

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

Electric Power Supply Association,)
Retail Energy Supply Association,)
Dynegy Inc., Eastern Generation, LLC)
NRG Power Marketing, LLC and)
GenOn Energy Management, LLC)
)
Complainants,)
)
v.)
)
AEP Generation Resources, Inc, and)
Ohio Power Company,)
)
Respondents.)

Docket No. EL16-33-000

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”),¹ the PJM Power Providers Group (“P3”)² submits comments in support of the Complaint³ filed by the above-captioned complainants (“Complainants”) against the above-captioned respondents (“Respondents”) on January 27, 2016.

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, Dynegy Inc., Eastern Generation, LLC, NRG Power Marketing LLC and GenOn Energy Management, LLC. (“Complainants”) against AEP Generation Resources, Inc. and Ohio Power Company in Docket No. EL16-33-000 on January 27, 2016 (“Complaint”).

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 1, 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 2, 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. While the Respondents seek to muddy the waters by including a voluminous history of the underlying state docket issues regarding its pending Affiliate Power Purchase Agreement (“Affiliate PPA”) proposal before the Public Utilities Commission of Ohio (“PUCO”),⁸ such an undertaking is not necessary for this Commission to address the Complaint. Rather, the issue before the Commission is straightforward: the circumstances underlying this Commission’s grant of the affiliate power sales restrictions to Respondents have significantly changed. The change in question – a retail rate rider (the “PPA Rider”) that will allow for the pass-through of

⁴ Notice of Complaint, Docket No. EL16-33-000 (January 28, 2016) (unreported).

⁵ Motion of Ohio Power Company and AEP Generation Resources, Inc. for Extension of Time and Request for Waiver of Period for Responses, Docket No. EL16-33-000 (filed Feb. 1, 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. EL16-33-000 (filed February 2, 2016).

⁷ *Notice of Extension of Time*, Docket No. EL16-33-000 (Feb. 9, 2016).

⁸ *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, PUCO Case No. 14-1693-EL-RDR, *et al.*, dated October 3, 2014 (“AEP Ohio Amended Application”).

costs incurred under the highly controversial no-bid Affiliate PPA between Ohio Power Company (“AEP Ohio” or “Ohio Power”) and AEP Generation Resources (“AEPGR”) – has been approved as to form (with the actual amount of the Affiliate PPA rate pending) by the PUCO. AEP Ohio does not require, and has not requested, PUCO approval of the Affiliate PPA, and, with the PPA Rider already in place, it requires only the PUCO’s approval of “retail cost recovery through inclusion in (a) PPA Rider.”⁹ The structure of this PPA Rider includes the requirement of captive Ohio retail ratepayers paying a non-bypassable charge to assure subsidization of AEPGR’s Ohio generation plants. These new developments were not present when this Commission granted Respondents’ request for waiver of the affiliate power sales restrictions.

This material change in circumstances relative to those described to this Commission in the waiver request necessitates rescission of the waivers and review of the Affiliate PPA under Section 205 of the Federal Power Act (the “FPA”) and in accordance with the *Edgar/Allegheny* standards.¹⁰

Without imminent action by the Commission to rescind the waiver and ensure that it can review the Affiliate PPA, both Ohio end-use customers and PJM market participants will be harmed as a result of offers from these subsidized resources into the PJM Interconnection, L.L.C.'s ("PJM") upcoming 2019/2020 Base Residual Auction (“BRA”), as well as into PJM’s energy and ancillary services markets.

⁹ AEP Ohio Amended Application, *supra*, at p.3.

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

PJM and its 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 Respondents' Affiliate PPA proposal, work is already underway to design an appropriate MOPR revision and submit it to the Commission for action prior to 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 forstall 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 foregoing reasons and as discussed in more detail below, P3 fully supports the Complaint's requested relief.

I. COMMENTS

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

On February 5, 2014, the Commission approved the Respondent's request for a waiver of the Order No. 697 affiliate power sales restrictions with respect to Ohio Power, including the requirement to obtain separate authorization under Section 205 of the FPA for transactions with Ohio Power's market-regulated power sales affiliates ("FERC Waiver Approval").¹¹

In the FERC Waiver Approval, FERC relied upon the representations made by Respondent as to the circumstances surrounding the affiliate transactions in Ohio. Included in those representations was that Ohio Power would not have captive retail or wholesale customers ("AEP Waiver Application").¹²

In approving the AEP Waiver Application, the Commission Staff stated that:

"The Applicants request waiver of the affiliate restrictions codified at 18 C.F.R. § 35.39 to allow market-based rate sales between Ohio Power and its affiliates, including AEP Energy, **because Ohio Power will no longer have captive wholesale or retail customers** after a corporate reorganization. You assert that the affiliate restrictions are not applicable in jurisdictions where there are no "captive customers" needing the protections afforded by these restrictions.

