

**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)
)	

**MOTION TO INTERVENE AND COMMENTS IN SUPPORT
SUBMITTED ON BEHALF OF THE
OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

I. Introduction.

In accordance with the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure 212 and 214,¹ the Ohio Manufacturers' Association Energy Group (OMAEG) hereby submits this motion for intervention and comments in support of the Protest and Request for Issuance of Further Order on Complaint (Protest) filed by the Electric Power Supply Association, the Environmental Law & Policy Center, the Ohio Environmental Council, the PJM Power Providers Group, the Retail Energy Supply Association, Dynegy Inc., Eastern Generation, LLC, and the NRG Companies.² Specifically, the Protest objects to the filings made by affiliates of FirstEnergy Corporation (FirstEnergy) on May 27, 2016 in response to the Commission's April 27, 2016 Order in Docket No. EL16-34-000,³ and requests that the Commission take further action to enforce its orders and rules,⁴ including the affiliate restrictions established by this Commission.⁵ In accordance with that Protest and as further described herein, the Commission should take affirmative steps to protect competitive wholesale markets and ensure that customers are not saddled with soaring costs arising from a scheme that was

¹ 18 C.F.R. § 385.212 and 385.214.

² Protest, Docket Nos. ER16-1807-000 (June 17, 2016) (Protest).

³ Tariff Filing, Docket No. ER16-1807-000 (May 27, 2016); Notice of Change in Status, Docket Nos. ER10-1469-004, et al. (May 27, 2016); *Electric Power Supply Assn. v. FirstEnergy Solutions Corp.*, Order Granting Complaint, 155 FERC ¶ 61,101 at P 13, 52 (2016) (April 27, 2016 Order).

⁴ Protest at 1-3.

⁵ 18 C.F.R. § 35.39(b). See also *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, clarified, 121 FERC ¶ 61,260 (2007), order on reh'g, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, clarified, 124 FERC ¶ 61,055, order on reh'g, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), order on reh'g, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), order on reh'g, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), aff'd sub nom. *Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), cert. denied, 133 S. Ct. 26 (2012).

purposefully devised by FirstEnergy and/or its affiliates⁶ to evade this Commission's regulatory oversight.

II. Communications.

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III. Motion to Intervene.

OMAEG was previously granted intervention and made a party to the proceeding in Docket No. EL16-34-000.⁷ The Protest, however, extends to additional proceedings. Therefore, to the extent necessary, OMAEG files this motion to intervene and requests that it be made a party to the Protest proceeding, Docket No. ER16-1807-000, as well as all relevant proceedings referenced and incorporated in the Protest, Docket No. ER10-1469-004, Docket No. ER10-1467-004, Docket No. ER10-1468-004, Docket No. ER10-1459-008, Docket No. ER13-785-003, Docket No. ER13-713-003, and Docket No. ER10-1453-004.

⁶ FirstEnergy Corporation's affiliated, regulated franchised public utilities in Ohio include Cleveland Electric Illuminating Company, Ohio Edison Company, and Toledo Edison Company (collectively, FirstEnergy Ohio Regulated Utilities). FirstEnergy Solutions Corp. is FirstEnergy Corporation's market-regulated power sales affiliate in Ohio (FES).

⁷ April 27, 2016 Order at P 13, 52.

The OMAEG is a non-profit entity created by the Ohio Manufacturers' Association (OMA) for the purpose of educating and providing information to energy consumers, regulatory boards and suppliers of energy; advancing energy policies to promote an adequate, reliable, and efficient supply of energy at reasonable prices; and, advocating on behalf of manufacturers in critical cases at the state and federal levels. The OMAEG's members are all members of the OMA. OMA has over 1,400 member companies of all different sizes and with various energy use profiles, all of which are Ohio retail customers and many of which purchase electric services from FirstEnergy Ohio Regulated Utilities.

Like the OMA, OMAEG is comprised exclusively of manufacturers who work together to protect and grow Ohio manufacturing. OMAEG strives to improve business conditions in Ohio and drive down the cost of doing business for Ohio manufacturers. OMAEG is regularly and actively involved in proceedings before the Public Utilities Commission of Ohio (PUCO) and its unique knowledge and perspective will contribute to the full development and equitable resolution of the issues in these proceedings. OMAEG has a direct, real, and substantial interest in the issues raised in these proceedings and is so situated that the disposition of these proceedings may, as a practical matter, impair or impede its ability to protect that interest.

