

**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.)

COMPLAINT REQUESTING FAST TRACK PROCESSING

Pursuant to Sections 206, 306 and 309 of the Federal Power Act (the “FPA”)¹ and Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”),² the Electric Power Supply Association (“EPSA”), the Retail Energy Supply Association (“RESA”), Dynergy Inc. (“Dynergy”), Eastern Generation, LLC (“Eastern Generation”), and the NRG Companies³ (collectively, “Complainants”) hereby file this complaint (this “Complaint”) seeking to ensure that an abusive affiliate power sales contract (the “Affiliate PPA”) involving subsidiaries of FirstEnergy Corporation (“FirstEnergy”) does not evade Commission review. Under the

¹ 16 U.S.C. §§ 824e, 825e, 825h (2012).

² 18 C.F.R. § 385.206 (2015).

³ For purposes of this filing, the NRG Companies are NRG Power Marketing LLC (“NRG-PML”) and GenOn Energy Management, LLC (“GEM”).

Affiliate PPA, captive Ohio consumers would be forced to fund a massive bailout of FirstEnergy's "unregulated" generation subsidiary through a non-bypassable charge assessed to all retail customers, even those served by competitive suppliers. The Commission should rescind the waiver of the affiliate power sales restrictions previously granted to FirstEnergy's market-based rate subsidiaries,⁴ as that waiver relates to the Affiliate PPA,⁵ and thus ensure that the Affiliate PPA is reviewed under Section 205 of the FPA⁶ and in accordance with the standards for evaluating proposed affiliate power sales set forth in *Boston Edison Co. Re: Edgar Electric Energy Co.*⁷ and *Allegheny Energy Supply Co., LLC*.⁸

The Affiliate PPA strikes at the heart of the Commission's longstanding restrictions on affiliate transactions. Indeed, this contract threatens exactly the harm to both captive consumers and markets that prompted the adoption of those restrictions in the first place. The Affiliate PPA would saddle captive Ohio consumers with hundreds of millions or even billions of dollars in above-market costs and would artificially distort prices in the PJM Interconnection, L.L.C. ("PJM") markets by subsidizing the continued operation of over 3 GW of generation that, according to FirstEnergy, would otherwise retire. The fact that FirstEnergy has devised, and that the PUCO may approve, a clever scheme to shift the costs of this abusive affiliate contract onto consumers does not alter

⁴ See *FirstEnergy Solutions Corp.*, 125 FERC ¶ 61,356 (2008) ("*FirstEnergy I*"), *on reh'g*, 128 FERC ¶ 61,119 (2009) ("*FirstEnergy II*").

⁵ Complainants are not, by this Complaint, asking that this waiver be rescinded as to wholesale power sales other than the Affiliate PPA.

⁶ 16 U.S.C. § 824d (2012).

⁷ 55 FERC ¶ 61,382 at 62,167 (1991) ("*Edgar*").

⁸ 108 FERC ¶ 61,082 at P 18 (2004) ("*Allegheny*").

the Commission's statutory duty to protect consumers from the effects of unjust and unreasonable wholesale rates⁹ or in any way make it less critical to ensure integrity of the PJM markets. There have been fundamental changes in circumstances since the Commission granted the waiver that make it unjust, unreasonable and unduly discriminatory to allow FirstEnergy Solutions Corporation ("FE Solutions") to enter into the Affiliate PPA pursuant to its blanket market-based rate authorization.

Expedited Commission action granting this Complaint and providing for review of the Affiliate PPA under the *Edgar/Allegheny* standards is essential. The Public Utilities Commission of Ohio (the "PUCO") is poised to authorize the parties to enter into the Affiliate PPA as early as next month, and PJM will conduct the Base Residual Auction for the 2019/2020 Delivery Year (the "2019/2020 BRA") in May 2016.¹⁰ A Commission order making clear its intent to review the Affiliate PPA in accordance with the *Edgar/Allegheny* standards will provide needed assurance to consumers and other market participants that the Affiliate PPA is not going to evade Commission review. It would also afford FirstEnergy sufficient time to file the Affiliate PPA with the Commission and obtain Commission guidance in advance of the 2019/2020 BRA.

⁹ See *FERC v. Elec. Power Supply Ass'n*, Nos. 14-840, *et al.*, slip op. at 28-29 (U.S. Jan. 25, 2016).

¹⁰ See PJM, Auction Schedule, <http://www.pjm.com/~media/markets-ops/rpm/rpm-auction-info/rpm-auction-schedule.ashx>.

I. CORRESPONDENCE AND COMMUNICATIONS

Complainants request that all correspondence and communications regarding this filing be addressed to the following persons, who should be placed on the Commission's official service list in this proceeding:¹¹

For EPSA:

Nancy Bagot
Senior Vice President
Sharon Theodore
Director of Regulatory Affairs
Electric Power Supply Association
1401 New York Ave, NW, 11th Floor
Washington, DC 20005
(202) 628-8200
nancyb@epsa.org
stheodore@epsa.org

David G. Tewksbury
Stephanie S. Lim
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500
(202) 626-3737 (facsimile)
dtewksbury@kslaw.com
sslim@kslaw.com

For RESA:

Elizabeth W. Whittle
NIXON PEABODY LLP
799 Ninth Street, N.W., Suite 500
Washington, DC 20001
(202) 585-8338
(202) 585-8080 (facsimile)
ewhittle@nixonpeabody.com

For Dynegy:

Michelle D. Grant
Senior Corporate Counsel
Dynegy Inc.
601 Travis Street, Suite 1400
Houston, TX 77002
(713) 767-0387
(713) 388-6008 (facsimile)
michelle.d.grant@dynegy.com

Dean Ellis
Vice President
Dynegy Inc.
601 Travis Street, Suite 1400
Houston, TX 77002
(713) 767-0328
dean.ellis@dynegy.com

¹¹ Complainants respectfully request waiver of Rule 203(b) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.203(b) (2015), to the extent necessary to allow each of these individuals to be included on the official service list in this proceeding.

For Eastern Generation:

John P. Reese
Senior Vice President
Liam T. Baker
Vice President, Regulatory Affairs
Eastern Generation, LLC
300 Atlantic Street, 5th Floor
Stamford, CT 06901
(202) 792-0800
(212) 792-0899 (facsimile)
jreese@uspowergen.com
lbaker@uspowergen.com

For the NRG Companies:

Abraham Silverman
Assistant General Counsel, Regulatory
Cortney Madea
Assistant General Counsel, Regulatory
Jennifer Hsia
Senior Counsel - Regulatory
NRG Energy, Inc.
211 Carnegie Center
Princeton, NJ 08540
(609) 524-4500
abraham.silverman@nrg.com
cortney.madea@nrg.com
jennifer.hsia@nrg.com

II. DESCRIPTION OF COMPLAINANTS AND RESPONDENTS

A. Complainants

1. EPSA

EPSA is a national trade association that represents the competitive power industry and is incorporated under the laws of the District of Columbia. EPSA's members include 14 companies, along with numerous supporting members, and state and regional partners, that represent the competitive power industry in their respective regions, including PJM. Competitive suppliers, which collectively account for 40 percent

of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers.¹²

2. RESA

RESA is a non-profit trade association of independent corporations that are involved in the competitive supply of electricity. RESA and its members are actively involved in retail electricity markets throughout the United States, including Ohio and other markets in PJM.¹³

3. Dynegy

Dynegy is a Delaware corporation that, through various subsidiaries, produces and sells electric energy, capacity, and ancillary services in various U.S. markets. Dynegy's power generation portfolio currently consists of approximately 26,000 MW of baseload, intermediate, and peaking power plants fueled by a mix of natural gas, coal, and fuel oil, including approximately 5,332 MW of generation in Ohio. Dynegy also has two retail electricity subsidiaries serving businesses and residents in Ohio and other states.

