

170 FERC ¶ 61,101
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

AEP Energy Partners, Inc.
Public Service Company of Oklahoma

Docket Nos. ER20-649-000
ER20-652-000

ORDER CONDITIONALLY GRANTING REQUEST FOR WAIVER OF
AFFILIATE RESTRICTIONS

(Issued February 14, 2020)

1. On December 19, 2019, American Electric Power Service Corporation, on behalf of its affiliates, Southwestern Electric Power Company (SWEPCO) and AEP Energy Partners, Inc. (AEPEP) (collectively, Applicants), requested waivers of the market-based rates affiliate information sharing prohibition found in section 35.39 of the Commission's regulations.¹ Pursuant to section 205 of the Federal Power Act (FPA),² Applicants also request approval of proposed tariff revisions to their market-based rate tariffs implementing the requested waivers.³ In this order, we conditionally grant Applicants' request for limited waivers of the affiliate information sharing restrictions, effective January 1, 2020, as requested.

I. Background

2. Applicants state that American Electric Power Company, Inc. (AEP) is a multi-state electric utility holding company system providing electric service at retail and wholesale in eleven states. Applicants also state that AEP owns SWEPCO and other vertically integrated utilities that are transmission, distribution, and generation-owning members of PJM

¹ 18 C.F.R. § 35.39(d)(1) (2019).

² 16 U.S.C. § 824d (2018).

³ Public Service Company of Oklahoma is the designated filer for the joint market-based rate tariff of the CSW Operating Companies, which includes SWEPCO. Public Service Company of Oklahoma states that it submitted revisions to that tariff to implement the waiver request on behalf of SWEPCO.

Interconnection, L.L.C. and the Southwest Power Pool, Inc. (SPP), and are authorized to make wholesale sales of electric energy and capacity at market-based rates.

3. Applicants indicate that SWEPCO is a franchised public utility with captive customers, which engages in the transmission and distribution of electric power in Arkansas, Louisiana, and northeastern Texas.

4. Applicants affirm that SWEPCO purchases a total of 108.8 megawatts (MW) of power from Flat Ridge 2 Wind Energy LLC, a single-purpose entity that was formed to own and operate a 470.2 MW wind generation facility and associated interconnection facilities (collectively, Flat Ridge 2) in south central Kansas. Applicants state that SWEPCO's purchases are made pursuant to 20-year power purchase agreements (PPA) that expire in 2032.

5. Applicants also state that Flat Ridge 2 became an affiliate of SWEPCO as the result of an indirect wholly-owned subsidiary of AEP – AEP Clean Energy Resources LLC – acquiring a 50 percent membership interest in Flat Ridge 2 Wind Holdings LLC, which is the parent company of Flat Ridge 2. According to Applicants, as a result of this transaction, in 2019, Flat Ridge 2 requested, and the Commission granted, an affiliate sales waiver on the basis that the PPAs (Flat Ridge 2 PPAs) between SWEPCO and Flat Ridge 2 were negotiated at arm's length when the entities were not affiliates.⁴

6. Applicants state that the Flat Ridge 2 PPAs require Flat Ridge 2 or its designee (the scheduling entity) to schedule SWEPCO's portion of the output of the Flat Ridge 2 facility into SPP, which requires SWEPCO to communicate its market offer for its generation entitlements under the Flat Ridge 2 PPAs to the scheduling entity, which will submit it to SPP on SWEPCO's behalf. Applicants indicate that, prior to January 1, 2020, an unaffiliated party, Sempra Trading, was the scheduling entity but that the scheduling arrangement with Sempra Trading expired on December 31, 2019.

7. Applicants further state that AEP is the parent company of AEPEP, a power marketer that has been granted market-based rate authority.⁵ Applicants state that Flat Ridge 2 has entered into an arrangement as of January 1, 2020, whereby AEPEP provides scheduling services to SWEPCO and other buyers of the output from Flat Ridge 2 and that all costs associated with AEPEP's provision of scheduling services are borne by Flat Ridge 2 and not passed onto SWEPCO.

⁴ *Flat Ridge 2 Wind Energy LLC*, 167 FERC ¶ 61,036 (2019) (Affiliate Sales Order).

