

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

Electric Power Supply Association,)
Retail Energy Supply Association,)
Dynergy Inc., Eastern Generation, LLC,)
NRG Power Marketing, LLC and)
GenOn Energy Management, LLC,)

Complainants,)

v.)

Docket No. EL16-34-000

FirstEnergy Solutions Corporation,)
Ohio Edison Company, The Cleveland)
Electric Illuminating Company, and The)
Toledo Edison Company,)

Respondents.

**MOTION TO INTERVENE AND COMMENTS IN SUPPORT
OF
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC") files this pleading to protect Ohio consumers from funding, in the words of others today, "a massive bailout of FirstEnergy's 'unregulated' generation subsidiary."¹ The OCC moves for leave to file a motion to intervene and comments supporting the consumer protection that could save these Ohioans billions of dollars in unwarranted charges. Consistent with the FirstEnergy Utilities pending plan at the Public Utilities Commission of Ohio ("PUCO"), if the

¹ Complaint Requesting Fast Track Processing filed by Electric Power Supply Association ("EPSA"), the Retail Energy Supply Association's ("RESA"), Dynergy Inc. ("Dynergy"), Eastern Generation, LLC ("Eastern Generation"), and the NRG Companies (for purposes of the complaint, the NRG Companies are NRG Power Marketing LLC and GenOn Energy Management, LLC) (collectively "Complainants") against FirstEnergy Solutions Corporation, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company in Docket No. EL16-34-000, at 1-2 (January 27, 2016) ("Complaint").

involved generation clears the PJM Interconnection, L.L.C.'s ("PJM") capacity auction, the cost to Ohio's customers would be approximately \$800 per customer and approximately \$3.6 billion in total over its eight-year term.² However, if the involved generation does not clear the PJM capacity auction the projected cost to Ohio customers could balloon to over a staggering \$1,100.00 per customer and approximately \$5.15 billion in total over the eight-year term.

The Complainants filed a complaint³ against FirstEnergy Solutions Corporation ("FE Solutions") and Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company ("FirstEnergy Utilities") (collectively referred to as "FirstEnergy"). The complaint alleges that the "bailout," at Ohio customers' expense, will result from an affiliate power purchase agreement ("Affiliate PPA" or FirstEnergy PPA") between FE Solutions and the FirstEnergy Utilities.⁴ Complainants represent that FirstEnergy does not plan to file the FirstEnergy PPA with the Federal Energy Regulatory Commission ("FERC" or "Commission") for review because FE Solutions and several of its marketing and generation affiliates have received a waiver of the Commission's affiliate restriction regulations that would otherwise require that review. The Commission granted that waiver based upon the existence of retail choice in Ohio.⁵ According to the Complainants, the FirstEnergy PPA will also not

² *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Second Supplemental Direct Testimony of James F. Wilson at 12-13 (December 30, 2015), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A15L30B45750G02894.pdf>.

³ Under Sections 206, 306 and 309 of the Federal Power Act, 16 U.S.C. §§ 824e, 825e and 825h (2012) and Rule 206 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.206 (2015).

⁴ Complaint at 1-3.

⁵ Complaint at 9, 13.

be subject to state regulatory review because the FirstEnergy Utilities have maintained in testimony before the PUCO that the PUCO “is not at liberty to change the terms of the [Affiliate PPA].”⁶

Complainants request that the Commission rescind the waiver previously granted to FE Solutions and FirstEnergy Utilities solely with respect to the FirstEnergy PPA, given the fundamental change in circumstances since that waiver was granted.⁷

Complainants represent that the costs of the FirstEnergy PPA will be imposed on all retail consumers in Ohio – shopping and non-shopping alike – through a non-bypassable surcharge. This surcharge eliminates the fundamental premise for the grant of the waiver, *i.e.*, that Ohio consumers could choose an alternative supplier and thus avoid the costs of any affiliate contract.⁸ Complainants request that FERC expeditiously direct FE Solutions and FirstEnergy Utilities to file the FirstEnergy PPA for FERC review. This will allow for FERC to determine whether that contract is unjust, unreasonable, and abusive of the affiliate relationship between FirstEnergy Utilities and FE Solutions because it transfers the risk of uneconomic generation owned by FirstEnergy Utilities marketing and generation affiliates to captive Ohio retail consumers.⁹

