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,	)	**Docket No. EL16-33-000**
v.	)	
AEP Generation Resources, Inc. and Ohio Power Company,	)	
Respondents.	)	
Electric Power Supply Association, Retail Energy Supply Association, Dynegy Inc., Eastern Generation, LLC, NRG Power Marketing LLC and GenOn Energy Management, LLC,	)	
Complainants,	)	**Docket No. EL16-34-000**
v.	)	
FirstEnergy Solutions Corporation, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company,	)	
Respondents.	)	

(Not consolidated)

MOTION FOR LEAVE TO ANSWER AND LIMITED ANSWER

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission" or "FERC"),[1] complainants

[1] 18 C.F.R. §§ 385.212, 385.213 (2015).

in the above-captioned proceedings ("Complainants") hereby move for leave to answer[2] and submit this limited answer[3] to Respondents' February 23, 2016 answers.[4] As discussed below, Respondents have utterly failed to rebut Complainants' showing that it would be unjust and unreasonable to allow the abusive affiliate power sales contracts (the "Affiliate PPAs") between AEP Generation and AEP Ohio (the "AEP PPA") and between FE Solutions and the FE Ohio Utilities (the "FirstEnergy PPA") to evade Commission review under Section 205 of the Federal Power Act (the "FPA").[5] Accordingly, the Commission should issue an order as soon as possible granting the complaints.[6]

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[2] Although the Commission's procedural rules do not allow for answers to answers as a matter of right, the Commission regularly accepts otherwise impermissible answers where, as here, such answers will assist the Commission's understanding of the record and its decision-making. *See, e.g.*, *Arizona Pub. Serv. Co.*, 153 FERC ¶ 61,157 at P 26 (2015); *California Indep. Sys. Operator Corp.*, 153 FERC ¶ 61,155 at P 9 (2015); *Entergy Gulf States La., L.L.C.*, 153 FERC ¶ 61,153 at P 26 (2015).

[3] Complainants have deliberately attempted to limit the scope of this answer as much as possible. Their decision not to address particular assertions or arguments should not be construed as acceptance of, or agreement with, such arguments or assertions.

[4] *See* Answer of AEP Generation Resources Inc. and Ohio Power Company in Opposition to Complaint, Docket No. EL16-33-000 (filed Feb. 23, 2016) ("AEP Answer"); Answer of the FirstEnergy Companies, Docket No. EL16-34-000 (filed Feb. 23, 2016) ("FirstEnergy Answer"). For purposes of this pleading, "Respondents" include (1) the respondents in Docket No. EL16-33-000: AEP Generation Resources, Inc. ("AEP Generation") and Ohio Power Company ("AEP Ohio" and, together with AEP Generation, the "AEP Respondents"); and (2) the respondents in Docket No. EL16-34-000: First Energy Solutions Corporation ("FE Solutions"), Ohio Edison Company ("Ohio Edison"), The Cleveland Electric Illuminating Company ("CEI") and the Toledo Edison Company (collectively with Ohio Edison and CEI, the "FE Ohio Utilities" and collectively with the other FE Ohio Utilities and FE Solutions, the "FE Respondents").

[5] 16 U.S.C. § 824d (2012).

[6] *See* Complaint Requesting Fast Track Processing, Docket No. EL16-33-000 (filed Jan. 27, 2016) (the "EL16-33 Complaint"); Complaint Requesting Fast Track Processing, Docket No. EL16-34-000 (filed Jan. 27, 2016) (the "EL16-34 Complaint" and, together with the EL16-33 Complaint, the "Complaints"). Under established Commission precedent, this Section 205 review would involve application of the standards for evaluating proposed affiliate power sales set forth in *Boston Edison Co. Re: Edgar Elec. Energy Co.*, 55 FERC ¶ 61,382 at 62,167 (1991) ("*Edgar*"), and *Allegheny Energy Supply Co., LLC*, 108 FERC ¶ 61,082 at P 18 (2004)