Under the Commission's Rules of Practice and Procedure, "[a]ny person seeking to intervene to become a party * * * must file a motion to intervene."⁸ The motion to intervene must state the movant's position and provide a basis for that position.⁹ Additionally, the movant must demonstrate that it has a right to participate as granted by

⁸ 18 C.F.R. § 385.214(a)(3).

⁹ 18 C.F.R. § 385.214(b)(1).

“statute or by Commission rule, order, or other action” and show that it has “an interest which may be directly affected by the outcome of the proceeding * * * .”¹⁰ OMAEG satisfies these standards, and, therefore, its motion for intervention should be granted and it should be made a party to the dockets enumerated above.

Ohio’s manufacturing sector is one of the top consumers of electricity in the state of Ohio, and any impacts arising from future increases to electricity prices will have a significantly negative effect on their businesses. To this end, OMAEG stated its opposition to the Affiliate Power Purchase Agreement (PPA) proposal that was addressed in Docket No. EL16-34-000.¹¹ Although the Affiliate PPA appears to have been abandoned, it has been replaced with an equally harmful construct: a modified non-bypassable generation-related charge (Rider RRS) proposal that substitutes the Affiliate PPA with a virtual purchase power agreement (hereinafter, Virtual PPA) (described in more detail below). Increases in electricity prices associated with FirstEnergy Ohio Regulated Utilities’ implementation of the Virtual PPA will negatively affect Ohio manufacturers’ competitiveness. Unquestionably, OMAEG has a real and substantial interest in these proceedings. As such, OMAEG’s interest will be directly affected by the outcome of these proceedings and cannot be represented by any other party.

IV. Comments in Support.

A. Background.

In its April 27, 2016 Order, the Commission found that Ohio retail customers were captive to a non-bypassable generation-related charge (Rider RRS) approved by the

¹⁰ 18 C.F.R. § 385.214(b)(2)(i)-(ii).

¹¹ OMAEG Motion to Intervene and Comments in Support, Docket No. EL16-34-000 (February 23, 2016).

PUCO¹² that was designed to recover the costs of an Affiliate PPA between FirstEnergy’s Ohio Regulated Utilities and their affiliate, FES.¹³ Additionally, the Commission rescinded the waivers on affiliate sales restrictions previously granted to FirstEnergy’s market-regulated power sales affiliates in Ohio, including FES, with respect to the Affiliate PPA and directed that the Affiliate PPA be submitted for review and approval under the *Edgar/Allegheny* standards before any sales could be transacted under it.¹⁴

To implement the terms of its Order, the Commission directed FES to modify its market-based rate tariff to specify “that the affiliate sales restrictions codified at 18 C.F.R. § 35.39(b) will apply to this specific Affiliate PPA.”¹⁵ The Commission also directed the FirstEnergy Ohio Regulated Utilities, FES, and their affiliates to file a change in status to address the impact of its finding that FirstEnergy’s Ohio Regulated Utilities have captive customers with respect to the Affiliate PPA.¹⁶ The change in status filing was intended to address other existing waivers of 18 C.F.R. § 35.39, “including other 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).”¹⁷

¹² *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, Opinion and Order at 85 (March 31, 2016), <https://dis.puc.state.oh.us/TiffToPDF/A1001001A16C31B41521H01842.pdf>.

¹³ April 27, 2016 Order at P 61.

¹⁴ Id. at P 53.

¹⁵ Id. at P 62.

¹⁶ Id. at P 66.

¹⁷ Id.

In its May 27, 2016 market-based tariff filing, FES states that “there have been no transactions under the Affiliate PPA” and that it “will submit the Affiliate PPA for Commission review and approval before performing any transactions under [it].”¹⁸ In the May 27, 2016 change in status filing submitted by the FirstEnergy Ohio Regulated Utilities, FES, and certain other affiliates, the companies state, among other things, that the FirstEnergy Ohio Regulated Utilities and FES “have suspended the Affiliate PPA pending the outcome of certain regulatory and business decisions.”¹⁹

