See* Ohio Edison Company, FERC Market-Based Rate Power Sales Tariff, § 19.05 Affiliate Sales (3.0.0); Cleveland Electric Illuminating Company, FERC Market-Based Rate Power Sales Tariff, § 19.05 Affiliate Sales (3.0.0); Toledo Edison Company, FERC Market-Based Rate Power Sales Tariff, § 19.05 Affiliate Sales (3.0.0); *Ohio Edison Co.*, Docket No. ER06-1386-000, *et al.* (Oct. 4, 2006) (delegated letter order); *Ohio Edison Co.*, Docket No. ER06-46-000, *et al.* (Oct. 17, 2005) (delegated letter order).

power sales contract (Affiliate PPA) pursuant to its blanket market-based rate authorization.¹² 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*.¹³

6. According to Complainants, in August 2014, FE Ohio Regulated Utilities proposed their fourth Electric Security Plan, under which the FE Ohio Regulated Utilities propose to enter into the Affiliate PPA with their affiliate, FE Solutions. Complainants state that under the terms of the Affiliate PPA, FE Ohio Regulated Utilities would purchase the output of the Sammis and Davis-Besse generation facilities, as well as an entitlement to certain output owned by Ohio Valley Electric Corporation, owned by FE Ohio Market Affiliates.¹⁴

7. According to Complainants, the power purchased under the Affiliate PPA would not be used to serve retail consumers in the FE Ohio Regulated Utilities' service territories 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.¹⁵ Complainants argue that, while

¹² Complaint at 3.

¹³ *Edgar*, 55 FERC ¶ 61,382 at 62,167; *Allegheny*, 108 FERC ¶ 61,082 at P 18.

¹⁴ In connection with the implementation of retail choice in Ohio, the FE Ohio Regulated Utilities divested virtually all of their generation assets to FE Ohio Market Affiliates, including interests in various coal- and oil-fired units at the W.H. Sammis Plant, the nuclear-powered David-Besse power station, and an entitlement to a portion of the output of generation units in Ohio and Indiana owned by Ohio Valley Electric Corporation. These assets represent an aggregate generating capacity of approximately 5531 MW. FE Solutions markets the output of these assets owned by its subsidiaries, FirstEnergy Generation Corporation, FirstEnergy Nuclear Generation Corporation, and FirstEnergy Generation Mansfield Unit 1 Corp. Complaint at 8.

¹⁵ Complainants state that the Ohio Commission proceeding concerning the PPA Rider is currently pending and they expect the Ohio Commission to issue an order as early as February 2016. Complaint at 3. We note that the Ohio Commission issued an order in that proceeding on March 31, 2016. *See In the Matter of the Application of Ohio Edison Co., Cleveland Elec. Illuminating Co., and Toledo Edison Co. for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Order and Opinion, Case No. 14-1297-EL-SSO (Mar. 31, 2016) (*FE Ohio Regulated Utilities Electric Security Plan Application*).

Ohio still has retail choice in the sense that customers may choose to receive retail service from competitive suppliers, the Affiliate PPA—coupled with the PPA Rider—effectively eliminate retail choice by requiring all retail customers, even those that opt to take service from a competitive retail supplier, to pay the costs associated with the Affiliate PPA. In this way, Complainants contend, retail customers in the FE Ohio Regulated Utilities’ service territories are in fact captive because they have no opportunity to avoid the costs, even if they choose to take service from a competitive supplier. Thus, Complainants conclude 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.”¹⁶

8. Complainants allege that the Affiliate PPA would impose “hundreds of millions, if not billions, of dollars in above-market costs on captive retail consumers” in Ohio by subsidizing the continued operation of generation that would otherwise retire.¹⁷ Specifically, Complainants point to estimates that the costs of the Affiliate PPA to Ohio consumers could be as high as \$3.6 billion over the term of the contract or \$858 million in net present value terms.¹⁸ Additionally, they assert that competing suppliers, not affiliated with FE Ohio Market Affiliates or FE Ohio Regulated Utilities, have offered to supply the FE Ohio Regulated Utilities the same amount of energy and capacity at prices that would save consumers between \$2 billion and \$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 FE Ohio Regulated Utilities’ service territories would bear under the Affiliate PPA.¹⁹

9. Complainants also argue that the Affiliate PPA and the PPA Rider will harm PJM’s wholesale markets. They argue that this case involves “uneconomic non-exit”—i.e., subsidized retention of resources that would otherwise have left the market—which, like uneconomic entry, could artificially suppress prices in PJM’s markets.²⁰ Complainants

¹⁶ Complaint at 17 & n.51 (citing Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at n.280).

¹⁷ *Id.* at 14.

¹⁸ *Id.* at 22 n.66.

¹⁹ *Id.* at 24.

²⁰ *Id.* at 24-26 & nn.74-78 (citing direct testimony submitted by the PJM Market Monitor and the PJM Power Providers Group and the Electric Power Supply Association in the Ohio Commission proceeding on the PPA Rider).

further argue that the Affiliate PPA and the PPA Rider proposal allow the subject generation resources to toggle between market-based and cost-based rates at the expense of competitors in PJM's wholesale markets, which will face artificially suppressed prices, and Ohio consumers.

