

136 FERC ¶ 61,216
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

FirstEnergy Corp.

Docket No. ER11-3050-000

ORDER CONDITIONALLY GRANTING REQUEST FOR WAIVER OF AFFILIATE
RESTRICTIONS

(Issued September 29, 2011)

1. On March 8, 2011, FirstEnergy Corp. (FirstEnergy) and its affiliates¹ (collectively, the FirstEnergy Companies) filed a request for waiver of the market-based rate affiliate restrictions to permit the FirstEnergy Companies to share employees that engage in fuel procurement and to share employees that engage in economic dispatch and schedule outages at certain facilities that are jointly owned by Mon Power and AE Supply. In this order, we conditionally grant limited waiver of the market-based rate affiliate restrictions, effective April 20, 2011, as requested by the FirstEnergy Companies.

I. Request for Waivers

2. The FirstEnergy Companies explain that FirstEnergy is a diversified energy company that has franchised public utility affiliates, market-regulated power sales affiliates, and non-utility affiliates. The FirstEnergy Companies explain that FE Solutions and AE Supply are market-regulated power marketers authorized by the Commission to make sales of energy, capacity and certain ancillary services at market-based rates. They state that FE Solutions and AE Supply are separate legal

¹ The affiliates of FirstEnergy for the purpose of its waiver request are FirstEnergy Solutions Corp., and its subsidiary, FirstEnergy Generation Corp. (together, FE Solutions); Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, the Ohio Companies); Pennsylvania Power Company; Pennsylvania Electric Company; Metropolitan Edison Company; Jersey Central Power & Light Company; Allegheny Energy, Inc. (Allegheny Energy), Monongahela Power Company (Mon Power); Allegheny Generating Company (AGC); and Allegheny Energy Supply Company, LLC (AE Supply). Filing at 1 n.1.

entities but are managed as a single merchant business by a common management team. According to the FirstEnergy Companies, FE Solutions and AE Supply own the entire FirstEnergy market-regulated generation fleet.² The FirstEnergy Companies state that they are in the process of developing their long-term organizational structures after a recent merger between FirstEnergy and Allegheny Energy.³

3. The FirstEnergy Companies explain that Mon Power is a franchised public utility with captive retail customers in West Virginia. They state that Mon Power owns generating facilities for the benefit of its retail captive customers, including facilities that are wholly-owned by Mon Power as well as three facilities that Mon Power jointly owns with AE Supply. Specifically, the FirstEnergy Companies explain that Mon Power and AE Supply jointly own the Harrison, Pleasants, and Bath County generating facilities (together, the jointly-owned facilities). They further explain that Mon Power owns 20.54 percent of the Harrison facility, located in Haywood, West Virginia, and 7.69 percent of the Pleasants facility, located in Willow Island, West Virginia, and that AE Supply owns the remaining interest in each of these facilities. In addition, they state that 60 percent of the Bath County facility, located in Warm Springs, Virginia, is owned by Dominion Virginia Power and that the remaining 40 percent is owned by AGC, which, in turn, is 40.62 percent owned by Mon Power and 59.38 percent owned by AE Supply.⁴

4. The FirstEnergy Companies state that they are seeking waiver of the affiliate restriction against sharing employees that engage in fuel procurement to permit employees of FE Solutions to procure fuel for the entire FirstEnergy generation fleet. They state that joint fuel procurement will confer substantial benefits on the customers of the FirstEnergy Companies, especially the captive customers of Mon Power, which they would not be able to obtain otherwise. They explain that joint fuel procurement will enhance their ability to obtain favorable terms when negotiating with fuel suppliers and will promote economies of scale. According to the FirstEnergy Companies, the primary beneficiaries of these economies of scale will be Mon Power's captive retail customers in West Virginia because Mon Power's coal requirements only represent roughly ten percent of the FirstEnergy Companies' total requirements.⁵ The FirstEnergy Companies also state that joint fuel procurement will create further efficiencies by facilitating inventory management.⁶

² *Id.* at 4-5, 7.

