

166 FERC ¶ 61,127
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

FirstEnergy Solutions Corp.

Docket No. ER18-810-000

ORDER GRANTING AUTHORIZATION TO MAKE AFFILIATE SALES

(Issued February 21, 2019)

1. In this order, we grant FirstEnergy Solutions Corp.'s (FirstEnergy Solutions) request under section 205 of the Federal Power Act (FPA)¹ to make power sales to its affiliate, West Penn Power Company (West Penn), pursuant to the terms of a Default Service Supplier Master Agreement and transaction confirmation between FirstEnergy Solutions and West Penn that was entered into pursuant to a competitive solicitation process conducted by West Penn. As discussed below, we find that the competitive solicitation process satisfies the Commission's concerns regarding the potential for affiliate abuse.

I. Background

2. On February 5, 2018, FirstEnergy Solutions requested authority to make sales to its affiliate, West Penn, under the terms of a Default Service Supplier Master Agreement and transaction confirmation entered into pursuant to a competitive solicitation that West Penn conducted on January 9, 2018.

3. FirstEnergy Solutions states that it markets energy and energy products in the wholesale market at negotiated, market-based rates and is a wholly owned subsidiary of FirstEnergy Corp. FirstEnergy Solutions represents that West Penn is also a subsidiary of FirstEnergy Corp. and a franchised public utility company serving residential, commercial, and industrial customers in portions of western Pennsylvania. According to FirstEnergy Solutions, as part of Pennsylvania's utility restructuring program, West Penn transferred all of the generating assets that it previously used to serve its retail electric service customers to its power marketing affiliate. FirstEnergy Solutions states that West Penn and its affiliates own transmission facilities subject to the Commission's

¹ 16 U.S.C. § 824d (2012).

jurisdiction, functional control of which has been transferred to PJM Interconnection, L.L.C. (PJM).

4. FirstEnergy Solutions explains that, pursuant to a rate settlement agreement with the Pennsylvania Public Utility Commission (Pennsylvania Commission), West Penn uses a competitive solicitation process to procure from the wholesale market the electricity supply needed to serve its customers who do not take service from competitive retail electric service suppliers (i.e., its default service obligations).

5. FirstEnergy Solutions states that on January 9, 2018, West Penn issued a request for bids for five tranches of Residential Service for a 12-month contract term beginning June 1, 2018 and five tranches of Residential Service for a 24-month contract term beginning June 1, 2018. As a result of the solicitation, FirstEnergy Solutions won one 12-month bid block for service to West Penn's Residential Service load beginning on June 1, 2018.

6. FirstEnergy Solutions represents that the competitive solicitation was conducted in accordance with rules approved by the Pennsylvania Commission under the supervision of an independent consultant, Charles River Associates International (Charles River Associates), selected by the Pennsylvania Commission. FirstEnergy Solutions states that its winning bid was the result of head-to-head competition with non-affiliates in a competitive solicitation based solely on price that was approved and supervised by the Pennsylvania Commission through an independent consultant that reported directly to the Pennsylvania Commission. FirstEnergy Solutions represents that the competitive solicitation complies with the Commission's standards for approving affiliate sales that result from participation in a competitive procurement process, as set forth in *Boston Edison Co. Re: Edgar Electric Energy Company*² and *Allegheny Energy Supply Company, LLC*.³ Accordingly, FirstEnergy Solutions requests that the Commission grant its requested authorization effective June 1, 2018.

² *Boston Edison Co. Re: Edgar Electric Energy Company*, 55 FERC ¶ 61,382 (1991) (*Edgar*).

³ *Allegheny Energy Supply Company, LLC*, 108 FERC ¶ 61,082 (2004) (*Allegheny*). FirstEnergy Solutions also states that this competitive solicitation "is substantially identical to those described in *AESC I* and *AESC II* and meets the same four guidelines." FirstEnergy Solutions Application at 6 (citing *Allegheny (AESC I)* and *Allegheny Energy Supply Co.*, 115 FERC ¶ 61,221 (2006) (*AESC II*)).

II. Notices and Responsive Pleadings

7. Notice of FirstEnergy Solutions' filing was published in the *Federal Register*,⁴ with interventions and protests due on or before February 26, 2018. None was filed.

III. Discussion

A. Affiliate Abuse Analysis

8. At issue here is whether FirstEnergy Solutions' filing satisfies the Commission's concerns regarding the potential for affiliate abuse. In *Edgar*, the Commission stated that, in cases where affiliates are entering into market-based rate agreements, it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is not distorted. Under *Edgar*, the Commission has approved 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.⁵

9. When an entity presents evidence seeking to satisfy the *Edgar* criteria, the Commission has required assurance that: (1) a competitive solicitation process was designed and implemented without undue preference for an affiliate; (2) the analysis of bids did not favor affiliates, particularly with respect to non-price factors; and (3) the affiliate was selected based on some reasonable combination of price and non-price factors.⁶

10. In *Allegheny*, the Commission provided guidance as to how it will evaluate whether a competitive solicitation process satisfies the *Edgar* criteria.⁷ As the

⁴ 83 Fed. Reg. 6,006 (2018).

⁵ See *Edgar*, 55 FERC ¶ 61,382 at 62,167-69. See also *Connecticut Light & Power Co.*, 90 FERC ¶ 61,195, at 61,633-34 (2000); *Aquila Energy Marketing Corp.*, 87 FERC ¶ 61,217, at 61,857-58 (1999); *MEP Pleasant Hill, LLC*, 88 FERC ¶ 61,027, at 61,059-60 (1999).