Glaringly absent from either the market-based tariff filing or the change in status filing is any acknowledgement of the Virtual PPA that the FirstEnergy Ohio Regulated Utilities proposed to the PUCO during the rehearing phase of their fourth electric security plan proceeding.²⁰ The PUCO originally authorized the FirstEnergy Ohio Regulated Utilities to calculate the Rider RRS charge based on the netting of the costs of the Affiliate PPA against actual generation revenues earned from the resale of the PPA units’ output into the PJM markets.²¹ In light of the Commission’s Order, however, the FirstEnergy Ohio Regulated Utilities abandoned the underlying framework for calculating the charges associated with Rider RRS.²² Now, instead of relying on actual generation costs and actual generation output to calculate the Rider RRS charges, the FirstEnergy Ohio Regulated Utilities propose to rely on projected generation costs and

¹⁸ Tariff Filing at 2, Docket No. ER16-1807-000 (May 27, 2016).

¹⁹ Notice of Change in Status at 3, Docket Nos. ER10-1469-004, et al. (May 27, 2016).

²⁰ FirstEnergy Ohio Regulated Utilities Application for Rehearing, Case No. 14-1297-EL-SSO (May 2, 2016), <https://dis.puc.state.oh.us/TiffToPDF/A1001001A16E02B64659C00268.pdf>. Rehearing Testimony of Eileen M. Mikkelsen on Behalf of FirstEnergy Ohio Regulated Utilities, Case No. 14-1297-EL-SSO (May 2, 2016), <https://dis.puc.state.oh.us/TiffToPDF/A1001001A16E02B65019F00270.pdf> (Mikkelsen Rehearing Testimony).

²¹ Mikkelsen Rehearing Testimony at 3-4.

²² Id. at 4.

projected volumes of sales into the PJM Interconnection, L.L.C. (PJM) wholesale markets to calculate the Rider RRS charge.²³ The modified Rider RRS proposal is intended to fall “solely within the [PUCO’s] jurisdiction” and purports to “rely on retail ratemaking mechanisms that do not utilize or refer to a PPA or any other contractual arrangement or other involvement of FES.”²⁴

By substituting the Virtual PPA for the Affiliate PPA to calculate the modified Rider RRS, FirstEnergy Ohio Regulated Utilities and their affiliates are trying to do indirectly what they cannot do directly. But in spite of FirstEnergy’s efforts to FERC-proof their new proposal, the fact remains that the so-called “hedge” promised by FirstEnergy Ohio Regulated Utilities is still premised on captive retail ratepayers paying non-bypassable generation-related charges incurred by market-regulated power sales affiliates less revenues received from projected capacity clearing the PJM capacity market at actual base residual auction pricing.²⁵ The Virtual PPA proposal also claims to preserve the benefits of the Affiliate PPA regarding support for generating facilities owned by its market-regulated affiliate. FirstEnergy Ohio Regulated Utilities state:

Effectively, Rider RRS helps to ensure the continued operation of 3,200 MWs of fuel diverse baseload generation. Accordingly, the significant economic development and job retention benefits and transmission reliability benefits contemplated under the original proposal for the region would continue to exist, albeit for potentially different plants. However, because the commitment involves previously rate-based units, the Commission is assured that the plants were built to serve Ohio customers and, therefore, will provide similar transmission advantages.

Continued operating of plants built to serve Ohio customers not only provides reliability benefits to customers, but also advantages customers

²³ Id. at 4-5.

²⁴ FirstEnergy Ohio Regulated Utilities Application for Rehearing at 14.

²⁵ Mikkelsen Rehearing Testimony at 5.

through the avoidance of transmission investment that would be needed if plants closed.

As the record demonstrates, and the [PUCO] has recognized, continued operation of fuel diverse baseload generating units provides significant positive economic and tax impact for employees, suppliers, and governmental entities in the region.²⁶

The FirstEnergy Ohio Regulated Utilities also state that if less than 3,200 MWs of formerly rate-based generation (most of which is now owned by their affiliates) remains in operation, the Commission may reduce Rider RRS.²⁷ The Commission should not permit FirstEnergy to evade its April 27, 2016 Order by concocting a scheme embodied in the newly-devised Virtual PPA with non-bypassable generation charges that, in substance, supports or bolsters market-regulated power sales affiliates and imposes the same types of harms on the PJM wholesale markets and customers that were embodied in the original Affiliate PPA, including “the ‘potential for the inappropriate transfer of benefits from [captive] customers to the shareholders of the franchised public utility’” that “could undermine the goal of the Commission’s affiliate restrictions.”²⁸

B. The Virtual PPA Should Be Reviewed by the Commission as it Creates an Effective Sale of Capacity from FirstEnergy market-regulated affiliates to FirstEnergy Ohio Regulated Utilities.