¹² 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.

¹³ 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 the Association. Founded in 1990, RESA is a broad and diverse group of more than twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

4. Eastern Generation

Eastern Generation is a wholly owned subsidiary of ArcLight Energy Partners Fund VI, L.P., a private equity fund managed by ArcLight Capital Partners, LLC. Eastern Generation recently indirectly acquired generation facilities with an aggregate generating capacity of approximately 4,953 MW, including an approximately 825 MW natural gas-fired generation facility in Vinton County, Ohio.¹⁴

5. The NRG Companies

The NRG Companies are wholly owned subsidiaries of NRG Energy, Inc. (“NRG”) that market the output of affiliated generation in various markets. In Ohio, NRG’s affiliates sell electricity and capacity from its Avon Lake generating facility, facilitate the sale of Ohio demand response into PJM’s market, and sell retail electricity in Ohio. Nationwide, NRG owns over 53,000 MW of electric generating capacity throughout the United States.

B. Respondents

Ohio Edison Company (“Ohio Edison”), The Cleveland Electric Illuminating Company (“CEI”), The Toledo Edison Company (together with Ohio Edison and CEI, the “FE Ohio Utilities”) and FE Solutions (collectively, “Respondents”) are subsidiaries of FirstEnergy. FirstEnergy is a diversified energy company headquartered in Akron, Ohio, and is a holding company under the Public Utility Holding Company Act of 2005.¹⁵

¹⁴ *Astoria Generating Co., L.P.*, 153 FERC ¶ 62,148 (2015) (approving the transaction).

¹⁵ 42 U.S.C. §§ 16451-16463 (2006).

Each of the FE Ohio Utilities is a “franchised public utility,” as defined in Section 35.36(a)(5) of the Commission’s regulations,¹⁶ with a franchised service territory in the State of Ohio. In connection with the implementation of retail choice in Ohio, the FE Ohio Utilities divested virtually all of their generation assets to subsidiaries of FE Solutions.¹⁷ These assets include (but are not limited to) the approximately 2,233 MW coal- and oil-fired W. H. Sammis Plant (the “Sammis Plant”) in Jefferson County, Ohio, the approximately 908 MW nuclear-powered Davis-Besse Power Station (the “Davis-Besse Station”) in Ottawa County, Ohio, and a 4.85 percent entitlement to the output of approximately 2,390 MW of generation in Ohio and Indiana owned by Ohio Valley Electric Corporation (“OVEC”).¹⁸

FE Solutions is a “market-regulated power sales affiliate,” as defined in Section 35.36(a)(7) of the Commission’s regulations,¹⁹ of the FE Ohio Utilities. Among other things, FE Solutions markets the output of electric generation facilities owned by its subsidiaries, including the Sammis Plant, the Davis-Besse Station and the OVEC entitlement.

¹⁶ 18 C.F.R. § 35.36(a)(5) (2015) (defining “franchised public utility” as “a public utility with a franchised service obligation under State law”).

¹⁷ See *FirstEnergy Corp.*, 94 FERC ¶ 61,179 (2001) (approving transfer of fossil-fueled and hydroelectric assets); *FirstEnergy Corp.*, 112 FERC ¶ 61,243 (2005) (approving transfer of nuclear-powered assets), *on reh’g*, 114 FERC ¶ 61,132 (2006).

¹⁸ See Application of Ohio Valley Electric Corporation for Order Accepting Market-Based Rate Tariff for Filing, and Granting Waivers and Blanket Approvals, Docket No. ER16-323-000 (filed Nov. 13, 2015).

¹⁹ 18 C.F.R. § 35.36(a)(7) (2015) (defining “market-regulated power sales affiliate” as “any power seller affiliate other than a franchised public utility . . . whose power sales are regulated in whole or in part on a market-rate basis”).

III. BACKGROUND

A. Previously-Granted Waiver Of Affiliate Sales Restriction

Since the inception of its market-based rate program, the Commission has recognized the risk of self-dealing and other affiliate abuse that exists when a franchised utility transacts with its affiliates. Accordingly, it has made clear that “it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is not distorted.”²⁰ To protect against affiliate abuse, the Commission’s market-based rate regulations expressly provide that “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].”²¹ For purposes of these restrictions, “captive customers” are “wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation.”²²

²⁰ *Edgar*, 55 FERC ¶ 61,382 at 62,167 (footnote omitted). See also *Southern Power Co.*, 153 FERC ¶ 61,068 at P 15 (2015) (“*Southern*”) (same); *Allegheny*, 108 FERC ¶ 61,082 at P 18 (same).

²¹ 18 C.F.R. § 35.39(b) (2015).

²² 18 C.F.R. § 35.36(a)(6) (2015). Retail customers electing to take cost-based service from a franchised public utility acting as a provider of last resort (“POLR”) “are not considered captive customers because, although they may choose not to do so, they have the ability to take service from a different supplier whose rates are set by the marketplace.” *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 480 (“Order No. 697”), *on reh’g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 (“Order No. 697-A”), *on reh’g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *on reh’g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *on reh’g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *clarified*, 131 FERC ¶ 61,021 (2010), *aff’d sub nom. Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied Pub. Citizen, Inc. v. FERC*, 133 S. Ct. 26 (2012).

As noted, the FE Ohio Utilities are “franchised public utilities,” one of whose “market-regulated power sales affiliates” is FE Solutions. FE Solutions and its affiliates requested and received waiver of the affiliate sales restrictions in late 2008.²³

In their Waiver Request, FE Solutions and its affiliates argued that the FE Ohio Utilities have no captive retail customers, because, under Ohio law, all of their retail customers “have retail choice, and by virtue of that law can purchase their power requirements at market-based rates from competitive electric retail suppliers.”²⁴ The Commission agreed and granted the waiver on that basis.²⁵ On rehearing, the Commission stated that even if the FE Ohio Utilities’ POLR customers were deemed to be captive, it would still have granted the waiver based on the State-mandated procurement process in place and PUCO oversight of that process.²⁶ As described by the Commission, Ohio law requires that the State’s franchised utilities:

provide retail customers with a standard service offer consisting of either a market rate offer (which is a competitive bidding process) or an electric security plan (which is a negotiated rate). Section 4928.142 of the Ohio Code (governing the market rate offer) provides that the competitive bidding process for the market rate offer must include the following: transparency; a clear product definition; standardized bid evaluation criteria; and oversight by an independent third party. In the event that an electric distribution utility chooses to file an application for the [PUCO]’s approval of an electric security plan, Section 4928.143 of the Ohio Code provides that the [PUCO] is required to determine whether the electric security plan, including its pricing and all other terms and conditions,

²³ See Amendments to Market-Based Rate Tariffs Waiving Affiliate Restrictions in Ohio, Docket Nos. ER09-134-000, *et al.* (filed Oct. 24, 2008) (the “Waiver Request”), *accepted*, *FirstEnergy I*, 125 FERC ¶ 61,356, *on reh’g*, *FirstEnergy II*, 128 FERC ¶ 61,119.

²⁴ Waiver Request at 10.

²⁵ See *FirstEnergy I*, 125 FERC ¶ 61,356 at PP 27-31.