The Ohio Consumers’ Counsel fully supports the relief sought in the Complaint, in the interest of Ohio consumers. The FirstEnergy PPA would impose on captive Ohio retail consumers undue discriminatory and preferential costs that should be borne by FirstEnergy Utilities marketing and generation affiliates. And the intended

⁶ Complaint at 13 citing Sept. 1 Tr. at 444; *See also, e.g.*, Transcript, Vol. IV at 702, PUCO Case No. 14-1297-EL-SSO (hearing held Sept. 3, 2015), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A15118B44510B00652.pdf>; Sept. 1 Tr. at 655-57; Aug. 31 Tr. at 39-40.

⁷ Complaint at 2-3.

⁸ Complaint at 19-21.

⁹ *Id.*

implementation of the FirstEnergy PPA could have a deleterious effect on wholesale markets operated by PJM. If the rider associated with the FirstEnergy PPA, the Retail Rate Stability Rider, is approved and populated with charges, it will result in Ohio retail consumers subsidizing the uneconomic generation resources named in the FirstEnergy PPA. The generation resource involved are FirstEnergy Utilities entitlements from Ohio Valley Electric Corporation (“OVEC”), and FE Solutions and its affiliates’ ownership interests in the 2,233 MW coal- and oil-fired W. H. Sammis Plant (“the Sammis Plant”) and the 908 MW nuclear-powered Davis-Besse Power Station (“the Davis Besse Power Station”), both located in Ohio.

Under the FirstEnergy PPA, FirstEnergy Utilities plan to purchase the power associated with these power plants. FirstEnergy Utilities will then bid the energy, capacity and ancillary services received under the FirstEnergy PPA into the PJM markets and charge retail customers under the non-bypassable rider the difference between the costs incurred under the Affiliate PPA and the revenues received from the sales into the PJM markets. The clearing prices resulting from the sale of that subsidized, uneconomic generation into PJM’s markets likely could distort market clearing prices, resulting in unjust and unreasonable rates in PJM’s markets. It will also fail to minimize energy procurement costs for consumers throughout the PJM region. That market failure will especially harm Ohio retail consumers who will pay both the distorted market clearing prices for any supplies procured from the PJM markets and the non-bypassable subsidies if approved by the PUCO.

The Ohio Consumers' Counsel, on behalf of the residential utility consumers of Ohio, respectfully moves for leave to intervene,¹⁰ and submits these Comments in Support of the Complaint in order to protect the interests of these Ohio retail consumers.

I. COMMUNICATIONS

Correspondence and communications concerning the submission should be directed to:

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II. MOTION TO INTERVENE

The Ohio Consumers' Counsel is the State of Ohio's representative of residential utility consumers. OCC represents the interests of approximately 4.5 million Ohio residential utility customers in proceedings before state and federal administrative agencies and the courts.¹¹ OCC is an active participant in numerous state and federal regulatory proceedings, and represents residential consumers located within the FirstEnergy and PJM regions.

On January 27, 2016, the Electric Power Supply Association ("EPSA"), the Retail Energy Supply Association's ("RESA"), Dynegy Inc. ("Dynegy"), Eastern Generation,

¹⁰ Under Rules 211, 212 and 214 of the FERC's Rules of Practice and Procedure, 18 C.F.R. §§ 385.211, 212 and 214 (2014).

¹¹ Under Ohio Revised Code Chapter 4911.

LLC (“Eastern Generation”), and the NRG Companies¹² filed a complaint against FE Solutions and FirstEnergy Utilities. The complaint alleges that the FirstEnergy PPA entered into by those affiliated entities is unjust and unreasonable, and stems from abusive affiliate transactions. Complainants request that the Commission rescind its previously-granted waiver of its affiliate restrictions for FE Solutions and FirstEnergy Utilities, and direct those entities to file the FirstEnergy PPA for Commission review under the standards for evaluating affiliate power sales set forth in *Boston Edison Co. Re: Edgar Elec. Energy Co.*¹³ and *Allegheny Energy Supply Co., LLC.*¹⁴

The Commission’s decision on the Complaint will have a significant impact on the rates paid by Ohio’s residential utility consumers, both those served by competitive retail electric service (“CRES”) providers and those served under standard service offers (“SSO” or “standard offer”) for generation supply provided by FirstEnergy Utilities to non-shopping customers. OCC seeks to intervene in this case to protect the interests of Ohio residential consumers, both shopping and non-shopping customers, who will be directly affected by this proceeding. As the statutory representative of Ohio residential consumers, OCC has a direct and substantial interest in this proceeding. No other party can fully represent this interest. Thus, OCC’s participation in this proceeding would ensure that OCC can fully protect its interests with respect to this matter.

