

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

FirstEnergy Solutions Corp.)	Docket No. ER16-1807-000
The Cleveland Electric Illuminating Company)	Docket No. ER10-1469-004
Ohio Edison Company)	Docket No. ER10-1467-004
The Toledo Edison Company)	Docket No. ER10-1468-004
FirstEnergy Solutions Corp.)	Docket No. ER10-1459-008
FirstEnergy Generation, LLC)	Docket No. ER13-785-003
FirstEnergy Nuclear Generation, LLC)	Docket No. ER13-713-003
FirstEnergy Generation Mansfield Unit 1 Corp.)	Docket No. ER10-1453-004
Electric Power Supply Association,)	
Retail Energy Supply Association,)	
Dynegy Inc., Eastern Generation, LLC,)	
NRG Power Marketing LLC and GenOn)	
Energy Management, LLC)	
)	
v.)	Docket No. EL16-34-000
)	
FirstEnergy Solutions Corporation,)	
Ohio Edison Company, The Cleveland)	
Electric Illuminating Company and The)	
Toledo Edison Company)	

(Not consolidated)

PROTEST AND REQUEST FOR ISSUANCE OF FURTHER ORDER ON COMPLAINT

The Electric Power Supply Association (“EPSA”),¹ the Environmental Defense Fund (“EDF”), the Environmental Law & Policy Center (“ELPC”), the Ohio

¹ The statements in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

Environmental Council (“OEC”), the PJM Power Providers Group (“P3”),² the Retail Energy Supply Association (“RESA”),³ Dynegy Inc. (“Dynegy”), Eastern Generation, LLC (“Eastern Generation”) and the NRG Companies⁴ (collectively, the “Indicated Parties”) hereby submit this joint protest to May 27, 2016 filings⁵ by affiliates of FirstEnergy Corporation (“FirstEnergy”) in response to the April 27, 2016 order⁶ of the Federal Energy Regulatory Commission (the “Commission” or “FERC”) in Docket No. EL16-34-000 and request that the Commission issue a further order to prevent FirstEnergy from circumventing the requirements of that order and the Commission’s affiliate restrictions.⁷ In the April 27 Order, the Commission recognized that a non-bypassable charge (“Rider RRS”) approved by the Public Utilities Commission of Ohio (the “PUCO”) rendered customers of FirstEnergy’s Ohio utility subsidiaries (the “FE Ohio Utilities”)⁸ captive with

² The statements in this filing represent the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue.

³ The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

⁴ The NRG Companies include: NRG Power Marketing LLC and GenOn Energy Management, LLC.

⁵ Notice of Change in Status, Docket Nos. ER10-1469-004, *et al.* (filed May 27, 2016) (the “Change in Status Filing”); Tariff Filing, Docket No. ER16-1807-000 (filed May 27, 2016) (the “Tariff Filing” and together with the Change in Status Filing, the “May 27 Filings”).

⁶ *Electric Power Supply Ass’n v. FirstEnergy Solutions Corp.*, 155 FERC ¶ 61,101 (2016) (the “April 27 Order”).

⁷ Each of the Indicated Parties has filed a motion to intervene in Docket Nos. ER10-1469-004, ER10-1467-004, ER10-1468-004, ER10-1459-008, ER13-785-003, ER13-713-003, ER10-1453-004 and ER16-1807-000. EPSC, RESA, Dynegy, Eastern Generation and the NRG Companies are the complainants in, and are thus parties to, Docket No. EL16-34-000 and any subsequent sub-dockets. See 18 C.F.R. § 385.102(c)(i) (2015); *Midwest Indep. Transmission Sys. Operator Corp.*, 121 FERC ¶ 61,131 at P 5 (2007) (“MISO”). The Commission granted the motions of EDF, ELPC, OEC and P3 to intervene in Docket No. EL16-34-000, making them parties to that proceeding and all subsequent sub-dockets. See April 27 Order, 155 FERC ¶ 61,101 at P 52; *MISO*, 121 FERC ¶ 61,131 at P 5.

⁸ The FE Ohio Utilities include: Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company.

respect to a proposed power purchase agreement (a “PPA”) between the FE Ohio Utilities and their “unregulated” affiliate (the “Affiliate PPA”). In an unabashed effort to evade the requirements of the Commission’s April 27 Order, FirstEnergy has now revised its scheme to replace the Affiliate PPA with a virtual power purchase agreement (the “Virtual PPA”) – closely tracking the characteristics of the original Affiliate PPA – on the theory that, with this change, the Commission will no longer have any say in the matter. FirstEnergy is wrong, and the Commission should issue a further order to that effect in order to protect Ohio consumers and the PJM Interconnection, L.L.C. (“PJM”) markets.

I. BACKGROUND

A. Rider RRS And The Affiliate PPA

In an August 4, 2014 application to the PUCO, the FE Ohio Utilities proposed their fourth electric security plan (“ESP IV”).⁹ A central element of ESP IV was the proposed Rider RRS, a non-bypassable charge through which the FE Ohio Utilities would recover the costs of purchases from their affiliate, FirstEnergy Solutions Corporation (“FE Solutions”), under the Affiliate PPA net of revenues from reselling the purchased power in the PJM markets.¹⁰ Under the Affiliate PPA, the FE Ohio Utilities were to purchase the output of generating facilities with an aggregate generating capacity of approximately 3,256 MW, including the W. H. Sammis Plant (the “Sammis Plant”), the Davis-Besse Power Station (the “Davis-Besse Station”) and FE Solutions’s

⁹ See Application at 9, PUCO Case No. 14-1297-EL-SSO (filed Aug. 4, 2014) (the “FE Application”), <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=7708e19d-64d4-42a4-ab52-00cfd4e10d7b>.