²⁶ *FirstEnergy II*, 128 FERC ¶ 61,119 at PP 18-20.

is more favorable in the aggregate as compared to the expected results that would otherwise apply under a market rate offer. The [FE] Ohio [] Utilities' ability to implement either a market rate offer or an electric security plan is dependent on approval by the [PUCO].²⁷

B. The Proposed Affiliate Transaction

In an August 4, 2014 application to the PUCO, the FE Ohio Utilities proposed their fourth electric security plan ("ESP IV").²⁸ A central element of ESP IV is the so-called "Economic Stability Program," an arrangement allegedly 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."²⁹ Under this program, the FE Ohio Utilities would enter into the Affiliate PPA with FE Solutions, and thereby agree to purchase the output of the Sammis Plant and the Davis-Besse Station, as well as the OVEC entitlement, on a long-term basis.³⁰ Under the Affiliate PPA, as originally proposed, the FE Ohio Utilities would pay rates reflecting the full embedded costs of the Sammis Plant and the Davis-Besse Station developed using an assumed 50/50 debt/equity ratio and a return on equity ("ROE") of 11.15 percent.³¹

²⁷ *Id.* at P 19 (footnote omitted).

²⁸ See Application, PUCO Case No. 14-1297-EL-SSO (filed Aug. 4, 2014) (the "ESP Application"), <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=7708e19d-64d4-42a4-ab52-00cfd4e10d7b>.

²⁹ *Id.* at 2.

³⁰ See *id.* at 2, 9. See also PUCO Exhibit Filing, Sierra Club Exh. 1, PUCO Case No. 14-1297-EL-SSO (dated Sept. 17, 2015) (the "Term Sheet"), <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=2b6f449c-8fe9-44e8-98f4-ceb585eb707c>.

³¹ See Direct Testimony of Jay A. Ruberto on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company at 3, 7-8, PUCO Case No. 14-1297-EL-SSO (filed Aug. 4, 2014) ("Ruberto Direct Testimony"), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A14H04B61610G15457.pdf>.

The power purchased under the Affiliate PPA will not be offered into any of the competitive solicitation auctions conducted pursuant to an electric security plan, and will not otherwise be used to serve retail consumers in the FE Ohio Utilities' service territories. Rather, the FE Ohio Utilities will re-sell the purchased power into the PJM markets and recover the difference between costs incurred under the Affiliate PPA and revenues from such resale through a non-bypassable Retail Rate Stability Rider ("Rider RRS") applicable to all retail customers, including those taking retail service from competitive retail suppliers.³² The FE Ohio Utilities have represented to the PUCO that the "Economic Stability Program" will have "no adverse impact on the [competitive retail] market in Ohio, customers' ability to shop for generation service, or on the [FE Ohio Utilities'] competitive bidding process or [POLR] supply."³³ They have never explained, however, how the impact on the distorting effect of the FE Ohio Utilities' submitting below cost offers for this capacity and energy on the PJM wholesale markets will not have significant adverse effects on retail competition and POLR customers in Ohio.

The FE Ohio Utilities have modified various aspects of the Economic Stability Program and other elements of ESP IV through a series of stipulations with some (but certainly not all) of the parties to the PUCO proceedings. Most recently, they submitted, on December 1, 2015, a third stipulation with the PUCO Staff and a minority of the parties to the proceeding.³⁴ Among other things, the Third Stipulation modifies the

³² See ESP Application at 9. To the extent revenues exceeded costs, retail customers would see a credit. See *id.*

³³ *Id.*

³⁴ See Third Supplemental Stipulation and Recommendation, PUCO Case No. 14-1297-EL-SSO (filed Dec. 1, 2015) (the "Third Stipulation"), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A15L01A85343G03072.pdf>.

Economic Stability Program to shorten the term to eight years (from the originally-proposed 15 years), to reduce the ROE from 11.15 to 10.38 percent, and to provide for additional PUCO review of Rider RRS.³⁵ At the same time, the overall effect of the Third Stipulation is to give FirstEnergy “even more than it wanted” in terms of shareholder benefits than its initial proposal.³⁶ The FE Ohio Utilities, PUCO Staff and other parties to the Third Stipulation have asked the PUCO to approve ESP IV, as modified by the stipulations, by February 10, 2016.³⁷

In the proceedings before the PUCO, the FE Ohio Utilities have stated that the Affiliate PPA will not be filed with the Commission.³⁸ At the same time, they have not requested PUCO approval of the Affiliate PPA and have steadfastly maintained that the PUCO “is not at liberty to change the terms of the [Affiliate PPA].”³⁹

³⁵ See *id.* at 7-8; Fifth Supplemental Testimony of Eileen M. Mikkelsen on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company at 7, PUCO Case No. 14-1297-EL-SSO (Dec. 1, 2015) (“Mikkelsen Fifth Supplemental Testimony”), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A15L01A85743A03074.pdf>.

³⁶ Dick Munson, *FirstEnergy Sought a Bailout. Ohio Regulators are Simply Selling Out*, Environmental Defense Fund Energy Exchange, Dec. 1, 2015, <http://blogs.edf.org/energyexchange/2015/12/01/firstenergy-sought-a-bailout-ohio-regulators-are-simply-selling-out/>.

³⁷ See Third Stipulation at 6.

³⁸ See Transcript, Vol. III at 660-61, PUCO Case No. 14-1297-EL-SSO (hearing held Sept. 1, 2015) (“Sept. 1 Tr.”) <http://dis.puc.state.oh.us/TiffToPDF/A1001001A15I17B51328H00492.pdf>. See also, e.g., Transcript, Vol. XIII at 2868-69, PUCO Case No. 14-1297-EL-SSO (hearing held Sept. 17, 2015), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A15J01B60337G00832.pdf>; Transcript, Vol. I at 130-31, PUCO Case No. 14-1297-EL-SSO (hearing held Aug. 31, 2015) (“Aug. 31 Tr.”), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A15I15B54357J00178.pdf>.

³⁹ 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/A1001001A15I18B44510B00652.pdf>; Sept. 1 Tr. at 655-57; Aug. 31 Tr. at 39-40.

IV. COMPLAINT

What the FE Ohio Utilities call an “Economic Stability Program” is, in reality, a massive ratepayer-funded bailout of their market-regulated power sales affiliate, FE Solutions.⁴⁰ This bailout may provide economic stability for their common parent, FirstEnergy,⁴¹ but it will do so by imposing hundreds of millions, if not billions, of dollars in above-market costs on captive retail consumers, and at the price of potentially enormous market distortion. It is essential that the Commission act to protect both consumers and the PJM markets by requiring that the Affiliate PPA be separately filed pursuant to Section 205 of the FPA and reviewed in accordance with the Commission’s established *Edgar/Allegheny* standards.

While Respondents and perhaps others will likely suggest that this Complaint is premature because the PUCO has not yet acted, immediate Commission action is, in fact, essential. Not only are Ohio consumers facing hundreds of millions, if not billions, of dollars in above-market costs to fund FirstEnergy’s “Stockholder Protection Plan,”⁴²

⁴⁰ See John Funk, *FirstEnergy opponents have sharp criticism for latest rate plan*, Cleveland Plain Dealer, Dec. 1, 2015, http://www.cleveland.com/business/index.ssf/2015/12/firstenergy_opponents_have_sha.html. See also John Finnegan, *FirstEnergy’s Bailout Isn’t Just Bad Policy – It’s Illegal*, Environmental Defense Fund Energy Exchange, Dec. 10, 2015, <http://blogs.edf.org/energyexchange/2015/12/10/firstenergys-bailout-isnt-just-bad-policy-its-illegal/>; Direct Testimony Joseph P. Kalt, Ph.D. on behalf of the PJM Power Providers Group and the Electric Power Supply Association at 7, PUCO Case No. 14-1297-EL-SSO (dated Dec. 22, 2014) (“Kalt Direct Testimony”), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A14L23B44153J85857.pdf>; Second Supplemental Testimony of Joseph P. Kalt, Ph.D. on behalf of the PJM Power Providers Group and the Electric Power Supply Association at 4, PUCO Case No. 14-1297-EL-SSO (dated Dec. 30, 2015) (“Kalt Second Supplemental Testimony”).

