

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

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

Docket No. EL16-34-000

Complainants,)

v.)

**FirstEnergy Solutions Corporation,)
Ohio Edison Company, The Cleveland)
Electric Illuminating Company and The)
Toledo Edison Company,)**

Respondents.)

SUPPORTING COMMENTS OF THE PJM POWER PROVIDERS GROUP

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission” or “FERC”),¹ the PJM Power Providers Group (“P3”)² submits comments in support of the Complaint³ filed by the above-

¹ 18 C.F.R. § 385.211 (2015).

² P3 is a non-profit organization dedicated to advancing federal, state and regional policies that promote properly designed and well-functioning electricity markets in the PJM Interconnection, L.L.C. (“PJM”) region. Combined, P3 members own over 84,000 MWs of generation assets, produce enough power to supply over 20 million homes and employ over 40,000 people in the PJM region covering 13 states and the District of Columbia. The comments contained in this filing represent the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue. For more information on P3, visit www.p3powergroup.com.

³ Complaint Requesting Fast Track Processing, filed by the Electric Power Supply Association, Retail Energy Supply Association, Dynergy Inc., Eastern Generation, LLC, NRG Power Marketing LLC and GenOn Energy Management, LLC. (“Complainants”) against FirstEnergy Solutions Corporation, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (“FE Ohio Utilities”), in Docket No. EL16-34-000 on January 27, 2016 (“Complaint”).

captioned complainants (“Complainants”) against the above-captioned respondents (“Respondents”) on January 27, 2016.

On January 28, 2016, the Commission established a 20-day comment period in this proceeding, making comments on the Complaint due on February 16, 2016.⁴ On February 3, 2016, Respondents filed a Motion for Extension of Time to File Answer, seeking an additional 14 days in the comment period, due to the “complex and numerous issues” raised by the Complaint.⁵ On February 5, 2016, Complainants filed an Answer in Opposition to the Motion for Extension of Time.⁶ On February 9, 2016, the Commission granted the Respondents’ Motion for Extension of Time, in part, establishing February 23, 2016, as the date in which comments in this proceeding are due.⁷

P3 agrees with the Complainants that the issues raised in the Complaint are neither complex nor numerous. As Complainants assert, the Complaint posits a straightforward inquiry as to whether this Commission should rescind the waiver of the affiliate power sales restrictions granted to Respondents and other affiliates of FirstEnergy Corporation (“FirstEnergy” or “FE”) as that waiver relates to an abusive affiliate power sales contract between FirstEnergy Solutions (“FES”) and the FE Ohio Utilities (“Affiliate PPA”) that has been approved as to form (with the actual amount of

⁴ Notice of Complaint, Docket No. EL16-34-000 (January 28, 2016) (unreported).

⁵ Motion for Extension of Time to File Answer of FirstEnergy Service Company, Docket No. EL16-34-000 (filed Feb. 3, 2016).

⁶ Joint Answer of the Electric Power Supply Association, the Office of Ohio Consumers’ Counsel and the Retail Energy Supply Association in Opposition to the Motion for Extension of Time, Docket No. EL16-34-000 (filed February 5, 2016).

⁷ *Notice of Extension of Time*, Docket No. EL16-34-000 (Feb. 9, 2016).

the Affiliate PPA rate pending) by the Ohio Public Utilities Commission (“PUCO”).⁸ The Affiliate PPA, in part, requires the PUCO’s approval of a non-bypassable affiliate generator cost recovery through inclusion in a Retail Rate Stability Rider (“Rider RRS”). The structure of Rider RRS includes the requirement that captive Ohio retail ratepayers pay a non-bypassable charge to assure subsidization of Respondents’ Ohio generation plants.

The Affiliate PPA, which results from a non-bid contract between a FERC-regulated wholesale merchant generator and its affiliate state-regulated public utility, in and of itself, would require this Commission’s review and approval. The additional new requirement that captive customers would pay this non-bypassable affiliate generator surcharge through the proposed Rider RRS has not been reviewed by this Commission. This change in circumstances from the position and statements originally espoused to this Commission in support for its Commission-approved waiver necessitates an immediate rescission of the waivers of the affiliate power sales restrictions previously granted to Respondents’ market-based rate subsidiaries (“Waiver” or “Waiver Approval”),⁹ in accordance with the *Edgar/Allegheny* standards.¹⁰

Without immediate action by the Commission to rescind the Waiver, both Ohio end-use customers and PJM Interconnection, L.L.C. ("PJM") market participants will be

⁸ In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C.4928.143 in the Form of an Electric Security Plan, Case No. 14-1297-EL-SSO (“Ohio Proceeding”).