This Motion to Intervene and Comments in Support are timely filed. As such, OCC’s intervention in this proceeding is in the public interest. OCC should be granted intervention as a party with all of the rights appurtenant to that status.

¹² For purposes of the complaint, the NRG Companies are NRG Power Marketing LLC and GenOn Energy Management, LLC.

¹³ *Boston Edison Co. Re: Edgar Elec. Energy Co.*, 55 FERC ¶ 61,382 at 62,167 (1991) (“*Edgar*”).

¹⁴ *Allegheny Energy Supply Co., LLC.*, 108 FERC ¶ 61,082 at P 18 (2004) (“*Allegheny*”).

III. COMMENTS IN SUPPORT OF COMPLAINT

OCC supports the Complaint filed by the Complainants against FE Solutions and FirstEnergy Utilities in this docket, for protecting Ohio consumers. The Ohio Consumers' Counsel by its support for the Complaint, request that FERC rescind the waiver of the affiliate restriction regulations granted to FE Solutions and FirstEnergy Utilities in Docket No. ER09-134-000,¹⁵ and review an Affiliate PPA entered into between FE Solutions and FirstEnergy Utilities. As Complainants note (Complaint at 12), FirstEnergy Utilities are not entering into that affiliate contract for the purpose of supplying energy, capacity, and ancillary services to their default, non-shopping SSO customers. Rather, FirstEnergy Utilities propose to acquire those electric products for the purpose of selling them into PJM's wholesale energy, capacity, and ancillary services markets.¹⁶ FirstEnergy Utilities represented in its PUCO proceeding that it plans to flow through to its Ohio retail consumers, via a non-bypassable PPA retail rate rider surcharge, the difference between the costs incurred under the FirstEnergy PPA and the revenues received from the sales into the PJM markets.¹⁷ FirstEnergy Utilities alleged that this proposal would allow the utility to use the FirstEnergy PPA and sales into the PJM markets as a hedge against future market volatility, and that this hedge would stabilize customer rates.¹⁸

¹⁵ *FirstEnergy Solutions Corp.*, 125 FERC ¶ 61,356 (2008); *reh'g denied*, 128 FERC 61,119 (2009) (accepting FE Solutions' request to waive application of the affiliate restriction regulations over OCC's protest).

¹⁶ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R. C. 4928.143, in the Form of an Electric Security Plan*, PUCO Case No. 14-1297-EL-SSO *et al.*, Application at 9 (August 4, 2014) ("FirstEnergy Application").

¹⁷ *Id.*

¹⁸ *Id.*

The PUCO has already approved similar riders at an initial rate of zero for Ohio Power Company and Duke Energy Ohio.¹⁹ A different result is not expected for FirstEnergy Utilities. FirstEnergy Utilities are awaiting PUCO action, anticipated in February or March of this year, on its requests to implement its Retail Rate Stability Rider (“Rider RRS”) in order to charge consumers in relation to the FirstEnergy PPA. That request, if approved by the PUCO, will result in Ohio retail consumers subsidizing the energy, ancillary services, and capacity offers associated with the FirstEnergy PPA that will be submitted by FirstEnergy Utilities into the PJM markets.