⁴¹ See William Pentland, *FirstEnergy Finagles Mother of All Boondoggles*, Forbes, Dec. 12, 2015, <http://www.forbes.com/sites/williampentland/2015/12/12/firstenergy-finagles-mother-of-all-boondoggles/#2715e4857a0b141164d87e71>.

⁴² *PUCO must oppose FirstEnergy settlement for Davis-Besse, coal plant bailout: editorial*, Cleveland Plain Dealer, Dec. 11, 2015, http://www.cleveland.com/opinion/index.ssf/2015/12/puco_must_oppose_firstenergys.html.

the threatened *de facto* re-regulation of the Ohio market and the subsidization of previously-divested generation assets have created an acute crisis of investor confidence in PJM markets⁴³ and threaten irreversible market distortion, including distortion of the upcoming 2019/2020 BRA. When combined with a similar scheme proposed by AEP,⁴⁴ the Affiliate PPA will result in the subsidized retention of over 6 GW of generation that would, according to FirstEnergy and AEP, otherwise retire.⁴⁵ It is hard to imagine a more clear threat to the viability of the PJM market or a circumstance that more clearly and urgently requires the Commission's attention.⁴⁶ Moreover, with the

⁴³ See, e.g., Letter from Chuck Davis to the PJM Board of Managers (dated Jan. 13, 2016) (letter from Carroll County Energy LLC describing the threat that the Affiliate PPA, as well as a similar proposal by affiliates of American Electric Power Company, Inc. ("AEP"), poses to investors in an approximately 700 MW natural gas-fired, combined-cycle facility under construction in Ohio), <http://www.pjm.com/~media/about-pjm/who-we-are/public-disclosures/20160113-apa-management-letter-regarding-ohio-ppa-settlements.ashx>; Letter from Lucas Missong to the PJM Board of Managers (dated Jan. 22, 2016) (letter from Oregon Clean Energy, LLC describing the threat that the Affiliate PPA and AEP's similar proposal poses to an 860 MW natural gas-fired combined cycle generator under construction in Lucas County, Ohio and an additional 860 MW project under development in Ohio), <http://www.pjm.com/~media/about-pjm/who-we-are/public-disclosures/20160125-oregon-clean-energy-llc-letter-to-pjm-board-of-managers.ashx>.

⁴⁴ Complainants are concurrently filing a separate complaint with respect to the waiver of the Commission's affiliate power sales restrictions previously granted to AEP's market-based rate subsidiaries.

⁴⁵ By comparison, the New Jersey and Maryland programs – which were, quite rightly, recognized as a serious threat to the PJM market – involved subsidies for the uneconomic entry of “only” about 3.8 GW of generation. See *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 at PP 19-20, *on reh'g*, 137 FERC ¶ 61,145, *on clarification & reh'g*, 138 FERC ¶ 61,160 (2011), *aff'd sub nom. New Jersey Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 3rd Cir. 2014).

⁴⁶ This Complaint asks only that the Commission rescind the waiver and review the Affiliate PPA pursuant to Section 205 of the FPA and in accordance with the *Edgar/Allegheny* standards. Complainants believe that the contemplated actions of the PUCO approving Rider RRS and guaranteeing the rates that will be received by the FE Ohio Utilities for their resale of the energy and capacity to be purchased from FE Solutions under the Affiliate PPA would separately be preempted by the FPA and subject to injunction. Any such preemption claim would be properly adjudicated in federal district court, see 16 U.S.C. §§ 825p, 825m(a) (2012), and the Commission need not and, indeed, should not address preemption questions in this proceeding.

PUCO already having approved retail rate riders of essentially the same type for AEP⁴⁷ and Duke Energy Ohio, Inc.,⁴⁸ it is hard to imagine that it will not do likewise for the FE Ohio Utilities – meaning that the only real issue remaining before the PUCO may be how much they will be allowed to recover from captive consumers through Rider RRS.

A. The Bases For The Waiver Of The Affiliate Power Sales Restrictions Are Invalid Where The Affiliate PPA Is Concerned

Rescinding the previously-granted waiver of the affiliate power sales restrictions, as it relates to the Affiliate PPA is entirely appropriate under these circumstances, because, as discussed below, the circumstances surrounding the Affiliate PPA are dramatically changed relative to those described to the Commission when it granted the waiver.⁴⁹

⁴⁷ See *In the Matter of the Application of Ohio Power Co. for Auth. to Establish a Standard Serv. Offer Pursuant to R.C. 4928.143, in the Form of an Elec. Security Plan*, Order and Opinion at 19-27, PUCO Case Nos. 13-2385-EL-SSO, *et al.* (Feb. 25, 2015), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A15B25B40110J73365.pdf>.

⁴⁸ *In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Elec. Security Plan, Accounting Modifications, & Tariffs for Generation Serv.*, Opinion and Order at 46-47, PUCO Case No. 14-841-EL-SSO, *et al.* (Apr. 2, 2015), <https://dis.puc.state.oh.us/TiffToPDF/A1001001A15D02B40703H86216.pdf>.

⁴⁹ The circumstances are sufficiently changed relative to the bases upon which the Commission granted the waiver that Complainants would hope and expect that the FE Ohio Utilities, FE Solutions and their affiliates with market-based rate authorization will recognize their obligation to file a notice of change in status pursuant to Section 35.42 of the Commission's regulations, 18 C.F.R. § 35.42 (2015). See *FirstEnergy II*, 128 FERC ¶ 61,119 at P 21 (reminding FE Solutions and its affiliates of their "obligation to report to the Commission any changes in status that may affect the basis on which the Commission relied in granting a waiver of the affiliate restrictions").

1. Retail Customers In The FE Ohio Utilities’ Service Territories Are Captive With Respect To The Affiliate PPA

The Commission has long recognized that, absent adequate safeguards, a “power marketer could sell power to its affiliated franchised public utility at an above market price, and that affiliated utility could then pass those costs through to its captive customers.”⁵⁰ That is precisely what is occurring here: FE Solutions will be selling power to the FE Ohio Utilities at an above-market price, and the FE Ohio Utilities will then pass those costs through to their captive customers. Indeed, this case effectively involves what the Commission has previously described as an “extreme example” of such affiliate abuse: “a holding company that siphons funds from a franchised public utility to support its failing market-regulated power sales affiliate”⁵¹

To be sure, the State of Ohio still has retail choice in the sense that customers may choose to receive retail service from competitive suppliers. But the “Economic Stability Program” would eliminate retail choice as it relates to the FE Ohio Utilities’ purchases under the Affiliate PPA, because customers will have no ability to choose not to bear the costs that those companies will incur under the Affiliate PPA. All customers, regardless of whether they take POLR service from the FE Ohio Utilities or have opted to take service from a competitive retail supplier, will be subject to the non-bypassable Rider RRS charges, and those charges will be cost-based in that they will represent the net cost of the affiliate purchases – the difference between what the FE Ohio Utilities

⁵⁰ *Illinova Power Mktg., Inc.*, 88 FERC ¶ 61,189 at 61,649 (1999) (“*Illinova*”).

⁵¹ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at n.280.

pay their affiliate, FE Solutions, and what they receive in the PJM markets.⁵² As a result, where costs of the Affiliate PPA are concerned, retail customers will be “served by a franchised public utility under cost-based regulation”⁵³ just as surely as they were before retail choice.