10. Complainants contend that the Commission cannot rely on the Ohio Commission to ensure that the rates, terms, and conditions of the Affiliate PPA are just and reasonable and not unduly discriminatory, because the Ohio Commission lacks the power to review the justness and reasonableness of the Affiliate PPA. Claims that the Ohio Commission's continuing regulation of the state-mandated procurement process adequately safeguards against affiliate abuse overlook a significant regulatory gap, they argue. They add that no matter how rigorously the Ohio Commission reviews the FE Ohio Regulated Utilities' activity selling generation into the PJM markets, the Ohio Commission cannot lawfully review the justness and reasonableness of the rates, terms, and conditions of the Affiliate PPA, including what costs are recoverable under the PPA Rider.²¹

11. Under these circumstances, Complainants argue that it would be unjust, unreasonable and unduly discriminatory if the Affiliate PPA were allowed to evade Commission review.²² Therefore, they request that the Commission rescind the waiver of the affiliate power sales restrictions previously granted to FE Ohio Market 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.

12. Finally, Complainants request that the Commission clarify that, when FE Solutions 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 FE Solutions anticipated being able to enter into the Affiliate PPA pursuant to blanket market-based rate authorization.

III. Notice of Filing and Responsive Pleadings

13. Notice of the complaint was published in the *Federal Register*, 81 Fed. Reg. 5729 (2016) with answers, interventions and protests due on or before February 23, 2016.²³ The

²¹ *Id.* at 19-20.

²² *Id.* at 25. Complainants note that, in the Ohio Commission proceeding on the PPA Rider, the FE Ohio Regulated Utilities have insisted that the Ohio Commission lacks the authority to review the Affiliate PPA. *Id.* at 19 & n.57.

²³ See *Electric Power Supply Association* [Notice Granting Extension of Time], Docket No. EL16-34-000 (Feb. 9, 2016).

Ohio Commission and the Pennsylvania Public Utility Commission (Pennsylvania Commission) filed notices of intervention. Timely motions to intervene were filed by American Electric Power Service Corporation (AEP); American Municipal Power, Inc.; Calpine Corporation (Calpine); Dayton Power and Light Company (Dayton); Dominion Resources Services, Inc.; Duke Energy Corporation (Duke); the Environmental Law & Policy Center; the PJM Independent Market Monitor (PJM Market Monitor); Industrial Energy Users; LS Power Associates, L.P.; the Village of Ottawa Hills, Northwest Ohio Aggregation Coalition, Lucas County, the City of Toledo, Lake Township, the City of Northwood, the Village of Waterville, the Village of Holland, the City of Maumee, the City of Sylvania, the City of Perrysburg (collectively, Northwest Ohio Communities); Nucor Steel Marion, Inc.; Ohio Consumers' Counsel; Old Dominion Electric Cooperative (Old Dominion); the Ohio Energy Group,²⁴ Ohio Manufacturers' Association Energy Group (Ohio Manufacturers); Oregon Clean Energy LLC; Panda Power Funds (Panda); PJM; PJM Power Providers Group (P3); PSEG Companies; Public Citizen Inc.; the Sierra Club, and the Talen PJM Companies.²⁵

14. Out-of-time motions to intervene were filed by PCS Nitrogen Ohio, L.P.; the National Rural Electric Cooperative Association (NRECA); the Environmental Defense Fund; the Utility Workers Union of America (Utility Workers Union); the Laborers' International Union of North America, Local 860 (Laborers' Union Local 860); the Executive Committee of Utility Workers Union of America, AFL-CIO Local 457 (Utility Workers Union Local 457); the Building Laborers' Union Local 310; the Teamsters Local Union No. 416; the Cleveland Building and Construction Trades Council (Cleveland Council); the Laborers' District Council of Ohio (Laborers' District Council); the International Brotherhood of Electrical Workers Local 245 (Electrical Workers Local 245);

²⁴ The Ohio Energy Group consists of Air Products and Chemicals, Inc.; AK Steel Corporation; Alcoa, Inc.; BP-Husky Refining, LLC; Cargill, Incorporated; Charter Steel; Fiat-Chrysler Automobiles US, LLC; Ford Motor Company; General Motors LLC; Johns Manville; Linde, Inc.; Martin Mariette Magnesia Specialties, LLC; Materion Brush Inc.; North Star BlueScope Steel, LLC; POET Biorefining; Praxair Inc.; and Worthington Industries.

²⁵ 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 Affiliated Construction Trades Ohio Foundation (ACT Ohio);²⁶ and Castleton Commodities Merchant Trading L.P. (Castleton).

15. On February 23, 2016, Respondents filed an answer to the complaint. Also on February 23, 2016, Ohio Energy Group filed comments in support of Respondents. Comments in support of the complaint were submitted by Calpine, Hardwood Flooring & Paneling, PJM Market Monitor, Northwest Ohio Communities, Ohio Consumers' Counsel, Ohio Citizen Action, Ohio Manufacturers, Oregon Clean Energy and Talen (jointly), Panda, the Pennsylvania Commission, PJM, P3, Environmental Defense Fund and Ohio Environmental Council (jointly) and the Sierra Club.

16. 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 Ohio Consumers' Counsel filed separate responses to Respondents' answer. Also on March 9, 2016, Respondents filed a response to the comments filed in support of the complaint.