The FirstEnergy PPA is a wholesale power supply contract subject to this Commission’s jurisdiction. The Commission’s affiliate restriction regulations require Commission review of any power supply contract entered into by a utility with captive consumers and an affiliate.²⁰ FirstEnergy Utilities, however, have no intent of submitting this contract to the Commission for its review, arguing that the waiver of these restrictions granted by this Commission in Docket No. ER09-134 allows the contract to avoid FERC review because Ohio is a retail choice state and FirstEnergy Utilities have no captive customers.²¹

The Commission must recognize that the premise on which the waiver was initially granted – that FirstEnergy Utilities have no captive customers – no longer exists

¹⁹ *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R. C. 4928.143, in the Form of an Electric Security Plan*, PUCO Case No. 13-2385-EL-SSO *et al.*, Opinion and Order at 25 (February 25, 2015) (“PUCO AEP Ohio Order”) available at <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=681f956b-e3c8-45cd-b6a2-1d8391fc46e0>; *see also In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to R. C. 4928.143, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, PUCO Case No. 14-841-EL-SSO *et al.*, Opinion and Order at 46-47 (April 2, 2015) (“PUCO Duke Energy Ohio Order”), available at <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=ff5ba1de-2f6e-4c1d-92a7-b1803e4a932e>.

²⁰ See 18 C.F.R. § 35.39(B) (2015).

²¹ See Complaint at 13, 19.

with respect to this FirstEnergy PPA. The non-bypassable nature of the charge to be imposed on all Ohio retail customers, shopping and non-shopping alike, effectively converts all Ohio customers into captive customers for purposes of this affiliated transaction. FirstEnergy makes its customers captive for payments by PPA, and in turn guaranteeing FE Solutions and OVEC recovery of their costs associated with these uneconomic generating facilities.

The Commission should not turn a blind eye to the affiliate abuse evident in this contract – an electric utility using captive customers to subsidize uneconomic generation owned by that utility’s marketing and generation affiliates. FirstEnergy Utilities characterize this plan as a hedging program with the goal of insulating Ohio retail customers from volatility in market prices for electric supply. The FirstEnergy PPA will have the opposite effect. The FirstEnergy PPA will transfer that market risk to captive Ohio retail consumers. Rescission of the waiver is warranted by the change in circumstances – the conversion of retail choice customers in Ohio to captive customers under the non-bypassable retail rate rider surcharge.

The FirstEnergy PPA, and FirstEnergy Utilities’ plan to offer the energy, capacity, and ancillary services associated with that contract into PJM’s wholesale markets is also unjust and unreasonable because that action could distort market clearing prices in those wholesale markets. FirstEnergy Utilities, OVEC and/or FE Solutions would be able to offer this subsidized power from uneconomic resources into the PJM markets at prices well below the marginal cost of those resources. This arrangement would be contrary to the core responsibility of “guard[ing] the consumer from

exploitation by non-competitive electric power companies.”²² OCC echoes Complainants’ call for rescission of the waiver limited to the FirstEnergy PPA, and joins them in requesting that the Commission direct FirstEnergy Utilities and FE Solutions to submit the FirstEnergy PPA to the Commission for its review under Section 205 of the FPA.

A. Background.

Ohio has embraced retail choice in electricity services since 2001. In 1999 Ohio passed Ohio Senate Bill 3, which implemented retail choice for electric services.²³ Senate Bill 3 anticipated that unbundling of generation services and allowing retail consumers to shop for electric power supply would result for consumers in market rates for production services that are lower than regulated, cost-based rates for those services. Under Ohio’s electric restructuring program, Ohio retail customers can either choose a competitive supplier of electric power, or can choose to remain with their electric utility for generation service. Ohio electric utilities, including FirstEnergy Utilities, must make generation service available to non-shopping customers through their standard service offer. And they must acquire those supplies through either a market rate offer or an electric security plan.²⁴ FirstEnergy Utilities provide SSO service through an ESP,²⁵ and they procure the energy, capacity and ancillary services needed to supply their standard offer to customers through competitive solicitation auctions overseen by the PUCO.

²² *Nat’l Ass’n for the Advancement of Colored People v. FPC*, 520 F.2d 432, 438 (D.C. Cir. 1975), *aff’d*, 425 U.S. 662 (1976).

²³ As passed by the Ohio 123rd General Assembly, 1999.

²⁴ FirstEnergy Application at 1.

