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Federal Energy Regulatory Commission Unanimously Decides that the Affiliate PPAs Proposed by AEP, FirstEnergy, and their Unregulated Generating Affiliates are Ineffective

In a unanimous decision, the Federal Energy Regulatory Commission (FERC) granted the complaints filed against AEP, FirstEnergy, and their unregulated generating affiliates (Respondents). FERC rescinded the waivers on affiliate power sales restrictions previously granted to Respondents and further held that “no sales may be made with respect to the Affiliate PPA[s] unless and until [FERC] approves the Affiliate PPA[s] under *Edgar* and *Allegheny*.”

FERC agreed with the arguments asserted by OMAEG and others that circumstances have changed since the waivers were originally granted and further agreed that customers are captive because they have no ability to avoid the costs associated with the Affiliate PPAs by shopping with a competitive supplier. According to FERC, “retail choice protects customers from affiliate abuse only to the extent they have a choice to undertake generation costs. Where, as here, circumstances demonstrate that a retail customer has no choice but to pay the costs of an affiliate transaction, they effectively are captive with respect to the transaction.” In response to arguments that the PUCO can protect customers, FERC noted that the PUCO’s authority is limited to the retail sphere. FERC noted that only it has the exclusive power to regulate the wholesale sphere, which includes an evaluation of whether the Affiliates PPAs are just and reasonable.

Strong language about the transaction itself suggests that FirstEnergy and AEP will be facing an uphill battle in any review of the Affiliate PPAs in the next phase: “[FERC’s] affiliate sales restrictions protect against captive customers of franchised public utilities cross-subsidizing market-regulated power sales affiliates. The Affiliate PPAs raise[] the potential for cross-subsidization from [the] Regulated Utilities’ retail customers--who are captive in the sense that they cannot avoid the non-bypassable charge--to [their] Ohio Market Affiliates.” FERC also stated that the Affiliate PPAs may affect other waivers that the Respondents have regarding corporate separation and affiliate interactions. The FERC required the Respondents to explain whether the Affiliate PPAs affect any other waivers that they currently possess.

FERC noted that OMAEG submitted a timely motion to intervene, thereby making it a party to the proceeding. FERC also noted the arguments of OMAEG multiple times throughout its order, and used these arguments to support its rationale to rescind the waivers previously granted to the Respondents.