The fact that the Rider RRS charges will apply to **all** retail customers is a critical distinction between the Affiliate PPA and other affiliate transactions whose costs are recovered solely from POLR customers. Complainants recognize that the Commission has held that:

Retail customers in retail choice states who choose to buy power from their local utility at cost-based rates as part of that utility’s [POLR] obligation, which is the case here, are not considered captive customers – that is, they are not served under cost-based regulation, since that term indicates the absence of retail choice.⁵⁴

The vital difference here is that retail customers in the FE Ohio Utilities’ service territories cannot avoid the cost of the affiliate transaction by choosing to take service from a competitive supplier, and thus retail choice, in any meaningful sense, is entirely absent. These retail customers could not be more captive with respect to costs of the Affiliate PPA if they were locked in a cage with a greedy tiger.

⁵² The Rider RRS charges are no less cost-based by virtue of their being based on the difference between costs incurred under an allegedly “market-based rate” contract and revenues from market-based rate sales into the PJM markets. In this respect, the inputs to the Rider RRS charges are no different from other inputs to cost-based rates, such as turbines, transformers, etc., whose prices are “market-based.”

⁵³ 18 C.F.R. § 35.36(a)(6) (2015).

⁵⁴ *Duquesne Light Holdings, Inc.*, 117 FERC ¶ 61,326 at P 38 (2006).

2. The Commission Cannot Rely On The PUCO To Ensure That The Rates, Terms And Conditions Of The Affiliate PPA Are Just, Reasonable And Not Unduly Discriminatory

On rehearing of the order granting waiver of the affiliate power sales restrictions, the Commission accepted FirstEnergy's claim that "continuing PUCO regulation of affiliate *purchases* provides sufficient safeguards without having to inquire into the efficacy of Ohio's retail choice program,"⁵⁵ finding that the "state-mandated procurement process . . . subject to oversight of the [PUCO]" was sufficient to prevent affiliate abuse, even if the FE Ohio Utilities' customers "met the definition of captive customers"⁵⁶ The problem with this reasoning, as it relates to the Affiliate PPA, is that the Affiliate PPA is not being procured through any PUCO-approved competitive solicitation process. Moreover, to the extent that this holding is construed as applying even to non-competitive procurement, it falsely assumes that the PUCO has the power to review the justness and reasonableness of the Affiliate PPA and thereby allows FirstEnergy to create, and then exploit, a regulatory gap.

As the FE Ohio Utilities have insisted in the PUCO proceedings, the PUCO lacks the authority to review the Affiliate PPA.⁵⁷ To be sure, ESP IV contemplates "rigorous review" by the PUCO of the FE Ohio Utilities' actions "when **selling** the output from

⁵⁵ Waiver Request at 14 (emphasis in original).

⁵⁶ *FirstEnergy II*, 128 FERC ¶ 61,119 at P 18.

⁵⁷ See *supra* note 39. FirstEnergy appeared to begin its retreat from the suggestion that the PUCO regulates the FE Ohio Utilities' purchases in the waiver docket. See FirstEnergy's Motion for Leave to Answer and Answer to Rehearing Requests of Ohio Parties at 3-4, Docket Nos. ER09-134-001, *et al.* (Feb. 5, 2009). Nonetheless, the *FirstEnergy II* order appears to assume that the PUCO would, in fact, review "procurement" in a way that would ensure that any affiliate purchases are on just and reasonable terms. *FirstEnergy II*, 128 FERC ¶ 61,119 at P 18.

generation units included in Rider RRS into the PJM market”⁵⁸ But no matter how rigorous this (or any other) PUCO review may be, it cannot lawfully encompass any review of the justness and reasonableness of the rates, terms and conditions of the Affiliate PPA. Any attempt by the PUCO to engage in such review, whether undertaken in advance or in determining what costs are recoverable under Rider RRS, would intrude upon the Commission’s exclusive jurisdiction under the FPA over rates, terms and conditions for wholesale sales.⁵⁹ PUCO oversight is thus no substitute for Commission review of the Affiliate PPA.

Meanwhile, if the waiver applies to the Affiliate PPA, there will be no effective oversight at the federal level either. The Commission’s market-based rate regime rests on the eminently reasonable presumption that rates negotiated at arm’s-length by a seller that lacks market power can be expected to satisfy the statutory just and reasonable standard, meaning that *ex ante*, transaction-specific review is unnecessary.⁶⁰ This presumption evaporates, however, when affiliates are involved, because of the incentive for “self-dealing” that follows naturally when the transacting parties “have the same goal: maximize profits for the parent firm.”⁶¹ Naturally, the

⁵⁸ Third Stipulation at 8 (emphasis added).

⁵⁹ See, e.g., *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986); Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 415 (“[O]nly the Commission has the authority to determine the justness and reasonableness of a public utility’s wholesale rates and . . . a state cannot disallow pass-through in retail rates on the basis that it disagrees with the Commission’s just and reasonable determination.”).

⁶⁰ See Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 963; *Citizens Power & Light Corp.*, 48 FERC ¶ 61,210 at 61,776-79 (1989) (“*Citizens*”). See also, e.g., *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990) (“In a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable . . .”).

⁶¹ *Citizens*, 48 FERC ¶ 61,210 at 61,777. Cf. also *Nantahala Power & Light Co. v. FERC*, 727 F.2d 1342, 1345 (4th Cir. 1984) (explaining that affiliate transactions “cannot be presumed

Commission does not need to concern itself with affiliate abuse when “non-traditional” affiliates without captive customers are involved, because a transaction undertaken by such an affiliate “at the expense of other non-traditional affiliates simply results in an allocation of revenues among the ‘non-regulated’ affiliates,” with “the profits ultimately go[ing] to [the same] shareholders”⁶² The Commission has properly been concerned, however, where, as here, the power marketer is “sell[ing] power to its affiliated public utility at an above market price, and . . . the affiliated utility c[an] then pass these costs through to its captive customers.”⁶³

FirstEnergy cannot be allowed to evade review at the federal level on the theory that the PUCO has it covered, particularly when it acknowledges (as it must) that the PUCO has no jurisdiction to review the Affiliate PPA. This gambit would unlawfully re-create precisely the sort of regulatory gap that the FPA was enacted to fill,⁶⁴ leaving FE Solutions free to make wholesale power sales to the FE Ohio Utilities at rates that that were not, by any stretch of the imagination, negotiated at arm’s-length and that are unjust, unreasonable and unduly discriminatory.

to be as fair as they would be if [the transacting parties] were independent entities”); *PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,128 at P 109 (2014) (“[A]rm’s-length bargaining is a process in which each party pursues its individual interests, and a negotiation in which the parties pursue a single, common, and shared interest is thus inconsistent with such bargaining”), *on reh’g*, 150 FERC ¶ 61,038, *on reh’g*, 151 FERC ¶ 61,250 (2015).

⁶² *USGen Power Servs., L.P.*, 73 FERC ¶ 61,302 at 61,846 (1995).

⁶³ *Illinova*, 88 FERC ¶ 61,189 at 61,649.

⁶⁴ See *Arkansas Elec. Coop. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 379 (1983) (stating that “the main purpose of th[e] FPA] was to ‘fill the gap’ created by [*Public Utils. Comm’n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927)] and its predecessors”).

B. Allowing The Waiver To Cover The Affiliate PPA Will Result In Exactly The Harms That The Affiliate Power Sales Restriction Is Meant To Prevent

Even assuming *arguendo* that the bases upon which the waiver of the affiliate power sales restrictions was granted remained valid, it would still be manifestly unjust, unreasonable and unduly discriminatory for that waiver to be allowed to apply under these circumstances. The Affiliate PPA threatens exactly the sorts of harm to both consumers *and* markets that the affiliate power sales restrictions exist to prevent.⁶⁵ The Affiliate PPA thus demands review under the *Edgar* and *Allegheny* standards, which will not occur unless the waiver is rescinded as it relates to the Affiliate PPA.