²⁵ *Id.*

FirstEnergy Utilities propose to base the proposed rider on certain contractual entitlements they have in generation owned by their affiliate, OVEC: the Kyger Creek and Clifty Creek generating stations. The proposal also includes two generation resources owned by FE Solutions or its affiliates: the Sammis Power Plant and the Davis-Besse Power Station.²⁶ The evidence submitted by FirstEnergy Utilities indicates that these facilities are uneconomic in current wholesale markets.²⁷ Prior to divesting their interests in these generation resources as part of Ohio’s retail choice unbundling program, FirstEnergy Utilities used to own all or a portion of these plants.

B. Commission review of the FirstEnergy PPA is required to ensure that Ohio consumers are not burdened with the costs of an unjust, unreasonable and abusive affiliate contract.

The FirstEnergy PPA is, without doubt, an affiliate, wholesale power supply contract subject to this Commission’s jurisdiction. Section 35.39 of the Commission’s regulations prohibits “[a]s a condition of obtaining and retaining market-based rate authority” all wholesale sales of electric energy or capacity “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 Federal Power Act.”²⁸ Section 35.44 likewise prevents cross-subsidization by captive customers of marketing affiliate resources.²⁹ Although Ohio is a retail choice state, and would not

²⁶ FirstEnergy Application at 2.

²⁷ FirstEnergy Application, Direct Testimony of Donald Moul at 2 (August 4, 2014) (“The economic viability of the Plants is in doubt. Market-based revenues for energy and capacity have been at historic lows and are insufficient to permit FES to continue operating the Plants and to make the necessary investments. Near-term forecasts for energy and capacity prices are unfavorable. While Company witness Rose forecasts that market prices for energy and capacity will increase over time, the Plants may not survive to see these better days.”)

²⁸ 18 C.F.R. § 35.39(a) (2015).

²⁹ 18 C.F.R. § 35.44 (2016).

normally be covered by the Commission's affiliate restriction regulations, the FirstEnergy PPA and related retail rate rider proposal pending before the PUCO will result in non-bypassable surcharges for both shopping and non-shopping customers. As a result, Ohio retail consumers will have no ability to avoid the subsidized costs incurred under the Affiliate PPA and the retail rate riders. Thus, the potential for affiliate abuse remains intact. In short, Ohio retail consumers should be viewed as captive for purposes of the Affiliate PPA.

FirstEnergy Utilities are not purchasing this power from their affiliate to provide physical delivery of electricity to their retail customers in Ohio. Rather, the FirstEnergy Utilities plan to offer those energy, capacity and ancillary services into the PJM wholesale markets. FirstEnergy Utilities also intend to recover from captive Ohio retail consumers the net difference between any PJM wholesale market revenues recovered for these sales and the full costs of the entitlements and facilities that will be owed by FirstEnergy Utilities to FE Solutions and OVEC under the terms of the Affiliate PPA. Thus, unfortunately for Ohioans, the costs and business risks associated with the uneconomic generating resources covered by the FirstEnergy PPA will be charged to captive retail consumers in Ohio if the PUCO approves the retail rate rider subsidy.

As Complainants accurately describe (Complaint at 19-21), absent immediate FERC review of the Affiliate PPA, it is unlikely that the underlying affiliate transactions will be reviewed in any regulatory forum. FirstEnergy Utilities represented in the PUCO proceedings that they have no intention of submitting this wholesale contract to either the PUCO or this Commission for review. Yet this Commission's review is imperative to ascertain whether the underlying transaction satisfies the Commission's requirements for

fair dealing between affiliates in the supply of wholesale power (with protection of Ohio consumers in the balance). Those restrictions include the Commission's ban on cross-subsidization of a market-regulated affiliate's resources by a utility's captive customers. The underlying FirstEnergy PPA raises the potential for cross-subsidies not just from Ohio retail consumers of FE Solutions' generating resources, but also for cross-subsidies among the different types of resources owned by FE Solutions and its affiliates that are bid into the PJM markets. Those cross-subsidies could affect the competitiveness of several of FE Solutions' or its affiliates' resources in wholesale energy markets. Good cause thus exists for rescinding the waiver of the affiliate restrictions granted to FirstEnergy Utilities and FE Solutions, and directing the submission of the FirstEnergy PPA for Commission review.