⁵ *AEP Energy Partners, Inc.*, Docket No. ER11-46-000 (Jan. 21, 2011) (delegated order).

8. Applicants state that SWEPCO must communicate certain information relating to its Flat Ridge 2 generation entitlements to AEPEP so AEPEP may perform the scheduling functions. Applicants represent that allowing SWEPCO to share limited information with AEPEP to enable AEPEP to schedule SWEPCO's Flat Ridge 2 generation entitlements into SPP's day-ahead market will not harm SWEPCO or its captive customers because Applicants have committed to implement safeguards to prevent such harm. Applicants state that these safeguards include: (1) SWEPCO providing only such information to AEPEP that is necessary for AEPEP to carry out SWEPCO's scheduling functions and submit offers on behalf of SWEPCO into the SPP day-ahead market; (2) implementing procedures to ensure that SWEPCO-provided information is restricted to only those AEPEP personnel who will perform the scheduling function; (3) ensuring that no affiliate personnel who receive SWEPCO-related information will serve as a conduit of such information to personnel who are engaged in trading or marketing activities; (4) providing specialized training on the Commission's no-conduit rule⁶ to personnel who provide these scheduling services; and (5) maintaining adequate documentation to facilitate Commission inspections and audits to assess Applicants' adherence to the foregoing commitments and any potential harm to captive customers.⁷

9. Finally, Applicants state that the Flat Ridge 2 PPAs in place when the Affiliate Sales Order was issued expressly provide that Flat Ridge 2, or its designee, will conduct scheduling services for several purchasers' entitlements, including SWEPCO's. For this reason, Applicants submit that the Affiliate Sales Order could reasonably be interpreted to permit the exchange of such information between Flat Ridge 2's designee, i.e., AEPEP, and SWEPCO as is needed to provide scheduling services for SWEPCO's Flat Ridge 2 generation entitlements.⁸

II. Notice of Filings

10. Notice of the filings was published in the *Federal Register*,⁹ with interventions and protests due on or before January 9, 2020. None was filed.

⁶ 18 C.F.R. § 35.39(g).

⁷ December 19, 2019 Filings at 7-8.

⁸ *Id.* at 8-9.

⁹ 84 Fed. Reg. 71,915 (2019).

III. Discussion

11. As discussed below, we conditionally grant Applicants' requests for limited waiver of the separation of functions in 18 C.F.R. § 35.39(d)(1) to permit Applicants to share limited information related to AEPEP's provision of scheduling services for SWEPCO into the SPP day-ahead market and accept proposed tariff revisions to their market-based rate tariffs implementing the requested waiver. However, we note that, notwithstanding our approval of these limited waivers, Applicants remain obligated to comply with the no-conduit provisions of section 35.39(g).¹⁰

12. 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.¹¹ Captive customers are defined as "any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation."¹² The affiliate restrictions govern, among other things, the separation of functions, the sharing of market information, 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 granting waiver of the affiliate restrictions.¹³ Failure to satisfy the conditions set forth in these affiliate restrictions constitutes a violation of a seller's market-based rate tariff.¹⁴

¹⁰ 18 C.F.R. § 35.39(g).

¹¹ *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 697, 119 FERC ¶ 61,295, at P 513, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 123 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, 125 FERC ¶ 61,326 (2008), *order on reh'g*, Order No. 697-C, 127 FERC ¶ 61,284 (2009), *order on reh'g*, Order No. 697-D, 130 FERC ¶ 61,206 (2010).

¹² Order No. 697-A, 123 FERC ¶ 61,055 at P 202; 18 C.F.R. § 35.36(a)(6).

¹³ *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, 131 FERC ¶ 61,021, at P 2, *order granting in part request for extension of time to comply*, 132 FERC ¶ 61,014 (2010), *order denying reh'g*, 134 FERC ¶ 61,046 (2011).

¹⁴ Order No. 697, 119 FERC ¶ 61,295 at PP 549-50.

