

166 FERC ¶ 61,128
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. ER18-809-000

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, Potomac Edison Company (Potomac Edison), pursuant to the terms of a Full Requirements Service Agreement and transaction confirmations between FirstEnergy Solutions and Potomac Edison that was entered into pursuant to a competitive solicitation process conducted by Potomac Edison. 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, Potomac Edison, under the terms of a Full Requirements Service Agreement and transaction confirmations entered into pursuant to a competitive solicitation that Potomac Edison conducted on April 24, 2017.

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 Potomac Edison is also a subsidiary of FirstEnergy Corp. and a franchised public utility company serving residential, commercial, and industrial customers in portions of Maryland and West Virginia. According to FirstEnergy Solutions, as part of Maryland's utility restructuring program, Potomac Edison 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 Potomac Edison and its affiliates own transmission facilities subject

¹ 16 U.S.C. § 824d (2012).

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

4. FirstEnergy Solutions explains that, in connection with Maryland's implementation of retail electric competition, Maryland's electric utilities, including Potomac Edison, select wholesale suppliers pursuant to uniform, state-wide procurement processes approved and supervised by the Maryland Public Service Commission (Maryland Commission).

5. FirstEnergy Solutions states that on September 9, 2016, Potomac Edison issued a request for bids for Residential Standard Offer Service and Type I Non-Residential Standard Offer Service to serve load in its Maryland service territory. As a result of the solicitation, FirstEnergy Solutions was selected as the winning bidder to serve one 12-month bid block of Residential Standard Offer Service and one 24-month block of Residential Standard Offer Service, each beginning on June 1, 2018.

6. FirstEnergy Solutions represents that the competitive solicitation was conducted under the supervision of the independent consultant selected by the Maryland Commission, the Liberty Consulting Group (Liberty Consulting). 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 Maryland Commission through an independent consultant who reported directly to the Maryland 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 *Allegheny* and *Allegheny Energy Supply Co., LLC*, 115 FERC ¶ 61,221 (2006) and meets the same four guidelines." FirstEnergy Solutions Application at 8.

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 were 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 (2010),

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, we conclude that the competitive solicitation described by FirstEnergy Solutions satisfies the Commission's concerns regarding affiliate abuse. Accordingly, we will grant FirstEnergy Solutions' request for authorization to make affiliate sales to Potomac Edison 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 publicized with all related documentation made available to all potential bidders at the same time through a website established by Potomac Edison.

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 the RFP described clearly the products and the nature of the service sought by Potomac Edison. FirstEnergy Solutions explains that Potomac Edison sought full requirements service including energy, capacity and ancillary services to serve portions of its Residential Standard Offer Service customers in bid blocks of approximately 50 MW each. FirstEnergy Solutions notes that network integration transmission service would be supplied by PJM. FirstEnergy Solutions states that the

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.

terms of the full requirements service agreements were available to all bidders via Potomac Edison's website.

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 auctions began, thereby eliminating the need to evaluate bids based on non-price factors. According to FirstEnergy Solutions, bidders were required to: (1) submit an expression of interest form containing contact information; (2) execute a confidentiality agreement; (3) certify that they meet the PJM membership and Commission authorization requirements; (4) submit a credit application and associated financial information; (5) execute a binding bid agreement; and (6) provide liquid bid assurance collateral to assure commitment of the bidder to execute the full requirement service agreement for bid blocks it wins. FirstEnergy Solutions states that the pre-qualification criteria were contained in a public document that was available to all potential 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 the process was the result of discussions among interested parties under the supervision of the Maryland Commission through an independent consultant who was selected by, and reported directly to, the Maryland Commission. Further, because bids are based solely on price, FirstEnergy Solutions states that there is "inherent assurance" that winning bidders would be selected based upon price alone.

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 Potomac Edison under the terms of a Full Requirements Service Agreement and transaction confirmations 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, 119 FERC ¶ 61,295 at Appendix C; Order No. 697-A, 123 FERC ¶ 61,055 at P 384.