¹⁰ See *id.* at 7.

entitlement to the output of generation facilities owned by Ohio Valley Electric Corporation (“OVEC”) (collectively, the “PPA Units”), on a long-term basis.¹¹ The FE Ohio Utilities claimed that these arrangements were intended to “help ensure future service reliability as well as preserve \$1 billion in annual statewide economic benefits and nearly 3,000 direct and indirect jobs created by operations at the Davis-Besse [Station] and [the] Sammis [P]lant[] located in Ohio.”¹²

Various parties raised concerns before the PUCO about the billions of dollars in above-market costs that the proposed ratepayer-funded bailout of FirstEnergy would impose on Ohio consumers¹³ and the negative impacts of the scheme on the PJM markets.¹⁴ Nonetheless, the PUCO issued an order approving ESP IV, including Rider RRS, on March 31, 2016.¹⁵

¹¹ See *id.* at 2, 9.

¹² *Id.* at 2.

¹³ See Second Supplemental Direct Testimony of James F. Wilson on Behalf of the Office of the Ohio Consumers’ Counsel and Northeast Ohio Public Energy Council at 12, PUCO Case No. 14-1297-EL-SSO (filed Dec. 30, 2015) (estimating costs of the Affiliate PPA to Ohio consumers as high as \$3.6 billion over the eight-year contract term), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A15L30B45750G02894.pdf>

¹⁴ See Joint Reply Brief of the PJM Power Providers Group and the Electric Power Supply Association, PUCO Case No. 14-1297-EL-SSO (filed Feb. 26, 2016), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A16B26B63345B05271.pdf>; Brief for Amicus Curiae PJM Interconnection, L.L.C., PUCO Case No. 14-1297-EL-SSO (filed Feb. 16, 2016), <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A16B16B60102I02373>; Post-Hearing Brief of the Independent Market Monitor for PJM, PUCO Case No. 14-1297-EL-SSO (filed Feb. 16, 2016), <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A16B16B60421G02375>; Post-Hearing Reply Brief of the Independent Market Monitor for PJM, PUCO Case No. 14-1297-EL-SSO (filed Feb. 26, 2016), <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A16B26B65412H05295>.

¹⁵ See *In the Matter of the Application of Ohio Edison Co., The Cleveland Elec. Illuminating Co., & The Toledo Edison Co. for Auth. to Provide for a Standard Serv. Offer Pursuant to R.C. 4928.143 in the Form of an Elec. Security Plan*, Opinion and Order, Case No. 14-1297-EL-SSO (Mar. 31, 2016) (the “PUCO Order”), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A16C31B41521H01842.pdf>.

B. The April 27 Order

The April 27 Order granted a complaint¹⁶ filed in Docket No. EL16-34-000 challenging the waiver of the Commission's affiliate power sales restrictions previously granted with respect to transactions between the FE Ohio Utilities and their market-regulated power sales affiliates, including FE Solutions,¹⁷ as it related to the Affiliate PPA. Under the Commission's regulations, "no wholesale sale of electric energy or capacity may be made between a franchised public utility with captive customers and a market-regulated power sales affiliate without first receiving Commission authorization for the transaction under section 205 of the [FPA]."¹⁸ The Commission had waived this restriction with respect to transactions between the FE Ohio Utilities and their market-regulated power sales affiliates, such as FE Solutions, on the grounds that, with Ohio having implemented retail choice, the FE Ohio Utilities no longer had captive retail customers.¹⁹

In granting the Complaint, the Commission agreed with the complainants and others that, notwithstanding retail ratepayers' "statutory right to choose one retail supplier over another," such ratepayers are still "captive in that they have no choice as to payment of the non-bypassable generation-related charges incurred under the Affiliate PPA."²⁰ As a result, the Commission found that the Rider RRS charges "present

¹⁶ Complaint Requesting Fast Track Processing, Docket No. EL16-34-000 (filed Jan. 27, 2016) (the "Complaint").

¹⁷ See *FirstEnergy Solutions Corp.*, 125 FERC ¶ 61,356 (2008) ("*FirstEnergy I*"), on reh'g, 128 FERC ¶ 61,119 (2009) ("*FirstEnergy II*").

¹⁸ 18 C.F.R. § 35.39(b) (2015).

¹⁹ See *FirstEnergy I*, 125 FERC ¶ 61,356 at PP 27-29.

²⁰ April 27 Order, 155 FERC ¶ 61,101 at P 55.

the ‘potential for the inappropriate transfer of benefits from [captive] customers to the shareholders of the franchised public utility,’ and, thus, could undermine the goal of the Commission’s affiliate restrictions.”²¹ Accordingly, it rescinded the waiver of the affiliate power sales restriction as to the Affiliate PPA and stated that, “prior to transacting under the Affiliate PPA, FE Solutions must submit the Affiliate PPA for [FERC] review and approval”²² The Commission emphasized that its action in the April 27 Order “does not frustrate or usurp the [PUCO]’s role in protecting retail customers,” but was instead in furtherance of the Commission’s “independent role to ensure that wholesale sales of electric energy and capacity are just and reasonable and to protect against affiliate abuse.”²³

The Commission ordered FE Solutions to revise its market-based rate tariff to reflect the rescission of the affiliate power sales waiver.²⁴ While stating that the tariff revision should “apply to this specific Affiliate PPA,”²⁵ the Commission emphasized that its “directive applies to any [FirstEnergy entity] to the extent such entity is a seller under the Affiliate PPA.”²⁶

²¹ *Id.* (quoting *Market-Based Rates For Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 198 (2008)). See also *id.* at P 64 (clarifying that notwithstanding statements in *FirstEnergy II* regarding the PUCO’s oversight of the FE Ohio Utilities’ retail electric plans, the Commission’s concern is with “the potential for a franchised public utility with captive customers to interact with a market-regulated power sales affiliate in ways that transfer benefits to the affiliate and its stockholders to the detriment of captive customers” (footnote omitted)).