⁶ *Edgar*, 55 FERC ¶ 61,382 at 62,168.

⁷ *Allegheny*, 108 FERC ¶ 61,082. See also *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 119 FERC ¶ 61,295, at P 540, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 123 FERC ¶ 61,055, *clarified*, 124 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

Commission stated in *Allegheny*, the underlying principle when evaluating a competitive solicitation process under the *Edgar* criteria is that no affiliate should receive undue preference during any stage of the process. The Commission stated that the following four guidelines will help the Commission determine if a competitive solicitation process satisfies that underlying principle: (1) Transparency: the competitive solicitation process should be open and fair; (2) Definition: the product or products sought through the competitive solicitation should be precisely defined; (3) Evaluation: evaluation criteria should be standardized and applied equally to all bids and bidders; and (4) Oversight: an independent third party should design the solicitation, administer bidding, and evaluate bids prior to the company's selection.⁸ The *Edgar* criteria and *Allegheny* guidelines are designed to ensure that the transactions between affiliates do not unduly favor affiliates, and thereby protect captive customers from affiliate abuse.

11. As discussed below, the Commission concludes that the competitive solicitation described by FirstEnergy Solutions satisfies the Commission's concerns regarding affiliate abuse. Accordingly, the Commission will grant FirstEnergy Solutions' request for authorization to make affiliate sales to West Penn pursuant to the competitive solicitation processes described herein.

1. Transparency Guideline

12. FirstEnergy Solutions claims that the competitive solicitation satisfies the transparency guideline because it was based on on-the-record, public state regulatory proceedings, and was designed to provide a free flow of information to all parties, and to ensure that no party (particularly FirstEnergy Solutions) had an informational advantage in any part of the solicitation process. FirstEnergy Solutions adds that all information regarding the solicitations, including bid eligibility rules and bid process milestones, were well publicized and made available to all potential bidders at the same time through a website maintained by West Penn and its affiliates in Pennsylvania.

13. Based on FirstEnergy Solutions' representations, we find that the competitive solicitation is consistent with the Commission's transparency guideline.

2. Definition Guideline

14. FirstEnergy Solutions claims that the competitive solicitation satisfies the definition guideline because it describes clearly the products sought by the purchasers. It states that the Bidding Rules and *pro forma* Default Service Supplier Master Agreement

(2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub nom. Public Citizen, Inc. v. FERC*, 567 U.S. 934 (2012).

⁸ *Allegheny*, 108 FERC ¶ 61,082 at P 22.

explain the nature of the service sought and that the terms of the full requirements service agreements for the solicitation were available to all bidders via a website maintained by West Penn and its affiliates in Pennsylvania.

15. Based on FirstEnergy Solutions' representations, we find that the competitive solicitation is consistent with the Commission's definition guideline.

3. Evaluation Guideline

16. FirstEnergy Solutions claims that the competitive solicitation satisfies the evaluation guideline because parties were prequalified before the auction began, thereby eliminating the need to evaluate bids based on non-price factors. According to FirstEnergy Solutions, the pre-qualification criteria were contained in the public documents describing the default supply procurement process and were available to all potential bidders. FirstEnergy Solutions states that West Penn used standardized evaluation criteria that were applied equally to all bidders and bids. FirstEnergy Solutions adds that the awards made pursuant to the solicitation were based entirely on price, with no individualized negotiation of the terms of the transactions between West Penn and participating bidders.

17. Based on FirstEnergy Solutions' representations, we find that the competitive solicitation is consistent with the Commission's evaluation guideline.

4. Oversight Guideline

18. FirstEnergy Solutions claims that the competitive solicitation satisfies the oversight guideline. It explains that an independent entity, Charles River Associates, administered the bidding and evaluated bids prior to the selection of the winner. According to FirstEnergy Solutions, Charles River Associates does not own any facilities that participate in PJM's markets and has no financial interest in the outcomes of the solicitations or in any of the bidders. FirstEnergy Solutions states that Charles River Associates monitored all phases of the solicitation process, including all bid day activities, bid evaluation under the criteria set forth in the solicitation documents, and made its own evaluation of the bids that were submitted. FirstEnergy Solutions states that the bidding companies had no role in selecting Charles River Associates or in determining compensation to Charles River Associates. Finally, FirstEnergy Solutions notes that the results of the solicitation were approved by the Pennsylvania Commission after determining that the procurement was conducted in accordance with the solicitation process and rules.

19. Based on FirstEnergy Solutions' representations, we find that the competitive solicitation is consistent with the Commission's oversight guideline.

B. Other Issues

20. This order satisfies the requirement that FirstEnergy Solutions must first receive Commission authorization, pursuant to section 205 of the FPA, before engaging in power sales at market-based rates for the affiliate sales discussed herein. We note that FirstEnergy Solutions must receive prior approval from the Commission under section 205 of the FPA for any other sales to affiliates with a franchised electric service territory and captive customers.

21. Finally, we direct FirstEnergy Solutions to submit a compliance filing, within 30 days of the date of this order, revising the limitations and exemptions section of its market-based rate tariff to list the specific, limited waivers granted herein and to include a citation to this order.⁹

The Commission orders:

(A) FirstEnergy Solutions' request for authorization to make wholesale power sales to West Penn under the Default Service Supplier Master Agreement and transaction confirmation entered into pursuant to the solicitation is granted, effective June 1, 2018, as discussed in the body of this order.

(B) FirstEnergy Solutions is hereby directed to submit a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at Appendix C; Order No. 697-A, 123 FERC ¶ 61,055 at P 384.