⁹ *FirstEnergy Solutions Corp.*, 125 FERC 61,356 (2008) (“*FirstEnergy I*”), on reh’g, 128 FERC 61,119 (2009) (“*FirstEnergy II*”).

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

harmed as a result of Respondents' participation in the PJM upcoming 2019/2020 Base Residual Auction ("BRA"). PJM and PJM's Independent Market Monitor ("IMM") have informed state regulators that the Affiliate PPAs would represent a market-distorting subsidy that would undermine PJM's Capacity Performance market and unfairly frustrate wholesale prices.

In the past, the Commission has approved the Minimum Offer Price Rule ("MOPR") to address any potential harms from out-of-market subsidies skewing market based signals. While the MOPR has proven to be an imperfect tool, because of the FirstEnergy and AEP proposals, work is underway to design an appropriate MOPR revision and submit it to the Commission for action prior the May auction. That said, expeditiously granting this Complaint may obviate the need for review of that filing, and, indeed, multiple other filings, at least for the time being.

At the very least, granting the instant complaint could forestall the need for this Commission to review filings similar to the MOPR filings that resulted from the New Jersey and Maryland subsidization cases. P3 notes, however, that even various proceedings designed to eliminate adverse market effects are unlikely to eliminate all of the adverse effects and unintended consequences for PJM's markets, specifically, and for wholesale competition, generally, when states attempt to fully subsidize units. Such actions clearly burden wholesale and retail market participants and harm wholesale competition, regardless of the efforts to minimize harm that may further increase costs to consumers.

For the reasons stated below, P3 fully supports the Complaint's requested relief.

I. COMMENTS

A. **The Commission Must Rescind Respondents’ Grant of the Waiver of Affiliate Restrictions, Due to the Significant Changes in Circumstances that formed the Basis for the Waiver.**

In granting the Respondents’ Waiver, this Commission found Ohio to be a retail choice state supported by a state-mandated procurement process for default service that is subject to the regulatory oversight of the Ohio Commission. In approving the Waiver, the Commission made clear that “FirstEnergy is under the obligation to report to the Commission any changes in status that may affect the basis on which the Commission relied in granting a waiver of the affiliate restrictions.”¹¹

The Affiliate PPA clearly presents a fundamental change in status that must be reviewed by this Commission. Per the Affiliate PPA, FES, the merchant generator operating in the PJM wholesale markets, would enter into a no-bid PPA with its affiliate, FE, to sell the output from its Davis-Besse nuclear plant (908 MW) and its Sammis coal units (2,220 MW), in addition to its 4.85% share of the output from the Ohio Valley Electric Corporation (“OVEC”) coal plants.¹² FE would then sell the output into the wholesale markets, netting all wholesale revenues (and charges) against payments made to FES under the Affiliate PPA, and the resulting charge or credit would be collected through a non-bypassable affiliate generator surcharge assessed on all captive customers – both shopping retail choice customers and non-shopping - paying the Rider RRS.

¹¹ FERC Waiver Approval, *supra*, at p.8.

¹² Ohio Proceeding, *supra*, Transcript Volume 1 at 31.

The Ohio Consumers Council (“OCC”) states 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. However, if the involved generation does not clear the PJM capacity auction, the projected cost to Ohio customers could balloon to over a staggering \$1,100.00 per customer and approximately \$5.15 billion in total over the eight-year term.¹³

As this Commission knows, the affiliate restrictions are designed to ensure that captive utility customers who lack a meaningful choice are not harmed by uneconomic dealings between that utility and its competitive affiliates. To that end, the Commission stated in Order No. 697 that:

“ . . . the Commission is 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 affiliate and its stockholders to the detriment of captive customers.”¹⁴

The Affiliate PPA relies upon a non-bypassable Rider RRS that will impose an above-market cost on Ohio customers that they cannot avoid, regardless of whether those customers choose a competitive option or remain with the utility’s default service. As a result, Ohio’s so-called competitive market place offers Ohio consumers no refuge at all from these above market PPAs. The non-competitive nature and non-bypassable payment structure of Rider RRS presents the type of clear circumstances that led the Commission to impose the affiliate restrictions in the first place. The Commission should not allow Respondents the opportunity to avoid the scrutiny and intent of those rules and restrictions.

