JIF-09

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Ohio Valley Electric Corporation,	)	
	)	
Complainant,	)	
	)	Docket No. EL18-
v.	)	
	)	
FirstEnergy Solutions Corp.,	)	
	)	
Respondent.	)	

COMPLAINT OR, IN THE ALTERNATIVE,
REQUEST FOR DECLARATORY ORDER

Pursuant to section 306 of the Federal Power Act ("FPA")[1] and Rule 206 of the Federal Energy Regulatory Commission's ("FERC" or the "Commission") Rules of Practice and Procedure,[2] Ohio Valley Electric Corporation and its wholly-owned subsidiary, Indiana-Kentucky Electric Corporation (collectively, "OVEC"), respectfully submits this Complaint ("Complaint") against FirstEnergy Solutions Corp. ("FirstEnergy"). FirstEnergy is a counterparty to the Inter-Company Power Agreement ("ICPA")[3], a long-term power supply and cost-recovery agreement under which FirstEnergy is obligated to pay for its contractual share of the costs incurred by OVEC to meet its obligations under the ICPA. The Complaint asks the Commission to find that FirstEnergy's anticipated breach of the ICPA would amount to a termination of FirstEnergy's purchase obligation in violation of the filed rate doctrine and

[1] 16 U.S.C. § 825e.

[2] 18 C.F.R. § 385.206.

[3] The ICPA is included as Attachment A to this pleading.

the ICPA. FirstEnergy has announced its intention to declare bankruptcy in the next few weeks and is expected to seek rejection of the ICPA in the bankruptcy court.[4]

The Commission has the authority and obligation to ensure enforcement of the ICPA[5] because the ICPA is a wholesale power arrangement subject to FERC's exclusive jurisdiction – and not jurisdiction of a bankruptcy court – and because the ICPA, as a filed rate, is "binding upon the seller and purchaser alike." Neither commercial nor equitable concerns are a defense by the purchaser against its obligation to pay the filed rate.[6] In fact, the Commission's failure to enforce the filed tariff rate against a customer, even where parties had agreed to a different rate, would amount to unlawful discrimination.[7] As discussed *infra*, moreover, if the Commission failed to intercede, the result would necessitate a change to the filed rate reflected in the ICPA, a potential increase in costs to OVEC's other customers, and in some cases resultant higher consumer rates, all in the amount of hundreds of millions of dollars over the remaining life of the contract.

The United States District Court for the Southern District of New York – the court to have most recently addressed the question – has held that a bankruptcy court's rejection of a FERC-jurisdictional power supply contract "directly interferes with FERC's exclusive jurisdiction and regulatory authority over wholesale power contracts or otherwise constitutes

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[4] *See* Samuel Riehn, "FirstEnergy Confirms FES Bankruptcy," Seeking Alpha (Mar. 1, 2018), *available at* https://seekingalpha.com/article/4152235-firstenergy-confirms-fes-bankruptcy.

[5] Section 309 of the FPA, 16 U.S.C. § 825h, gives the Commission the power "perform any and all acts…necessary or appropriate to carry out" its obligations under the Act, including its obligation to ensure adherence to the filed rate. Thus, for example, if the Commission has erroneously permitted a utility to undercharge a customer, the Commission has the inherent authority to correct its error and order the customer to pay a surcharge as a means to address the resulting undercollection. *See, e.g., Cambridge Electric Light* Co., 66 FERC ¶61,346 at 62,162 (1994) (citing *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965)).

[6] *Maislin Indus., US, Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126-28 (1990).

[7] *Id.* at 130.

a collateral attack on the filed rate."[8] But even under the narrowest reading of FERC's authority vis-à-vis that of the bankruptcy courts, FERC's authority is exclusive where the actions of the debtor would result in changes to a FERC-filed rate.[9]

If the Commission declines to act on OVEC's Complaint, OVEC alternatively requests, under Rule 207(a)(2) of FERC's Rules of Practice and Procedure[10] and section 554(e) of the Administrative Procedure Act ("APA"),[11] that the Commission issue a declaratory order finding that it has exclusive jurisdiction over the ICPA. Such an order is within the Commission's authority as it would resolve the substantial marketplace uncertainty created by FirstEnergy's anticipated bankruptcy filing and potential attempt to reject the ICPA.

Even assuming, *arguendo*, under the broadest possible interpretation of a bankruptcy court's jurisdiction to authorize rejection of the ICPA, the bankruptcy court nonetheless must consider determinations by this Commission whether or not rejection of the contract would be in the public interest.[12] Thus, OVEC also makes this alternative request for declaratory order: Should the Commission determine that it does not have exclusive authority over the ICPA, OVEC requests that the Commission issue a declaratory order advising the bankruptcy court that rejection of the ICPA would be contrary to the public interest. And, should the Commission conclude that it needs more information to make that determination, OVEC would support FERC's initiation of proceedings in which affected parties could submit comments and briefs on the issue.

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[8] *In re Calpine Corp.*, 337 B.R. 27, 36 (S.D.N.Y. Jan. 27, 2006).

[9] *In re Mirant Corp.*, 378 F.3d 511, 519 (5th Cir. 2004).

[10] 18 C.F.R. § 385.207(a)(2).

[11] 5 USC § 554(e) (2012).

[12] *In re Mirant Corp.*, 378 F.3d at 524-26; *In re Mirant Corp.*, 318 B.R. 100, 108 (N.D. Tx. 2004) (on remand).

All of these points are discussed in more detail, *infra.* Briefly, OVEC requests the following relief:

1. A Commission order granting OVEC's Complaint (1) by making a finding that FirstEnergy's anticipatory breach of the ICPA constitutes a violation of its obligations under that agreement, and (2) by making a determination that permitting FirstEnergy to terminate its obligations under the ICPA would be contrary to the public interest in violation of the *Mobile Sierra* doctrine (and to establish such additional procedures as may be necessary to make the latter determination);

2. Alternatively, a Commission order declaring that it has exclusive jurisdiction to ascertain whether FirstEnergy's anticipatory breach of its purchase obligation under the ICPA, by rejection of the contract in bankruptcy or otherwise, (1) is a matter exclusively within the jurisdiction of the Commission, and (2) that such termination would be contrary to the public interest in violation of the *Mobile Sierr*a doctrine (and to establish such additional procedures as may be necessary to make the latter determination); and

3. Alternatively, should the Commission determine that it lacks exclusive jurisdiction, to initiate proceedings to ascertain whether termination of FirstEnergy's purchase obligations under the ICPA would be contrary to the public interest in violation of the *Mobile Sierr*a doctrine (and to establish such additional procedures for the development of a record as may be necessary to make the latter determination) and to advise the bankruptcy court both of its intention to make such a determination and of its ultimate conclusions.

I. SERVICE AND COMMUNICATIONS

All correspondence and communications to the Complainant in this docket should be addressed to the following individuals, whose names should be entered on the official service list maintained by the Secretary in connection with these proceedings:[13]

[13] OVEC requests waiver of 18 C.F.R. § 385.203(b)(3), to the extent necessary, to allow the placement of four OVEC representatives on the official service list in this docket.

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II. BACKGROUND

OVEC owns and operates two coal-fired generating power plants, the Kyger Creek plant in Ohio and the Clifty Creek plant in Indiana, with a combined capacity of approximately 2,400 MW. OVEC has approximately 660 employees (and has approximately 650 retired employees and surviving spouses receiving pension and other benefits from OVEC). OVEC and its wholly-owned subsidiary, Indiana-Kentucky Electric Corporation ("IKEC"), were formed on October 1, 1952 for the purpose of providing electric power in support of the operation of uranium enrichment facilities then under construction by the Atomic Energy Commission ("AEC") near Portsmouth, Ohio. The AEC's facilities are now operated by the Department of Energy ("DOE"), as successor to the AEC. OVEC and AEC entered into a power supply agreement supporting the AEC's Portsmouth facilities on October 15, 1952 ("DOE Power Agreement").