³ *Id.* at 3. The Commission approved the merger of FirstEnergy and Allegheny Energy on December 16, 2010. *FirstEnergy Corp.*, 133 FERC ¶ 61,222 (2010).

⁴ Filing at 2 n.3.

⁵ *Id.* at 17.

⁶ *Id.* at 15-17, 19.

5. The FirstEnergy Companies state that denying the requested waiver would deprive Mon Power's customers of substantial benefits by requiring the FirstEnergy Companies to unwind existing contractual arrangements that contain prices that are significantly below current and forecasted market prices, by requiring the creation of a separate fuel procurement group, and by eliminating economies of scale.⁷ They explain that operating separate fuel groups at facilities that are jointly owned by Mon Power and AE Supply would both jeopardize the physical operation of the facilities and impose additional costs on ratepayers.⁸

6. According to the FirstEnergy Companies, the process by which joint fuel solicitations are carried out protects captive customers against the possibility of cheaper fuel being diverted to one of Mon Power's market-regulated affiliates at the expense of Mon Power's captive retail customers.⁹ They explain that prior to making a joint fuel solicitation, Mon Power and FE Solutions' Fuels and Unit Dispatch Group (Fuels Group) each determine their individual fuel requirements, which are then reflected in the joint solicitation. The FirstEnergy Companies state that the fuel obtained through the joint solicitation process is then allocated between Mon Power and its market-regulated affiliates on a *pro-rata* basis according to the pre-defined procurement objectives for each entity.¹⁰ They explain that in the event that fuel is transferred from a market-regulated unit to a franchised regulated unit, the franchised regulated unit would pay the lesser of either cost or market price; conversely, in the event that fuel is transferred from a franchised regulated unit to a market-regulated unit, the market-regulated unit will pay the higher of cost or market price. The FirstEnergy Companies further explain that Mon Power has the option to direct the Fuels Group to secure fuel through alternate means to the extent that Mon Power chooses not to participate in a particular joint solicitation or procurement for its wholly-owned regulated plants.¹¹ In addition, the FirstEnergy Companies state that FE Solutions' Regulated Generation Group has final decision-making authority on fuel procurement and establishes inventory levels for regulated generating facilities.¹² Additionally, the FirstEnergy Companies explain that annual review of the procurement of coal for Mon Power by the West Virginia Public Service Commission further protects retail captive customers.¹³ They further explain that

⁷ *Id.* at 20-21.

⁸ *Id.* at 21-22.

⁹ *Id.* at 22.

¹⁰ *Id.* at 22-23.

¹¹ *Id.* at 26.

¹² *Id.* at 25-26.

¹³ *Id.* at 23-25.

state oversight has been vigorous and that no party to the state proceedings has suggested that any retail captive customers have been harmed by the joint fuel procurement process.¹⁴

7. With regard to employees who conduct economic dispatch, the FirstEnergy Companies state that permitting the sharing of employees conducting economic dispatch at the jointly-owned facilities is necessary and consistent with the underlying purpose of the market-based rate affiliate restrictions. They further represent that there will be no harm to Mon Power's captive customers as a result of the requested waiver.¹⁵ They explain that the Fuels Group dispatches the jointly-owned facilities along with the other market-regulated units owned by FE Solutions. According to the FirstEnergy Companies, the Fuels Group dispatches the jointly-owned facilities in accordance with PJM Interconnection, L.L.C.'s (PJM) market rules with the objective of maximizing operating efficiencies and value for both the franchised regulated and market-regulated facilities. They state that any benefits derived from sales from the jointly-owned facilities are split *pro-rata* by ownership share.¹⁶ They state that granting the requested waiver is critical to the continued efficient operation of the jointly-owned facilities, which benefits captive customers. They state that joint economic dispatch creates efficiencies and avoids the potential wear and tear on unit components that would result if independent dispatch by fractional interest was pursued.¹⁷ They also state that, as a practical matter, Mon Power does not own enough megawatts at either of the Harrison or Pleasants facilities to meet the minimum operating load and allow it to operate the unit on its own, meaning that a single offer price must be offered for PJM to dispatch the units at their minimum level.¹⁸ According to the FirstEnergy Companies, the Commission has previously recognized that the conjoined ownership of the jointly-owned facilities makes it impractical for Mon Power and AE Supply to make individual economic dispatch decisions for the jointly-owned facilities without sharing employees or information.¹⁹ Moreover, they state that FE Solutions does not have any incentive to offer or dispatch the jointly-owned facilities out of economic merit, since such behavior would hurt FE Solutions and AE Supply on a *pro-rata* basis.²⁰