As an initial matter, while the AEP Respondents dismissively refer to Complainants as "a group of generators and marketers that compete with AEP Generation . . . and AEP Ohio,"[7] Complainants, as participants in the markets administered by PJM Interconnection, L.L.C. ("PJM"), have legitimate and legally cognizable interests in ensuring that those markets are not distorted by these abusive affiliate contracts and produce just and reasonable prices.[8] In any event, this remark only serves to highlight the broad support for the Complaints not only from other suppliers,[9] but from entities representing a wide range of interests, including:

- PJM, which urged the Commission to expeditiously grant the Complaints in order "to ensure that the [Affiliate PPAs are] evaluated in accordance with the *Edgar*/*Allegheny* standards and to afford the Commission [an] opportunity to consider the potential effects of the Affiliate PPA[s] . . . on the wholesale market competitiveness";[10]

("*Allegheny*"). *See Southern Cal. Edison Co.*, 106 FERC ¶ 61,183 at P 58 (adopting a policy under which these standards apply regardless of whether the rates in the proposed affiliate contract are market-based or cost-based), *on reh'g*, 109 FERC ¶ 61,086 (2004), *on reh'g*, 110 FERC ¶ 61,319 (2005).

7 AEP Answer at 1.

8 *See, e.g.*, *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (holding that "the fixing of 'just and reasonable' rates . . . involves a balancing of the investor and consumer interests"); *Bridgeport Energy, LLC*, 113 FERC ¶ 61,311 at P 29 (2005) (recognizing that a supplier is entitled to "the *opportunity* to recover its costs"),*on reh'g*, 114 FERC ¶ 61,265 (2006).

9 *See* Supporting Comments of Calpine Corporation, Docket Nos. EL16-33-000, *et al.* (filed Feb. 23, 2016); Supporting Comments of the PJM Power Providers Group, Docket No. EL16-33-000 (filed Feb. 23, 2016); Supporting Comments of the PJM Power Providers Group, Docket No. EL16-34-000 (filed Feb. 23, 2016); Comments of Oregon Clean Energy, LLC and the Talen PJM Companies in Support of the Complaint, Docket No. EL16-33-000 (filed Feb. 23, 2016) ("OCE/Talen EL16-33 Comments"); Comments of Oregon Clean Energy, LLC and the Talen PJM Companies in Support of the Complaint, Docket No. EL16-34-000 (filed Feb. 23, 2016) ("OCE/Talen EL16-34 Comments").

10 Motion to Intervene and Comments in Support of PJM Interconnection, L.L.C. at 2, Docket No. EL16-33-000 (filed Feb. 23, 2016); Motion to Intervene and Comments in Support of PJM Interconnection, L.L.C. at 2, Docket No. EL16-34-000 (filed Feb. 23, 2016).

- the Independent Market Monitor for PJM, which warned that the Affiliate PPAs will "interfere[] with the efficient operation of wholesale markets in the PJM region";[11]

- the Pennsylvania Public Utility Commission, which expressed concern about the "potential threat to the continued efficient function of PJM's wholesale capacity markets" and argued that the Affiliate PPAs are examples of "the exact type of abuse of the affiliate relationship that should be subject to FERC review under FPA Section 205 and the *Edgar*/*Allegheny* standard";[12]

- the Office of the Ohio Consumers' Counsel, which, in its capacity as representative for Ohio's approximately 4.5 million residential customers, argued that the "only objective of [the] Affiliate PPA[s] is to subsidize the uneconomic generation of [AEP Ohio's and the FE Ohio Utilities'] uneconomic generation"[13] and estimated the cost of Ohio consumers of these subsidies at $5.5-$8.25 billion;[14]

- the Northwest Ohio Aggregation Council and 10 Northwest Ohio communities, who observed that "[w]hen all the jargon is stripped away, the [Affiliate] PPA [with FE Solutions] requires regular people to pay an extra month's electric bill each year for eight years";[15]

- Ohio Citizen Action, which, as Ohio's largest consumer organization, supported the Complaints because "electricity consumers in Ohio will be

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[11] Comments of the Independent Market Monitor for PJM at 3, Docket Nos. EL16-33-000, *et al.* (filed Feb. 23, 2016).