²² *Id.* at P 53.

²³ *Id.* at P 65.

²⁴ *Id.* at P 62.

²⁵ *Id.*

²⁶ *Id.*

In addition, the Commission held that “the non-bypassable charges associated with the Affiliate PPA and [Rider RRS] represent a reportable change”²⁷ and that the FirstEnergy market-based rate sellers were “obligated to file a notice of change in status with respect to their waivers after issuance of the [PUCO]’s decision regarding [Rider RRS].”²⁸ The Commission also found the PUCO’s approval of Rider RRS to be a reportable change with respect to waivers of any other affiliate restrictions FirstEnergy’s subsidiaries may have received, including waivers of “provisions of the Commission’s regulations such as § 35.39(c) (separation of functions), § 35.39(d) (information sharing), § 35.39(e) (non-power goods or services), and § 35.39(f) (brokering of power) and the corresponding regulations in § 35.44(a) and § 35.44(b).”²⁹ The Commission, therefore, ordered FE Solutions and the FE Ohio Utilities to “file a change in status addressing whether this change in circumstances affects any other waivers the Commission previously granted with respect to 18 C.F.R. § 35.39 and 18 C.F.R. § 35.44.”³⁰

C. The Virtual PPA

Tellingly, FirstEnergy did not seek rehearing of the April 27 Order.³¹ Instead, it immediately went to work on the Virtual PPA as a means of evading the strictures of the April 27 Order and the Commission’s affiliate restrictions. The FE Ohio Utilities unveiled

²⁷ *Id.* at P 54.

²⁸ *Id.* at n.92.

²⁹ *Id.* at P 66.

³⁰ *Id.*

³¹ The American Electric Power Company, Inc. subsidiaries that were the respondents to a similar complaint granted in a companion order to the April 27 Order, see *Electric Power Supply Ass’n v. AEP Generation Res., Inc.*, 155 FERC ¶ 61,102 (2016), likewise elected not to seek rehearing.

the Virtual PPA on May 2, 2016 in what was styled as an “application for rehearing” of the PUCO Order.³²

In the Rehearing Application, the FE Ohio Utilities proposed a “narrow change for a modified Rider RSS structure, based on cost and generation information that is already part of the litigated record, which will continue the benefits” of the original scheme.³³ More specifically, the “narrow change” proposed in the Rehearing Application is to replace the Affiliate PPA with the Virtual PPA. Under Rider RRS as originally approved by the PUCO, the FE Ohio Utilities would have passed through actual costs of the PPA Units (*i.e.*, actual payments under the Affiliate PPA) less actual revenues from the resale of the purchased power in the PJM markets.³⁴ On rehearing, the FE Ohio Utilities have proposed to substitute projected costs of the PPA Units (*i.e.*, projected payments under the Affiliate PPA) and projected volumes of re-sales into the PJM markets.³⁵ The backing for the “hedge” that the FE Ohio Utilities claim to be providing would be “more generic” than the specific 3,256 MW of capacity from the PPA Units, but their ability to collect Rider RRS would still be contingent on at least “3,200 MWs of formerly rate-based nuclear or fossil generation owned by the [FE Ohio

³² See Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company’s Application for Rehearing, PUCO Case No. 14-1297-EL-SSO (filed May 2, 2016) (the “Rehearing Application”), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A16E02B64659C00268.pdf>. See *also* Rehearing Testimony of Eileen M. Mikkelsen on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, PUCO Case No. 14-1297-EL-SSO (filed May 2, 2016) (the “Mikkelsen Rehearing Testimony”), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A16E02B65019F00270.pdf>. The Rehearing Application currently remains pending before the PUCO.

³³ Rehearing Application at 16.

³⁴ See *id.* at 16, 18.

³⁵ See *id.* at 18. See *also* Letter from Irene M. Prezelj to the Investment Community at 2 (May 2, 2016) (the “May 2 Letter”), <http://investors.firstenergycorp.com/Cache/1500084774.PDF?O=PDF&T=&Y=&D=&FID=1500084774&iid=4056944>.

Utilities] on January 2000 remain[ing] in operation, including at least 900 MWs of nuclear resources”³⁶ In other words, FirstEnergy would still be collecting the net costs, albeit projected costs rather than actual costs, of the PPA Units and FE Solutions would still be ensuring the continued operation of the PPA Units or other divested units with comparable capacity.

As the FE Ohio Utilities state in the Rehearing Application, the revised proposal replacing the Affiliate PPA with the Virtual PPA, was “designed to be solely within the [PUCO]’s jurisdiction” and to “rely on retail ratemaking mechanisms that do not utilize or refer to a PPA or any other contractual arrangement or other involvement of FE[Solutions].”³⁷ Or, as FirstEnergy’s President and CEO put it, the revised scheme attempts to achieve the same result as the original proposal “without the need for the [Affiliate] PPA or FERC approval.”³⁸ Of course, despite FirstEnergy’s claims to have eliminated the need for a PPA and thereby to have deprived FERC of jurisdiction, Rider RRS is based on projected payments under the Affiliate PPA and the FE Ohio Utilities’ ability to collect Rider RRS depends on the continued operation of divested generation owned by FE Solutions. As discussed below, FirstEnergy’s efforts to “FERC-proof” its bailout scheme ultimately fail, and the Commission can, should and – in the Indicated Parties’ opinion – must act to protect Ohio consumers and the PJM markets.