Irrespective of whether a contract exists for FES to sell the output of the PPA units to FirstEnergy Ohio Regulated Utilities for re-sale into the PJM markets, the fact remains that the FirstEnergy Ohio Regulated Utilities are guaranteeing the continued existence or availability of capacity in Ohio owned by their market-regulated affiliates in

²⁶ Id. at 15-16 (citations omitted).

²⁷ Id.

²⁸ April 27, 2016 Order at P 55 (citations omitted).

contravention of the April 27, 2016 Order.²⁹ The implementation of the Virtual PPA will bestow upon FirstEnergy Ohio Regulated Utilities and likely their parent company and/or FirstEnergy's Ohio market-regulated affiliates at least \$3.6 billion in revenue from Ohio customers.³⁰ As FirstEnergy Ohio Regulated Utilities admit, the features of the newly-devised Virtual PPA closely follow the contours of the originally-contemplated Affiliate PPA. FirstEnergy Ohio Regulated Utilities state that the Virtual PPA “uses the generation output (MWhs) and cleared capacity (MWs) that were included in the record and relied upon by the [PUCO] in reaching its decision” that was predicated on the Affiliate PPA.³¹ As devised, FirstEnergy Ohio Regulated Utilities explain that under the Virtual PPA proposal they have made a “few modest modifications to the calculation of the costs and revenues that will be reflected in [the modified] Rider RRS” proposal:

- “actual costs will be replaced with the costs which are already evidence of record and relied upon by the [PUCO]”;
- “actual generation output will be replaced with the generation output which is already evidence of record and relied upon by the [PUCO]”; and
- “actual capacity (MWs) cleared in the PJM capacity market will be replaced with the capacity (MWs) projected to clear which is already evidence of record and relied upon by the [PUCO].”³²

Notwithstanding FirstEnergy Ohio Regulated Utilities' claim that the Virtual PPA is not backed by an executed contract between FirstEnergy Ohio Regulated Utilities and FES, the Virtual PPA provides a guarantee for the availability of capacity owned by

²⁹ Mikkelsen Rehearing Testimony at 15 (“Effectively, Rider RRS helps ensure the continued operation of 3,200 MWs of fuel diverse baseload generation.”).

³⁰ Second Supplemental Direct Testimony of James F. Wilson on Behalf of The Office of the Ohio Consumers' Counsel at 12, Case No. 14-1297-EL-SSO (December 30, 2015), <https://dis.puc.state.oh.us/TiffToPdf/A1001001A15L30B45750G02894.pdf>.

³¹ Mikkelsen Rehearing Testimony at 6.

³² Id. at 5.

market-regulated affiliates.³³ In this way, the Virtual PPA provides an effective sale of capacity from FES (or other market-regulated affiliates) to FirstEnergy Ohio Regulated Utilities. Indeed, but for the output associated with generating units owned by market-regulated affiliates, FirstEnergy Ohio Regulated Utilities would not be in a position to offer customers a so-called “hedge,” at least not one based upon costs and revenues associated with generation assets and the sale of the output of those assets into the PJM wholesale markets.³⁴ The reality is that the only thing hedged here is FirstEnergy’s revenue stream, not customers’ price risk.

The Commission has previously observed that it is inappropriate to bypass Commission policy by seeking to accomplish by indirect means what cannot be accomplished directly.³⁵ That principle should be applied here. The workaround contemplated by the Virtual PPA should not escape the Commission’s review. The substance of the Virtual PPA provides support to market-regulated affiliates and in essence guarantees the availability of capacity to FirstEnergy Ohio Regulated Utilities from market-regulated affiliates. Moreover, the cost data underlying the Virtual PPA is based on plants owned by FES or other market-regulated affiliates, which are subject to the Commission’s jurisdiction. It is immaterial that the Virtual PPA is not memorialized in an agreement between FES and FirstEnergy Ohio Regulated Utilities. A long line of Commission decisions have stressed that substance matters—not artful labeling designed

³³ Id. at 15 (“Effectively, Rider RRS helps ensure the continued operation of 3,200 MWs of fuel diverse baseload generation.”).