17. On April 4, 2016, Respondents filed a notice stating that, on March 31, 2016, the Ohio Commission issued an order approving FE Ohio Regulated Utilities' proposed Electric Security Plan, including the PPA Rider, and briefly describing the March 31 Ohio Commission order. Respondents' notice also includes the March 31 Ohio Commission order as an attachment. On April 6, 2016, Complainants and Ohio Consumers' Counsel filed a joint answer stating that they do not oppose including the March 31 Ohio Commission Order in the record. Also on April 6, 2016, FE Solutions filed an informational filing advising the Commission that a report related to the Affiliate PPA was filed with the Securities and Exchange Commission on April 5, 2016 and including the report as an attachment. On April 19, 2016, the Environmental Law & Policy Center filed an answer to Respondents' notice of the Ohio Commission's order approving the FE Ohio Regulated Utilities' Electric Security Plan.

18. On April 8, 2016, American Municipal Power and Old Dominion (jointly) responded to a statement made in Respondents' March 9, 2016 Answer. On April 11, 2016, Respondents filed a response to Complainants' April 6 answer.

19. 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 and the PPA Rider. On April 13, 2016, Complainants filed a response stating that they did not

²⁶ The Utility Workers Union, Laborers' Union Local 860, Utility Workers Union Local 457, Building Laborers' Union Local 310, Teamsters Local Union No. 416, Cleveland Council, Laborers' District Council, Electrical Workers Local 245, and ACT Ohio are referred to, collectively, as the Ohio Unions and Councils.

object to the acceptance of the Ohio Commission's out-of-time comments and Talen filed a response to the Ohio Commission's comments. On April 26, 2015 the Ohio Consumers' Counsel filed a response to the Ohio Commission's comments. On April 19, 2016, the Environmental Law & Policy Center filed an answer to Respondents' notice of the Ohio Commission's order approving the FE Ohio Regulated Utilities' Electric Security Plan.

20. In multiple filings from April 8, 2016, to April 15, 2016, the Ohio Unions and Councils submitted out-of-time comments in support of Respondents.²⁷

A. Respondents' Answer

21. Respondents assert that the Commission should deny the complaint on the merits, given that Complainants have alleged no change in law in Ohio that alters the basis on which the Commission previously granted FE Ohio Market Affiliates a waiver from the affiliate sales restrictions.²⁸ Respondents argue that the PPA Rider does not eliminate retail choice for the FE Ohio Regulated Utilities' customers and that the Commission has repeatedly held that the presence of retail choice in a state renders its retail customers not captive.

22. Respondents state that Order No. 697 defined "captive" customers as "any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation."²⁹ However, Respondents state, Order No. 697 explains that the term does not include customers in states with retail choice,³⁰ and Order No. 707-A further explains that retail choice means that, "by virtue of state law [retail customers] can purchase at market-based rates from retail suppliers other than a franchised public utility."³¹ Respondents

²⁷ On April 20, 2016, the president of the Utility Workers Union Local 457, Bryan Derenburger, submitted a letter to Chairman Norman C. Bay urging the Commission to dismiss the complaint and reiterating arguments raised comments filed by the Utility Workers Union Local 457.

²⁸ Respondents Answer at 9.

²⁹ *Id.* at 11 (citing 18 C.F.R. § 35.36(a)(6)).

³⁰ *Id.* (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 479).

³¹ *Id.* at 12 (citing *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264, *order on reh'g*, Order No. 707-A, FERC Stats. & Regs. ¶ 31,272, at P 45 (2008)).

therefore conclude that the PPA Rider would not render the FE Ohio Regulated Utilities' retail customers captive under the Commission's regulations.

23. Respondents contend that Commission precedent also holds that customers in states with retail choice are not captive as a matter of law, and that the FirstEnergy Waiver Order found that the FE Ohio Regulated Utilities had no captive customers "because all retail customers have retail choice under Ohio's restructuring law."³² Respondents further state that, in the FirstEnergy Rehearing Order, the Commission stated that even if the FE Ohio Regulated Utilities' retail customers did meet the definition of captive customers under the Commission's regulations, the Commission would nonetheless conclude that affiliate abuse is not a concern in that case because Ohio has a state-mandated procurement process that is subject to the oversight of the Ohio Commission.³³ Respondents state that Ohio continues to have retail choice and that the Ohio Commission will continue to exercise its prudence review to protect the FE Ohio Regulated Utilities' retail customers, including through its review of annual filings that the FE Ohio Regulated Utilities must make to the Ohio Commission after the proposed retail rate plan is approved.³⁴

24. Respondents argue that Complainants are incorrect in suggesting that the Ohio Commission lacks the authority to review the impact of the Affiliate PPA on retail customers because the Affiliate PPA is not state-jurisdictional. Respondents state that FE Ohio Regulated Utilities' pending fourth Electric Security Plan and the PPA Rider determine what costs can be passed through or credited to retail customers, and that the Ohio Commission has both jurisdiction over those proposals and an ample record on which to evaluate them. Respondents therefore request that the Commission defer to the Ohio Commission to determine what is best for its retail customers in this case.³⁵

25. Respondents assert that the mere presence of non-bypassable charges for electric service has never affected the Commission's policy of granting waivers of affiliate rules. It states that commenting parties in the 2008-2009 waiver request proceeding argued that FE Ohio Regulated Utilities' Electric Security Plan included provisions that would create barriers to competition, including non-bypassable charges that would force shopping customers to pay twice for the same services and costs, but that the Commission rejected

³² *Id.* (citing FirstEnergy Waiver Order, 125 FERC ¶ 61,356, at P 5 (2008)).

³³ *Id.* (citing FirstEnergy Rehearing Order, 128 FERC ¶ 61,119, at P 18 (2008)).

