ORDER CONDITIONALLY GRANTING REQUEST FOR WAIVER OF AFFILIATE RESTRICTIONS

(Issued February 2, 2018)

1. On October 6, 2017, as amended on December 6, 2017, FirstEnergy Service Company (FirstEnergy) filed a request for waiver of certain market-based rate affiliate restrictions to allow for the establishment of a centralized regional transmission organization (RTO) interface group to provide services to certain franchised public utilities and market-regulated power sales affiliates within the FirstEnergy Corp. holding company system. In this order, we conditionally grant limited waiver of certain market-based rate affiliate restrictions, effective December 5, 2017.

I. Request for Waiver

2. FirstEnergy states that it is a wholly owned subsidiary of FirstEnergy Corp. that provides legal, financial, and other corporate support services exclusively to affiliated companies within the FirstEnergy Corp. holding company system.

3. Jersey Central Power & Light Company, Monongahela Power Company (Mon Power), Pennsylvania Electric Company, and The Potomac Edison Company (collectively, the FE Franchised Public Utilities), each of which is a wholly owned subsidiary of FirstEnergy Corp., are franchised public utilities that have been granted market-based rate authority by the Commission. FirstEnergy represents that, of the FE Franchised Public Utilities, only Mon Power serves captive customers.
4. FirstEnergy states that the FE Franchised Public Utilities dispatch their respective generation resources through a single generation dispatch group that is bifurcated into two distinct roles.\(^1\) FirstEnergy explains that employees in the first role perform the market function component of dispatch, which includes making decisions related to developing offers and scheduling generation, while employees in the second role communicate those decisions to PJM Interconnection, L.L.C. (PJM) and, in turn, follow the instructions sent by PJM.

5. According to FirstEnergy, FirstEnergy Solutions Corp. (Solutions) is a power marketer engaged in the sale of electric power into competitive wholesale and retail electricity markets. Solutions is a market-regulated power sales affiliate of the FE Franchised Public Utilities and has been authorized by the Commission to sell electricity at market-based rates.

6. FirstEnergy states that Allegheny Energy Supply Company, LLC (AE Supply) owns and operates electric generation facilities and is a power marketer engaged in the sale of electric power into competitive wholesale and retail electricity markets. AE Supply is a market-regulated power sales affiliate of the FE Franchised Public Utilities and has been authorized by the Commission to sell electricity at market-based rates.

7. FirstEnergy states that Solutions dispatches all of the output of the generation that is owned or controlled by Solutions and AE Supply through two separate groups.\(^2\) According to FirstEnergy, similar to the bifurcated dispatch groups for the FE Franchised public utilities, the first group performs the market function component of dispatch, which includes making decisions related to developing offers and scheduling generation, while the second group acts as an RTO interface, communicating the decisions made by the first group to PJM and, in turn, following the signals PJM sends in response.

8. FirstEnergy represents that, at present, the dispatch groups for Solutions and the FE Franchised Public Utilities are physically and organizationally separate. FirstEnergy proposes to consolidate the two separate groups performing the RTO interface function into a single support group that will perform the RTO interface function on behalf of both the FE Franchised Public Utilities and the market-regulated power sales affiliates. FirstEnergy represents that the day-ahead dispatch offers and real-time generation dispatch offers will continue to be developed independently by the respective market function staff of the FE Franchised Public Utilities and Solutions. FirstEnergy states that the new centralized RTO interface services group will be physically and organizationally

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\(^1\) FirstEnergy Filing at 4.

\(^2\) Id. at 6.
separate from the respective groups performing the market function component of dispatch for the FE Franchised Public Utilities and Solutions.

II. **Notice of Filing and Responsive Pleadings**


III. **AMP’s Initial Comments and Conditional Withdrawal of Comments**

10. In its October 27, 2017 comments, AMP states that it disagrees with FirstEnergy’s characterization that the RTO interface personnel in question perform purely ministerial functions or that they fall into the same category as other shared employee groups that the Commission found would be unlikely to harm captive customers. AMP also states that FirstEnergy notes that it has announced its intent to no longer own Solutions and refers to Solutions’ financial difficulties as a basis for needing the waiver. AMP cautions the Commission against permitting a single group of employees to serve as the RTO interface for both the FE Franchised Public Utilities and Solutions in light of Solutions’ financial position.

11. In its November 22, 2017 conditional withdrawal of comments, AMP states that it has discussed the filing with FirstEnergy and will withdraw its comments without prejudice on the condition that the waiver be for a limited period ending no later than December 31, 2019. AMP states that this is consistent with FirstEnergy’s plan to exit the competitive generation business, which would negate the need for a consolidated RTO interface services group.