³⁴ Id. at 14.

³⁵ *Tennessee Gas Pipeline Co., L.L.C.*, 143 FERC ¶ 61,128 at P 61 (2013).

to escape regulatory scrutiny.³⁶ Further, any argument that FirstEnergy Ohio Regulated Utilities are not directly paying FES or any other affiliate for the continued retention of capacity rests on a mirage. FirstEnergy Ohio Regulated Utilities, FES, and other generator-owned affiliates share the same corporate parent. Thus, costs recovered from customers under modified Rider RRS could be imputed to FES or other market-regulated affiliates based on the transfer of funds from FirstEnergy Ohio Regulated Utilities to the parent.³⁷

In keeping with these precepts, and to ensure that its April 27, 2016 Order is not contravened, OMAEG recommends that the Commission take the following actions. First, the Commission should direct that the Virtual PPA be reviewed in accordance with Section 205 of the Federal Power Act for evaluation under the *Edgar/Allegheny* standards.³⁸ Second, all FirstEnergy market-regulated affiliates, including FES, should be directed to revise their market-based tariff to bar it from providing capacity or other electric products to FirstEnergy Ohio Regulated Utilities where the costs will be recovered through the modified Rider RRS. Finally, the Commission should enforce the no-conduit provision prescribed by 18 C.F.R. § 35.39(g)³⁹ to prevent FirstEnergy Ohio Regulated Utilities from flowing Riders RRS revenues to the parent for distribution to

³⁶ See, e.g., *WSPP Inc.*, 139 FERC ¶ 61,061 at P 26 (2012); *Entergy Servs., Inc.*, 85 FERC ¶ 61,268 at 62,078 (1998); *Western Mass. Elec. Co.*, 61 FERC ¶ 61,182 at 61,664 (1992).

³⁷ *Criteria for Reassertion of Jurisdiction Over the Gathering Services of Natural Gas Company Affiliates*, 118 FERC ¶ 61,114 at P 36 (2007) (“The Commission has no doubt as to its authority to disregard corporate structures” to prevent frustration of statutory purposes), citing *Capital Tel. Co. v. FCC*, 498 F.2d 734, 738, n. 10 (D.C. Cir. 1974) (“[w]here the statutory purpose could be easily frustrated through the use of separate corporate entities a regulatory commission is entitled to look through the corporate entities and treat the separate entities as one for purposes of regulation.”).

³⁸ See 16 U.S.C. § 824d; 55 FERC ¶ 61,382 (1991) (*Edgar*); 108 FERC ¶ 61,082 (2004) (*Allegheny*).

³⁹ 18 C.F.R. § 35.39(g) provides: “A franchised public utility with captive customers and a market-regulated power sales affiliate are prohibited from using anyone * * * as a conduit to circumvent the affiliate restrictions in §§ 35.39(a) through (g).”

FirstEnergy market-regulated affiliates, including FES. These actions by the Commission will carry out the “primary aim” of the Federal Power Act which “is the protection of consumers from excessive rates and charges,”⁴⁰ and 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.”⁴¹

C. The Virtual PPA Triggers the Commission’s Regulatory Authority Over the Transfer of Non-Power Goods and Services.

A finding that the Virtual PPA does not constitute the effective sale of capacity from FirstEnergy market-regulated affiliates to FirstEnergy Ohio Regulated Utilities does not negate the grant of additional measures of relief against FirstEnergy’s harmful stratagem. To this end, the Commission’s regulations pertaining to non-power goods and services should be enforced for the benefit of customers and the competitive wholesale markets. Under 18 C.F.R. § 35.39(e)(2), “Unless otherwise permitted by Commission rule or order, sales of any non-power goods or 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.” Likewise, 18 C.F.R. § 35.44(b)(2) provides that a franchised public utility with captive customers “may not purchase or receive non-power goods and services from a market-regulated power sales affiliate or a non-utility affiliate at a price above market.” These restrictions on the transfer of non-power goods and services plainly apply here.

The creation of this so called “hedge” through the retention or availability of capacity provided by generating units owned by FirstEnergy market-regulated affiliates

⁴⁰ *Municipal Light Bds. of Reading & Wakefield v. Federal Power Comm.*, 450 F.2d 1341, 1348 (D.C. Cir 1971), cert. denied, 405 U.S. 989 (1972).