OVEC and OVEC's owners or their utility-company affiliates (called "Sponsoring Companies") signed the ICPA on July 10, 1953 to support the DOE Power Agreement and provide for excess energy sales to the Sponsoring Companies of power and energy not utilized by DOE or its predecessors. Initially set for 25 years, this agreement was later

extended through December 31, 2005. The current term of the ICPA extends through June 30, 2040. On September 29, 2000, DOE notified OVEC of its cancellation of the DOE Power Agreement, effective April 30, 2003. Since the termination of the DOE Power Agreement, OVEC's entire generating capacity has been exclusively available to the Sponsoring Companies under the terms of the ICPA. The ICPA, and all amendments thereto, constitute a FERC-filed, cost-based power agreement.[14] The current Sponsoring Companies of OVEC are as follows (and share the following OVEC "power participation ratio" benefits and payment obligations under the ICPA):

Sponsoring Company	**% Share**	**Parent Entity**[15]
Allegheny Energy Supply Company LLC	3.01%	FE
Appalachian Power Company	15.69%	AEP
Buckeye Power Generating, LLC	18.00%	Buckeye
The Dayton Power and Light Company	4.90%	AES
Duke Energy Ohio, Inc.	9.00%	Duke
FirstEnergy Solutions Corp.	4.85%	FE
Indiana Michigan Power Company	7.85%	AEP
Kentucky Utilities Company	2.50%	PPL
Louisville Gas and Electric Company	5.63%	PPL
Monongahela Power Company	0.49%	FE
Ohio Power Company	19.93%	AEP
Peninsula Generation Cooperative	6.65%	Wolverine
Southern Indiana Gas and Electric Company	1.50%	Vectren
	100.00%	

Under the ICPA, OVEC must "make Available Energy available to each Sponsoring Company in proportion to said Sponsoring Company's Power Participation Ratio."[16] While no

[14] The Commission accepted the ICPA in a delegated letter order issued on May 23, 2011. *Ohio Valley Elec. Corp.*, Docket Nos. ER11-3181-000, ER11-3440-000 and ER11-3441-000 (May 23, 2011) (delegated letter order).

[15] The abbreviations of the Sponsoring Companies' parent entities are as follows: American Electric Power Company, Inc. ("AEP"); The AES Corporation ("AES"); Buckeye Power, Inc. ("Buckeye"); Duke Energy Corporation ("Duke"); FirstEnergy Corp. ("FE"); PPL Corporation ("PPL"); Vectren Corporation ("Vectren"); Wolverine Power Supply Cooperative, Inc. ("Wolverine").

[16] ICPA, Section 4.03.

Sponsoring Company is "obligated to avail itself of any Available Energy,"[17] they are each individually responsible for their proportionate share of the fixed and operating costs of the project, including the costs of additions, upgrades, repairs, employee benefits (including post-retirement benefits obligations) and eventually decommissioning.[18] In addition, they are responsible for adjustment charges for "Minimum Loading Event Costs" if they fail to take their "Power Participant Ratio" share of the facilities' energy output.[19] Their obligations under the ICPA are individual, not joint.[20] That is, each Sponsoring Company is responsible only for its assigned *pro rata* portion of the OVEC's costs. FirstEnergy's proportionate share of the OVEC costs – including the eventual and substantial costs of environmentally sound decommissioning is just under 5%.[21] In these respects the ICPA is more accurately viewed not as a conventional purchased power agreement, but a joint venture whose participants have committed to support the operation of OVEC's facilities from "cradle to grave."

The unique nature of the agreement – the fact that the rights and obligations of all the parties to the ICPA are "several and not joint or joint and several"[22] for the life of the generating facilities – is directly related to OVEC's breach claim in the event FirstEnergy is able to reject the ICPA in bankruptcy. In November 2016, Moody's announced that it had "placed the ratings of the Ohio Valley Electric Corporation (OVEC) under review for downgrade," an action it said was prompted by "the downgrade of FirstEnergy Corp's (FirstEnergy) subsidiaries FirstEnergy Solutions Corp. (FES: Caa1 negative) and Allegheny Energy Supply Company, LLC (AES: B1

[17] *Id.*

[18] *See id.*, Sections 7.01, 7.02, 7.03 and 8.04.

[19] *Id.*, Section 5.05.

[20] *Id.*, Section 9.11.

[21] *Id.*, Section 1.0117 (identifying FirstEnergy's Power Participation Ratio as 4.85%).

[22] *Id.*, Section 9.11.

negative) which together are contractually obligated to cover about 8% of OVEC's expenditures."[23] FirstEnergy, Moody's noted, had publicly announced its "intention to exit its merchant business entirely within 18 months even if it requires a restructuring or bankruptcy at FES."[24] In Moody's view, because each of the OVEC's Sponsoring Company's obligations are several, OVEC is similar in nature to a municipal joint action agency, and thus Moody ascribes a credit rating to OVEC tied to its weakest link, or (in other words) OVEC's lowest rated Sponsoring Company, FirstEnergy Solutions Corp., which contributes just under 5% of revenues.

FirstEnergy's efforts to exit the merchant generation business continue to have real impact on OVEC. Just last month, FirstEnergy Corporation's CEO announced that "the company's merchant generation business is likely headed for bankruptcy protection by the end of March."[25] "While I cannot speak for the unregulated business," he stated, "I would be shocked if they go beyond the end of March without some type of filing."[26] Based on this announcement – and the clear implication that FirstEnergy would reject the ICPA in bankruptcy – "Moody's lowered the subsidiary's rating from below investment grade to likely in default."[27] Standard & Poor's Financial Services LLC had already downgraded FirstEnergy's bond rating for the same

[23] Moody's Investor Services Rating Action (November 4, 2016), included as Attachment B to this filing.

[24] *Id.*

[25] Gavin Bade, "FirstEnergy CEO says generation subsidiary headed for bankruptcy protection," Utility Dive (Feb. 23, 2018), *available at* https://www.utilitydive.com/news/firstenergy-ceo-says-generation-subsidiary-headed-for-bankruptcy-protection/517743/.

[26] Samuel Riehn, "FirstEnergy Confirms FES Bankruptcy," Seeking Alpha (Mar. 1, 2018), *available at* https://seekingalpha.com/article/4152235-firstenergy-confirms-fes-bankruptcy.

[27] *Id.*

reason last summer.[28] That a bankruptcy filing by FirstEnergy would likely be coupled with an attempt to reject the ICPA is obvious and widely expected. OVEC's negative outlook from Fitch Ratings Inc.'s rating service expressly "reflects the risk of revenue shortfall should one of OVEC's sponsors opt to file for bankruptcy and reject their obligation under OVEC's…ICPA."[29] OVEC is making this filing in direct response to the expectation that FirstEnergy will seek to reject the ICPA in its bankruptcy case.

III. JURISDICTION

The Commission should exercise exclusive jurisdiction over this Complaint because FirstEnergy's anticipated bankruptcy rejection of the ICPA has already harmed OVEC, will adversely affect OVEC's other Sponsoring Companies and their customers, and because the Commission has exclusive jurisdiction to address changes to the ICPA, including termination of FirstEnergy's purchase obligation.

In cases involving contract interpretation, the Commission generally possesses concurrent jurisdiction with courts with respect to a legal action for breach of a filed contract.[30] The Commission enjoys primary jurisdiction over disputes involving construction of a contract subject to its jurisdiction.[31] Whether the Commission should exercise primary jurisdiction in such cases is within its own discretion.[32] The Commission considers the following three factors

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[28] John Funk, "FirstEnergy Solutions downgraded on bankruptcy expectation, FE parent seen as stable," Cleveland Plain Dealer (Aug. 21, 2017), *available at* http://www.cleveland.com/business/index.ssf/2017/08/firstenergy_solutions_downgrad.html.

[29] Fitch Ratings Inc., Press Release on OVEC (Aug 9, 2017), included as Attachment C to this filing. The press release adds Fitch's view that " the obligations held by FirstEnergy Solutions Corp (FES; CC; 4.85% share) and Allegheny Energy Supply Co (AES; B/Stable; 3.01% share) pose a greater concern in Fitch's opinion, given FirstEnergy Corp.'s (FE; 'BBB-'/Outlook Stable) plans to exit the merchant power business."

[30] *Pan Am. Petrol. Corp. v. Super. Ct. of Del.*, 366 U.S. 656 (1961).

[31] *See, e.g., United States v. W. Pac. R.R. Co.*, 352 U.S. 59 (1956); *AEP Generating Co.*, 32 FERC ¶ 61,364 (1985), *reh'g granted on other grounds*, 36 FERC ¶ 61,226 (1986).