IV. **Deficiency Letter and Response**

12. On November 17, 2017, Commission staff issued a deficiency letter seeking additional information concerning the methodology that FirstEnergy would use to allocate the costs for the RTO interface services group among the FE Franchised Public Utilities and Solutions. In its December 6, 2017 response, FirstEnergy explains that it

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4 AMP Comments at 3.

5 Id. at 4.
will allocate the costs for the RTO interface services group to the FE Franchised Public Utilities and Solutions according to each company’s share of the total installed capacity dispatched by the RTO interface services group. FirstEnergy also specifies that cost allocation to the FE Franchised Public Utilities is limited to activities undertaken solely on their behalf and is unaffected by any marketing strategies of the market-regulated power sales affiliates.

V. Discussion

A. Procedural Matters

13. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2017), the timely, unopposed motion to intervene serves to make AMP a party to this proceeding. Pursuant to Rule 214(d) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2017), the Commission will grant PJM Market Monitor’s late-filed motion to intervene given its interest in the proceeding, the early stage of this proceeding, and the absence of undue prejudice or delay.

B. Substantive Matters

14. As discussed below, we will conditionally grant FirstEnergy’s request for waiver of the separation of functions provision in 18 C.F.R. 35.39(c)(2)(i) to the FE Franchised Public Utilities and market-regulated power sales affiliates within the FirstEnergy Corp. holding company system. The waiver is conditioned upon FirstEnergy maintaining sufficient records to enable the Commission to audit whether the representations and commitments made in its request for waiver remain true and accurate, including its commitment that captive customers will not be harmed.

15. In Order No. 697, the Commission codified certain affiliate restrictions in its regulations to protect captive customers from the potential for a franchised public utility to interact with a market-regulated power sales affiliate in ways that transfer benefits to the affiliate and its stockholders to the detriment of the captive customers. 6 Captive customers are defined as “any wholesale or retail electric energy customers served by a

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franchised public utility under cost-based regulation.”\(^7\) The affiliate restrictions govern, among other things, the separation of functions, the sharing of market information, sales of non-power goods or services, and power brokering. The Commission requires that, as a condition of receiving and retaining market-based rate authority, sellers comply with these affiliate restrictions unless otherwise permitted by Commission rule or order granting waiver of the affiliate restrictions.\(^8\) Failure to satisfy the conditions set forth in these affiliate restrictions constitutes a violation of a seller’s market-based rate tariff.\(^9\)

16. Under the separation of functions requirement in the affiliate restrictions (section 35.39(c)(2)(i)), employees of market-regulated power sales affiliates must operate separately, to the maximum extent practical, from employees of affiliated franchised public utilities with captive customers.\(^10\) Further, the no conduit provision in the affiliate restrictions (section 35.39(g)) prohibits anyone from acting as a conduit to circumvent the affiliate restrictions, including the separation of functions and information sharing requirements. On April 15, 2010, in response to a request for clarification in the Commission’s market-based rate rulemaking proceeding regarding affiliate restrictions, the Commission provided guidance regarding which employees may not be shared.\(^11\) Specifically, the Commission clarified that, consistent with Order No. 697-A, a franchised public utility with captive customers and its market-regulated power sales affiliate may not share employees that make economic dispatch decisions or that determine the timing of scheduled outages.\(^12\) The Commission has also explained that, to the extent that affected entities believe they need additional guidance concerning

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\(^8\) Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, 131 FERC ¶ 61,021, at P 2 (2010) (April 15 Clarification Order), order granting in part request for extension of time to comply, 132 FERC ¶ 61,014 (July 2 Order), order denying reh’g, 134 FERC ¶ 61,046 (2011).


\(^11\) April 15 Clarification Order, 131 FERC ¶ 61,021 at P 43.

\(^12\) Id.
compliance with the currently effective market-based rate affiliate restrictions, they may seek waiver of the market-based rate affiliate restrictions on a case-by-case basis.\textsuperscript{13}

17. FirstEnergy represents that employees of the proposed centralized RTO interface services group will not make dispatch decisions or perform market functions. Rather, their role will be to input unit offer prices and availability schedules – which will be determined independently by the respective marketing dispatch function staff of the FE Franchised Public Utilities and Solutions – into PJM’s day-ahead and real-time markets, and then to follow the dispatch instructions of PJM and communicate relevant information from PJM back to the FE Franchised Public Utilities and Solutions, as appropriate. FirstEnergy represents that personnel staffing the centralized RTO interface services group will receive additional training on compliance with respect to the no conduit rule\textsuperscript{14} and the prohibition against functioning as a conduit for communication of offers and/or other non-public market-related information between the FE Franchised Public Utilities and Solutions.