¹³ *Motion to Intervene and Comments in Support of the Ohio Consumers Council*, EL16-34-000, January 27, 2016, at pp.1-2.

¹⁴ Order No. 697, 119 FERC ¶ 61,297 (2007) (“Order No. 697”) at P 513.

1. The Affiliate PPA is Dependent Upon Captive Customers Who Must Pay a Non-Bypassable Affiliate Generation Charge.

Although Respondents' Waiver found that Ohio was a retail choice state and that presumably, even if customers were "captive," the PUCO could exercise oversight of those customers through its state auction procurement, P3 believes the dynamics of the customer responsibility for payments under the Rider RRS are significant enough to require Commission rescission of the waiver and review of the Affiliate PPA under Section 205 of the Federal Power Act ("FPA") and in accordance with the *Edgar/Allegheny* standards¹⁵.

First, Rider RRS and the Affiliate PPA will require a "captive" customer component of which this Commission has not reviewed or approved. The Commission has made clear that "captive customers" means "any wholesale or retail electric energy customers served under cost-based regulation."¹⁶ The Commission clarified 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 "cost-based regulation" and therefore are not "captive."¹⁷

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

¹⁶ Order No. 697, at P 478

¹⁷ Order No. 697, at P 479.

The distinguishing factor here is that Rider RRS charges will apply to *all* retail customers, not just those who choose a competitive retail electric service (“CRES”) provider, or otherwise choose to stay with the provider of last resort (“POLR”). The “captive” nature of Rider RRS is clear in that it will have an economic impact on all customers, both shopping and non-shopping customers, due to the fact that it is a non-bypassable affiliate generator surcharge. P3 believes that this, in fact, is the exact type of captive ratepayer aspect that it sought to protect in affiliate transactions.

Second, the non-bypassable affiliate generator charge is expected to be a significant cost for these captive ratepayers. Despite the Respondents’ claim that there would be a projected credit for customers, expert testimony before the PUCO instead showed significant costs to customers. One estimate, utilizing just a small adjustment of the NYMEX natural gas prices, found a net present loss of \$858 million to customers over the eight-year period of the Affiliate PPA.¹⁸

Finally, these captive ratepayer costs will have negative impacts for the wholesale market. PJM’s IMM has expressed concerns surrounding Rider RRS and its implications for both wholesale customers and the PJM markets, by stating, in part, that:

“Nonetheless, FirstEnergy wants to shift the costs and risks of these resources to ratepayers. The purpose of the proposed Rider RRS is to transfer the costs and market risks associated with the Rider RRS assets from FirstEnergy’s shareholders to FirstEnergy’s ratepayers. FirstEnergy has not demonstrated and cannot demonstrate why customers should bear these costs and take these risks, if a well-informed generation owner is not willing to do so. **The fact that FirstEnergy is proposing to transfer the costs, the risks and the asserted net**

¹⁸ Ohio Proceeding, *supra*, P3/EPSCA Testimony of Dr. Joseph Kalt, Ex. 12 at 16-17.

benefits of these units from shareholders to customers is evidence that FirstEnergy does not believe that the units are profitable and does not appear to believe that current and expected market conditions will make the units profitable.”¹⁹

For all of these reasons, the Affiliate PPA, which is dependent on the non-bypassable affiliate generation charge, presents a new dynamic of “captive” customers that necessitates the rescission of Respondents’ Waiver.

2. The Affiliate PPA presents a New Affiliate Transaction that Would be Rejected under the *Edgar/Allegheny* Standards.

The Commission must reject the Respondents’ Waiver as it changes the circumstances under which the Waiver Approval was originally granted and would not satisfy the Commission’s concerns regarding the potential for affiliate abuse as articulated in the *Edgar/Allegheny* decisions.

This Commission has found that under *Edgar*, it will approve “affiliate sales resulting from competitive bidding processes after the Commission has determined that, based on the evidence, the proposed sale was a result of direct head-to-head competition between affiliated and competing unaffiliated suppliers.”²⁰ The Respondents’ Affiliate PPA would fail this *Edgar* standard, since there was no opportunity for competing unaffiliated suppliers to offer an alternative for this PPA.

¹⁹ First Supplemental Testimony of Joseph E. Bowring on Behalf of the Independent Market Monitor for PJM, Dated December 30, 2015, at p.3 (emphasis added).

²⁰ *Edgar*, supra, at 62, 167-69.