³⁴ *Id.* at 13, 19-20.

³⁵ *Id.* at 19-21.

these challenges and found that the only issue is whether customers in Ohio have retail choice.³⁶

26. Respondents argue that Complainants are incorrect in asserting that FE Solutions and the other FE Ohio Market Affiliates must file a notice of change in status with the Commission due to the PPA Rider currently pending before the Ohio Commission. Respondents argue that neither the currently-pending Electric Security Plan nor the associated PPA Rider constitute a change in status from the facts upon which the Commission relied in granting FE Ohio Market Affiliates the waiver.³⁷

27. Respondents argue that Complainants' assertions about the distortionary impacts of the PPA Rider on PJM's wholesale markets are misplaced and speculative. Respondents argue that PJM's current market rules permit existing capacity resources—meaning those that have previously cleared a PJM capacity auction—to submit offers into a capacity auction at a price of zero (i.e., as a “price-taker”) without any justification. Respondents also state that, regardless, the FE Ohio Regulated Utilities have not disclosed or committed to an offer strategy for the generators at issue, and that Complainants' concerns about their offer behavior are speculative.³⁸

28. Lastly, Respondents assert that preemption questions with regard to the Ohio Commission's potential actions on FE Ohio Regulated Utilities' Electric Security Plan application are beyond the scope of the instant complaint.

B. Comments

1. Comments in Support of Complainants

29. Numerous commenters submitted comments in support of the complaint, asserting that the Commission should rescind FE Ohio Market Affiliates' waiver of the affiliate sales restrictions and review the Affiliate PPA under section 205 of the FPA.³⁹ They agree with

³⁶ *Id.* at 17.

³⁷ *Id.* at 22-23.

³⁸ *Id.* at 25-26.

³⁹ Calpine Comments at 2; Hardwood Flooring & Paneling Letter at 1; Northwest Ohio Aggregation Comments at 4; Ohio Citizen Action Comments at 1; Ohio Consumers' Counsel Comments at 7; Ohio Manufacturers Comments at 5; Oregon Clean Energy and Talen Comments at 2, 10; P3 Comments at 3; Panda Comments at 2-3; Pennsylvania Commission Comments at 8-9; PJM Comments at 4-5; PJM Market Monitor Comments

(continued...)

Complainants that, since the Commission granted FE Ohio Market Affiliates' waiver of the affiliate sales restrictions, circumstances have changed to render FE Ohio Regulated Utilities' customers captive.⁴⁰ They argue that, regardless of whether retail choice exists in Ohio, FE Ohio Regulated Utilities' 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.⁴¹ Specifically, the Affiliate PPA, combined with the PPA Rider, will subject all customers located in FE Ohio Regulated Utilities' distribution service territories to a non-bypassable generation charge regardless of whether the customers have exercised retail choice and opted to take service from another retail supplier.⁴² Therefore, supportive commenters argue, the justification for the waiver—that customers are not captive due to retail choice—no longer applies.

30. Many 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.⁴³ Some commenters also contend that the Affiliate PPA is exactly the type of transaction that the Commission was concerned about when issuing Order No. 697 and establishing the affiliate sales restrictions, as articulated in *Edgar* and *Allegheny*.⁴⁴ The Environmental Defense Fund and Ohio Environmental Council argue further that the Commission should reject the Affiliate PPA.⁴⁵ Sierra Club argues that the proposal before the Ohio Commission shifts virtually all of the market risk facing the unregulated generation

at 3; Sierra Club Comments at 2-4.

⁴⁰ Panda Comments at 3; P3 Comments at 3.

⁴¹ P3 Comments at 6-8; Ohio Consumers' Counsel Comments at 12; Ohio Manufacturers Comments at 7-8; PJM Market Monitor Comments at 3; Oregon Clean Energy and Talen Comments at 10-12; Environmental Defense Fund and Ohio Environmental Council Comments at 3-4.

⁴² Oregon Clean Energy and Talen Comments at 2.

⁴³ See Ohio Consumers' Counsel Comments at 13-16; Ohio Manufacturers Comments at 5-6; Panda Comments at 3.

⁴⁴ P3 Comments at 10; Calpine Comments at 2, 5. See also Environmental Defense Fund and Ohio Environmental Council Comments at 3-4.

⁴⁵ Environmental Defense Fund and Ohio Environmental Council Comments at 4.

to the FE Ohio Regulated Utilities' captive customers.⁴⁶ P3 contends that the consequences to all of FE Ohio Regulated Utilities' retail ratepayers are significant enough to require the Commission to rescind FirstEnergy's waiver, even though the Commission has stated that Ohio is a retail choice state and the Ohio Commission has authority to oversee the state procurement process.⁴⁷ Ohio Consumers' Counsel agrees, arguing that the "circumstances under which the Commission found that the Ohio Commission has the ability to review 'affiliate undue preference' and thus adequately protect captive Ohio consumers interests, no longer exist today with respect to the Affiliate PPA."⁴⁸ Moreover, Ohio Consumers' Counsel asserts, FE Ohio Regulated Utilities are not procuring the Affiliate PPA through the state competitive solicitation process, so relying on state regulatory oversight would be misplaced.⁴⁹

31. 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.⁵⁰ Sierra Club emphasizes that the FE Ohio Regulated Utilities have not submitted the Affiliate PPA to the Ohio Commission and have maintained that the Ohio Commission lacks the authority to review the agreement to ensure that it is just and reasonable and not unduly discriminatory.⁵¹

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

⁴⁶ Sierra Club Comments at 1-2.