13. First, we reject Applicants' suggestion that the Affiliate Sales Order could reasonably be interpreted to permit the exchange of such information between AEPEP and SWEPCO as is needed to provide scheduling services for SWEPCO's Flat Ridge 2 generation entitlements. As explained above, sellers must comply with the affiliate restrictions unless explicitly granted a waiver by Commission rule or order. No such waiver was requested previously, nor did the Commission grant such waiver in the Affiliate Sales Order.¹⁵

14. Under the information sharing provisions in the affiliate restrictions (section 35.39(d)(1)), a franchised public utility with captive customers may not share market information with a market-regulated power sales affiliate if the sharing could be used to the detriment of captive customers, unless simultaneously disclosed to the public. Section 35.39(d)(2) generally provides that permissibly shared support employees, field and maintenance employees, and senior officers and board of directors may have access to information covered by the prohibition of section 35.39(d)(1), subject to the no-conduit provision in section 35.39(g), which provides that a franchised public utility with captive customers and a market-regulated power sales affiliate are prohibited from using anyone as a conduit to circumvent the affiliate restrictions.

15. We conditionally grant Applicants' requests for limited waivers of section 35.39(d)(1) to permit Applicants to continue their current practices, based on their representation that the safeguards Applicants will implement ensure that captive customers will not be harmed. Namely, Applicants affirm that: (1) SWEPCO will provide only such information to AEPEP that is necessary for AEPEP to carry out SWEPCO's scheduling functions and submit offers on behalf of SWEPCO into the SPP day-ahead market; (2) Applicants will implement procedures to ensure that SWEPCO-provided information is restricted to only those AEPEP personnel who will perform the scheduling function; (3) no affiliate personnel who receive SWEPCO-related information will serve as a conduit of such information to personnel who are engaged in trading or marketing activities; (4) Applicants will provide specialized training on the Commission's no-conduit rule to personnel who provide these scheduling services; and (5) Applicants will maintain adequate documentation to facilitate Commission inspections and audits to assess Applicants' adherence to the foregoing commitments and any potential harm to captive customers.

¹⁵ Moreover, the waiver request that was the subject of the Affiliates Sales Order did not mention provision of scheduling services. Scheduling services were being performed by a non-affiliate at the time the order was issued, and the PPAs at issue here were not part of the record in that proceeding. Thus, the Commission had no knowledge that the information sharing restrictions in section 35.39(d)(1) could be implicated. In any event, as noted above, waivers must be specifically requested by applicants and explicitly granted by the Commission; waivers may not be inferred.

16. As noted above, these limited waivers do not affect Applicants' obligation to comply with the no-conduit provision of section 35.39(g).¹⁶ Applicants must not implement the limited waivers granted herein in a manner that harms captive customers. Additionally, as a condition of these waivers, Applicants will be required to maintain sufficient records to enable the Commission to audit whether the representations and commitments made in their requests for waivers remain true and accurate, including their commitment that captive customers will not be harmed.

17. The waivers conditionally granted herein are limited to the specific facts, representations, policies, and procedures Applicants presented in their December 19, 2019 filings. To the extent 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 waivers, Applicants must inform the Commission within 30 days of any such change. With the exception of the limited waivers specifically granted herein, and any other previously granted waivers, all of the other affiliate restrictions continue to apply to Applicants.

18. As part of these filings, Applicants submitted proposed revisions to their market-based rate tariffs to modify the limitations and exemptions of their respective market-based tariffs to list the specific authorization or waiver granted by the Commission. We accept these revisions, effective January 1, 2020, as requested, but direct Applicants to submit compliance filings within 30 days of the date of this order to include in those tariff revisions a citation to this order.¹⁷

The Commission orders:

(A) Applicants' request for limited waiver of section 35.39(d)(1) is hereby granted, effective January 1, 2020, subject to conditions, as discussed in the body of this order.

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

(C) Applicants must inform the Commission within 30 days of any material change in circumstances that would reflect a departure from the facts, policies, and procedures the Commission relied upon in granting the waiver herein, as discussed in the body of this order.

¹⁶ 18 C.F.R. § 35.39(g).

¹⁷ Order No. 697, 119 FERC ¶ 61,295 at App. C; Order No. 697-A, 123 FERC ¶ 61,055 at P 384.

(D) Applicants' proposed tariff revisions are hereby accepted, effective January 1, 2020, as discussed in the body of this order.

(E) Applicants are hereby directed to submit compliance filings, within 30 days of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.