[12] Comments of the Pennsylvania Public Utility Commission at 4, Docket No. EL16-33-000 (filed Feb. 23, 2016); Comments on the Pennsylvania Public Utility Commission at 4, Docket No. EL16-34-000 (filed Feb. 23, 2016).

[13] Motion to Intervene and Comments in Support of the Office of the Ohio Consumers' Counsel at 15, Docket No. EL16-33-000 (filed Jan. 27, 2016) ("OCC EL16-33 Comments"); Motion to Intervene and Comments in Support of the Office of the Ohio Consumers' Counsel at 15, Docket No. EL16-34-000 (filed Jan. 27, 2016) ("OCC EL16-34 Comments").

[14] *See* OCC EL16-33 Comments at 2 (estimating costs of the Affiliate PPA with AEP Generation of $1.9-$3.1 billion); OCC EL16-34 Comments at 2 (estimating costs of the Affiliate PPA with FE Solutions of $3.6-$5.15 billion).

[15] Motion to Intervene and Comments in Support of the Northwest Ohio Aggregation Council, Lucas County, the City of Toledo, the City of Perrysburg, the City of Sylvania, the City of Maumee, the Village of Waterville, the Village of Holland, the Village of Ottawa Hills, the City of Northwood and Lake Township at 2, Docket No. EL16-34-000 (filed Feb. 23, 2016) (emphasis omitted).

harmed unless FERC exercises its jurisdiction to review [the Affiliate PPAs] for affiliate abuse";[16]

- the Ohio Manufacturers' Association Energy Group, which explained that the Affiliate PPAs are being proposed because the subject units "are unable to withstand the demands of competition"[17] and which warned that the resulting costs to consumers "will negatively affect Ohio manufacturers' global competitiveness and have a chilling effect on future investments in Ohio markets";[18]

- Hardwood Flooring & Paneling, Inc. d/b/a Sheoga Hardwood Flooring, which explained that the additional $105,834 it will be paying to support Respondents "is real money that could be used on more productive purposes [such as] updating our equipment, increasing our inventories and building a new finishing plant for our hardwood flooring products";[19] and

- the Sierra Club, which expressed concern that the FirstEnergy PPA "would, for an eight-year period, shift all of the market risks facing approximately 3,000 [MW] of its unregulated generation capacity in Ohio."[20]

It is rare to see these parties and suppliers in complete agreement on wholesale market issues, and that they are should be clear sign that, to paraphrase Shakespeare, something is rotten in the state of Ohio.[21]

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[16] Letter from Rachael Belz to Kimberly D. Bose, Docket Nos. EL16-33-000, *et al.* (filed Feb. 23, 2016).

[17] Motion to Intervene and Comments in Support Submitted on Behalf of the Ohio Manufacturers' Association Energy Group at 6-7, Docket No. EL16-33-000 (filed Feb. 23, 2016) ("OMEAG EL16-33 Comments"); Motion to Intervene and Comments in Support Submitted on Behalf of the Ohio Manufacturers' Association Energy Group at 7, Docket No. EL16-34-000 (filed Feb. 23, 2016) ("OMEAG EL16-34 Comments").

[18] OMEAG EL16-33 Comments at 4-5 (footnote omitted); OMEAG EL16-34 Comments at 4-5 (footnote omitted).

[19] Letter from Barbara Titus to Kimberly D. Bose at 1, Docket Nos. EL16-33-000, *et al.* (filed Feb. 17, 2016).

[20] Comments of the Sierra Club in Support of the Complaint of EPSA et al. at 1, Docket No. EL16-34-000 (filed Feb. 23, 2016). The Sierra Club did not file comments on the EL16-33 Complaint.