Experts estimate that the Affiliate PPA will saddle retail customers in the FE Ohio Utilities' service territories with hundreds of millions, if not billions, of dollars in above-market costs.⁶⁶ Not surprisingly, the FE Ohio Utilities tell a different story, one in which

⁶⁵ See, e.g., *Southern*, 153 FERC ¶ 61,068 at P 15; *Allegheny*, 108 FERC ¶ 61,082 at P 18; *Edgar*, 55 FERC ¶ 61,382 at 62,167. See also *Pinnacle W. Capital Corp.*, 109 FERC ¶ 61,295 at P 31 (2004) (finding that a market-based rate applicant had satisfied the Commission's affiliate abuse concerns but noting that "the Commission has become increasingly concerned about the potential impact affiliate transactions may have not only on customers, but also on wholesale competition"), *on clarification*, 110 FERC ¶ 61,127 (2005); *Sunbury Generation, LLC*, 108 FERC ¶ 61,160 at P 41 (2004) (same).

⁶⁶ 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 (dated 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>; Kalt Second Supplemental Testimony at 17 (projecting a net present value loss to captive customers of as much as \$858 million). It is not just the pricing of the Affiliate PPA that is one-sided; the agreement would also shift the risk of penalties under PJM's Capacity Performance construct onto captive consumers. See Second Supplemental Testimony of Lael Campbell on Behalf of Constellation NewEnergy, Inc. and Exelon Generation Company, LLC at 4, PUCO Case No. 14-1297-EL-SSO (filed Dec. 30, 2015) ("Campbell Second Supplemental Testimony"), <http://dis.puc.state.oh.us/TiffToPdf/A1001001A15L30B13832D02812.pdf>. As the Commission well knows, such penalties are, by design, "substantial." *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208 at P 15 (2015).

the Affiliate PPA will produce significant financial benefits to consumers.⁶⁷ As Joseph P. Kalt, Ph.D. explained in testimony before the PUCO, however, this story collapses when juxtaposed with the FE Ohio Utilities' claims that the Affiliate PPA is needed to prevent the Sammis Plant and the Davis-Besse Station from shutting down.⁶⁸ Dr. Kalt observed that the FE Ohio Utilities' proposal thus

involves an economic *non sequitur*. If the plants face retirement, it is because they do not yield a positive net present value for an efficient owner going forward – and would not do so for ratepayers. That is the plants are “losers.” On the other hand, if the plants can and will produce a positive net present value on the open market . . . for ratepayers even when those ratepayers pay the full embedded cost (plus return) of the plants, they would also do so for an efficient, non-subsidized owners and would therefore not rationally be retired. Indeed, under the latter conditions, FE[Solutions] is inexplicably giving the right to the plants' outputs away to ratepayers at below their fair market value.⁶⁹

In other words, if the FE Ohio Utilities' claims about the benefits to consumers of the Affiliate PPA are true, this contract represents the first recorded instance in which the polarity of affiliate abuse has been reversed and affiliates are voluntarily transacting with each other in a way designed to transfer value from shareholders to captive consumers.

Separate and apart from what the experts have said, ***the market*** has spoken and has confirmed just how grossly-one sided the Affiliate PPA really is: competing

⁶⁷ See Mikkelsen Fifth Supplemental Testimony at 12. See *also* Ruberto Direct Testimony at 6.

⁶⁸ See ESP Application at 2, 9-10; Direct Testimony of Donald Moul on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company at 2, PUCO Case No. 14-1297-EL-SSO (filed Aug. 4, 2014) (“The economic viability of the Plants is in doubt.”), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A14H04B61449B97661.pdf>.

⁶⁹ Kalt Direct Testimony at 5. See *also id.* at 9-10.

suppliers, not affiliated with FirstEnergy, have offered to supply the FE Ohio Utilities the same amount of energy and capacity at prices that would save consumers between \$2 billion and \$2.5 billion over the contract term.⁷⁰ To be clear, Complainants oppose Rider RRS and would continue to oppose it even if a non-affiliated supplier were substituted for FE Solutions as the seller, without a competitive solicitation.⁷¹ Nonetheless, these offers remove any doubt as to the magnitude of the above-market costs that retail customers in the FE Ohio Utilities' service territories would bear under the Affiliate PPA. Assuming *arguendo* that the FE Ohio Utilities are going to enter into a power purchase agreement of the sort contemplated by ESP IV, entering into the Affiliate PPA will now indisputably cost retail customers billions of dollars relative to market alternatives. But for the affiliate preference, a rational purchaser would choose either of these offers over the Affiliate PPA in a heartbeat.

Over and above the impact on Ohio consumers, the impact of the Affiliate PPA on the PJM markets will be enormous. If it is true, as FirstEnergy suggests, that the Sammis Plant and the Davis-Besse Station would retire but for the Affiliate PPA, this case involves the same issue of “uneconomic non-exit” – *i.e.*, subsidized retention of resources that would otherwise have left the market – with which the Commission has

⁷⁰ See Campbell Second Supplemental Testimony at 6; Dynegy, News Release, *Dynegy Offers Superior Alternatives to the FirstEnergy and AEP PPA Subsidies*, Jan. 12, 2016, <http://www.dynegy.com/news/news-release?newsurl=http%3A%2F%2Fphx.corporate-ir.net%2Fphoenix.zhtml%3Fc%3D147906%26amp%3Bp%3DRssLanding%26amp%3Bcat%3Dnews%26amp%3Bid%3D2128549>.

⁷¹ The same is true of Exelon Generation Company, LLC (“ExGen”), one of the suppliers that made such an offer. See Campbell Second Supplemental Testimony at 2 (stating that ExGen “is opposed to the [Third] Stipulation and Rider RRS in its entirety (including the [Affiliate PPA]), and believes that the [PUCO] should reject both outright”).

been confronted in other proceedings.⁷² Because capacity markets are designed to convey the price signals needed **both** to encourage entry of economic new resources and to discourage the premature exit of economic existing resources,⁷³ it follows naturally that uneconomic non-exit will present the same threat to such markets as uneconomic entry.

The subsidies that will be paid under the Affiliate PPA threaten serious disruption of the wholesale markets. As Joseph E. Bowring, Ph.D., the Independent Market Monitor for PJM testified in the PUCO proceeding, the effect of the Affiliate PPA is that the Sammis Plant and the Davis-Besse Station will “be returned to the cost of service regulation regime that predated the introduction of competitive wholesale power markets.”⁷⁴ Dr. Bowring further testified that such an arrangement “is not consistent with competition in the PJM wholesale power market” because it:

would require that the ratepayers of the [FE Ohio Utilities] subsidize the cost of the plants and the contracts to the benefit of the [FE Ohio Utilities]. The logical offer price in the PJM capacity market, under these conditions, would be zero. A zero offer would be rational because this would maximize the revenue offset to the customers who would be required to pay 100 percent of the costs of this capacity. This would

⁷² See *Independent Power Producers of N.Y., Inc. v. New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,214 at P 69 (2015) (finding that a contract that would provide subsidies for the retention of capacity “above the amount needed for short-term reliability” could “raise potential issues of artificial price suppression”).