[32] *W. Pac. R.R. Co., supra*, 352 U.S. at 64-66.

in deciding whether to assert primary jurisdiction over contractual issues otherwise pending before the courts:

i. whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision;

ii. whether there is a need of uniformity of interpretation of the type of question raised by the dispute; and

iii. whether the case is important in relation to the regulatory responsibilities of the Commission.[33]

Where, as in this case, there is no dispute about the meaning of the contract, however, the usual considerations about whether the Commission should exert primary jurisdiction (or defer to the courts for ordinary contract interpretation issues) are not present.[34] Instead, as in this case, the issue is exclusively the Commission's to resolve. As discussed *infra*, FirstEnergy's anticipated rejection of the ICPA is effectively a collateral attack on the filed rate in the contract. In such instances, the Commission's jurisdiction is not merely primary, but exclusive. The only question, therefore, is whether the Commission should consider OVEC's Complaint before the anticipatory breach occurs.[35] The answer is that "[t]he disclaimer of a contractual duty *is* a breach of contract even if the time specified in the contract for performing the duty has not yet arrived. It is what is called anticipatory breach."[36] And here, it is obvious that FirstEnergy will attempt to seek to reject the ICPA in bankruptcy. Thus, this dispute involves FirstEnergy's anticipated breach of the ICPA, a filed rate subject to the Commission's exclusive jurisdiction.

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[33] *Ark. La. Gas Co. v. Hall*, 7 FERC ¶ 61,175, 61,322 (1979).

[34] *See In re Calpine Corp.*, 337 B.R. at 36, discussed in Section IV, *infra.*

[35] Under bankruptcy law, rejection of a contract constitutes an anticipatory breach of the contract giving rise to rejection damages as a result of the rejecting party's (here FirstEnergy) future non-performance.

[36] *Combs v. Int'l Ins. Co.*, 354 F. 3d 568, (6th Cir. 2004), *quoting Wis. Power & Light Co. v. Century Indem. Co.*, 130 F.3d 787, 793 (7th Cir.1997) (emphasis added).

IV. COMPLAINT FOR ANTICIPATORY BREACH

This Commission has the authority and obligation to ensure enforcement of the ICPA,[37] because the ICPA is a wholesale power arrangement subject to FERC's exclusive jurisdiction – and not jurisdiction of a bankruptcy court – and because the ICPA, as a filed rate, is "binding upon the seller and purchaser alike."[38] Neither commercial nor equitable concerns are a defense by the purchaser against its obligation to pay the filed rate.[39] In fact, the Commission's failure to enforce the filed tariff rate against a customer, even where parties had agreed to a different rate, would amount to unlawful discrimination.[40] The foregoing does not mean that the Commission lacks the authority itself to modify or terminate a filed rate, but where that filed rate is embodied in, and fixed, by a voluntary agreement, the burden – a very steep one – is on the party seeking the change to demonstrate that the change is in the public interest.[41] That is the situation here, as ICPA Article 9.09 expressly provides that absent the consent of all parties, those seeking changes to the provisions of the agreement must meet the *Mobile-Sierra* public interest test.

A. The Public Interest Standard

Regarding the public interest standard, OVEC urges the Commission to find, not only that it has exclusive jurisdiction over any attempt by FirstEnergy to reject its

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[37] Section 309 of the FPA, 16 U.S.C. § 825h, gives the Commission the power "perform any and all acts …necessary or appropriate to carry out" its obligations under the Act, including its obligation to ensure adherence to the filed rate. Thus, for example, if the Commission has erroneously permitted a utility to undercharge a customer, the Commission has the inherent authority to correct its error and order the customer to pay a surcharge as a means to address the resulting undercollection. *See, e.g., Cambridge Electric Light* Co., 66 FERC ¶61,346 at 62,162 (1994) (citing *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965)).

[38] *Nw. Pub. Serv. Co. v. Montana-Dakota Utils. Co.*, 181 F.2d 19 (8th Cir. 1950), *aff'd*, 341 U.S. 246 (1951).

[39] *Maislin Indus. US, Inc. v. Primary Steel, Inc.*, 497 US 116, 126-28 (1990).

[40] *Id.* at 130.

[41] *See United Gas Pipeline Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956), *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) and *NRG Power Mktg. v. Maine Pub. Utils. Comm'n*, 585 U.S. 165 (2010).

obligations under the ICPA, but that doing so would run contrary to the public interest in violation of the *Mobile-Sierra* doctrine. "Under the *Mobile-Sierra* doctrine, [FERC] must presume that the [electricity] rate set in a freely negotiated wholesale-energy contract meets the 'just and reasonable' requirement [of the [FPA], see 16 U.S.C. § 824d(a)], and the "presumption may be overcome only if FERC concludes that the contract seriously harms the public interest."[42] This follows from the Federal Power Act's regulatory system, which "is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity."[43] Hence, the presumption is that "[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a 'just and reasonable' rate as between the two of them."[44] There are only limited circumstances under which changing rates fixed by a voluntarily negotiated contract would be in the public interest under *Mobile Sierra* – such as when "there is unfair dealing at the contract formation stage," or where contracts were executed during periods of market dysfunction and the market dysfunctions "were caused by illegal action of one of the parties."[45] Those circumstances are not present here.

Not only would FirstEnergy be unable to satisfy the *Mobile Sierra* burden that termination of its obligations would be in the public interest, but FirstEnergy's rejection of the contract in bankruptcy would *adversely* affect the public interest in several ways.

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[42] *Morgan Stanley v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 530, 128 S. Ct. 2733, 2736 (2008).

[43] *Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968).

[44] *Morgan Stanley, supra*, 128 S. Ct. at 2746 (quoting *Verizon Commc'n, Inc. v. FCC*, 535 U.S. 467, 479 (2002)).

[45] *Morgan Stanley*, 128 S. Ct. at 2747.

As an initial matter, because the Sponsoring Companies' obligations are several and not joint, if FirstEnergy is able to reject its obligations under the ICPA, the resulting cost shortfalls are not payable by the other Sponsoring Companies and will go unreimbursed every month over the life of the contract (i.e., until at least 2040), absent the types of ameliorative changes to the filed rate discussed in Section IV.B, *infra*.[46] This will further impact OVEC's credit rating (which already has been impacted by the prospect of contract rejection), further raising OVEC's borrowing costs. Those higher borrowing costs will directly result in higher costs to the remaining Sponsoring Companies and their customers. In the case of OVEC's rural electric cooperative Sponsoring Companies, for example, whose customers are *their* owners, all of these increased costs will be borne by the ultimate ratepayers.

Moreover, the ICPA contemplates that the Sponsoring Companies will cover the eventual and substantial cost of environmentally sound decommissioning of the OVEC plants when they are retired from service in 2040 or thereafter. When assessing the potential environmental remediation costs – including the clean closure of the site's landfills and ponds – and all other ancillary charges that will be associated with restoring each location to a condition suitable for industrial use, OVEC has estimated that the costs for both sites currently exceed $240 million, assuming all expenditures would have occurred in 2017. Because the retirement of the units will not take place until 2040 under the ICPA, however, the final decommissioning costs are simply too difficult to quantify with any reasonable measure of certainty, though this figure will only increase in the future given

[46] More specifically, OVEC is referring to replacing FirstEnergy with a new Sponsoring Company at a discount, and/or renegotiation of the ICPA to reallocate the revenue shortfall associated with FirstEnergy's rejection of the contract.

potential changes in environmental regulations and other escalation of costs. And without FirstEnergy's ongoing contributions, those projected decommissioning costs are likely to escalate even further and by amounts that neither OVEC (nor any other party) can currently predict with an exact level of certainty.

As indicated, OVEC currently has approximately 660 employees (and has approximately 650 retired employees and surviving spouses receiving pension and other benefits from OVEC). The ICPA requires the Sponsoring Companies to pay all salaries and benefits of such employees, as well as pensions and post-retirement benefits through 2040 and thereafter. Such obligations are likely to be significant and very difficult to estimate.