⁴⁷ P3 Comments at 7-8 (referring to FirstEnergy Waiver Order, 125 FERC ¶ 61,356 and FirstEnergy Rehearing Order, 128 FERC ¶ 61,119).

⁴⁸ Ohio Consumers' Counsel Comments at 16.

⁴⁹ *Id.* at 16-17.

⁵⁰ Ohio Manufacturers Comments at 5; PJM Comments at 5-7; Pennsylvania Commission at Comments at 8-9.

⁵¹ Sierra Club Comments at 2 & nn.4, 6 (citing *FE Ohio Regulated Utilities Electric Security Plan Application*, Hearing Transcripts, Case No. 14-1297-EL-SSO, Vol. I at 56-57, Vol. IV at 869-70, Vol. XI at 2332, Vol. XIII at 2750-51, Vol. XXVI at 7527).

⁵² Pennsylvania Commission Comments at 8-9.

33. Multiple commenters also argue that electricity consumers and the economy in Ohio will be harmed unless the Commission reviews the Affiliate PPA for potential affiliate abuse.⁵⁴ Ohio Consumers' Counsel estimates that if the involved generation clears the PJM capacity auction, the cost to Ohio's customers would be approximately \$800 per customer and approximately \$3.6 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 \$1,100 per customer and approximately \$5.15 billion over the eight-year term.⁵⁵ Northwest Ohio Communities and Hardwood Flooring & Paneling add 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.⁵⁶

34. Several commenters argue that the Affiliate PPA is not needed for consumer protection and that the sole objective instead is to subsidize FirstEnergy's uneconomic generation, to the benefit of shareholders.⁵⁷ Ohio Consumers' Counsel disputes the argument that the Affiliate PPA is intended to hedge market volatility because it would not make sense for FirstEnergy to have invested in a single source of power for that purpose.⁵⁸ Calpine claims that non-affiliated competitors could provide the same amount of power at lower prices.⁵⁹ Oregon Clean Energy agrees, arguing that the Affiliate PPA is a preferential contract that would cost retail customers \$2 billion more than another, non-affiliated,

⁵³ Ohio Consumers' Counsel Comments at 14; Ohio Manufacturers Comments at 9.

⁵⁴ Ohio Consumers' Counsel Comments at 2; Northwest Ohio Communities Comments at 2-4; Hardwood Flooring & Paneling Comments at 1; Ohio Citizen Action Comments at 1.

⁵⁵ Ohio Consumers' Counsel Comments at 2.

⁵⁶ Northwest Ohio Communities Comments at 3-4; Hardwood Flooring & Paneling Comments at 1.

⁵⁷ See Ohio Manufacturers Comments at 7; Calpine Comments at 3-5.

⁵⁸ Ohio Consumers' Counsel Comments at 14.

⁵⁹ 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).

supplier's offer.⁶⁰ Calpine adds that in a competitive procurement process, it would be able to offer something substantially more attractive than the Affiliate PPA.

35. Many commenters assert that the Affiliate PPA would undermine the efficiency and fairness of PJM's wholesale electric energy and capacity markets.⁶¹ Some argue that the Affiliate PPA and the PPA Rider represent a market-distorting subsidy that could disrupt competitive market forces and frustrate the prices and signals the markets are intended to create.⁶² 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.⁶³ Calpine adds that the Affiliate PPA weakens the incentives in the PJM Capacity Performance construct in PJM because shareholders and management have less of an incentive to manage the performance of the units.⁶⁴ Oregon Clean Energy and Talen argue that the Commission has recognized the harms to competitive markets associated with allowing units to switch between market-based and cost-based regulation.⁶⁵ They are concerned that FirstEnergy's proposal could have a "downward spiraling, domino effect" on PJM's wholesale electric energy and capacity market because when one generator receives cost-based payments, it "harms the next generator, which then requires a financial crutch, and so on and on."⁶⁶

36. 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.

⁶⁰ Oregon Clean Energy and Talen Comments at 3 n.9, 10; *see also* Complaint at 24; P3 Comments at 8-10.

⁶¹ Oregon Clean Energy and Talen Comments at 4, 12-14; P3 Comments at 3-4, 10.

⁶² P3 Comments at 11; Northwest Ohio Communities Comments at 3-4.

⁶³ *See* Pennsylvania Commission Comments at 9-10; PJM Market Monitor Comments at 3; Oregon Clean Energy and Talen Comments at 4-6, 13-14; Ohio Manufacturers Comments at 6; Calpine Comments at 7-8; Ohio Consumers' Counsel Comments at 4.

⁶⁴ Calpine Comments at 7-8.

⁶⁵ Oregon Clean Energy and Talen Comments at 14-15 (citing *Devon Power LLC*, 103 FERC ¶ 61,082 (2003); *ISO New England Inc.*, 151 FERC ¶ 61,226, at P 22 (2015); *Bridgeport Energy, LLC*, 118 FERC ¶ 61,243, at P 66 (2007)).

⁶⁶ Oregon Clean Energy and Talen Comments at 13-14; *see* P3 Comments at 11.