[21] To date, only the Ohio Energy Group ("OEG") has filed in support of Respondents. *See* Comments of the Ohio Energy Group, Docket No. EL16-33-000 (filed Feb. 23, 2016); Comments of the Ohio Energy Group, Docket No. EL16-34-000 (filed Feb. 23, 2016). That OEG would be indifferent to Respondents' affiliate abuse is unsurprising, because OEG was able to lock-in favorable rate treatment for its members under stipulations with AEP Ohio and

On the merits, Respondents miss two very fundamental points. First, the Commission has a statutory duty to ensure that rates for wholesale sales are just and reasonable.[22] The Commission's jurisdiction in this area is exclusive and non-delegable.[23] The Commission must, therefore, ensure that the rates, terms and conditions of the Affiliate PPAs are just and reasonable, regardless of what the Public

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the FE Ohio Utilities. *See* Joint Stipulation and Recommendation, PUCO Case No. 14-1693-EL-RDR, *et al.* (filed Dec. 14, 2015), http://dis.puc.state.oh.us/TiffToPDf/A1001001A15L14B60023H00068.pdf; Third Supplemental Stipulation and Recommendation, PUCO Case No. 14-1297-EL-SSO (filed Dec. 1, 2015), http://dis.puc.state.oh.us/TiffToPDf/A1001001A15L01A85343G03072.pdf. The same is not true for other Ohio consumers, who must pay not only for the Affiliate PPAs but also for the inducements provided to parties like OEG. *See* Reply Brief by the Office Of The Ohio Consumers' Counsel and Appalachian Peace and Justice Network at 12, PUCO Case No. 14-1693-EL-RDR, *et al.* (filed Feb. 8, 2016) ("[R]esidential customers are left to pay for the Joint Stipulation's handouts. AEP Ohio and the Signatory Parties are using other people's money."), http://dis.puc.state.oh.us/TiffToPDf/A1001001A16B08B70254H01377.pdf; Reply Brief of Office of the Ohio Consumers' Counsel, and Northwest Ohio Aggregation Coalition *et al.*, at 86, PUCO Case No. 14-1297-EL-SSO (filed Feb. 26, 2016) (explaining how inducements to parties supporting the FE Ohio Utilities' proposals "by and large are paid with other people's money"), http://dis.puc.state.oh.us/TiffToPDf/A1001001A16B26B70318I05307.pdf.

[22] *See* 16 U.S.C. §§ 824d(a), 824e(a) (2012). *See also, e.g.*, *Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 897 (1999) ("*Louisiana PSC*") ("[As to matters within its jurisdiction, the Commission has the duty – not the option – to reform rates that by virtue of changed circumstances are no longer just and reasonable.") (internal citation omitted).

[23] *See, e.g.*, *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205, 215 (1964) (holding that the FPA left "no power in the states to regulate . . . sales for resale in interstate commerce"); *Missouri Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1077 (D.C. Cir. 2003) ("FERC may not brandish a state's prior approval of a set of existing rates as if it were independently sufficient to satisfy the Commission's own regulatory obligations."); *Louisiana PSC*, 184 F.3d at 897 (stating that the Commission "alone has jurisdiction to regulate wholesale transactions"); *R.E. Ginna Nuclear Power Plant, LLC*, 154 FERC ¶ 61,157 at PP 30-31 (2016) (requiring modification of a settlement provision to make clear that a State commission's review of a reliability support services agreement will be "limited to [the agreement] that are within [the State commission]'s jurisdiction" in order to prevent any intrusion on the Commission's exclusive jurisdiction over "the wholesale rate and the terms and conditions of service related thereto"); *Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,448 at P 41 (rejecting the notion that "state commissions can serve as co-regulators with regard to wholesale energy markets" and emphasizing that "[t]he Commission is the agency charged by statute with regulating public utility sales for resale in interstate commerce"), *on reh'g*, 113 FERC ¶ 61,081 (2005); *Reporting Requirement for Changes in Status for Pub. Utils. with Market-Based Rate Authority*, Order No. 652 FERC Stats. & Regs. ¶ 31,175 at P 36 ("The Commission has an independent statutory duty to ensure that rates are just and reasonable, and we cannot delegate this responsibility . . . ."), *on reh'g*, 111 FERC ¶ 61,413 (2005).