Further, the ICPA similarly requires the Sponsoring Companies to pay all of OVEC's borrowing costs. As result of OVEC's construction of significant emissions' control equipment at both of its plants, as of December 31, 2017, OVEC's outstanding debt obligations were approximately $1.4 billion. FirstEnergy's 4.85% *pro rata* responsibility for this debt amounts to $67.9 million. However, if FirstEnergy is allowed to reject its obligations under the ICPA, OVEC and the remaining Sponsoring Companies would need to come up with some way to close the gap in OVEC's recovery of its costs, which would likely result in further increased debt and borrowing costs for OVEC's remaining Sponsoring Companies, with a disproportionately adverse effect on the costs of OVEC's power and energy to them and their customers. OVEC would be faced with a number of options, including potentially borrowing additional funds (including to refinance FirstEnergy's portion of maturities as they come due at ever-increasing borrowing costs), attempting to locate a new Sponsoring Company to replace FirstEnergy's ownership interest a discount, and/or a renegotiation of the ICPA with all Sponsoring Companies to reallocate

the revenue shortfall associated with FirstEnergy's rejection of the contract. All of these options would raise and reallocate the costs of power and energy generated by the OVEC facilities. Furthermore, OVEC understands that many of OVEC's Sponsoring Companies bid their entitlement to OVEC's power and energy into nearby markets (principally, PJM). While power and energy from OVEC is currently economic to dispatch, there is no guaranty that if OVEC's costs continue to increase, this proposition will continue to remain true, may result in upward pressure on market prices in the PJM market.

All of these consequences would be adverse to the public interest.

B. FERC's Authority Over Termination of FirstEnergy's Purchase Obligation is Exclusive.

For a number of years, the Commission took the position that parties seeking relief from the terms of filed wholesale contracts must seek such relief in proceedings before FERC, and that any effort by one party to reject a FERC-regulated contract in a bankruptcy proceeding "is actually a collateral attack upon a filed rate."[47] The United States District Court for the Southern District of New York expressly endorsed that position in *In re Calpine*.[48] It held that a bankruptcy court's rejection of a power purchase agreement "directly interferes with FERC's exclusive jurisdiction and regulatory authority over wholesale power contracts or otherwise constitutes a collateral attack of the filed rate."[49]

The rationale for the court's holding is instructive. It recognized that the Commission has exclusive jurisdiction "over the rates, terms, conditions, and *duration* of

[47] *In re Mirant*, 378 F.3d at 518.

[48] *In re Calpine Corp.*, 337 B.R. at 36.

[49] *Id.*

wholesale energy contracts,"[50] and that rejection of wholesale power purchase agreements "would directly interfere" with that jurisdiction.[51]

In arguing that the bankruptcy court nonetheless had jurisdiction, Calpine, the debtor in that case, maintained that:

> bankruptcy courts have a broad power to reject executory contracts, rejection constitutes breach, FERC has exclusive jurisdiction over approval, modification, or termination of wholesale energy contracts, not over breaches, and as such rejection is outside of FERC's exclusive jurisdiction.[52]

The district court rejected this argument. Instead, the cases in which FERC "has declined jurisdiction over breach issues," it said, "involved alleged breaches the resolution of which called for simple contract interpretation well within the jurisdiction of the courts."[53] "The breach here," it held, "is not a dispute, nor does it require any contract interpretation, it is a complete cessation of performance under the terms and conditions of the Power Agreements."[54] "Against FERC's vast authority over filed rate energy contracts," the district court's search of the Bankruptcy Code found "little evidence of congressional intent to limit FERC's regulatory authority."[55] "Absent overriding language," it held, "the Bankruptcy Code should not be read to interfere with FERC jurisdiction."[56]

To be sure, the District Court's decision in *In re Calpine* conflicts with, but also separately distinguishes, an earlier decision of the Fifth Circuit in *In re Mirant.* In the

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[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.* at 33.

[56] *Id.*

Mirant case, the Fifth Circuit stated that the Commission's authority is exclusive only with respect to the application of the filed rate doctrine where there is a change to the filed rate.[57] Thus, it ruled that "while the FPA does preempt breach of contract claims that challenge a filed rate, district courts are permitted to grant relief in situations where the breach of contract claim is based upon another rationale."[58] If rejecting a contract has only an "indirect effect" on the filed rate, the bankruptcy court's authority is not preempted.[59]

This jurisdictional conflict was again considered by United States District Court for the Southern District of New York in the matter of *In re Boston Generating LLC*, a subsequent bankruptcy case involving the proposed rejection of a contract for the transportation of natural gas. In a preliminary ruling ("*Algonquin I*"), the district court explained that natural gas contracts "require consideration of the Natural Gas Act [('NGA')]," which "grants FERC 'exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale.'"[60] Noting the rulings from both the *Mirant* and *Calpine* courts, *Algonquin I* recognized that there was "*no binding precedent* that applies a bankruptcy court's authority to reject an executory contract to a contract regulated by FERC under the NGA."[61] In a subsequent ruling in those proceedings ("*Algonquin II*"), the Southern District of New York concluded that while the bankruptcy court did enjoy the authority to reject a contract governed by the NGA, "the Debtors *must also* obtain a ruling

[57] *In re Mirant, supra*, 378 F.3d at 519.

[58] *Id.*

[59] *Id.* at 519-20.

[60] *In re Boston Generating, LLC*, No. 10 CIV. 6528 DLC, 2010 WL 4288171 at *4 (S.D.N.Y. Nov. 1, 2010) (quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988)).

[61] *In re Boston Generating, LLC*, No., 2010 WL 4288171 at *6 (emphasis added).

from FERC that abrogation of the contract does not contravene the public interest."[62] *Algonquin II* afforded FERC the *exclusive* authority to make this public interest determination, and went on to hold that if "FERC does not approve the Debtors' rejection of the [transportation contract], *the Debtors may not reject the contract.*"[63]

OVEC acknowledges that in a January 2006 case – *Cal. Oversight Bd. et al. v. Calpine Energy Servs., et al.*[64] FERC had stated its intention to "follow" *Mirant*: finding that the Fifth Circuit had "spoken to the issue" in *Mirant*, FERC stated that it planned "to follow that authority."[65] FERC added, however, that it nonetheless would make a determination whether the rejection of the Calpine wholesale contract at issue before it would be in the public interest "and then inform the Bankruptcy Court of its views."[66] But there are ample reasons for the Commission to conclude, based on more recent precedent, both that (1) it should not continue to follow *Mirant* and that (2) in any event, *Mirant* does not preclude the relief sought in OVEC's Complaint.

First, it was only a few weeks after the Commission's decision in *Cal. Oversight Bd.* that the United States District Court for the Southern District of New York – addressing the same Calpine contracts at issue in that case – issued the opinion, discussed *supra*, that FERC's rate authority preempted the bankruptcy court's authority to reject FERC-jurisdictional contracts.[67] To OVEC's knowledge, the Commission has not considered the

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[62] *In re Boston Generating, LLC*, No. 10 CIV. 6528 DLC, 2010 WL 4616243 at *1 (S.D.N.Y. Nov. 12, 2010) (emphasis added).

[63] *Id.* at *3 (emphasis added).

[64] 114 FERC ¶ 61,003 (2006).

[65] *Id.* at P 11.

[66] *Id.* at P 12.

[67] *In re Calpine Corp., supra*, 337 B.R. at 36.

impact of the Southern District of New York's opinions (*i.e.*, *Calpine and Algonquin I and II*), in any other case and therefore has not expressly revisited its decision to follow *Mirant*. The District Court decision in *Calpine*, however, did lift the restraining order that was then "restricting FERC from determining the disposition of energy contracts,"[68] a constraint that undoubtedly influenced the Commission's decision, a few weeks earlier, to follow *Mirant*.