¹¹ *Waiver of Affiliate Restrictions, Request for Category 1 Status, and Notice of Cancellation*, AEP Energy Partners, Inc., Ohio Power Company, Docket Nos. ER14-593-000, ER14-594-000, ER14-595-000, dated February 5, 2014 ("FERC Waiver Approval").

¹² *Ohio Power Company, AEP Energy Partners, Inc., Amended Market Based Rate Tariffs Waiving Affiliate Restrictions*, Docket Nos. ER14-593-000, ER14-594-000, ER14-595-000, Dated December 11, 2013 ("AEP Waiver Application"), pp. 2, 11.

You state that Ohio Power does not have any captive retail customers because retail customers in Ohio have retail choice. Based on your representations, the Applicants' request for waiver of the affiliate restrictions is granted."¹³

The cornerstone of Respondents' waiver request – that Ohio Power did not have captive customers - has changed under the Affiliate PPA. As such, this Commission must review the waivers in question and rescind them.

B. The Affiliate PPA is Dependent Upon Captive Retail and Wholesale Rate Customers Who Must Pay a Non-Bypassable Affiliate Generator Charge.

The sole basis for the waiver of the affiliate power sales restrictions was the Commission's understanding that, upon the completion of a PUCO-approved restructuring, AEP Ohio would no longer have any captive retail or wholesale customers. That understanding will not be accurate with respect to the Affiliate PPA if the PUCO authorizes AEP Ohio to recover the net costs of that contract pursuant to the PPA Rider.

The Commission has made clear that "captive customers" means "any wholesale or retail electric energy customers served under cost-based regulation."¹⁴ The Commission clarified that the definition of "captive customers" does not include retail customers served by the utility at cost-based rates if – and only if – those customers who have retail choice, i.e. the ability to take service at market-based rates from a competitive supplier. Under such circumstances, the Commission has determined that the retail

¹³ FERC Waiver Approval, *supra*, at p.2 (emphasis added).

¹⁴ Order No. 697, 119 FERC ¶ 61,297 (2007) ("Order No. 697) at P. 478.

customers are not considered to be under “cost-based regulation” and therefore are not “captive.”¹⁵

Respondents will no doubt argue that retail choice in Ohio still exists and that customers in Ohio will still have a choice in generation providers after the Affiliate PPA goes into effect. However, as the Ohio Consumers Council (“OCC”) has stated in its comments to this Commission, Ohio ratepayers are “captive,” as they “will have no ability to avoid the subsidized costs incurred under the Affiliate PPA and the retail rate riders by choosing another supplier.”¹⁶ As the OCC has stated to this Commission:

“The Commission should not turn a blind eye to the affiliate abuse evident in this contract – an electric utility using captive customers to subsidize uneconomic generation owned by the utilities’ marketing and generation affiliates. AEP Ohio characterizes this plan as a hedging program with the goal of insulating Ohio retail customers from volatility in market prices for electric supply. The AEP PPA will have the opposite effect. The PPA will transfer market risk to captive Ohio retail consumers. Rescission of the waiver is warranted by the change in circumstances – the conversion of retail choice customers in Ohio to captive customers under the non-bypassable retail rate rider surcharge.”¹⁷

More broadly, accepting arguments that the existence of retail choice in Ohio justifies retention of the waiver, even where no choice is available where costs are incurred under the Affiliate PPA, would elevate form over substance. The reason that “retail choice” has been found adequate to protect retail customers from affiliate power sales involving a franchised utility is that retail choice would ordinarily give customers

¹⁵ Order No. 697, *supra*, at P. 479.

¹⁶ *Motion to Intervene and Comments in Support of the Office of the Ohio Consumers’ Council*, Docket No. EL16-33-000, filed January 27, 2016 (“OCC Comments”) at p.12.

¹⁷ OCC Comments, *supra*, at p.9.

the ability to choose not to bear the costs of an abusive affiliate transaction. That is manifestly not the case where the costs of the abusive affiliate transaction are recovered through a non-bypassable charge assessed to all retail customers, even those taking service from competitive retail supplies. To hold otherwise would be to expose retail customers in AEP Ohio's service territory to exactly the sort of risk against which the Commission's affiliate power sales restrictions are intended to protect: namely, the risk "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."¹⁸ The PPA Rider will impose an above-market cost on Ohio customers that they cannot avoid and the beneficiary of their payments is AEP's generation affiliate and, indirectly AEP stockholders. Thus, regardless of how the Respondents may attempt to characterize the PPA Rider, it will squarely raise the issue that led the Commission to impose the affiliate restrictions in the first place, and the Commission should not allow AEP to avoid the intent of those rules.

It should also be crystal clear that charges under the PPA Rider will be the product of "cost-based regulation." The Affiliate PPA is dependent upon the PUCO's "cost-based regulation," insofar as the Affiliate PPA assumes that the PUCO will determine "whether (or to what extent) AEP Ohio should be permitted to pass on the net costs and net benefits of the Revised Affiliate PPA to retail customers."¹⁹ Per the Affiliate PPA, AEP Ohio "agrees to participate in annual compliance reviews," including

¹⁸ Order No. 679, *supra*, at P 513; see also Order No. 679-A at P 198 and FN 280.