³⁶ Mikkelsen Rehearing Testimony at 15.

³⁷ Rehearing Application at 14.

³⁸ FirstEnergy, *2016 Annual Meeting Remarks, Charles E. Jones, FirstEnergy president and CEO* (May 17, 2016), <https://www.firstenergycorp.com/newsroom/2016-annual-meeting-remarks.html>.

D. The May 27 Filings

1. The Tariff Filing

In the Tariff Filing, FE Solutions proposed to revise its market-based rate tariff to clarify that the affiliate sales restrictions apply to the Affiliate PPA.³⁹ It also advised the Commission that:

there have been no transactions under the Affiliate PPA, and that in the event [FE] Solutions desires to transact under the Affiliate PPA, [FE] Solutions will submit the Affiliate PPA for Commission review and approval before performing any transactions under the Affiliate PPA in accordance with the April 27[] Order. In addition, the FE Ohio [] Utilities and [FE] Solutions note that they have suspended the Affiliate PPA pending the outcome of certain regulatory and business decisions.⁴⁰

FE Solutions did not discuss the Rehearing Application or otherwise elaborate on the nature of the referenced “regulatory and business decisions.”⁴¹

2. The Change In Status Filing

In the Change in Status Filing, the FE Ohio Utilities, FE Solutions and certain of their affiliates (collectively, the “FE Companies”) addressed the effect of the PUCO Order on waivers of other affiliate restrictions besides the affiliate power sales restrictions. They stated that, in addition to the waiver of the affiliate power sales restrictions, the Commission granted them two additional waivers, one relating to sales by the FE Ohio Utilities to FirstEnergy Generation, LLC and FirstEnergy Nuclear Generation, LLC and a second relating to joint fuel procurement and outage scheduling

³⁹ Tariff Filing at 2.

⁴⁰ *Id.*

⁴¹ *Id.*

and economic dispatch at jointly-owned plants.⁴² The FE Companies maintained that neither of these waivers is impacted by the PUCO's approval of Rider RRS.⁴³

As in the Tariff Filing, the FE Companies made no specific mention of the Rehearing Application or the revisions to Rider RRS proposed therein and merely stated that the FE Ohio Utilities and FE Solutions "have suspended the Affiliate PPA pending the outcome of certain regulatory and business decisions."⁴⁴

II. PROTEST AND REQUEST FOR ISSUANCE OF FURTHER ORDER ON THE COMPLAINT

FirstEnergy did not even mention its attempted jurisdictional escape act in either of the May 27 Filings. As discussed below, its failure to grapple with the implications of the Virtual PPA renders both those filings deficient and compels the issuance of a further order on the Complaint in order to protect Ohio consumers and the PJM markets.⁴⁵

⁴² See Change in Status Filing at 4.

⁴³ See *id.* at 4-6. Curiously, while conceding, as they must, that the reportable "change in circumstances was the PUCO approval of Rider RRS," *id.* at 3, the FE Companies offered no reason for having waited until May 27, 2016 to submit the Change in Status Filing. The PUCO Order issued on March 31, 2016, which would have made the Change in Status Filing due on May 2, 2016. See 18 C.F.R. § 35.42(b) (2016). While the FE Companies may have been unsure about whether they needed to make a change in status filing until the issuance of the April 27 Order, that does not explain why they did not make the Change in Status Filing until 30 days after the issuance of the April 27 Order and 57 days after the issuance of the PUCO Order.

⁴⁴ Change in Status Filing at 3.

⁴⁵ The Indicated Parties accept that the Commission found that "PJM bidding behavior is not relevant to the affiliate abuse claim that is the sole basis for this complaint" and, therefore, "dismiss[ed] as beyond the scope of this complaint any claims of potential adverse effects in the PJM markets." April 27 Order, 155 FERC ¶ 61,101 at P 67. Notwithstanding this finding, the Commission is free to consider PJM market impacts if and as necessary to grant the relief requested herein with respect to the May 27 Filings in light of established precedent recognizing that affiliate abuse can not only harm captive customers but can also distort the markets. See, e.g., *Boston Edison Co. Re: Edgar Elec. Energy Co.*, 55 FERC ¶ 61,382 at (1991) ("[I]t is essential that ratepayers be protected **and that transactions be above suspicion in order to**

In their Rehearing Application, the FE Ohio Utilities touted the fact that the modified Rider RRS proposal is designed to “function in a very similar manner for customers” as the original proposal.⁴⁶ It is for precisely that reason that the modified proposal can be expected to burden Ohio consumers for the benefit of FirstEnergy’s shareholders in the same ways that were described in detail in the Complaint and other pleadings previously submitted in Docket No. EL16-34-000.⁴⁷ The Ohio Consumers’ Counsel, for example, estimated the cost of Ohio consumers of the subsidies provided by the FirstEnergy scheme at \$3.6 billion.⁴⁸ As the Northwest Ohio Aggregation Council and 10 Northwest Ohio communities explained, “[w]hen all the jargon is stripped away, the [FirstEnergy scheme] requires regular people to pay an extra month’s electric bill each year for eight years.”⁴⁹ Moreover, while the impact of the Virtual PPA on the PJM markets may be less direct than that of the Affiliate PPA, it will still pose a threat to those markets. At a minimum, if the subsidies provided under the Virtual PPA prevent or delay the retirement of generation resources – *i.e.*, if it has the “significant economic

ensure that the market is not distorted.” (emphasis added) (footnote omitted)). See also *Southern Power Co.*, 153 FERC ¶ 61,068 at P 15 (2015) (same); *Allegheny Energy Supply Co., LLC*, 108 FERC ¶ 61,082 at P 18 (2004) (“*Allegheny*”) (same).