⁴¹ April 27, 2016 Order at P 65.

amounts to the transfer of a non-power good and service between FirstEnergy market-regulated affiliates and FirstEnergy Ohio Regulated Utilities in contravention of 18 C.F.R. § 35.39(e)(2) and 35.44(b)(2). Neither the FirstEnergy market-regulated affiliates nor the FirstEnergy Ohio Regulated Utilities enjoy waivers from these restrictions. Moreover, it would be implausible to suggest that the transfer of \$3.6 billion in funds (at the very least) from customers to FirstEnergy Ohio Regulated Utilities over the next eight years does not constitute an above market price. Any argument that the transfer of non-power goods and services does not occur between FirstEnergy market-regulated affiliates and FirstEnergy Ohio Regulated Utilities elevates form over substance. Just as revenues could be imputed to FirstEnergy market-regulated affiliates based on the transfer of funds from FirstEnergy Ohio Regulated Utilities to the parent, so can the transfer of non-power goods and services.⁴²

D. The Failure to Disclose the Virtual PPA Warrants Further Commission Scrutiny.

FES' market-based tariff filing that was purportedly submitted in accordance with the Commission's April 27, 2016 Order did not disclose the Virtual PPA.⁴³ Likewise, FirstEnergy Ohio Regulated Utilities, FES, and the other designated FirstEnergy affiliates listed on the notice of change in status filing did not disclose the Virtual PPA.⁴⁴ As explained in the Protest,⁴⁵ the failure to disclose the Virtual PPA in these two filings

⁴² *Criteria for Reassertion of Jurisdiction Over the Gathering Services of Natural Gas Company Affiliates*, 118 FERC ¶ 61,114 at P 36 (2007) ("The Commission has no doubt as to its authority to disregard corporate structures" to prevent frustration of statutory purposes), citing *Capital Tel. Co. v. FCC*, 498 F.2d 734, 738, n. 10 (D.C. Cir. 1974) ("[w]here the statutory purpose could be easily frustrated through the use of separate corporate entities a regulatory commission is entitled to look through the corporate entities and treat the separate entities as one for purposes of regulation.").

⁴³ Tariff Filing, Docket No. ER16-1807-000 (May 27, 2016).

⁴⁴ Notice of Change in Status, Docket Nos. ER10-1469-004, et al. (May 27, 2016)

⁴⁵ Protest at 22-23.

bespeaks a lack of candor towards the Commission and should prompt the Commission to examine whether it would be appropriate to revoke or suspend the market-based rate authority enjoyed by the entities listed on these two filings for the existence of the Virtual PPA in FirstEnergy's service territory.

It is imperative that entities act with transparency in their Commission-directed filings. To remedy actual or alleged violations of statutes and regulations it is entrusted with administering, the Commission has previously suspended or revoked entities' market-based authority.⁴⁶ Examining whether similar treatment is warranted here will protect the public interest and ensure compliance with the Commission's directives.

V. Conclusion.

The "hedge" embodied in the Virtual PPA is supported by the claimed continued retention of capacity provided by the FirstEnergy market-regulated affiliate-owned generating units. This amounts not only to the effective sale of capacity from FirstEnergy market-regulated affiliates to FirstEnergy Ohio Regulated Utilities but also to the transfer of non-power goods and services between FirstEnergy market-regulated affiliates and FirstEnergy Ohio Regulated Utilities. Given this, the notion that FES, or any other FirstEnergy market-regulated affiliate, has no involvement with the Virtual PPA is incorrect. In accordance with the comments set forth herein, the Virtual PPA should be scrutinized to ensure that the Commission's April 27, 2016 Order is not rendered meaningless simply through FirstEnergy's artifice.

⁴⁶ *J.P. Morgan Ventures Energy Corp.*, 141 FERC ¶ 61,131 at P 1 (2012) (suspending market-based rate authority upon finding of false or misleading statements); *Cleco Corp.*, 104 FERC ¶ 61,125 at P 4 (2003) (revoking market-based rate authority)

Respectfully submitted,

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June 17, 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 17th day of June, 2016.

/s/ Ryan P. O'Rourke _____
Ryan P. O'Rourke
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