⁷³ See, e.g., *Maine Pub. Utils. Comm’n v. FERC*, 520 F.3d 464, 473 (D.C. Cir. 2008) (explaining that the New England capacity market was intended to “ensure both that existing generators are adequately compensated and that prices support new entry when additional capacity is needed”), *rev’d in part not relevant*, *NRG Power Mktg. LLC v. Maine Pub. Utils. Comm’n*, 558 U.S. 165 (2010).

⁷⁴ Direct Testimony of Joseph E. Bowring on Behalf of the Independent Market Monitor for PJM at 3, PUCO Case No. 14-1297-EL-SSO (filed Dec. 23, 2014) (“Bowring Direct Testimony”), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A14L23B53330D43713.pdf>.

have an anti-competitive, price-suppressive effect on the PJM capacity markets.⁷⁵

As Dr. Kalt testified, the proposal “will depress prices in the wholesale market, benefit inefficient producers at the expense of more efficient ones, and crowd out new and existing suppliers.”⁷⁶ Indeed, as Dr. Bowring observed, these sorts of subsidies “negatively affect the incentives to build new generation and would likely result in a situation where only subsidized units would ever be built.”⁷⁷ Among other things, Dr. Kalt also explained that, as a result of being effectively guaranteed a return of, and on, its investments, FE Solutions “would rationally seek to make capital investments in the plants, even when such investments are uneconomic relative to alternatives in the open marketplace.”⁷⁸

The fact that the Sammis Plant’s and the Davis-Besse Station’s return to the cost-of-service nest may only be temporary does not make the Affiliate PPA any less troubling. To the contrary, in certain respects, it makes matters worse. The Commission has consistently refused to “allow[] generation resources to ‘toggle between’ market-based and cost-based rates, at the expense of properly functioning

⁷⁵ *Id.* See also First Supplemental Testimony of Joseph E. Bowring on Behalf of the Independent Market Monitor for PJM at 4-5, PUCO Case No. 14-1297-EL-SSO (filed Dec. 30, 2015) (“Bowring First Supplemental Testimony”), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A15L30B52627E02902.pdf>. The harm to the market could be mitigated by imposing a floor on the FE Ohio Utilities’ offers into the PJM markets. See *id.* at 6-7; Direct Testimony of F. Stuart Bresler, III on Behalf of PJM Interconnection, PUCO Case No. 14-1297-EL-SSO (filed Dec. 30, 2015), <http://dis.puc.state.oh.us/TiffToPDF/A1001001A15L30B61150F02978.pdf>. Of course, as Dr. Bowring observed, doing so would work to reduce the offset to costs that the FE Ohio Utilities’ customers will bear under Ride RRS. Bowring First Supplemental Testimony at 7.

⁷⁶ Kalt Direct Testimony at 8.

⁷⁷ Bowring Direct Testimony at 3.

⁷⁸ Kalt Direct Testimony at 9 (footnote omitted).

markets.”⁷⁹ The FirstEnergy proposal represents toggling on a truly grand scale: FE Solutions will get to send over 3 GW of its least economic generation to the cost-based spa for eight years before it returns, rested and refreshed, to the market. In the meantime, its competitors will face market prices artificially suppressed by the FE Ohio Utilities’ below-cost offers of the output of that same generation. Adding insult to injury is the fact that this same capacity previously toggled from cost-based rates to market-based rates when it was transferred from the FE Ohio Utilities to FE Solutions, with the understanding that, following an opportunity to recover stranded costs, Ohio consumers would no longer bear the costs or risks of these plants.⁸⁰ In this regard, FirstEnergy’s latest ride on the toggle-go-round will deprive Ohio consumers of one of the key benefits of the competitive paradigm, which was supposed to get away from a system that used “the captivity of local ratepayers to insulate generation owners from risk.”⁸¹

⁷⁹ *ISO New England Inc.*, 145 FERC ¶ 61,110 at P 37 (2013). See also, e.g., *New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116 at P 21 (2015); *ISO New England Inc.*, 125 FERC ¶ 61,102 at PP 45-48, *on clarification*, 125 FERC ¶ 61,324 (2008), *on reh’g & clarification*, 130 FERC ¶ 61,089 (2010); *Bridgeport Energy, LLC*, 118 FERC ¶ 61,243 at P 66 (2007). FirstEnergy is well aware of this precedent, having objected to other sellers’ efforts to toggle between cost-based and market-based rates. See FirstEnergy’s Motion to Intervene, Protest, and Requests for Rejection, Maximum Suspension, and Evidentiary Hearings at 14, Docket No. ER12-1173-000 (filed Mar. 21, 2012).

⁸⁰ See Direct Testimony of Kenneth Rose, Ph.D. on Behalf of the Ohio Office of Consumers’ Counsel at 17, PUCO Case No. 14-1297-EL-SSO (filed Dec. 22, 2014) (“Rose Direct Testimony”), <http://dis.puc.state.oh.us/TiffToPdf/A1001001A14L22B45918J69232.pdf>.

⁸¹ Kalt Direct Testimony at 8. See also Rose Direct Testimony at 15 (describing the FE Ohio Utilities’ “proposal is an attempt to ‘re-regulate’ the very service (competitive generation) that has been the focus of attempts to deregulate, at both the federal and state levels” but in a fashion inferior to traditional regulation where a “revenue guarantee [is] masked as partial cost-based regulation”); The Electric Energy Market Competition Task Force, *Report to Congress on Competition in Wholesale & Retail Markets for Elec. Energy* at 25 (Apr. 2007) (explaining that one of the reasons for retail restructuring was “shift the risks of new generation construction from ratepayers to competitive market providers”), <http://www.ferc.gov/legal/fed-sta/ene-pol-act/epact-final-rpt.pdf>.

To be clear, Complainants are not asking the Commission to prejudge the issues that would be presented if and when it has the opportunity to review the Affiliate PPA under Section 205 of the FPA.⁸² The Commission is obviously in no position to review a contract that has not been filed and that has not even been executed yet. Nor are Complainants asking the Commission, either in this proceeding or any future proceeding in which it reviews the Affiliate PPA, “to pass judgment on state resource procurement policies.”⁸³ States indisputably possess broad authority over generation and the procurement practices of state-regulated utilities. What the Commission can, should and, in Complainants’ view, must do is act to ensure that it has the **opportunity** to review the Affiliate PPA under Section 205 and in accordance with well-established Commission standards for reviewing affiliate power sales contracts, *i.e.*, the *Edgar/Allegheny* standards,⁸⁴ in order to ensure that the rates, terms and conditions of this wholesale power sales contract are just and reasonable.

V. RELIEF REQUESTED

Complainants respectfully request that the Commission rescind the waiver of the affiliate power sales restrictions previously granted to Respondents, as that waiver relates to the Affiliate PPA, for the reasons set forth herein and that it make such rescission effective as of the date of filing of this Complaint pursuant to Section 206(b)

⁸² 16 U.S.C. § 824d (2012).

⁸³ *PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,066 at P 40 (2015).

⁸⁴ Complainants note that the *Edgar/Allegheny* standards will apply whether the Affiliate PPA is filed as a market-based rate agreement or as a cost-based rate agreement. See *Southern Cal. Edison Co.*, 106 FERC ¶ 61,183 at P 58, *on reh’g*, 109 FERC ¶ 61,086 (2004), *on reh’g*, 110 FERC ¶ 61,319 (2005).

of the FPA.⁸⁵ Making the rescission effective as of the date of this Complaint would be consistent with the Commission’s policy of setting refund effective dates at the earliest date possible in order to “provid[e] maximum protection to customers”⁸⁶

In rescinding the waiver, the Commission should make clear that when FE Solutions files the Affiliate PPA pursuant to Section 205 of the FPA, the Commission will not entertain any request for waiver of the prior notice filing requirements based on claims that FE Solutions anticipated being able to enter into the Affiliate PPA pursuant to its blanket market-based rate authorization. The Commission has long required that a public utility demonstrate “extraordinary circumstances” for waiver when an agreement is filed “on or after the day service has commenced.”⁸⁷ Even if the Commission does not grant this Complaint until after service has commenced under the Affiliate PPA, FE Solutions can have no legitimate claim that loss of the waiver establishes “extraordinary circumstances” for late filing of the Affiliate PPA. This Complaint places FE Solutions on notice that the waiver could be rescinded effective to the date of filing of this Complaint, and there is no reason that FE Solutions cannot file the Affiliate PPA pursuant to Section 205 of the FPA while this Complaint is pending.⁸⁸

⁸⁵ 16 U.S.C. § 824e(b) (2012).