2. Comments in Support of Respondents

37. Ohio Energy Group urges the Commission to deny the complaint. Ohio Energy Group asserts that the complaint represents a premature collateral attack on the Affiliate PPA because the Ohio Commission has not completed its review of the agreement in the proceeding before it. Ohio Energy Group argues that denying the complaint would promote judicial economy and serve the interests of federal-state comity.⁶⁷

38. Ohio Energy Group argues that the Affiliate PPA neither alters Ohio's status as a retail choice state nor creates captive customers, because, with or without the Affiliate PPA, retail customers in Ohio will still have the choice to purchase all of their energy and capacity from competitive retail suppliers.⁶⁸ Ohio Energy Group states that the Ohio Commission has broad authority to protect Ohio customers and to examine whether affiliate abuse has occurred under the proposed Affiliate PPA before any retail costs associated with the Affiliate PPA could be recovered from retail customers. Further, Ohio Energy Group explains, Ohio's hybrid regulatory system allows the Ohio Commission to establish financial limitations on customer shopping if such limitations help stabilize retail electric service rates. Ohio Energy Group argues that the Commission recognized the Ohio Commission's ability to protect retail customers when granting FirstEnergy waiver of its affiliate sales restrictions and that nothing has changed to invalidate this conclusion.⁶⁹

39. Ohio Energy Group argues that Complainants' concerns that the Ohio Commission may lack adequate authority to review the Affiliate PPA are overblown, particularly given that FE Ohio Regulated Utilities have agreed the Ohio Commission has the authority to review the reasonableness of Affiliate PPA-related costs. Specifically, Ohio Energy Group states, FE Ohio Regulated Utilities voluntarily submitted to state ratemaking jurisdiction and have agreed to absorb any costs the Ohio Commission deems unreasonable.⁷⁰ Ohio Energy Group adds that the proposed Affiliate PPA is expected to provide many benefits to Ohio

⁶⁷ Ohio Energy Group Comments at 2.

⁶⁸ *Id.*

⁶⁹ *Id.* at 4-5.

⁷⁰ *Id.* at 5-6 & n.11 (citing *FE Ohio Regulated Utilities Electric Security Plan Application*, FE Ohio Regulated Utilities Post-Hearing Brief, Case No. 14-1297-EL-SSO, at 74 (Feb. 16, 2016)).

retail customers, including net positive projections for the PPA Rider of \$721 million over eight years.⁷¹

40. Ohio Energy Group also argues that there is no definitive evidence indicating that the proposed Affiliate PPA would result in a distortion of PJM markets, particularly because evidence in the Ohio Commission record contradicts Complainants' statement that the relevant generation units would certainly retire absent the Affiliate PPA. Ohio Energy Group argues that the Affiliate PPA will affect neither the generation supply bid into the PJM markets nor demand, and thus, "there are probably not even 'incidental' effects on the wholesale power market."⁷² Ohio Energy Group states that the Affiliate PPA units are existing generators that previously were bid into the PJM markets and will continue to do so. Thus, the Ohio Energy Group urges the Commission to defer to the Ohio Commission in this instance.⁷³

41. In addition, the Ohio Unions and Councils urge the Commission to deny the complaint to avoid jeopardizing the future of the Sammis and Davis-Besse plants and the plants owned by the Ohio Valley Electric Corporation. They argue that the ongoing operation of these plants directly and indirectly sustains substantial employment in Ohio, provides significant tax revenues, and supports the local economies and communities. Utility Workers Union Local 457 adds that the long-term viability of the Sammis plant may be at risk without the Affiliate PPA. In addition, the Ohio Unions and Councils argue that the FE Ohio Regulated Utilities' Electric Security Plan will provide Ohio other specific job retention and creation benefits, such as funding for economic development in the region and various experimental programs. They argue that the Electric Security Plan not only will keep the Sammis and Davis-Besse plants and the Ohio Valley Electric Corporation plants running, but also it will ensure against rising electricity prices in the future.⁷⁴

⁷¹ *Id.* at 6-7.

⁷² *Id.* at 9 (citing *FERC v. Elec. Power Supply Assoc.*, Case No. 14-840, slip op. at 34 (U.S. Jan. 25, 2016) (emphasis in original)).

⁷³ *Id.*

⁷⁴ The Utility Workers Union Comments at 3-4; Laborers' Union Local 860 Comments at 3-4; Utility Workers Union Local 457 Comments at 3-4; Building Laborers' Union Local 310 Comments at 3-5; Teamsters Local Union No. 416 Comments at 3-4; Cleveland Council Comments at 3-4; Laborers' District Council Comments at 3-4; Electrical Workers Local 245 Comments at 2-4; and ACT Ohio Comments at 3-5.

C. Other Answers

42. In response to Respondents' February 23 Answer, Complainants point out that entities representing a wide range of interests support the complaint. Further, they reiterate their argument that the Commission must review the Affiliate PPAs because the circumstances surrounding the agreements provide no basis for presuming the rates, terms, and conditions are just and reasonable and not unduly discriminatory.⁷⁵ In particular, they argue that, in this case, retail choice and other state regulatory initiatives do not operate as a check on the potential for self-dealing and the exercise of market power by Respondents.⁷⁶

43. Countering Respondents' February 23 Answer, Ohio Consumers' Counsel asserts that Respondents fail to show how customers subject to the PPA Rider are not captive with respect to the Affiliate PPA's purchase power costs that will be involuntarily flowed through to them pursuant to the non-bypassable charge. 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.⁷⁷ 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.⁷⁸ Ohio 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.