Second, the *Calpine* opinion also explained, in detail, the reasons why the District Court concluded that the Fifth Circuit's *Mirant* decision was incorrect and indistinguishable, not least of which is the fact that a bankruptcy court rejection hearing would likely provide an inadequate forum in which to consider public interest factors. The court's analysis bears recitation here:

> The Court is aware that its holding here is in obvious conflict with the holding of the Fifth Circuit in *Mirant*, 378 F.3d 511, and the conclusions of the FERC Order.[10] Mirant is not controlling here and relies heavily on Fifth Circuit cases that have no Second Circuit corollaries. Nevertheless, were the Court to adopt and apply Mirant faithfully, it would still find that FERC has exclusive jurisdiction over the fate of the Power Agreements.
>
> In *Mirant*, public utility PEPCO, pursuant to deregulation legislation, sold its electric generation facilities and assigned most of its power purchase agreements to Mirant, a power purchaser and provider. 378 F.3d at 515. Because some of the power purchase agreements contained language that foreclosed PEPCO from assigning them, PEPCO and Mirant entered into a separate agreement (also FERC-regulated), which provided that PEPCO would continue to buy energy under the unassigned agreements and that Mirant would purchase that energy from PEPCO at the filed rates set in those contracts. Id. When Mirant later filed for Chapter 11 bankruptcy, it sought to reject the contracts that bound it to buy the energy from PEPCO. *Id.* at 516. The district court withdrew the reference to the bankruptcy court of the rejection motions and later found, inter alia, that the FPA deprived it of jurisdiction. *Id.* at 516-17.
>
> The Fifth Circuit reversed the district court. It recognized first that a rejection of a contract under § 365 constitutes a breach, not a modification of the

[68] *Id.* at 30.

contract. *Id.* at 519. Central to the Fifth Circuit's holding is the notion that "[w]hile the FPA does preempt breach of contract claims that challenge a filed rate, district courts are permitted to grant relief in situations where the breach of contract claim is 38*38 based upon another rationale." *Id.* Though above-market rates were part of Mirant's decision to reject the contracts, the court found that Mirant's main justification was that it did not need the energy it was purchasing from PEPCO to fulfill its own obligations to supply electricity; "Mirant may choose to reject this agreement as unnecessary to its reorganized business because it represents excess capacity in its system to supply electricity." *Id.* at 520. The only thing separating Mirant's rejection motion from being an unlawful collateral attack on the rate was the fact that it did not want the energy at all. Indeed, in reaching its holding, the Mirant Court quoted Fifth Circuit precedent that held: "The district court would have jurisdiction if [the debtor] claimed that it cannot take [the supplier's] electricity regardless of price. If, however, [the debtor] can fulfill its purchase obligations at lower rate, then [the debtor] merely seeks rate relief not available in district court." Id. (quoting *Gulf States Utils. Co. v. Ala. Power Co.*, 824 F.2d 1465, 1472 (5th Cir. 1987)). The Court concluded that, under the circumstances, the rejection of the contracts would only have an "indirect effect" on the rate, and thus the FPA would not preempt the district court from exercising its jurisdiction under the Bankruptcy Code.

As noted, this Court does not construe the filed rate doctrine so narrowly as to only reach modifications of the rate. Just the same, Mirant's holding militates against Calpine. Here, while Calpine expressly states that it seeks relief from the Power Purchase Agreements because it is forced to sell energy at rates far below market, it does not offer "another rationale." *Id.* at 519. Calpine remains "ready and willing to supply the same amount of wholesale electric power—but at competitive market prices"(Posoli Aff. P28), so there is no excess capacity issue presented, but merely a desire to get a better rate.[11] The Mirant Court clearly held that it would find FPA preemption where, as here, a debtor was able to fulfill its obligations but only at a lower rate. *Mirant*, 378 F.3d at 520. Rejection in such a situation does not "indirectly effect" the filed rate; it is a collateral attack on it.

The Court's conclusion in this case is consistent with general policy considerations, including the proper allocation of power in our system of separated powers. The Supreme Court has held that "[t]he clear assignment of power to a branch . . . allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance." *Loving v. United States*, 517 U.S. 748, 758, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996). This principle seems particularly applicable here. By holding that FERC has exclusive jurisdiction to modify or terminate the Power Agreements in this case, an issue of great public interest will be heard in a branch accountable to the electorate in a forum that specializes in considering the public interest.

> To this end, although the Court takes no formal position on what standard would apply were it to have jurisdiction, the Court does note that the standard issue may very well compel the Court's finding that it lacks jurisdiction altogether to authorize the rejection of the Power Agreements. Both the *Mirant* decision and the FERC Order predicate bankruptcy court jurisdiction to reject energy contracts on the belief that the public interest is adequately considered at a rejection hearing, at least in part through FERC's participation. *See Mirant*, 378 F.3d at 525 39*39 ("Use of the business judgment standard would be inappropriate because it would not account for the public interest inherent in the transmission and sale of electricity. . . . We presume that the district court would also welcome FERC's participation. . . ."); FERC Order ¶ 12 (displaying willingness to "inform the Bankruptcy Court [on] the impact on the public interest of a potential rejection"). This process would allow the bankruptcy court to sit in judgment of FERC's determination of the public interest, a prospect prohibited by established case law. See MCorp Fin. Inc., 502 U.S. at 41, 112 S.Ct. 459 (disallowing the bankruptcy court to scrutinize the legitimacy of federal agency action); *In re Federal Communications Commission*, 217 F.3d 125, 135 (holding that a federal agency "need not defend its regulatory calculus in the bankruptcy court"); *In re NRG Energy*, 2003 WL 21507685 at *3 (holding that, under the FPA, actions taken by FERC are reviewable only by a court of appeals). To the extent that, under the FPA, the fate of wholesale power contracts cannot be determined without consideration of the public interest, the executive agency FERC should determine that interest. *Cf. Smith v. Hoboken R.R. Warehouse & S.S. Connecting Co.*, 328 U.S. 123, 131, 66 S.Ct. 947, 90 L. Ed. 1123 (1946) ("When the public interest, as distinguished from private, bulks large in the problem, the solution is largely a function of the legislative and administrative agencies of government with their facilities and experience in investigating all aspects of the problem and appraising the general interest.")[69]

OVEC submits that the more recent District Court decision is better reasoned and that FERC should follow it in addressing OVEC's Complaint. Like the *Calpine* case, this is not a case involving a matter of contract interpretation. No party is seeking bankruptcy rejection because the other party has failed to comply with the ICPA's terms nor is it a circumstance where this contract provides a unilateral right of termination. Breaching an obligation under the ICPA involves public interest considerations that are within FERC's special competence and exclusive jurisdiction. The special circumstances in this case

[69] *Id.* at 37-39.

involve a multi-party contract between OVEC and the Sponsoring Companies to pay the fixed cost of OVEC's generating facilities through June 2040. Beyond that date, the Sponsoring Companies also are responsible for the costs incurred for the demolition and decommissioning of such facilities. The decision by one of the Sponsoring Companies to exit its merchant generation business through bankruptcy should not provide a basis for avoiding the contractual commitment that it made to pay its proportionate share of the costs of the facilities and its consequent impact on OVEC, its remaining Sponsoring Companies and their customers. The District Court's opinion better accommodates these uniquely FERC-related public interest concerns than does the *Mirant* opinion.

But even if the Commission continues to follow the *Mirant* holding, this case falls within the area of exclusive Commission jurisdiction recognized in *Mirant.* As noted earlier, *Mirant* finds no Commission preemption of bankruptcy court jurisdiction where rejection of a contract would have only an indirect effect on filed rates.[70] Even under the narrowest reading of FERC's authority vis-à-vis that of the bankruptcy courts, FERC's authority is exclusive where the debtor's actions would result in changes to a FERC-filed rate.[71] Unlike the *Mirant* case, rejection of the ICPA will have a *direct* effect on the filed rate and, as discussed below, a resulting adverse effect on customers.

In this case the *ICPA* is the filed rate. The direct result of contract rejection would be to change to the filed rate currently reflected in the ICPA and to increase costs to OVEC's remaining customers (and in certain circumstances ratepayers) which could equal

[70] *In re Mirant, supra*, 378 F.3d at 519-20.