18. FirstEnergy further represents that structural restrictions will be put in place to prevent the sharing of marketing-related information regarding one business unit with the marketing personnel of the other business unit. In particular, the proposed centralized RTO interface services group will be both physically and organizationally separate from the respective groups performing the market function component of dispatch for the FE Franchised Public Utilities and Solutions. In addition, FirstEnergy represents that access to the RTO interface services facility will be key card restricted, and that appropriate communications access controls and firewalls will be implemented and maintained between the computer networks of the FE Franchised Public Utilities, Solutions, and the RTO interface services group.

19. FirstEnergy also represents that because the FE Franchised Public Utilities will be allocated costs only from activities undertaken solely on their behalf, that allocation cannot be affected by any increase or reduction in production or generation by their market-regulated power sales affiliates. FirstEnergy further states that it expects the FE Franchised Public Utilities’ captive customers to benefit from cost savings achieved through the reduction in personnel costs, the costs of owning and maintaining the buildings that house the two RTO interface services groups and two backup centers, and the costs of redundant communications hardware and software.\textsuperscript{15}

\textsuperscript{13} See July 2 Order, 132 FERC ¶ 61,014 at P 5 (citing Cleco Power LLC, 130 FERC ¶ 61,102).

\textsuperscript{14} 18 C.F.R. § 35.39(g) (2017).

\textsuperscript{15} December 6, 2017 response to data request at 3.
20. Based on these representations, we will conditionally grant FirstEnergy’s request for limited waiver of the separation of functions requirements of section 35.39(c)(2)(i) to permit FirstEnergy to establish a centralized RTO interface services group, as described by FirstEnergy in its request for waiver, based on its representation that granting the requested waiver will not harm captive customers or otherwise result in the transfer of non-public market information among market-regulated power sales and franchised public utility affiliates within the FirstEnergy Corp. holding company system. We note that this limited waiver does not affect FirstEnergy’s obligation to comply with the no-conduit provisions of section 35.39(g). Additionally, as a condition of the waiver granted herein, we will require FirstEnergy to maintain sufficient records to enable the Commission to audit whether the representations and commitments made in its request for waiver remain true and accurate, including its commitment that captive customers will not be harmed.

21. We find that the limited and specific responsibilities of the centralized RTO interface services group, as they are described in FirstEnergy’s filing, can be classified as ministerial in nature in the sense that employees performing the function will merely be communicating to PJM, but not developing, offer prices and availability schedules. Accordingly, waiver of the separation of functions requirement with respect to the RTO interface services group will not run afoul of the protections that the separation of functions requirement was intended to preserve. It is upon this basis, and not on FirstEnergy’s financial position, that we grant the requested waiver in this case. Therefore, we will not impose a time limitation on the waiver, as AMP has suggested.

22. Moreover, FirstEnergy’s commitment to put in place structural measures to prevent the improper sharing of non-public, marketing-related information further reduces the potential for affiliate abuse between Solutions and the FE Franchised Public Utilities.

23. The waiver conditionally granted herein is limited to the specific facts, representations, and procedures presented by FirstEnergy in its filing, and applies only to the employees discussed in its request for waiver. To the extent that there is any material change in circumstances that would reflect a departure from the facts, representations, policies, and procedures that we have relied upon in granting the requested waiver, we will require FirstEnergy to inform the Commission within 30 days of any such change. With the exception of the limited waiver specifically granted herein, all of the other market-based rate affiliate restrictions continue to apply.

\[16\] 18 C.F.R. § 35.39(g) (2017).
24. We will direct the FE Franchised Public Utilities, AE Supply, and Solutions to submit a compliance filing, within 30 days of the date of this order, revising the limitations and exemptions sections of their market-based rate tariffs to list the limited waiver granted herein and to include a citation to this order.\footnote{Order No. 697, FERC Stats. & Regs. ¶ 31,252 at Appendix C, order on reh 'g, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 385 n.517.}

The Commission orders:

(A) FirstEnergy’s request for waiver of certain of the market-based rate affiliate restrictions is hereby granted, effective December 5, 2017, subject to condition, as discussed in the body of this order.

(B) FirstEnergy is hereby directed to maintain records to enable the Commission to audit its compliance, as discussed in the body of this order.

(C) FE Franchised Public Utilities, AE Supply, and Solutions are hereby directed to submit a compliance filing, within 30 days of the date of this order, revising the limitations and exemptions sections of their market-based rate tariffs, as discussed in the body of this order.

(D) FE Franchised Public Utilities, AE Supply, and Solutions must inform the Commission within 30 days of any material change in circumstances that would reflect a departure from the facts, representations, policies, and procedures the Commission relied upon in granting the waiver described herein.

By the Commission.

(SEAL)

Kimberly D. Bose,
Secretary.