44. Ohio Consumers' Counsel contends that Respondents' argument that the Commission has already determined that the Ohio Commission can adequately protect Ohio retail customers because it oversees a state-mandated procurement process is irrelevant, because the energy and power procured under the Affiliate PPA is not being acquired under the Ohio Commission's state-mandated procurement process and will not be used to provide service to Ohio retail customers.⁷⁹ Ohio Consumers' Counsel argues that

⁷⁵ Complainants March 9 Answer at 6-7.

⁷⁶ *Id.* at 8-9.

⁷⁷ Ohio Consumers' Counsel March 9 Answer at 4.

⁷⁸ *Id.* at 6-11 (referring to FirstEnergy Waiver Order, 125 FERC ¶ 61,356).

⁷⁹ *Id.* at 11-13.

the Ohio Commission's review of how FE Ohio Regulated Utilities implement the PPA Rider does not substitute for the Commission's review for whether the wholesale Affiliate PPA poses affiliate abuse concerns for both retail and wholesale customers and the competitiveness of 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 FE Solutions that could affect the competitiveness of FirstEnergy Solution's resources in wholesale energy markets.⁸⁰

45. 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.⁸¹

46. In response to the comments filed in support of the complaint, Respondents maintain that the only question the Commission should consider in determining whether FE Ohio Market Affiliates' waiver should remain in place is whether Ohio has retail choice.⁸² Respondents argue that the only determination that is relevant to this proceeding is whether Ohio customers still have retail choice under the Ohio retail choice program, because the Commission has determined that its affiliate sales restrictions are unnecessary in the context of retail choice states.⁸³ Respondents state that the Commission has determined that the affiliate sales restrictions are unnecessary for FE Ohio Market Affiliates, given that the Ohio Commission has authority to protect retail customers from the potential for affiliate abuse, and that the Commission should continue to defer to states in the protection of retail customers.⁸⁴ Respondents argue that the PPA Rider does not change the status of Ohio as a

⁸⁰ *Id.* at 13-15.

⁸¹ In their joint April 6 answer, Ohio Consumers' Counsel and Complainants reiterate that the complaint is not premature, in light of the fact that the Ohio Commission approved FE Ohio Regulated Utilities' Electric Security Plan in the March 31 Ohio Commission order. *See FE Ohio Regulated Utilities Electric Security Plan Application, Order and Opinion, Case No. 14-1297-EL-SSO (Mar. 31, 2016).*

⁸² Respondents March 9 Answer at 11-17 (referring to assertions of harm to the PJM wholesale markets, calls for changes in PJM's market rules, and arguments that the PPA Rider will harm retail customers).

⁸³ *Id.* at 5-6 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 481).

⁸⁴ *Id.* at 6 & nn.12-15 (citing FirstEnergy Waiver Order, 125 FERC ¶ 61,356 at PP 18-20; *NSTAR Elec. Co.*, 131 FERC ¶ 61,097, at PP 10- 13 (2010); *Alpena Power*

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retail choice state and does not prevent the Ohio Commission from adequately protecting retail customers.⁸⁵ Further, Respondents state that Ohio retains full authority to make determinations regarding resource adequacy in the state and that the Commission should reject the “sweeping redefinition of the role of state regulators” contemplated by comments in support of the complaint.⁸⁶

47. 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 this proceeding by including matters that it contends are irrelevant to the issues posed by Complainants.⁸⁷ Similarly, in their April 8, 2016 response, American Municipal Power and Old Dominion object to Respondents’ assertions regarding minimum offer requirements.

48. In their April 8 response, Respondents dispute characterizations in Complainants’ and Ohio Consumers Counsels’ April 6 joint answer regarding certain statements and findings contained in the Ohio Commission’s March 31, 2016 Order.

49. 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.”⁸⁸ 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.

50. In its April 19 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 FE Ohio Regulated Utilities’ 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

Generation, L.L.C., 110 FERC ¶ 61,199, at PP 18-20 (2005); *Duke Energy Retail Sales, LLC*, 127 FERC ¶ 61,027, at PP 29-34 (2009)).

⁸⁵ *Id.* at 4, 7-10.

⁸⁶ *Id.* at 10-11 (referring to PJM and P3).

⁸⁷ American Municipal Power Response at 4-5.

⁸⁸ Ohio Comments at 3.

Rider.⁸⁹ The Environmental Law & Policy Center emphasizes that the Ohio Commission, in approving the Electric Security Plan, 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 FE Solutions.⁹⁰

51. 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.

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 PCS Nitrogen Ohio, L.P; NRECA; the Environmental Defense Fund; Laborers' Union Local 860, Utility Workers Union, Utility Workers Union Local 457, Building Laborers' Union Local 310; Teamsters Local Union No. 416; Cleveland Council, Laborers' District Council, Electrical Workers Local 245, ACT Ohio, and Castleton, given their interests in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay. 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.

B. Substantive Matters

53. 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 FE Solutions' power sales to FE Ohio Regulated Utilities under the Affiliate PPA.⁹¹ Accordingly, we hereby rescind waiver as to the Affiliate PPA

⁸⁹ Environmental Law & Policy Center Answer at 2-4.

⁹⁰ *Id.* at 5-7.

⁹¹ 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*. As such, the requirement in 18 C.F.R. § 35.39(b) to obtain prior approval for affiliate sales of electric energy or capacity applies to any FE Ohio Market Affiliate to the

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and find that, prior to transacting under the Affiliate PPA, FE Solutions must submit the Affiliate PPA for review and approval under *Edgar* and *Allegheny* in accordance with 18 C.F.R. § 35.39(b).