[71] *Id.* at 519.

hundreds of millions of dollars over the remaining life of the contract.[72] This eventuality is a direct consequence of the structure of that agreement itself. As discussed earlier, the ICPA is akin to a joint venture arrangement (including "cradle to grave" coverage of all costs regardless of usage) and is viewed as such by the markets and the rating agencies. The obligation of the off-takers under the ICPA is several but not joint, exposing OVEC to the risk of nonpayment in the event of a defaulting Sponsoring Company because the non-defaulting Sponsoring Companies are not obligated to cover the shortfall. Because of the several, not joint, liabilities of the Sponsoring Companies under the ICPA, even Moody's points out that a FirstEnergy rejection of its obligations, coupled with no other changes to the ICPA would likely lead to a further downgrade in OVEC's credit rating.[73] A similar downgrade risk would result if there was a payment default by a Sponsoring Company that OVEC would not be able to cover by its existing reserves or through a replacement of the defaulting Sponsoring Company.[74] But coverage through use of OVEC's existing reserves would be a mere temporary fix, and OVEC would not only need to seek a replacement for FirstEnergy, it may have to offer any such replacement Sponsoring Company a substantial discount – in effect a different filed rate. Or, to keep OVEC "whole" in the absence of a new replacement Sponsoring Company, the remaining existing Sponsoring Companies would need to increase their proportionate ownership shares *and* corresponding cost responsibilities, which for many of these remaining Sponsoring Companies will result in increased rates passed on to their customers and to the public. All of these consequences

[72] What could follow is a legal "out" of the ICPA for other Sponsoring Companies. As costs increase towards the end of the useful life of the ICPA, the obligation to demolish and clean up the facilities may be saddled upon only those Sponsoring Companies who have not rejected the agreement.

[73] Attachment B.

[74] *Id.*

stem not from a mere "simple" rejection by a bankrupt debtor who no longer needs power at any price, like the *Mirant* debtor. Rather, these consequences — which are the direct effect of rejection of the ICPA by FirstEnergy — reflect multiple, multi-party, interconnected changes to the filed rate, with a direct impact on rates paid by the consuming public.

Bankruptcy rejection serves as the functional equivalent to determination that the obligations under the ICPA are unjust and unreasonable from the debtor's perpsective, thus permitting termination. Under applicable FERC case law, however, this requires consideration of the public interest in terminating a contract obligation. Only FERC can make the determination whether FirstEnergy's termination of its obligations under the ICPA would be consistent with the public interest. As a result, this Commission should hold that a bankruptcy court lacks jurisdiction to consider rejection of the ICPA.

V. COMPLIANCE WITH RULE 206 COMPLAINT FILING REQUIREMENTS

A. Description of Alleged Violation and Quantification of Impacts (18 C.F.R. § 385.206(b)(1)-(5)).

Parts I – IV of this Complaint set forth the required information. As stated therein, FirstEnergy's anticipated rejection of the ICPA would constitute a breach of its obligations under a rate schedule on file with the Commission, the threat of which has already resulted in a downgrade to OVEC's credit rating. FirstEnergy's rejection of its obligations will ultimately saddle OVEC's remaining Sponsoring Companies and their customers with hundreds of millions of dollars in additional costs over the remaining life of the agreement.

B. Other Pending Proceedings (18 C.F.R. § 385.206(b)(6)).

The issues presented herein are not pending in an existing Commission proceeding or a proceeding in any other forum in which OVEC is a party.

C. Specific Relief or Remedy Requested (18 C.F.R. § 385.206(b)(7)).

OVEC's specific request for relief is set forth in more detail in the body of this Complaint.

D. Supporting Documentation (18 C.F.R. § 385.206(b)(8)).

All documents supporting the facts set forth in this Complaint are included as attachments hereto.

E. Use of Alternate Dispute Resolution Mechanism (18 C.F.R. § 385.206(b)(9)).

OVEC has not used the Commission's Enforcement Hotline, Dispute Resolution Service or tariff-based dispute resolution mechanisms. The exigencies of the situation facing OVEC – FirstEnergy's threatened imminent bankruptcy filing – have made any attempt to pursue other alternatives impractical.

F. Form of Notice (18 C.F.R. § 385.206(b)(10)).

A form of notice of this Complaint suitable for publication in the Federal Register is provided as an attachment hereto and submitted in electronic form.

G. Basis for Fast Track Request (18 C.F.R. § 385.206(b)(11)).

OVEC does not request fast-track processing of its Complaint under Rule 206(b)(11) of the Commission's Rules of Practice and Procedure.

H. Service (18 C.F.R. § 385.206(c)).

OVEC has served a copy of this Complaint upon the Respondent simultaneous with its filing of the Complaint with the Commission. OVEC has also served copies of the Complaint upon all other Sponsoring Companies to the ICPA and to the relevant state authorities.

VI. PETITION FOR DECLARATORY ORDER

A. The Commission Should Issue a Declaratory Order Finding that FirstEnergy's Breach of the ICPA Would Result in a Change to the Filed Rate.

Under Rule 207(a)(2) of the Commission's Rules of Practice and Procedure[75] and section 554(e) of the APA,[76] the Commission may issue declaratory orders "to terminate a controversy or remove uncertainty."[77] Any person seeking to terminate a controversy or remove uncertainty regarding a matter within the Commission's jurisdiction may file a request for a declaratory order…."[78] Because "a declaratory order represents a binding statement of policy,"[79] it is "useful to persons seeking reliable, definitive guidance from the Commission."[80]

While the Commission's decision whether to grant a declaratory order is discretionary,[81] the Commission has exercised that discretion where, as here, its guidance is needed to address a matter of important public policy. As discussed in Sections II – IV, *supra*, the Commission has ample legal basis to conclude that a breach of the ICPA by FirstEnergy would trigger a change to the filed rate embodied in that agreement.

Accordingly, if the Commission concludes that a complaint is the wrong vehicle to address OVEC's concerns, OVEC alternatively requests a declaration that the Commission has exclusive

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[75] 18 C.F.R. § 385.207(a)(2).

[76] 5 USC § 554(e) (2012).

[77] *ITC Grid Dev't, LLC*, 154 FERC P 61,206, P 42 (2016); *Pioneer Wind Park I LLC*, 145 FERC 61,215, P 35 (2013) (granting in part petition for declaratory order, stating that Section 554(e) of the Administrative Procedure Act and section 207(a)(2) of the Commission's Rules of Practice and Procedure provide us the authority and discretion to rule on a petition for declaratory order in order to "remove uncertainty.").

[78] *Informal Staff Advice on Regulatory Requirements,* 113 FERC ¶ 61,174, P 17 (2005). *Am. Elec. Power Serv. Corp.,* 82 FERC ¶ 61,131, 61,472 (1998) (stating that "[f]or definitive rulings, interested persons may seek declaratory orders from the Commission, which have binding effect").

[79] *Obtaining Guidance on Regulatory Requirements,* 123 FERC ¶ 61,157, P 19 (2008).

[80] *Id.*

[81] *Pioneer Wind Park I, LLC*, 145 FERC at P 35.

jurisdiction to address FirstEnergy's rejection of the ICPA and to determine that such a rejection would result in a change to the filed rate reflected in that agreement. Such a determination would avoid prolonged litigation over FirstEnergy's obligations under the ICPA and the ensuing damage to OVEC's credit rating while this issue plays out in the bankruptcy court.

B. Alternatively, the Commission Should Issue a Declaratory Order Finding that FirstEnergy's Rejection of the ICPA Would Be Contrary to the Public Interest.

As noted at the outset of this pleading, OVEC also requests a declaratory order even if the Commission concludes that its authority is not exclusive. A declaratory order addressing whether rejection of the ICPA contract is in the public interest would be of significant value to the bankruptcy court. More than that, even a bankruptcy court following *Mirant*, at a minimum, would be *obliged* to consider determinations by this Commission whether rejection of the ICPA would be in the public interest. "Supreme Court precedent supports applying a more rigorous standard" than the "business judgment standard" to motions to reject contracts of a "special nature," like collective bargaining agreements.[82] And as the Fifth Circuit noted, "the nature of a contract for the interstate sale of electricity at wholesale is also unique."[83] "Use of the business judgment standard," it stated, "would be inappropriate in this case because it would not account for the public interest inherent in the transmission and sale of electricity."[84] In remanding the case back to the bankruptcy court,

[82] *In re Mirant Corp.*, 378 F.3d at 524-25.

[83] *Id.* at 525.