In *Allegheny Energy Supply Co.*, 108 FERC ¶ 61,082 (2004) ("*Allegheny*") the Commission adopted guidelines for review of affiliate power supply transactions. These guidelines, often referred to as the *Edgar* principle,³⁰ require that no affiliate should receive undue preference during any stage of the competitive solicitation process. These four guidelines include:

- (a) Transparency: the competitive solicitation process should be open and fair.
- (b) Definition: the product or products sought through the competitive solicitation should be precisely defined.
- (c) Evaluation: evaluation criteria should be standardized and applied equally to all bids and bidders.
- (d) Oversight: an independent third party should design the solicitation, administer bidding, and evaluate bids prior to the company's selection.³¹

³⁰ *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (1991) (*Edgar*).

³¹ *FirstEnergy Solutions Corporation*, 113 FERC ¶ 61,338 at PP 18 - 22 (2005), citing *Allegheny*.

These guidelines that protect the competitiveness of the process work ultimately to protect the benefits of market pricing for consumers. *Allegheny* notes that, “in cases where affiliates are entering into market-based rate sales agreements, it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is not distorted.”³² The Commission also stated that it has approved affiliate sales resulting from competitive bidding processes after first determining, based on the evidence, that “the proposed sale was a result of direct head-to-head competition between affiliated and competing unaffiliated suppliers.” The guidelines envision competitive solicitation of the power bought and sold under the wholesale contract.

The evidence in the PUCO proceedings indicates that the FirstEnergy PPA is unlikely to satisfy the *Edgar/Allegheny* standards. In the relevant Ohio retail proceedings, FirstEnergy Utilities considered only one source for the power to be provided under the Affiliate PPA – its generation affiliates. If the intent is, as FirstEnergy Utilities represented to the PUCO, to hedge market price volatility for Ohio retail consumers, it does not make sense that FirstEnergy Utilities would have investigated a single source of power for that purpose. Indeed, no hedging program that includes a subsidy from Ohio retail consumers would be appropriate. Simply replacing the Affiliate PPA with subsidized purchases from non-affiliated suppliers would not avoid the unreasonable effect of imposing billions of dollars in unnecessary subsidies on Ohio retail consumers or of allowing subsidized generation to participate in wholesale markets.

³² See *Allegheny* at P 18, citing *Edgar*, 55 FERC ¶ 61,382 at 62,167 (1991).

Moreover, to address FirstEnergy Utilities' concern that they need to provide a hedge for Ohio retail consumers against market price volatility, if the power supplied under the FirstEnergy PPA were competitive, FirstEnergy Utilities could provide that hedge for Ohio retail consumers more directly and efficiently by purchasing the power for their SSO customers. FirstEnergy Utilities' arguments to the contrary notwithstanding, the only objective of FirstEnergy Utilities' Affiliate PPA is to subsidize the uneconomic generation of their generation and marketing affiliates – an outcome explicitly banned by the Commission's cross-subsidization regulations. The objective is anti-consumer and anti-competitive.

Moreover, Ohio's restructuring law already allowed FirstEnergy Utilities to recover from Ohio retail consumers, shopping and non-shopping alike, \$6.9 billion in alleged stranded costs associated with their investment in the resources whose costs are included in the Affiliate PPA – resources FirstEnergy feared would become stranded because the resources would not be able to compete in the markets.³³ The subsidy proposed in the Affiliate PPA will exacerbate the injury already incurred by Ohio retail consumers in having to pay these alleged stranded costs – FirstEnergy Utilities will reap the upside of competitive markets when those markets provide profits, but transfer the downside risk to their Ohio retail customers when those resources are no longer economic in those markets.

In Order No. 697-A, the Commission explained that “an extreme example” of the type of affiliate abuse that the Commission seeks to prevent, “would be a holding

³³ *In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of Their Transition Plans and form Authorization to Collect Transition Revenues*, PUCO Case No. 99-1213-EL-ETP, 99-1213-EL-ATA, and 99-1214-EL-AAM, Opinion and Order at p. 71 (July 19, 2000).

company that siphons funds from a franchised public utility to support its failing market-regulated power sales affiliate company; again, this results in financial benefit to shareholders at the expense of customers.”³⁴ The Commission should require those entities to submit the FirstEnergy PPA for a thorough review of whether it complies with the *Edgar/Allegheny* guidelines, because Ohio retail customers in this case are captive for purposes of the FirstEnergy PPA. OCC requests that the Commission grant the Complaint, rescind FirstEnergy Utilities’ and FE Solutions’ waiver of the affiliate restrictions, and direct them to file the Affiliate PPA as an FPA Section 205 filing.