⁴⁶ Rehearing Application at 17.

⁴⁷ See, *e.g.*, Complaint at 22-24.

⁴⁸ See Motion to Intervene and Comments in Support of the Office of the Ohio Consumers’ Counsel at 2, Docket No. EL16-34-000 (filed Jan. 27, 2016) (the “OCC Comments”).

⁴⁹ 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). See also, *e.g.*, 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); Letter from Barbara Titus to Kimberly D. Bose at 1, Docket Nos. EL16-33-000, *et al.* (filed Feb. 17, 2016).

development and job retention benefits” cited by FirstEnergy⁵⁰ – it will pose the same uneconomic non-exit problem addressed in prior Commission orders.⁵¹

FirstEnergy’s Virtual PPA must be considered in light of the well-established principle that a regulated entity may not do indirectly what it is prohibited from doing directly. The Commission has long followed this axiom where regulated entities have sought to slip the ties of its jurisdiction. For example, in addressing a similar attempt to end run its jurisdiction, the Commission pointed to the

axiom of the law that one may not presume the right to do indirectly what one may not do directly. Here, [the pipeline] is asserting that it may bypass Commission policy by signing an agreement with its own affiliate stating so. Since any pipeline can create an affiliate with relative ease, [the pipeline]’s reading would render the [Commission’s] policy a dead letter.⁵²

In the April 27 Order, the Commission expressly prohibited FirstEnergy from moving forward with the Affiliate PPA unless and until it obtained FERC approval under Section 205 of the FPA.⁵³ FirstEnergy cannot be allowed to evade that prohibition through the expedient of employing a Virtual PPA, whose terms closely track those of the Affiliate PPA, and allowing it to do so would render the April 27 Order and the important Commission policies it embodies a dead letter.

⁵⁰ Mikkelsen Rehearing Testimony at 15.

⁵¹ *See Independent Power Producers of N.Y., Inc. v. New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,214 at P 69 (2015).

⁵² *Tennessee Gas Pipeline Co., L.L.C.*, 143 FERC ¶ 61,128 at P 61 (2013) (citation omitted).

⁵³ April 27 Order, 155 FERC ¶ 61,102 at P 55 & n.85.

A. The Commission Should Require That The Virtual PPA Be Filed Under FPA Section 205, Because FE Solutions Will Still Be Selling Capacity To The FE Ohio Utilities

As discussed below, the Virtual PPA still involves a wholesale power sale, albeit of capacity only, by FE Solutions to the FE Ohio Utilities. Accordingly, the Commission should require FE Solutions to file the terms of the Virtual PPA under Section 205 of the FPA for review in accordance with the *Edgar/Allegheny* standards.⁵⁴

The FE Ohio Utilities claim that their revised scheme will “provide all the rate stabilization benefits recognized in the [PUCO Order] . . . without reliance on or existence of a PPA or any other contractual arrangement or other involvement with FE[Solutions].”⁵⁵ To be sure, the Virtual PPA is not documented in a written instrument obligating FE Solutions to provide, and the FE Ohio Utilities to pay for, energy, capacity or ancillary services. But the existence or absence of a written instrument has never been dispositive of whether a FERC-jurisdictional wholesale sale is occurring.⁵⁶ Rather, it is the substance, not the structuring, of the arrangement that matters,⁵⁷ and the substance of the Virtual PPA is that FE Solutions will be providing electric capacity to

⁵⁴ The Commission should also require FE Solutions to further revise its market-based rate tariff to preclude it from providing capacity or any other electricity product to the FE Ohio Utilities where the costs will be recovered through Rider RRS.

⁵⁵ Rehearing Application at 14.

⁵⁶ See *PacifiCorp Elec. Operations*, 60 FERC ¶ 61,292 at 61,036 (1992).

⁵⁷ See, e.g., *WSPP Inc.*, 139 FERC ¶ 61,061 at P 26 (2012) (stating that “parties cannot avoid Commission jurisdiction by simply separating a bundled [renewable energy credit] so that the sale of energy and the [renewable energy credit] sale are included in separate documents”); *Clarksdale Pub. Utils. Comm’n v. Entergy Servs., Inc.*, 85 FERC ¶ 61,268 at 62,078 (1998) (“The Commission’s applicable filing requirement is determined by the actual length of the transaction, *i.e.*, the substance of the power supply arrangement, and not the number of agreements used to document the transaction.”), *on reh’g*, 93 FERC ¶ 61,002 (2000); *Western Mass. Elec. Co.*, 61 FERC ¶ 61,182 at 61,664 (1992) (holding that a public utility “cannot avoid regulatory scrutiny of its charges merely by structuring the agreements to require prepayment of those charges prior to the commencement of service”), *aff’d sub nom. Western Mass. Elec. Co. v. FERC*, 165 F.3d 922 (D.C. Cir. 1999).

the FE Ohio Utilities. Moreover, the condition that at least 3,200 MW of divested generation, all or virtually all of which is owned by FE Solutions, renders the claim that the Virtual PPA eliminates any “involvement with” FE Solutions⁵⁸ flatly untrue.