[84] *Id.*

the Fifth Circuit advised that FERC would be able to assist it in balancing the public interest equities.[85]

On remand, the lower court embraced the Fifth Circuit's directives, stating that it would:

> carefully scrutinize the impact of rejection upon the public interest and would, *inter alia*, ensure that rejection will not cause any disruption in the supply of electricity to other public utilities or to consumers or lead to unjust or excessive rates. If rejection would compromise the public interest in any respect, it would not be authorized unless Debtors show that they cannot reorganize without the rejection. Before authorizing a rejection, the court would give the FERC an opportunity to participate as a party in interest for all purposes in this case under 11 U.S.C. § 1109(b) and FED. R. BANKR. P. 2018(a), and would afford the FERC an opportunity to engage in appropriate inquiry to enable it to evaluate the effect that such a rejection would have on the public interest.[86]

OVEC believes the Commission has sufficient information to declare that rejection of the ICPA would, in fact, be contrary to the public interest. As discussed earlier, the ICPA is not a bilateral agreement, but, as the rating agencies have viewed it, the agreement is more in the nature of a joint venture arrangement. Rejection of the ICPA will thus impact not only OVEC, but the other joint venture participants. In the short run, it raises OVEC's borrowing costs and, over the remaining life of the contract would shift hundreds of millions of dollars of OVEC's expenses for which FirstEnergy is now responsible to OVEC's remaining owners and their customers.

But even if the Commission were to conclude that it needs more information to ascertain where the public interest lies if FirstEnergy is permitted to reject the ICPA, it should still determine that it would address the question in a declaratory order. The Commission could do so

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[85] *Id.* at 526. *See also, Cal. Oversight Bd. et al. v. Calpine Energy Servs., L.P. et al.*, 114 FERC ¶ 61,003, PP 5-11 (2006).

[86] *In re Mirant Corp.*, 318 B.R. at108.

after opening the proceeding to the filing of comments and briefs so that it has the record it needs to address the issue.

VII. CONCLUSION

For the reasons set forth above, OVEC seeks the following relief from the Commission:

1. A Commission order granting OVEC's Complaint (1) by making a finding that FirstEnergy's anticipatory breach of the ICPA constitutes a violation of its obligations under that agreement, and (2) by making a determination that permitting FirstEnergy to terminate its obligations under the ICPA would be contrary to the public interest in violation of the *Mobile Sierra* doctrine (and to establish such additional procedures as may be necessary to make the latter determination);

2. Alternatively, a Commission order declaring that it has exclusive jurisdiction to ascertain whether FirstEnergy's termination of its purchase obligation under the ICPA, by rejection of the contract in bankruptcy or otherwise, (1) is a matter exclusively within the jurisdiction of the Commission, and (2) that such termination would be contrary to the public interest in violation of the *Mobile Sierr*a doctrine (and to establish such additional procedures as may be necessary to make the latter determination); and

3. Alternatively, should the Commission determine that it lacks exclusive jurisdiction, to initiate proceedings to ascertain whether termination of FirstEnergy's purchase obligations under the ICPA would be contrary to the public interest in violation of the *Mobile Sierr*a doctrine (and to establish such additional procedures for the development of a record as may be necessary to make the latter determination) and to advise the bankruptcy court both of its intention to make such a determination and of its ultimate conclusions.

Respectfully submitted,

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Dated: March 26, 2018

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Ohio Valley Electric Corporation, Complainant	)	
v.	)	**Docket No. EL18-___-000**
First Energy Solutions Corp., Respondent.	)	

NOTICE OF COMPLAINT

(_____, 2018)

Take notice that on March 26, 2018, the Ohio Valley Electric Corporation and its wholly-owned subsidiary, Indiana-Kentucky Electric Corporation (collectively, Complainant) filed a formal Complaint against FirstEnergy Solutions Corp. (Respondent) pursuant to section 306 of the Federal Power Act, 16 U.S.C. §825e, and Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission), 18 C.F.R. 385.206 (2018), asking the Commission to enjoin Respondent's anticipated breach of the Inter-Company Power Agreement (ICPA), as more fully explained in the Complaint.

Complainant certifies that copies of the Complaint were served on the contacts for Respondent 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, 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 Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the 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 5 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 online at http://www.ferc.gov, using the "eLibrary" link and is available for electronic 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 **[DATE]**, 2018.

Kimberly D. Bose,
Secretary.

Attachment A

Execution Copy

AMENDED AND RESTATED

INTER-COMPANY POWER AGREEMENT

DATED AS OF SEPTEMBER 10, 2010

AMONG

OHIO VALLEY ELECTRIC CORPORATION,
ALLEGHENY ENERGY SUPPLY COMPANY, L.L.C.
APPALACHIAN POWER COMPANY,
BUCKEYE POWER GENERATING, LLC,
COLUMBUS SOUTHERN POWER COMPANY,
THE DAYTON POWER AND LIGHT COMPANY,
DUKE ENERGY OHIO, INC.,
FIRSTENERGY GENERATION CORP.,
INDIANA MICHIGAN POWER COMPANY,
KENTUCKY UTILITIES COMPANY,
LOUISVILLE GAS AND ELECTRIC COMPANY,
MONONGAHELA POWER COMPANY,
OHIO POWER COMPANY,
PENINSULA GENERATION COOPERATIVE, and
SOUTHERN INDIANA GAS AND ELECTRIC COMPANY

AMENDED AND RESTATED

INTER-COMPANY POWER AGREEMENT

THIS AGREEMENT, dated as of September 10, 2010 (the "Agreement"), by and among OHIO VALLEY ELECTRIC CORPORATION (herein called OVEC), ALLEGHENY ENERGY SUPPLY COMPANY, L.L.C. (herein called Allegheny), APPALACHIAN POWER COMPANY (herein called Appalachian), BUCKEYE POWER GENERATING, LLC (herein called Buckeye), COLUMBUS SOUTHERN POWER COMPANY (herein called Columbus), THE DAYTON POWER AND LIGHT COMPANY (herein called Dayton), DUKE ENERGY OHIO, INC. (formerly known as The Cincinnati Gas & Electric Company and herein called Duke Ohio), FIRSTENERGY GENERATION CORP. (herein called FirstEnergy), INDIANA MICHIGAN POWER COMPANY (herein called Indiana), KENTUCKY UTILITIES COMPANY (herein called Kentucky), LOUISVILLE GAS AND ELECTRIC COMPANY (herein called Louisville), MONONGAHELA POWER COMPANY (herein called Monongahela), OHIO POWER COMPANY (herein called Ohio Power), PENINSULA GENERATION COOPERATIVE (herein called Peninsula), and SOUTHERN INDIANA GAS AND ELECTRIC COMPANY (herein called Southern Indiana, and all of the foregoing, other than OVEC, being herein sometimes collectively referred to as the Sponsoring Companies and individually as a Sponsoring Company) hereby amends and restates in its entirety, the Inter-Company Power Agreement dated as of March 13, 2006, as amended by Modification No. 1, dated as of March 13, 2006 (herein called the Current Agreement), by and among OVEC and the Sponsoring Companies.

WITNESSETH THAT:

WHEREAS, the Current Agreement amended and restated the original Inter-Company Power Agreement, dated as of July 10, 1953, as amended by Modification No. 1, dated as of June 3, 1966; Modification No. 2, dated as of January 7, 1967; Modification No. 3, dated as of November 15, 1967; Modification No. 4, dated as of November 5, 1975; Modification No. 5, dated as of September 1, 1979; Modification No. 6, dated as of August 1, 1981; Modification No. 7, dated as of January 15, 1992; Modification No. 8, dated as of January 19, 1994; Modification No. 9, dated as of August 17, 1995; Modification No. 10, dated as of January 1, 1998; Modification No. 11, dated as of April 1, 1999; Modification No. 12, dated as of November 1, 1999; Modification No. 13, dated as of May 24, 2000; Modification No. 14, dated as of April 1, 2001; and Modification No. 15, dated as of April 30, 2004 (together, herein called the Original Agreement); and

WHEREAS, OVEC designed, purchased, and constructed, and continues to operate and maintain two steam-electric generating stations, one station (herein called Ohio Station) consisting of five turbo-generators and all other necessary equipment, at a location on the Ohio River near Cheshire, Ohio, and the other station (herein called Indiana Station) consisting of six turbogenerators and all other necessary equipment, at a location on the Ohio River near Madison,

Indiana, (the Ohio Station and the Indiana Station being herein called the Project Generating Stations); and

WHEREAS, OVEC also designed, purchased, and constructed, and continues to operate and maintain necessary transmission and general plant facilities (herein called the Project Transmission Facilities) and OVEC established or cause to be established interconnections between the Project Generating Stations and the systems of certain of the Sponsoring Companies; and

WHEREAS, OVEC entered into an agreement, attached hereto as Exhibit A, with Indiana-Kentucky Electric Corporation (herein called IKEC), a corporation organized under the laws of the State of Indiana as a wholly owned subsidiary corporation of OVEC, which has been amended and restated as of the date of this Agreement and embodies the terms and conditions for the ownership and operation by IKEC of the Indiana Station and such portion of the Project Transmission Facilities which are to be owned and operated by it; and

WHEREAS, transmission facilities were constructed by certain of the Sponsoring Companies to interconnect the systems of such Sponsoring Companies, directly or indirectly, with the Project Generating Stations and/or the Project Transmission Facilities, and the Sponsoring Companies have agreed to pay for Available Power, as hereinafter defined, as may be available at the Project Generating Stations; and

WHEREAS, the parties hereto desire to amend and restate in their entirety, the Current Agreement to define the terms and conditions governing the rights of the Sponsoring Companies to receive Available Power from the Project Generating Stations and the obligations of the Sponsoring Companies to pay therefor.