Utility Commission of Ohio (the "PUCO") does or says. Having consistently taken the position before the PUCO that it has no jurisdiction to review the Affiliate PPAs,[24] it is Respondents are in no position to suggest otherwise. Indeed, were the PUCO to question the justness and reasonableness of the charges under the Affiliate PPAs in the course of reviewing costs to be passed through to retail customers, Respondents would undoubtedly be the first to point to the Supreme Court's holding that: "Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable."[25] It is for precisely this reason that the Commission must not allow the Affiliate PPAs to go into effect without some assurance that the rates, terms and conditions of those contracts are just and reasonable.

Unlike in other cases, the circumstances surrounding the Affiliate PPAs provide no basis for presuming that the rates, terms and conditions of those contracts satisfy the statutory requirements. It is both lawful and appropriate for the Commission to forego individual review of wholesale power sales contracts negotiated at arm's-length by sellers that lack market power, because it is reasonable to assume that the rates, terms and conditions of such contracts are just and reasonable.[26] It is neither lawful nor appropriate, however, for the Commission to forego individual review where, as here, the "power marketer [will] sell power to its affiliated franchised public utility at an above

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[24] *See* EL16-33 Complaint at 13 & n.39.

[25] *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986). *See also, e.g.*, *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 780 (2016) ("The FPA 'leaves no room either for direct state regulation of the prices of interstate wholesales' or for regulation that 'would indirectly achieve the same result.'" (quoting *Northern Natural Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 91 (1963))).

[26] *See* EL16-33 Complaint at 12 & n.39; EL16-34 Complaint at 13 & n.39.

market price, and that affiliated utility [can] then pass those costs through to its captive customers."[27]

Second, "retail choice" and other State regulatory initiatives are only relevant to the wholesale rate analysis to the extent that they operate as a check on self-dealing and the exercise of market power and thereby serve to ensure that the wholesale rates negotiated between affiliates are just and reasonable. Irrespective of how they are labeled, State regulatory initiatives that do not operate as a check on self-dealing and the exercise of market power are irrelevant to the wholesale rate analysis. It is, therefore, pure sophistry for Respondents to claim that the Commission must leave the waivers intact if it agrees that "retail customers have the legal right under state law to choose alternative suppliers, and thus are not captive customers regardless of whether the PUCO approves a non-bypassable charge."[28] Where the costs of the Affiliate PPAs are concerned, the only "choice" left to the retail customer under this reimagined notion of "retail choice" is the choice of which entity acts as the collection agent for Respondents and their shareholders. That power to choose, whatever one wishes to call it, does nothing to ensure that the rates, terms and conditions of the Affiliate PPAs are just and reasonable, as required by the FPA. Nonetheless, Respondents would have the Commission believe that it can just say the magic words "retail choice" and that will be the end of the matter.[29] The Commission must resist this invitation to

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[27] *Illinova Power Mktg., Inc.*, 88 FERC ¶ 61,189 at 61,649 (1999) (citation omitted).

[28] AEP Answer at 2. *See also* FirstEnergy Answer at 2 (arguing that "the fact that the PUCO may decide that it is in the State's best interest to impose a non-bypassable charge/credit to retail customers does not make customers 'captive'").