It is important to bear in mind that the Virtual PPA is a shadow version of the Affiliate PPA and is the basis for the costs passed through Rider RRS:

- the price under the Virtual PPA will be based on the “assumed costs of the [PPA Units],” without the true-up to actual costs that would have occurred under the Affiliate PPA,⁵⁹
- the quantities under the Virtual PPA will be the projected output of the PPA Units, rather than actual output;⁶⁰
- the offset to the projected costs of the PPA Units will be calculated based on actual PJM clearing prices applied to output of the PPA Units that were projected to clear in the PJM-administered markets, rather than actual amounts cleared,⁶¹ and
- the Virtual PPA makes the continued operation of at least 3,200 MW of divested generation, versus 3,256 MW under the Affiliate PPA, a condition to collection of the full Rider RRS.⁶²

The original Rider RRS proposal was built around the Affiliate PPA, and, as FirstEnergy has conceded, the revised Rider RRS proposal “does not change any of the provisions the [PUCO] relied upon when making its [earlier] determination”⁶³ Indeed, the FE Ohio Utilities have urged the PUCO to approve the revised proposal based on the existing record⁶⁴ – a record developed based on the Affiliate PPA and the PPA Units. In

⁵⁸ Rehearing Application at 14.

⁵⁹ Mikkelsen Rehearing Testimony at 5.

⁶⁰ See *id.* at 5-6.

⁶¹ See *id.*

⁶² See *id.* at 15.

⁶³ *Id.* at 1.

⁶⁴ See Rehearing Application at 21.

fact, having been proposed through an application for rehearing, the Virtual PPA is, by definition, substantially the same as the Affiliate PPA and must be supported by evidence that “could have been offered upon the original hearing” before the PUCO.⁶⁵ FirstEnergy cannot have it both ways: it cannot claim that its revised proposal is indistinguishable from the original for purposes of the PUCO’s rehearing process and then turn around and tell FERC that the revised proposal is an entirely different animal over which FERC has no jurisdiction.

With the changes proposed in the Rehearing Application, the PUCO could reduce Rider RRS proportionally if “less than 3,200 MWs of formerly rate-based nuclear or fossil generation owned by the [FE Ohio Utilities] [i]n January 2000 remains in operation, including at least 900 MWs of nuclear resources”⁶⁶ Significantly, none of the generation described in that passage is owned by the FE Ohio Utilities, and virtually all, if not all, of it is currently owned, directly or indirectly, by FE Solutions.⁶⁷ As

⁶⁵ Ohio Revised Code, § 4903.10 (barring the submission of evidence on rehearing “that, without reasonable diligence, could have been offered upon the original hearing”).

⁶⁶ Mikkelsen Rehearing Testimony at 15.

⁶⁷ At most, 64 MW of this generation is owned by an entity other than FE Solutions. Accounting for retirements, the “nuclear or fossil generation owned by the [FE Ohio Utilities] [i]n January 2000,” *id.*, and still in operation today appears to include: the Bay Shore Plant (coal/oil, 153 MW), the Bruce Mansfield Plant (coal, 2,490 MW), the W.H. Sammis Plant (coal, 2,233 MW), the West Lorain Plant (gas/oil, 545 MW), the Richland Peaker (gas/oil, 45 MW), the Stryker Peaker (oil, 19 MW), the Beaver Valley Power Station (nuclear, 1,815 MW), the Davis-Besse Nuclear Power Station (nuclear, 908 MW) he Perry Nuclear Power Plant (1,268 MW) and FE Solutions’s OVEC entitlement (fossil, 116 MW). See FirstEnergy, Form 10-K, Item 2 (1999), <http://www.sec.gov/Archives/edgar/data/20947/000103129600000008/0001031296-00-000008.txt>; FirstEnergy, Generation Plants Map, https://www.firstenergycorp.com/content/fecorp/environmental/stewardship/generation/generation_plantsmap.html; John Funk, *Eastlake, Cleveland power plants among 4 FirstEnergy Corp. plants to close in Ohio* (Jan. 26, 2012), http://www.cleveland.com/business/index.ssf/2012/01/firstenergy_corp_to_shut_four.html; Bob Downing, *FirstEnergy begins razing old coal-fired Burger plant in Belmont County; site may become home of ethane cracker plant*, Akron Beacon Journal (Dec. 24, 2015), <http://www.ohio.com/news/local/firstenergy-begins-razing-old-coal-fired-burger-plant-in-belmont-county-site->

a result, the FE Ohio Utilities, franchised public utilities with captive customers, will still be relying on their market-regulated power sales affiliate, FE Solutions, to keep 3,200 MW of divested generation “in operation.”⁶⁸ Put differently, the FE Ohio Utilities will be relying on FE Solutions to provide them not with “electricity itself but the ability to produce it when necessary” – *i.e.*, to provide them with “[c]apacity.”⁶⁹ It is precisely that capacity procured from FE Solutions that enables the FE Ohio Utilities to sell retail customers a hedge in the form of the assurance of the continued operation of at least 3,200 MW of divested fossil and nuclear generation.

The fact that FE Solutions will provide this ability to produce electricity without any of the strings attached to sales of capacity into modern organized capacity markets, such as must-offer obligations, unforced capacity adjustments and non-performance penalties,⁷⁰ does not make what FE Solutions provides any less a wholesale capacity product or any less FERC-jurisdictional. Rather, it just makes the product more like old-fashioned capacity products sold in the Northeastern markets, products that were often

may-become-home-of-ethane-cracker-plant-1.649804; Richard Payerchin, *FirstEnergy tears down Lorain plant along shore*, The Morning Journal News (Oct. 7, 2010), <http://www.morningjournal.com/article/MJ/20101007/NEWS/310079922>. All of these plants except the Richland and Stryker Peakers are owned indirectly by FE Solutions. See Triennial Market Power Update Analysis of FirstEnergy Companies, Attachment, Docket Nos. ER10-2727-003, *et al.* (filed Dec. 20, 2013) (asset appendix). The Richland and Stryker Peakers are owned by Richland-Stryker Energy LLC, an indirect subsidiary of Dynegy. See Application for Market-Based Rate Authorization Under Section 205 of the Federal Power Act and Request for Waivers and Blanket Approvals, Attachment C, Docket No. ER15-2535-000 (Aug. 27, 2015). The generating capacity of the Richland and Stryker Peakers units that were in service in January 2000 is 64 MW (nameplate rating). See Energy Information Administration, 2014 Form EIA-860, <https://www.eia.gov/electricity/data/eia860/>.