¹⁹ Joint Stipulation and Recommendation, AEP Ohio Amended Application, *supra*, ("Joint Stipulation and Recommendation"), dated Dec. 14, 2015, pp. 3-4

a review of its “costs and revenues.”²⁰ In fact, AEP Ohio concedes as much in describing the PUCO’s jurisdiction over the retail rate recovery structure of the PPA Rider, stating that:

“The wholesale rates paid to AEPGR under the proposed PPA are jurisdictional to the Federal Energy Regulatory Commission (FERC) and could only be challenged through proceedings before the FERC. **But the Commission will have reasonable and adequate regulatory jurisdiction over several aspects of AEP Ohio’s recovery of the proposed PPA costs through retail rates**, as discussed in testimony supporting the Application.”²¹

The structure of the Affiliate PPA clearly encompasses captive retail ratepayers pursuant to a state commission cost-based regulatory review.

C. The Affiliate PPA is an Above-Market Cost, Non-Bid Contract That Will Distort the PJM Markets.

The Commission’s concerns about abusive affiliate transactions are not limited to the effect of such transactions on captive customers. They also extend to the potential market-distorting effects of transactions that have not been shown to be reasonably priced and lack evidence of direct head-to-head competition between affiliated and unaffiliated suppliers.²²

Above-market costs in such transactions can prove detrimental to the wholesale markets. This is clearly the case with the Affiliate PPA, in that both PJM and the IMM have recognized that the subsidies provided under the Affiliate PPA would have detrimental effects on the PJM wholesale market. As PJM’s IMM stated, “[t]he proposed

²⁰ Joint Stipulation and Recommendation, *supra*, at p.7.

²¹ AEP Waiver Application, *supra*, p.4 (emphasis added).

²² See *Edgar*, 55 FERC ¶ 61,382 at 62,167; *Allegheny*, 108 FERC ¶ 61,082 at P 18.

PPA Rider would constitute a subsidy analogous to the subsidies previously proposed in New Jersey and Maryland, both of which were found to be inconsistent with competition in the wholesale power markets.”²³

The IMM also expressed concern that the Affiliate PPA would distort PJM’s markets, by stating that:

“The proposed PPA Rider would require that the ratepayers of AEP subsidize the costs of the plants to the benefit of AEP. The logical offer price for these resources in the PJM Capacity Market, under these conditions, would be zero. A zero offer would be rational because this would maximize the revenue offset to the customers who would be required to pay 100 percent of the costs of this capacity and bear all of the performance risks. Offers at or near zero would have an anti-competitive, price suppressive effect on the PJM Capacity Market as would any offers at less than the competitive offer level. The proposed PPA Rider would create strong incentives for AEP to offer this capacity at less than the competitive offer level.”

This type of subsidy is inconsistent with competition in the wholesale power markets because of its price suppressive effects. Such effects would make it difficult or impossible for generating units without subsidies to compete in the market. Competition depends on units making competitive offers that reflect their costs and the risk of paying penalties and/or receiving benefits (e.g. the offer cap for Capacity Performance resources) and on recovering revenues only from the markets and not from subsidies. Such subsidies would negatively affect the incentives to build new generation in Ohio and elsewhere in PJM and if adopted by others would likely result in a situation where only subsidized units would ever be built.”²⁴

The Affiliate PPA is also the result of a non-bid contract between Ohio Power and AEPGR. 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

²³ First Supplemental Testimony of Joseph E. Bowring, AEP Ohio Amended Application, *supra*, (“IMM Testimony”) at p.4.

²⁴ IMM Testimony, *supra*, at 5 (emphasis added).

between affiliated and competing unaffiliated suppliers.”²⁵ 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.

Despite other market participant offers that would be significantly less than the Affiliate PPA that has been proposed to the PUCO,²⁶ 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*.

The non-bid, above-market cost Affiliate PPA in question clearly involves captive customers that would unfairly subsidize Respondents’ generation units that will participate in PJM’s energy, capacity and ancillary service markets. This was not the case when this Commission granted Respondents’ waiver in question. Therefore, this Commission should exercise its jurisdictional purview of rejecting the Respondents’ previously approved waiver.

²⁵ *Edgar*, supra, at 62, 167-69.

²⁶ Although the parties were not allowed additional time in which to submit testimony in the AEP Ohio Amended Application docket, Exelon has stated that it would have offered similar testimony to that it submitted before the PUCO in the FirstEnergy Electric Security Plan Case (Case No. 14-1297-EL-SSO) that, if allowed to compete for a similar PPA, it could offer a guaranteed eight-year, 100% emissions-free power agreement 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, Dynegy, has also offered to supply competitively-priced energy and capacity, if allowed to participate in a competitive solicitation. *Initial Brief of Dynegy, Inc.*, dated February 16, 2016. <http://www.dynegy.com/investor-relations>

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 AEP Ohio and AEP Generation Resources 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.

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