OCC also supports Complainants’ argument (Complaint at 19-21) that the Commission cannot rely on the PUCO to ensure that the rates, terms and conditions of the Affiliate PPA are just, reasonable, not unduly discriminatory and not unduly preferential. Although the Commission initially granted FirstEnergy Solutions and its affiliates the waiver of the affiliate restriction regulations in part on the premise that the PUCO could adequately protect Ohio consumers because it oversees the competitive solicitation auctions in Ohio,³⁵ as discussed above, the circumstances under which the Commission found that the PUCO has the ability to review “affiliate undue preference” and thus adequately protect captive Ohio consumers interests, no longer exist today with respect to the Affiliate PPA. When the PUCO issues an order approving the FirstEnergy Utilities’ Economic Stability Program and retail rate rider, it will have effectively sanctioned the affiliate undue preference. Moreover, the Affiliate PPA is not being procured through the state competitive solicitation process. Thus, any reliance on the

³⁴ Order No. 697-A at n.280.

³⁵ *FirstEnergy Solutions Corp., et al.*, 128 FERC ¶ 61,119 at P 18.

state regulatory authority oversight to protect Ohio captive consumer interests through review of that state solicitation process would be misplaced.

C. The sale of subsidized power into PJM’s markets could distort market clearing prices.

If the PUCO approves FirstEnergy Utilities’ PPA rider as anticipated in February or March this year, FirstEnergy Utilities, and/or their affiliates, OVEC and FE Solutions, will be poised to execute the Affiliate PPA and to begin offering the subsidized, uneconomic generation into the PJM wholesale markets. Although existing PJM regulations allow energy and capacity to be offered into the PJM markets at zero, there is no doubt that offering the energy, capacity and ancillary services that receive these out-of-market subsidies into PJM’s markets will disrupt the RTO’s wholesale market prices and the bidding behavior incentives inherent in PJM’s market rules. As the PJM Independent Market Monitor pointed out in his testimony before the PUCO, allowing subsidized uneconomic generation to remain in the market will directly affect both the wholesale market clearing prices and the incentives for unsubsidized generators to invest in new generation in the region.³⁶ This action would undermine the competitive incentives the Commission seeks to facilitate in its wholesale market regime.³⁷ It would also pass on unjust and unreasonable costs throughout the PJM market and, in particular, to the captive Ohio retail consumers that would be forced to pay for both that uneconomic activity and the subsidies charged through the PPA rider.

³⁶ FirstEnergy Application, Direct Testimony of Joseph E. Bowring on Behalf of the Independent Market Monitor for PJM at 3-4 (December 22, 2014).

³⁷ *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719 at P 1, FERC Stats. & Regs. ¶ 31,281 (2008) (“National policy has been, and continues to be, to foster competition in wholesale electric power markets.”), *order on reh’g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292; *order on reh’g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

The FirstEnergy PPA may well be the tip of the iceberg as the industry struggles with trying to retain older, uneconomic base load resources, such as coal and nuclear units, in an environment in which future investment is steered toward lower cost natural gas-fired generation resources. This is evidenced, in part, by Complainants' similar complaint, filed this same day at FERC, concerning the power purchase agreement proposal pending at the PUCO between AEP Generation Resources, Inc. and Ohio Power Company in Docket No. EL16-33-000. Indeed, Ohio Power Company initially filed with the PUCO for recovery of costs associated with its 19.93% entitlement in uneconomic capacity owned by OVEC, but then broadened that request after the Commission initially accept the rider as a placeholder, to include a total of more than 2,600 MWs of capacity associated with several additional large old coal plants owned by AEP Generation and/or its affiliates.³⁸ Duke Energy Ohio likewise filed for similar treatment of an Affiliate PPA that includes its OVEC entitlements.³⁹ Together, these applications seek recovery for captive Ohio consumers of stranded costs associated with over 6,000 MW of uneconomic generating resources. These expansive programs, if not rejected, are likely to open the door to additional utility filings in Ohio to recover costs, from Ohioans, that are associated with uneconomic generation. This result could occur notwithstanding the