¹⁴ *Id.* at 24-25.

¹⁵ *Id.* at 29.

¹⁶ *Id.* at 27-28.

¹⁷ *Id.* at 29-30.

¹⁸ *Id.* at 30.

¹⁹ *Id.* at 28 (citing *Allegheny Energy, Inc.*, 119 FERC ¶ 61,025, at P 20, 25 (2007)).

²⁰ *Id.* at 29.

8. Similarly, the FirstEnergy Companies explain that granting a limited waiver to permit the sharing of employees that schedule outages at the jointly-owned facilities is consistent with the purpose of the market-based rate affiliate restrictions. They explain that employees of FE Solutions will schedule outages for both the jointly-owned facilities and the entire market-regulated fleet.²¹ They state that both FE Solutions and Mon Power have the ability to alter the outage schedule in order to minimize fleet costs or address operational needs. According to the FirstEnergy Companies, permitting FE Solutions to schedule outages at the jointly-owned facilities will benefit ratepayers by ensuring that the facilities operate efficiently and will reduce costs and increase the quality of outages for the FirstEnergy generation fleet. The FirstEnergy Companies state that AE Supply would be disproportionately harmed by any scheduling inefficiencies, and that FE Solutions does not have an incentive to harm the captive retail customers of Mon Power.²² They explain that because AE Supply is a majority owner of the jointly-owned facilities, there is no incentive for FE Solutions to schedule outages at inopportune or high-demand times as it will receive a greater fractional share of those increased costs or foregone profits.²³ The FirstEnergy Companies state that the Commission has previously granted waiver of the market-based rate affiliate restrictions in cases involving conjoined facilities and that the Commission has previously recognized that co-owners of a facility will generally know about the outage schedules at individual units due to the need for coordination, even if outage scheduling decisions are made unilaterally.²⁴

II. Notice of Filing and Responsive Pleadings

9. Notice of the FirstEnergy Companies' filing was published in the *Federal Register*, 76 Fed. Reg. 14,965 (2011), with interventions and comments due on or before March 30, 2011.

10. On March 30, 2011, Consumers Energy Company (Consumers) filed a motion to intervene and Direct Energy Business, LLC and Direct Energy Services (together, Direct Energy) filed a joint motion to intervene.

²¹ *Id.* at 32.

²² *Id.* at 32-33.

²³ *Id.* at 34.

²⁴ *Id.* at 33 (citing *Cleco Power LLC*, 130 FERC ¶ 61,102, at P 22 (2010)).

III. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motions to intervene filed by Consumers and Direct Energy serve to make them parties to this proceeding.

B. Substantive Matters

12. As discussed below, we will conditionally grant the FirstEnergy Companies' request for limited waiver of the separation of functions provision in 18 C.F.R. 35.39(c)(2)(i) to permit the FirstEnergy Companies to share employees that engage in fuel procurement and to share employees that engage in economic dispatch and schedule outages at certain facilities that are jointly owned by Mon Power and AE Supply, as discussed in their request for waiver. However, we note that this limited waiver does not affect the FirstEnergy Companies' obligation to comply with the no-conduit provisions of section 35.39(g).²⁵

13. 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.²⁶ Captive customers are defined as "any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation."²⁷ 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 explicitly permitted by Commission rule or order

²⁵ 18 C.F.R. § 35.39(g) (2011).