[29] In fact, Respondents claim that the Commission has already embraced this feeble argument. *See, e.g.*, First Energy Answer at 9 (asserting that the Commission "considered and rejected" the proposition that "the proposed non-bypassable charge/credit currently pending

reversible error and focus on whether it has fulfilled its ratemaking duties under the FPA, rather than invoking "a talismanic phrase that does not advance reasoned decision making."[30]

Finally, Complainants wish to emphasize that the need for expeditious Commission action has only become more acute since the Complaints were filed. In their comments, Oregon Clean Energy, LLC and the Talen PJM Companies warned that contracts like the Affiliate PPAs can have a "domino effect," because, when one generator receives cost-based payments, it "harms the next generator, which then requires a financial crutch, and so on and on."[31] Since the filing of the Complaints, another domino has fallen as The Dayton Power Power and Light Company ("DP&L") has filed an application with the PUCO proposing to enter into a power purchase agreement with an "unregulated" generation affiliate in order to "allow[] at-risk generation plants to remain operational."[32] Moreover, since the Complaints were filed,

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before the PUCO would render [the FE Ohio Utilities'] Ohio customers 'captive'"). *See also id.* at 2-3, 13, 16-19; AEP Answer at 2, 16-17. That is simply not true. To be sure, the Commission has declined to put itself in the business of evaluating the success of retail choice programs, as such, and has found that a franchised public utility will not be deemed to have captive customers because it offers provider-of-last-resort ("POLR") service at cost-based rates. But that does not mean that the Commission should, or lawfully can, ignore the fact that the costs of affiliate power sales are being recovered through a non-bypassable charge assessed to all customers, not just POLR customers. The issue is not whether retail customers have "'no choice' but to return to [the utility]," AEP Answer at 16 (citation omitted); rather, it is whether they have no choice but to pay for the affiliate transaction, as is the case where the Affiliate PPAs are concerned.

30 *TransCanada Power Mktg. Ltd. v. FERC*, Nos. 14-1103, *et al*., slip op. 24 (D.C. Cir. Dec. 22, 2015) (internal footnote omitted).

31 OCE/Talen EL16-33 Comments at 18; OCE/Talen EL16-34 Comments at 14.

32 Application of the Dayton Power and Light Company for Approval of its Electric Security Plan at 1, PUCO Case Nos. 16-0395-EL-SSO, *et al.* (filed Feb. 22, 2016), http://dis.puc.state.oh.us/TiffToPDf/A1001001A16B22B33152F03093.pdf. Because DP&L has only just submitted this proposal to the PUCO and its plan is not proposed to go into effect until January 1, 2017, Complainants are not challenging, either in these proceedings or through a separate complaint,

the evidence of the detrimental impacts of the Affiliate PPAs on Ohio consumers and the PJM markets has continued to pile up.[33]

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the waiver of the affiliate power sales restrictions previously granted to DP&L and its affiliates at this time. They reserve the right to do so and to seek other appropriate relief in a separate proceeding at a future date.

[33] *See, e.g.*, IEEFA, David Schlissel & Cathy Kunkel, *A $4 Billion Bailout in the Buckeye State: FirstEnergy's Plan will Cost Customers for Years to Come* at 21 (Feb. 2016), http://ieefa.org/wp-content/uploads/2016/02/4-Billion-Bailout-in-the-Buckeye-State-FirstEnergy-Plan-Will-Cost-Customers-for-Years-to-Come-_Feb-2016.pdf; John Funk, *Ohio voters against FirstEnergy, AEP power deals, worry about utility bills*, Cleveland Plain Dealer (Jan. 30, 2016) (discussing surveys showing widespread opposition to the Affiliate PPAs), http://www.cleveland.com/business/index.ssf/2016/01/ohio_voters_against_firstenerg.html.

CONCLUSION

WHEREFORE, for the foregoing reasons, Complainants respectfully request that the Commission accept this limited answer and grant the Complaints without delay.

Respectfully submitted,

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Dated: March 9, 2016

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on each person designated on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in this proceeding.

Dated at Washington DC, this 9th day of March, 2016.

/s/ Stephanie Lim
Stephanie S. Lim