⁸⁶ *Boston Energy Trading & Mktg. LLC v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,336 at P 43 (2015). See also, e.g., *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993).

⁸⁷ *Central Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,337 at 61,339, *on reh’g*, 61 FERC ¶ 61,089 (1992). See also, e.g., *Pacific Gas & Elec. Co.*, 153 FERC ¶ 61,021 at P 24 (2015); *San Gorgonio Farms, Inc.*, 140 FERC ¶ 61,234 at PP 42-43 (2012); *El Paso Elec. Co.*, 105 FERC ¶ 61,131 at PP 44-46 (2003); *Prior Notice & Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,984 (1993).

⁸⁸ Naturally, if this Complaint were still pending, FE Solutions could make the Section 205 filing with the understanding that it could withdraw, or the Commission could reject, the filing if and when this Complaint was denied.

VI. REQUEST FOR FAST TRACK PROCESSING

The issues raised in this Complaint warrant fast track processing under Rule 206(b)(11) of the Commission's Rules of Practice and Procedure.⁸⁹ As noted, the PUCO is poised to approve ESP IV as soon as February 2016. A Commission order making clear its intent to review the Affiliate PPA in accordance with the *Edgar/Allegheny* standards would put all parties on notice that the Affiliate PPA, an integral part of ESP IV for which the FE Ohio Utilities have not sought PUCO review, is not going to evade regulatory review. In particular, it would avoid the situation in which FE Solutions enters into the Affiliate PPA with the expectation that its market-based rate tariff provides the necessary FPA Section 205 authorization and then learns otherwise after-the-fact. It would also afford FE Solutions sufficient time to file the Affiliate PPA with the Commission pursuant to Section 205 of the FPA and to obtain Commission guidance in advance of the 2019/2020 BRA.

VII. OTHER MATTERS

A. Other Proceedings

The Ohio Office of Consumers' Counsel has raised issues relating to the Affiliate PPA and other aspects of ESP IV in Docket No. ER16-323-000, a proceeding in which OVEC is seeking authorization to sell electric energy, capacity and ancillary services at market-based rates.⁹⁰ Complainants note that OVEC has taken the position that such

⁸⁹ 18 C.F.R. § 385.206(b)(11) (2015).

⁹⁰ See, e.g., Motion to Intervene, Protest and Request for Evidentiary Hearings of the Office of the Ohio Consumers' Counsel, Docket No. ER16-323-000 (filed Dec. 4, 2015).

issues are beyond the scope of that proceeding.⁹¹ In addition, as noted above,⁹² Complainants are concurrently filing a separate complaint with respect to the waiver of the Commission's affiliate power sales restrictions previously granted to AEP's market-based rate subsidiaries. Pursuant to Rule 206(b)(6) of the Commission's Rules of Practice and Procedure,⁹³ Complainants state that, to the best of their knowledge, the issues presented in this Complaint are not pending before the Commission in any other proceeding.

B. Negotiations Among The Parties

As indicated above, the FE Ohio Utilities have made clear in the PUCO proceedings that FE Solutions does not intend to file the Affiliate PPA with the Commission.⁹⁴ Moreover, even if FE Solutions voluntarily filed the Affiliate PPA pursuant to Section 205 of the FPA, such a filing would almost certainly be dismissed if the waiver of the affiliate sales restrictions were to remain in force.⁹⁵ Accordingly, Complainants do not believe that informal discussions provide a means of addressing the concerns that have prompted this Complaint.

In accordance with Rule 206(b)(9) of the Commission's Rules of Practice and

⁹¹ See Motion for Leave to Answer and Answer of Ohio Valley Electric Corporation, Docket No. ER16-323-000 (filed Dec. 18, 2015); Motion for Leave to Answer and Answer of Ohio Valley Electric Corporation, Docket No. ER16-323-000 (filed Dec. 23, 2015).

⁹² See *supra* note 44.

⁹³ 18 C.F.R. § 385.206(b)(6) (2015).

⁹⁴ See *supra* note 38.

⁹⁵ See, e.g., *Commonwealth Edison Co.*, 122 FERC ¶ 61,200 (2008) (dismissing FPA Section 205 filing of affiliate contract where parties had already obtained waiver of the affiliate power sales restrictions), *on reh'g*, 126 FERC ¶ 61,032 (2009).

Procedure,⁹⁶ Complainants state that they have not contacted the Commission's Office of Enforcement before filing this Complaint. This Complaint seeks rescission of a waiver previously granted by a Commission order and thus involves issues that could not be resolved by the Office of Enforcement.

C. Financial Impact

It is not possible to estimate the financial impact of the Affiliate PPA and the associated arrangements with precision, in no small measure because of the internally inconsistent story that the FE Ohio Utilities have presented to the PUCO (claiming, on the one hand, that the Sammis Plant and the Davis-Besse Station are so uneconomic that they may need to shut down and, on the other hand, that the resale of their output into the PJM markets will result in net credits under Rider RRS). Nonetheless, as discussed above in Section IV.B, the potential financial impact of FirstEnergy's scheme on both consumers and the markets is massive.

D. Service and Form of Notice

In accordance with Rule 206(c) of the Commission's Rules of Practice and Procedure,⁹⁷ Complainants are serving a copy of this Complaint on the corporate officials identified on the Commission's website for service on behalf of Respondents.

In accordance with Rule 206(b)(10) of the Commission's Rules of Practice and Procedure,⁹⁸ a form of notice suitable for publication in the Federal Register is provided in Attachment A.

⁹⁶ 18 C.F.R. § 385.206(b)(9) (2015).

⁹⁷ 18 C.F.R. § 385.206(c) (2015).

⁹⁸ 18 C.F.R. § 385.206(b)(10) (2015).

Attachment A

Form of Notice

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

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

Complainants,)

v.)

Docket No. EL16-____-000

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

Respondents.)

NOTICE OF COMPLAINT

(January __, 2016)

Take notice that on January 27, 2016, the Electric Power Supply Association, the Retail Energy Supply Association, Dynegy Inc., Eastern Generation, LLC, NRG Power Marketing LLC and GenOn Energy Management, LLC (Complainants) filed a formal complaint against FirstEnergy Solutions Corporation (FE Solutions), Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (Respondents) pursuant to Sections 206, 306 and 309 of the Federal Power Act seeking rescission of a previously-granted waiver of the Commission's affiliate power sales restriction as it relates to a proposed affiliate transaction between FE Solutions and the other Respondents.

Complainants certify that copies of the complaint were served on the contacts for Respondents, as listed on the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR §§ 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondents' answer and all interventions, or protests must be filed on or before the comment date. The Respondents' answer, motions to intervene, and protests must be served on Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the “eFiling” link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the “eLibrary” link and is available for review in the Commission’s Public Reference Room in Washington, D.C. There is an “eSubscription” link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5:00 pm Eastern Time on (insert date).

Kimberly D. Bose
Secretary