²⁶ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 467, 490, 513, *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).

²⁷ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 202; 18 C.F.R. § 35.36(a)(6) (2011).

granting waiver of the affiliate restrictions.²⁸ Failure to satisfy the conditions set forth in these affiliate restrictions constitutes a violation of a seller's market-based rate tariff.²⁹

14. 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.³⁰ On April 15, 2010, in response to a request for clarification, the Commission provided guidance regarding which employees may not be shared under the affiliate restrictions.³¹ 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.³² The Commission also clarified that franchised public utilities with captive customers are prohibited from sharing employees that engage in fuel procurement with their market-regulated power sales affiliate.³³ With respect to fuel procurement employees, the Commission explained that a shared employee that procures fuel for both the franchised public utility and the market-regulated power sales affiliate may have the incentive to allocate purchases of lower priced fuel supplies to the market-regulated power sales affiliate while allocating purchases of higher priced fuel supplies to the franchised public utility.³⁴ The Commission denied rehearing of the April 15 Clarification Order, and required that market-based rate sellers comply with the guidance in the April 15 Clarification Order within 90 days, or by April 20, 2011.³⁵ The Commission has also

²⁸ *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) (Rehearing Order).

²⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 549-550.

³⁰ 18 C.F.R. § 35.39(c)(2)(i) (2011).

³¹ April 15 Clarification Order, 131 FERC ¶ 61,021 at P 43.

³² *Id.*

³³ *Id.* P 41.

³⁴ *Id.* P 42.

³⁵ Rehearing Order, 134 FERC ¶ 61,046. On April 15, 2011, the FirstEnergy Companies filed a request that, in the event that the Commission did not act upon their waiver request by April 20, 2011, the Commission grant them an extension of time to comply until the Commission acts upon and grants the waiver request, or until 90 days following the Commission's denial of the waiver request. On April 20, 2011, the Secretary of the Commission issued a notice granting the FirstEnergy Companies an extension of time to comply pending further Commission order on the waiver request.

explained that, to the extent that affected entities believe they need additional guidance concerning compliance with the currently effective market-based rate affiliate restrictions, they may submit a request for a no-action letter regarding specific proposed transactions, practices, or situations³⁶ or may seek waiver of the market-based rate affiliate restrictions on a case-by-case basis.³⁷

15. We will conditionally grant the FirstEnergy Companies' limited request for waiver of the separation of functions requirement in section 35.39(c)(2)(i) of the Commission's regulations to permit the employees of FE Solutions to procure fuel for the entire FirstEnergy fleet, including Mon Power, and to permit employees of FE Solutions to engage in outage scheduling and economic dispatch at the jointly-owned facilities, effective April 20, 2011, based on the FirstEnergy Companies' representation that the FirstEnergy Companies' fuel procurement arrangements and outage and dispatch scheduling arrangements, as described above, ensure that captive customers will not be harmed and will obtain benefits that they would not obtain otherwise. We interpret this representation to be a commitment that captive customers will not be harmed. As discussed above, the FirstEnergy Companies represent that the process by which joint fuel solicitations are carried out protects captive customers against the possibility of cheaper fuel being diverted to one of Mon Power's market-regulated affiliates at the expense of Mon Power's captive retail customers.³⁸ They state that joint fuel procurement will enhance the FirstEnergy Companies' ability to obtain favorable terms when negotiating with fuel suppliers and will promote economies of scale. According to the FirstEnergy Companies, the primary beneficiaries of these economies of scale will be Mon Power's captive retail customers in West Virginia because Mon Power's coal requirements only represent roughly 10 percent of the FirstEnergy Companies' total requirements.³⁹ The FirstEnergy Companies also state that joint fuel procurement will create further efficiencies by facilitating inventory management.⁴⁰

16. With respect to their request for waiver to permit employees of FE Solutions to conduct economic dispatch and outage scheduling at the jointly-owned facilities, the FirstEnergy Companies represent that requiring separate groups of employees to conduct economic dispatch and schedule outages based on the respective shares of Mon Power

FirstEnergy Corp., Docket No. ER11-3050-000 (Apr. 20, 2011) (delegated letter order).