⁶⁸ Mikkelsen Rehearing Testimony at 15.

⁶⁹ *Connecticut Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477, 479 (D.C. Cir. 2009) (“*Connecticut DPUC*”).

⁷⁰ Indeed, there are so few strings attached that FE Solutions will presumably be able to sell the same capacity into the PJM-administered capacity auctions.

criticized as paying generators merely for existing – a criticism that can fairly be levelled at the Virtual PPA. The Commission had the authority to regulate charges for those capacity products,⁷¹ and likewise has the authority to regulate the charges for the capacity product provided under the Virtual PPA.

Similarly, the fact that the FE Ohio Utilities are not paying FE Solutions directly does not alter the analysis, because they share the same corporate parent, FirstEnergy.⁷² A bribe is still a bribe if it is paid to the politician’s spouse, and a capacity payment is still a capacity payment if it is transferred up to the common parent through a dividend or other intra-corporate transfer. The end result is that FirstEnergy and its shareholders will still be the beneficiaries of an above-market capacity purchase by the FE Ohio Utilities from FE Solutions, with the costs borne by the FE Ohio Utilities’ captive ratepayers. Indeed, but for FirstEnergy’s common ownership of FE Solutions and the FE Ohio Utilities, the FE Ohio Utilities would not be in a position to provide any assurance to retail customers about the continued operation of divested generation.

The Indicated Parties recognize that the Commission might ordinarily be somewhat reluctant to impute payments by a franchised public utility to a market-regulated power sales affiliate based on the flow of dollars to a common parent. But failure to do so here, where the Virtual PPA is tied so directly to the Affiliate PPA that was the subject of the April 27 Order, would reward FirstEnergy’s attempt to circumvent

⁷¹ See *Municipalities of Groton v. FERC*, 587 F.2d 1296, 1300-03 (D.C. Cir. 1978). See also *Connecticut DPUC*, 569 F.3d 477, 482 (“Petitioners are . . . compelled to concede that the Commission may directly establish prices for capacity . . .”).

⁷² Even if true, claims by FirstEnergy that the revised scheme “was not designed to transfer regulated revenues to the competitive operations,” May 2 Letter at 2, are irrelevant. The revised scheme, like the original, is designed to transfer regulated revenues to the common parent, FirstEnergy.

the Commission's directives and its affiliate restrictions. To the extent that imputing payments here would require that the Commission disregard the corporate form, the Commission can and should exercise its "authority to disregard corporate structures . . . where necessary to prevent frustration of the statutory purpose of the [FPA]." ⁷³ Such action is not only justified but essential, because FirstEnergy's scheme seeks to frustrate the fundamental purpose of the affiliate restrictions by enabling the "diversion of benefits or profits . . . for the benefit of the affiliate's shareholders." ⁷⁴

To the extent that the Commission credits claims that the absence of a traceable flow of dollars from the FE Ohio Utilities to FE Solutions alters the analysis of whether there is a capacity sale or the pricing of that sale, the Commission must hold FirstEnergy to the consequences of those claims. Specifically, the Commission should require that FirstEnergy put measures in place that will ensure compliance with the no-conduit rule set forth in Section 35.39(g) of the Commission's regulations. ⁷⁵ This rule prohibits franchised public utilities with captive customers and market regulated power sales affiliates "from using anyone . . . as a conduit to circumvent the affiliate restrictions

⁷³ *Criteria for Reassertion of Jurisdiction Over the Gathering Servs. of Natural Gas Co. Affiliates*, 118 FERC ¶ 61,114 at P 36 (2007) (citation omitted). See also, e.g., *San Diego Gas & Elec. Co. v. Sellers of Mkt. Energy & Ancillary Servs.*, 127 FERC ¶ 61,269, at P 225 (2009), *on reh'g*, 131 FERC ¶ 61,144 (2010); *Town of Highlands, N.C. v. Nantahala Power & Light Co.*, Opinion No. 255, 37 FERC ¶ 61,149 at 61,356 (1986), *on reh'g*, Order No. 255-A, 38 FERC ¶ 61,052 (1987), *aff'd sub nom. Nantahala Power & Light Co. v. FERC*, 840 F.2d 11 (4th Cir. 1988).

⁷⁴ *Northeast Utils. Serv. Co.*, 84 FERC ¶ 61,269 at 62,316 n.9 (1998) (citations omitted) ("*NUSCO*").

⁷⁵ 18 C.F.R. § 35.39(g) (2015). See also *Market-Based Rates For Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 697, FERC Stats. & Regs. ¶ 31,31,252 at n.523 (2008) ("*Order No. 697*") (stating that this rule prohibits the use of "anyone as a conduit to circumvent any of the affiliate restrictions, including the affiliate sales restriction").

in §§ 35.39(a) through (g).⁷⁶ Flowing Rider RRS revenues from the FE Ohio Utilities through FirstEnergy back to FE Solutions would constitute a clear violation of the no-conduit rule, and, if FirstEnergy is going to be allowed to get away with its Virtual PPA caper on the theory that the FE Ohio Utilities are not paying FE Solutions, it is only reasonable and fair to put measures in place to make sure that they do not, in fact, make indirect payments to FE Solutions through FirstEnergy.

