



FirstEnergy and AEP PPA cases – What’s next?

On March 31 the Public Utilities Commission of Ohio (PUCO) decided two power purchase agreement cases brought by FirstEnergy (FE) and American Electric Power (AEP). This decision will continue to face a variety of legal challenges.

Venue of Challenge	Notes	Parties
<p style="text-align: center;">Ohio Supreme Court</p>	<ul style="list-style-type: none"> ▪ Parties may directly appeal PUCO decisions to the Ohio Supreme Court after a rehearing process. ▪ Applications for rehearing must be filed within 30 days of the decision. ▪ From start to finish, this appeal process often takes 2-3 years. 	<ul style="list-style-type: none"> ▪ Any party to the PUCO proceeding may initiate an appeal. ▪ Parties are beginning to file applications for rehearing to the PUCO.
<p style="text-align: center;">Federal Energy Regulatory Commission (FERC)</p>	<ul style="list-style-type: none"> ▪ Complaints were filed at FERC in early 2016. ▪ Jointly filed complaints against AEP (EL16-33) and FE (EL16-34) seek to ensure that “abusive” affiliate power sales contracts do “not evade FERC review.” ▪ The complaints said that FERC should revoke the waivers it granted AEP and FE regarding affiliate power sales. ▪ Current timeline for potential FERC action is unclear. 	<ul style="list-style-type: none"> ▪ Filed by Electric Power Supply Association; Retail Energy Supply Association; Dynegy, Inc.; Eastern Generation, LLC; NRG Power Marketing LLC; GenOn Energy Management, LLC. ▪ A wide variety of stakeholders filed comments supporting the complaints, including OCC; OMAEG; Pennsylvania PUC; Independent Market Monitor; ELPC; Oregon Clean Energy, LLC; Calpine Corporation; and others.
<p style="text-align: center;">U.S. District Court</p>	<ul style="list-style-type: none"> ▪ A federal complaint will likely allege that the PPA arrangement violates the Federal Power Act (FPA). ▪ The FPA grants exclusive jurisdiction to FERC over wholesale electricity markets. ▪ Very similar state subsidies by New Jersey and Maryland to support in-state generation were determined to violate the FPA by federal district courts and the Third and Fourth Circuit Courts of Appeal. ▪ The U.S. Supreme Court is widely expected to uphold the lower court determinations in a decision this summer. ▪ If SCOTUS upholds lower courts on the basis of “field preemption,” the PUCO decision will almost certainly be <i>void ab initio</i>. 	<ul style="list-style-type: none"> ▪ Any party able to show “harm” will likely have standing. ▪ A lawsuit in federal court will likely be pursued by an independent power producer which will now have to compete against subsidized generation.



Background on FirstEnergy and AEP PPA Proposals

For over a year, stakeholders in Ohio have vigorously debated and litigated the merits of power purchase agreements (PPAs) proposed by Ohio Power (AEP) and FirstEnergy (FE) with their respective competitive generating affiliates. On March 31, 2016, the Public Utilities Commission of Ohio (PUCO or Commission) approved the proposals with only minimal changes.¹

Under the PPAs approved by the Commission, both AEP and FE will purchase the capacity, energy and ancillary services produced by select generation plants owned by the unregulated affiliates. They would subsequently sell those products into the PJM markets, promising that if the cost of the output is below market, customers would receive a credit for the difference. However, if that cost is above market, customers would pay a surcharge for that difference, via a nonbypassable rider. All of the plants involved are currently operating at costs above market rates and are considered uneconomic by the utilities' unregulated affiliates.

FE's PPA involves approximately 3,500 MW of capacity, primarily from its affiliate First Energy Solutions' (FES) Davis Besse nuclear plant and its Sammis coal-fired plant. AEP's PPA included approximately 2,700 MW of coal-fired generation provided by various Ohio plants owned either exclusively by AEP Generation Resources or jointly with other companies. As approved, the terms of both PPA proposals will run for eight years (June 2016 through May 2024).

Under these PPA arrangements approved by the PUCO, both the utilities and their unregulated affiliates will be kept whole with respect to the operation of the plants – virtually all risk of operation is transferred to the ratepayers of the utilities on a nonbypassable basis with limited PUCO regulatory oversight.

The PPA provisions of the Commission's decision will certainly be challenged. Under Ohio law, PUCO decisions may be directly appealed to the Ohio Supreme Court by parties in the original case, after a rehearing process. Due to the affiliate dealing and concerns about the PPA-units' impact to the wholesale market, complaints have already been filed to the Federal Energy Regulatory Commission (FERC).² A variety of actions by the FERC could essentially void the PUCO decision as to the PPAs. Finally, many of the opponents of the utilities' PPA arrangements argued to the Commission that the proposals were unconstitutional and are preempted by the Federal Power Act (FPA), which gives FERC exclusive jurisdiction over wholesale electricity markets.³ Now that the Commission has issued a decision, this theory may now be pursued in federal district court.⁴

¹ Opinion and Order, Case No. 14-1693 (March 31, 2016); Opinion and Order, Case No. 14-1297 (March 31, 2016).

² See *Electric Power Supply Association v. AEP Generation Resources, Inc.*, Docket No. EL16-33-000 (January 27, 2016).

³ The U.S. Supreme Court is expected to rule this summer on cases involve state-mandated power contracts similar to the PPAs at issue in the PUCO decisions—the U.S. Supreme decision in these cases may be decisive on the Federal Power Act concerns raised in the FE and AEP PPA cases. See *Hughes et al. v. PPL EnergyPlus LLC et al.*, case number 14-614, and *CPV Maryland LLC v. PPL EnergyPlus LLC et al.*, case number 14-623, in the Supreme Court of the United States.

⁴ In its order, the Commission opted not to address the constitutional issues raised by various opponents of the utilities' PPA arrangements, stating that such arguments "are best reserved for judicial determination." See AEP Order, at 103.