³⁶ See July 2 Order, 132 FERC ¶ 61,014 at P 5 (citing *Interpretative Order Modifying No-Action Letter Process and Reviewing Other Mechanisms for Obtaining Guidance*, 123 FERC ¶ 61,157 (2008)).

³⁷ See *id.* (citing *Cleco Power LLC*, 130 FERC ¶ 61,102).

³⁸ *Id.* at 22.

³⁹ *Id.* at 17.

⁴⁰ *Id.* at 15-17, 19.

and AE Supply is not practical given the conjoined nature of the facilities. They state that any benefits derived from sales from the jointly-owned facilities are split *pro-rata* by ownership share. They also state that, as a practical matter, Mon Power does not own enough megawatts at either the Harrison or Pleasants facilities to meet the minimum operating load and allow it to operate these units on its own, meaning that a single offer price must be offered for PJM to dispatch the units at their minimum level. They represent that there will be no harm to captive customers because FE Solutions does not have any economic incentive to offer or dispatch the jointly-owned facilities out of economic merit, since such behavior would hurt FE Solutions and AE Supply on a *pro-rata* basis. With regard to outage scheduling, they represent that permitting FE Solutions to schedule outages at the jointly-owned facilities will benefit ratepayers by ensuring that the facilities operate efficiently and will reduce costs and increase the quality of outages for the FirstEnergy generation fleet. They further represent that captive customers will not be harmed by permitting FE Solutions to schedule outages for the jointly-owned facilities. They represent that, because AE Supply is a majority owner of the jointly-owned facilities, there is no incentive for FE Solutions to schedule outages at inopportune or high-demand times as it will receive a greater fractional share of those increased costs or foregone profits.

17. Accordingly, we will conditionally grant the FirstEnergy Companies' request for limited waiver of the separation of functions requirement to permit the FirstEnergy Companies to share employees that engage in fuel procurement and to share employees that engage in economic dispatch and schedule outages at certain facilities that are jointly owned by Mon Power and AE Supply based on the FirstEnergy Companies' representation that the FirstEnergy Companies' fuel procurement arrangements and outage and dispatch scheduling arrangements, as described above, ensure that such arrangements will not harm the FirstEnergy Companies' captive customers, and will confer benefits on them that they would not obtain otherwise. Additionally, as a condition of the waivers granted herein, we will require the FirstEnergy Companies to maintain sufficient records to enable the Commission to audit whether the representations and commitments made in their request for waiver remain true and accurate, including their commitment that captive customers will not be harmed.

18. The waiver conditionally granted herein is limited to the specific facts, representations, and procedures presented by the FirstEnergy Companies in their filing, and applies only to the employees discussed in their 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 the FirstEnergy Companies 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 to the FirstEnergy Companies.⁴¹

19. We will direct the FirstEnergy Companies 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.⁴²

The Commission orders:

(A) The FirstEnergy Companies' request for waiver of certain of the market-based rate affiliate restrictions is hereby granted, effective April 20, 2011, subject to conditions, as discussed in the body of this order.

(B) The FirstEnergy Companies are hereby directed to maintain records to enable the Commission to audit their compliance, as discussed in the body of this order.

(C) The FirstEnergy Companies 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) The FirstEnergy Companies 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 waivers granted herein.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁴¹ However, section 35.39(f) of the Commission's regulations requires that a market-regulated power sales affiliate, such as FE Solutions, that brokers (or offers) power for an affiliated franchised public utility with captive customers, such as Mon Power, must offer the franchised public utility's power first. Neither FE Solutions nor Mon Power has sought a waiver of this requirement in this proceeding and must comply with section 35.39(f) of the Commission's regulations. 18 C.F.R. § 35.39(f) (2011).

⁴² 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.