B. Even If There Is No Capacity Sale, The Virtual PPA Still Involves The FE Ohio Utilities' Purchase Of A Non-Power Good Or Service At An Above-Market Price

To the extent that the Commission determines that FE Solutions is not providing capacity but is nonetheless providing a non-power good or service, the Commission should require FirstEnergy to obtain the necessary waivers of its affiliate restrictions before providing that good or service.

As discussed above, the hedge being provided by the FE Ohio Utilities to retail customers in their service territories is backed by a capacity purchase from their market-regulated power sales affiliate, FE Solutions. That hedge is dependent upon the continued operation of at least 3,200 MW of divested generation, all or virtually all of which is owned by FE Solutions. Even assuming *arguendo* that the capacity sale inherent in that arrangement can be ignored, FE Solutions would still be providing a non-power good or service to the FE Ohio Utilities by keeping the necessary generation in operation and thereby enabling the FE Ohio Utilities to sell a hedge to retail customers in their service territories. That would implicate Section 35.39(e)(2) of the Commission's regulations, which provides that "sales of any non-power goods or

⁷⁶ 18 C.F.R. § 35.39(g) (2015).

services by a market-regulated power sales affiliate to an affiliated franchised public utility with captive customers may not be at a price above market,”⁷⁷ and Section 35.44(b)(2), which prohibits a franchised public utility with captive customers from “purchas[ing] or receiv[ing] non-power goods and services from a market-regulated power sales affiliate . . . at a price above market.”⁷⁸

Like the restrictions on affiliate power sales, the restrictions on affiliate transactions involving non-power goods and services were put in place “to protect against the possible diversion of benefits or profits from the traditional public utility to the affiliate for the benefit of the affiliate’s shareholders.”⁷⁹ These and other affiliate restrictions have become all the more important since the repeal of the Public Utility Holding Company Act of 1935 as a means of “ensur[ing] that customers of franchised public utilities do not inappropriately cross-subsidize the activities of ‘non-regulated’ affiliates, and are not otherwise financially harmed as a result of affiliate transactions and activities.”⁸⁰

The FE Companies have not received any waivers of Sections 35.39(e)(2) and 35.44(b)(2) that would potentially allow FE Solutions to provide a non-power good or service to the FE Ohio Utilities at an above market price.⁸¹ And, as was well-

⁷⁷ 18 C.F.R. § 35.39(e)(2) (2015).

⁷⁸ 18 C.F.R. § 35.44(b)(2) (2015).

⁷⁹ *NUSCO*, 84 FERC ¶ 61,269 at 62,316 n.9 (citations omitted).

⁸⁰ *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264 at P 2, *on reh’g*, Order No. 707-A, FERC Stats. & Regs. ¶ 31,272 (2008).

⁸¹ As noted, the Change in Status Filing indicates that the FE Companies have received two waivers of the Commission’s affiliate restrictions in addition to the waiver of the affiliate power sales restrictions. See Change in Status Filing at 4. To the extent that FirstEnergy is going to claim otherwise, the Change in Status filing was plainly deficient for failing to address

documented in the Complaint and subsequent pleadings in Docket No. EL16-34-000, the pricing of the hedge in this instance is clearly above market.⁸² That the above market payments are flowing from the FE Ohio Utilities directly to FirstEnergy rather than through FE Solutions does not alter either the pricing or the fact of the affiliate sale. Again, to the extent that the Commission is going to credit claims to the contrary, FirstEnergy must be required to put measures in place to ensure that it does not act as a conduit for the flow of payments from the FE Ohio Utilities to FE Solutions.

C. The Commission Should Revoke Or Suspend The FE Companies' Market-Based Rate Authority

The Commission has emphasized that compliance with its affiliate abuse policies is a “condition of obtaining and retaining market-based rate authority.”⁸³ FirstEnergy’s Virtual PPA scheme evidences a willful disregard for both the letter and the spirit of the Commission’s affiliate abuse restrictions that warrants revocation or suspension, for the full eight-year term of the Virtual PPA, of its subsidiaries’ market-based rate authority in the FE Ohio Utilities’ service territories. Also troubling is the fact that FirstEnergy did not see fit to disclose this scheme in the May 27 Filings, which, after all, were submitted to comply with the very order whose requirements the Virtual PPA is designed to avoid. Under the circumstances, the Commission would be well within its rights to revoke or suspend the FE Companies’ market-based rate authority in the FE Ohio Utilities’ service

whether the approval of Rider RRS “affects *any* other waivers the Commission previously granted with respect to 18 C.F.R. § 35.39 and 18 C.F.R. § 35.44.” April 27 Order, 155 FERC ¶ 61,101 at P 66 (emphasis added). Equally important, such a claim, if true, would mean that the Change in Status Filing was materially misleading inasmuch as it suggested that the scope of the waivers of non-power affiliate restrictions was far narrower. See 18 C.F.R. § 35.41(b) (2015).

⁸² See, e.g., Complaint 22-24; OCC Comments at 2.

⁸³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 467.

territories, consistent with past orders revoking market-based rate authority for violations of the affiliate restrictions.⁸⁴

⁸⁴ See *Cleco Corp.*, 104 FERC ¶ 61,125 (2003). *Cf. also Enron Power Mktg., Inc.*, 103 FERC ¶ 61,343 (2003) (revoking market-based rate authorization for market manipulation), *on reh'g*, 106 FERC ¶ 61,024 (2004); *J.P. Morgan Ventures Energy Corp.*, 141 FERC ¶ 61,131 (2012) (suspending market-based rate authority for making false or misleading statements to the Commission).

III. CONCLUSION

Wherefore, for the foregoing reasons, the Indicated Parties respectfully request that the Commission grant the relief requested herein.

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Dated: June 17, 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 17th day of June, 2016.

/s/ Stephanie Lim
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