³⁸ PUCO AEP Ohio Order at 8; *see also In the Matter of the Application Seeking Approval of Ohio Power Company Proposal to Enter Into An Affiliate Power Purchase Agreement for Inclusion in the ,Power Purchase Agreement Rider*, PUCO Case Nos. 14-1693-EL-RDR, *et al.* (AEP Ohio Amended Application”), Direct Testimony of Pablo A. Vegas in Support of AEP Ohio’s Amended Application at 12, Table 2 (filed May 15, 2015) (“Vegas Direct Testimony”) (describing the PPA Units), available at <http://dis.puc.state.oh.us/TiffToPDF/A1001001A15E15B61949I33668.pdf>.

³⁹ Duke Energy Ohio Order at 46-47.

Commission's expressed policy that the cost of uneconomic generation is a risk that should be borne by market participants other than consumers.⁴⁰

IV. CONCLUSION AND REQUEST FOR RELIEF.

The Complaint raises significant concerns about affiliate abuse and distortion of wholesale markets that could cost Ohioans dearly on their monthly electric bills. The incongruity of suppliers and consumers joining efforts to address wholesale market concerns should not be lost on the Commission. OCC, while not always on the same side of wholesale market issues as suppliers such as EPSA, fully supports the relief sought in this Complaint. That fact alone signals the seriousness of the issues raised by the Affiliate PPA and the consequences for competition in wholesale markets of allowing utilities to shift the financial risks of uneconomic resources to captive retail consumers and offer subsidized uneconomic generation into wholesale markets.

The Commission should grant the relief requested in that Complaint and rescind the waiver previously granted FirstEnergy Utilities and FE Solutions as to the FirstEnergy PPA at issue in this docket. In order to adequately protect Ohio consumers from the deleterious effects of the FirstEnergy PPA and potential distortion of PJM market clearing prices, the Commission should make the relief sought in the Complaint of rescinding the waiver of the affiliate restrictions effective as of the earliest possible date consistent with the authority granted in FPA Section 206(b), 16 U.S.C. § 824e(b) (2012), *i.e.*, as of the date of the filing of the Complaint. OCC supports the Complainants' additional request that the Commission clarify in any order granting the

⁴⁰ See, e.g., Order No. 719 at P 1 ("Effective wholesale competition protects consumers by providing more supply options, encouraging new entry and innovation, spurring deployment of new technologies, promoting demand response and energy efficiency, improving operating performance, exerting downward pressure on costs, *and shifting risk away from consumers.*") (emphasis added).

Complaint that it will not entertain a request for waiver of the prior notice filing requirements that would allow any affiliate contract filed to become effective prior to the expiration of the 60 day notice period required by FPA Section 205. A refund effective date set as of the date of the filing of the Complaint combined with clarification that the Commission will not entertain a request for waiver of the prior notice filing requirements will help to ensure that Ohio consumers are protected in the event the PUCO approves the Affiliate PPA prior to a final order in this proceeding, and prior to Commission review and action on the Affiliate PPA.

WHEREFORE, for the foregoing reasons, the Ohio Consumers' Counsel requests that the FERC (1) grant this motion to intervene, and permit the Ohio Consumers' Counsel to participate in this proceeding with full rights as a party; (2) rescind the waiver of the affiliate restrictions granted to FirstEnergy Utilities and FE Solutions in Docket No. ER09-134; (3) direct FirstEnergy Utilities and FE Solutions to submit their Affiliate PPA for Commission review as requested in these Comments and in the Complaint; and (4) set the refund effective date at the date of the filing of the Complaint and clarify that the Commission will not entertain a request for waiver of the prior notice filing requirements in any proceeding in which FirstEnergy Utilities and FE Solutions the FirstEnergy PPA for FERC review.

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

/s/ Kevin F. Moore

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DATED: January 27, 2016

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.2010, I hereby certify that I have this day served the foregoing document by electronic means upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Columbus, Ohio this 27th day of January, 2016.

/s/ Kevin Moore
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