54. 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 FE Ohio Market Affiliates.⁹²

55. 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 FE Ohio Regulated Utilities' 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,"⁹³ and, thus, could undermine the goal of the Commission's affiliate restrictions.

56. 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."⁹⁴ 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 considered to be under

extent such entity is a seller under the Affiliate PPA.

⁹² 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 PPA Rider.

⁹³ 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).

⁹⁴ 18 C.F.R. § 35.36(a)(6) (2015).

“cost-based regulation” and therefore are not “captive.”⁹⁵

57. 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.”⁹⁶ 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.”⁹⁷

58. 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.”

59. 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.”⁹⁸ 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.”⁹⁹

60. Here, while FE Ohio Regulated Utilities’ retail ratepayers retain a statutory right to choose one retail supplier over another, they are “involuntarily. . . in a situation in which

⁹⁵ 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).

⁹⁶ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 480.

⁹⁷ *Id.*

⁹⁸ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 198.

⁹⁹ *Id.*

[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.¹⁰⁰ In light of the PPA Rider, all of FE Ohio Regulated Utilities’ retail customers in their retail 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.¹⁰¹

61. Consistent with these statements, we find that FE Ohio Regulated Utilities’ 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.

62. Accordingly, we find that the affiliate sales restrictions in section 35.39(b) apply to sales under the Affiliate PPA and waiver of the affiliate restrictions as to this Affiliate PPA is hereby rescinded. Therefore, we direct FE Solutions to modify its market-based rate tariff to clarify that the affiliate sales restrictions codified at 18 C.F.R. § 35.39(b) will apply to this specific Affiliate PPA. We reiterate that this directive applies to any FE Ohio Market Affiliate to the extent such entity is a seller under the Affiliate PPA. To the extent FE Solutions or any other FE Ohio Market Affiliate wishes to make sales under the Affiliate

¹⁰⁰ *See id.*

¹⁰¹ 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. . . .”).

PPA, they must submit the agreement to the Commission under section 205 of the FPA for analysis under the *Edgar* and *Allegheny* standards.¹⁰²

63. Our decision here is not inconsistent with precedent in the FirstEnergy Waiver Order.¹⁰³ That order describes concerns raised by protesters regarding barriers to competition presented by the FE Ohio Regulated Utilities' 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.¹⁰⁴ 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 protestor that FE Ohio Regulated Utilities' 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."¹⁰⁵ 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.

64. Respondents argue that nothing has changed since the Commission previously determined that Ohio law already addresses the Commission's affiliate concerns because the Ohio Commission "has, and will continue to have, the ability to oversee properly developed retail electric rate plans, and fair administration of such plan for the protection of retail customers."¹⁰⁶ Notwithstanding the Commission's statements in the FirstEnergy Rehearing Order, the Commission's concern in Order No. 697 is the potential for a franchised public utility with captive customers to interact with a market-regulated power sales affiliate in

¹⁰² 18 C.F.R. § 35.39(b). *See also* Order No. 697, FERC Stats. & Regs. ¶ 31,252.

¹⁰³ *See* FirstEnergy Waiver Order, 125 FERC ¶ 61,356 at P 13.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* P 28 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 513).

¹⁰⁶ FirstEnergy Answer at 19 & n.65 (citing FirstEnergy Rehearing Order, 128 FERC ¶ 61,119 at PP 16, 18-20).

ways that transfer benefits to the affiliate and to its stockholders to the detriment of captive customers.¹⁰⁷ As to the facts of this case, we find that fundamental changes in circumstances that have occurred since the Commission granted FE Ohio Market Affiliates' waiver (i.e., the Ohio Commission approval of the PPA Rider to include the Affiliate PPA) present the potential for the inappropriate transfer of benefits from captive customers to shareholders and, thus, may frustrate the goal of the Commission's affiliate sales restrictions.

65. Our determination to rescind the affiliate waiver 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 sales 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 FE Ohio Regulated Utilities' retail customers—who are captive in the sense that they cannot avoid the non-bypassable charge—to FE Ohio Market Affiliates. While the Ohio Commission may have analyzed the effect of the PPA Rider on retail customers, only this Commission can exercise jurisdiction to review the Affiliate PPA. Therefore, 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.

66. In addition, the finding that the FE Ohio Regulated Utilities have 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) and the corresponding regulations in § 35.44(a) and § 35.44(b). Therefore, we direct that Respondents and their affiliates file a 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 and 18 C.F.R. § 35.44.

67. 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.¹⁰⁸ We similarly

¹⁰⁷ See Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 513; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at PP 188-189.

¹⁰⁸ We note that a complaint against PJM that is related, in part, to the Affiliate PPA

(continued...)

dismiss, as beyond the scope of the complaint, arguments made by the Ohio Unions and Councils that the FE Ohio Regulated Utilities' Electric Security Plan and the Affiliate PPA will promote employment, tax revenues, and economic growth in Ohio.

68. Consistent with our general policy of providing maximum protection to customers,¹⁰⁹ 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) FE Solutions, and any other FE Ohio Market Affiliate that is a seller under the Affiliate PPA, is hereby directed to revise its market-based rate tariff within 30 days of the date of this order, as discussed in the body of this order.
- (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 No. EL16-34-000, established pursuant to section 206 of the FPA, will be January 27, 2016.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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).

¹⁰⁹ *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).