Despite other market participant offers that would be significantly less than the Affiliate PPA that has been proposed to the PUCO,²¹ the Affiliate PPA is the result of a non-competitive bid contract between wholesale and retail market affiliates that is designed to advantage one wholesale market participant to the disadvantage of all others. This is exactly the type of transaction that this Commission was suspect of in issuing the affiliate transaction requirements of Order 697 and the affiliate transactions standards as further articulated in *Edgar/Allegheny*. As one Ohio wholesale and retail market participant stated:

“Dynergy opposes arrangements or constructs that are designed to distort the markets in a manner that assure benefits to one market participant and therefore inappropriately disadvantage other market participants. With its incorporation of the Companies' modified PPA proposal, the Stipulation is just such an arrangement. If approved by the Commission, the Stipulation will have a direct impact for years on Dynergy's ability to compete with FES and the Companies in the wholesale markets. Under the proposed PPA, FES will have all its costs covered plus receive a guaranteed 10.38% rate of return. All other merchant generators, including Dynergy, must compete for sales and bear the risk of lost revenues if they do not competitively price their generation output. The Stipulation provides FES with an advantage over other merchant generators, placing other existing merchant generators, jobs and tax revenues at risk. Further, because the design of the PPA remains cost plus, FES and the Companies have no financial incentive to act in an economically rational manner for the purchased output from the PPA units and the OVEC entitlement. Including the PPA units and the OVEC entitlement in the PPA rider will effectively encourage the continued operation of less efficient, less cost effective plants and discourage the modernization of generation sited in Ohio.”²²

²¹ For example, Exelon submitted testimony before the PUCO that, if allowed to compete for a similar PPA, it could offer a guaranteed eight-year, 100% emissions-free power that could save Ohio customers over \$2 billion compared to the Affiliate PPA. *Second Supplemental Testimony of Lael Campbell on behalf of Constellation NewEnergy, Inc., and Exelon Generating Company, L.L.C.*, dated December 30, 2015. Similarly, Dynergy, has also offered to supply competitively-priced energy and capacity, if allowed to participate in a competitive solicitation. *Initial Brief of Dynergy, Inc.*, dated February 16, 2016. <http://www.dynergy.com/investor-relations>

²² Direct Testimony of Dean Ellis, Vice President, Regulatory Affairs, Dynergy Inc., in Opposition to Third Supplemental Stipulation, dated December 30, 2015, (“IMM Testimony”) at p.5.

The potential market distortions of the non-bid Affiliate PPA were highlighted by PJM's IMM, who stated, in part, that:

“ . . . The adoption of the non-market paradigm in this case would move the PJM market farther from a market paradigm and create real risk to the market paradigm. Whatever the decision, it is essential at a minimum that the choices about incentives and regulatory approaches be made with an explicit understanding of the short run and long run implications of these choices for the design of wholesale power markets and the interaction between wholesale power markets and retail markets. The market paradigm creates competitive incentives for all participants and creates a market in which competitors can build new capacity. The quasi-market paradigm eliminates those incentives, creates an advantage for the incumbent regulated utility and creates a disadvantage for competition from new entrants to the market.”²³

Given this significant and detrimental market effect coupled with the level of change in circumstance from the Respondents' originally-filed waiver request, the Commission should reject its prior Waiver Approval.

Indeed, without the Commission's immediate rejection of the Respondents' Waiver, P3 remains concerned that the Affiliate PPA in question will serve as a template for other states to attempt to subsidize similar generation units, thereby burdening wholesale and retail customers and market participants, and harming wholesale competition.

Given the fact that the Affiliate PPA was not subject to a competitive solicitation process and is dependent on a non-bypassable affiliate generator charge – via Rider RRS,

²³ IMM Testimony, *Id.*, at p.6.

P3 urges the Commission to agree with Complainants' requests in full and rescind Respondents' Waiver.

II. CONCLUSION

WHEREFORE, for the foregoing reasons, P3 fully supports the Complainants' and other interveners' request that the Commission (1) promptly reject the waiver of the affiliate power sales restrictions previously granted to Respondents, as that waiver relates to the Affiliate PPA and (2) direct Respondents to submit their Affiliate PPA for Commission review, allowing appropriate comment from interested parties.

Respectfully submitted,

On behalf of the PJM Power Providers Group

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Dated: February 23, 2016

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service lists compiled by the Secretary in these proceedings.

Dated at Washington, D.C. this day of February 23, 2016.

On behalf of the PJM Power Providers Group

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