NOW, THEREFORE, the parties hereto agree with each other as follows:

ARTICLE 1

DEFINITIONS

1.01. For the purposes of this Agreement, the following terms, wherever used herein, shall have the following meanings:

1.011 "Affiliate" means, with respect to a specified person, any other person that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with, such specified person; provided that "control" for these purposes means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise.

1.012 "Arbitration Board" has the meaning set forth in Section 9.10.

1.013 "Available Energy" of the Project Generating Stations means the energy associated with Available Power.

1.014 "Available Power" of the Project Generating Stations at any particular time means the total net kilowatts at the 345-kV busses of the Project Generating Stations which Corporation in its sole discretion will determine that the Project Generating Stations will be capable of safely delivering under conditions then prevailing, including all conditions affecting capability.

1.015 "Corporation" means OVEC, IKEC, and all other subsidiary corporations of OVEC.

1.016 "Decommissioning and Demolition Obligation" has the meaning set forth in Section 5.03(f) hereof.

1.017 "Effective Date" means September 10, 2010, or to the extent necessary, such later date on which Corporation notifies the Sponsoring Companies that all conditions to effectiveness, including all required waiting periods and all required regulatory acceptances or approvals, of this Agreement have been satisfied in form and substance satisfactory to the Corporation.

1.018 "Election Period" has the meaning set forth in Section 9.183(a) hereof.

1.019 "Minimum Generating Unit Output" means 80 MW (net) for each of the Corporation's generation units; provided that such "Minimum Generating Unit Output" shall be confirmed from time to time by operating tests on the Corporation's generation units and shall be adjusted by the Operating Committee as appropriate following such tests.

1.0110 "Minimum Loading Event" means a period of time during which one or more of the Corporation's generation units are operating at below the Minimum Generating Output as a result of the Sponsoring Companies' failure to schedule and take delivery of sufficient Available Energy.

1.0111 "Minimum Loading Event Costs" means the sum of the following costs caused by one or more Minimum Loading Events: (i) the actual costs of any of the Corporation's generating units burning fuel oil; and (ii) the estimated actual additional costs to the Corporation resulting from Minimum Loading Events, including without limitation the incremental costs of additional emissions allowances, reflected in the schedule of charges prepared by the Operating Committee and in effect as of the commencement of any Minimum Loading Event, which schedule may be adjusted from time to time as necessary by the Operating Committee.

1.0112 "Month" means a calendar month.

1.0113 "Nominal Power Available" means an individual Sponsoring Company's Power Participation Ratio share of the Corporation's current estimate of the maximum amount of Available Power available for delivery at any given time.

1.0114 "Offer Notice" means the notice required to be given to the other Sponsoring Companies by a Transferring Sponsor offering to sell all or a portion of such Transferring Sponsor's rights, title and interests in, and obligations under this Agreement. At a minimum, the Offer Notice shall be in writing and shall contain (i) the rights, title and interests in, and obligations under this Agreement that the Transferring Sponsor proposes to Transfer; and (ii) the cash purchase price and any other material terms and conditions of such proposed transfer. An Offer Notice may not contain terms or conditions requiring the purchase of any non-OVEC interests.

1.0115 "Permitted Assignee" means a person that is (a) a Sponsoring Company or its Affiliate whose long-term unsecured non-credit enhanced indebtedness, as of the date of such assignment, has a Standard & Poor's credit rating of at least BBB- and a Moody's Investors Service, Inc. credit rating of at least Baa3 (provided that, if the proposed assignee's long-term unsecured non-credit enhanced indebtedness is not currently rated by one of Standard & Poor's or Moody, such assignee's long-term unsecured non-credit enhanced indebtedness, as of the date of such assignment, must have either a Standard & Poor's credit rating of at least BBB- or a Moody's Investors Service, Inc. credit rating of at least Baa3); or (b) a Sponsoring Company or its Affiliate that does not meet the criteria in subsection (a) above, if the Sponsoring Company or its Affiliate that is assigning its rights, title and interests in, and obligations under, this Agreement agrees in writing (in form and substance satisfactory to Corporation) to remain obligated to satisfy all of the obligations related to the assigned rights, title and interests to the extent such obligations are not satisfied by the assignee of such rights, title and interests; provided that, in no event shall a person be deemed a "Permitted Assignee" if counsel for the Corporation reasonably determines that the assignment of the rights, title or interests in, or obligations under, this Agreement to such person could cause a termination, default, loss or payment obligation under any security issued, or agreement entered into, by the Corporation prior to such transfer.

1.0116 "Postretirement Benefit Obligation" has the meaning set forth in Section 5.03(e) hereof.

1.0117 "Power Participation Ratio" as applied to each of the Sponsoring Companies refers to the percentage set forth opposite its respective name in the tabulation below:

Company	Power Participation Ratio—Percent

Allegheny	3.01
Appalachian	15.69
Buckeye	18.00
Columbus	4.44
Dayton	4.90
Duke Ohio	9.00
FirstEnergy	4.85
Indiana	7.85
Kentucky	2.50
Louisville	5.63
Monongahela	0.49
Ohio Power	15.49
Peninsula	6.65
Southern Indiana	1.50
Total	100.0

1.0118 "Tariff" means the open access transmission tariff of the Corporation, as amended from time to time, or any successor tariff, as accepted by the Federal Energy Regulatory Commission or any successor agency.

1.0119 "Third Party" means any person other than a Sponsoring Company or its Affiliate.

1.0120 "Total Minimum Generating Output" means the product of the Minimum Generating Unit Output times the number of the Corporation's generation units available for service at that time.

1.0121 "Transferring Sponsor" has the meaning set forth in Section 9.183(a) hereof.

1.0122 "Uniform System of Accounts" means the Uniform System of Accounts prescribed by the Federal Energy Regulatory Commission as in effect on January 1, 2004.

ARTICLE 2

TRANSMISSION AGREEMENT AND FACILITIES

2.01. *Transmission Agreement.* The Corporation shall enter into a transmission service agreement under the Tariff, and the Corporation shall reserve and schedule transmission service, ancillary services and other transmission-related services in accordance with the Tariff to provide for the delivery of Available Power and Available Energy to the applicable delivery point under this Agreement.

2.02. *Limited Burdening of Corporation's Transmission Facilities.* Transmission facilities owned by the Corporation, including the Project Transmission Facilities, shall not be burdened by power and energy flows of any Sponsoring Company to an extent which would impair or prevent the transmission of Available Power.

ARTICLE 3

[RESERVED]

ARTICLE 4

AVAILABLE POWER SUPPLY

4.01. *Operation of Project Generating Stations.* Corporation shall operate and maintain the Project Generating Stations in a manner consistent with safe, prudent, and efficient operating practice so that the Available Power available from said stations shall be at the highest practicable level attainable consistent with OVEC's obligations under Reliability*First* Reliability Standard BAL-002-RFC throughout the term of this Agreement.

4.02. *Available Power Entitlement.* The Sponsoring Companies collectively shall be entitled to take from Corporation and Corporation shall be obligated to supply to the Sponsoring Companies any and all Available Power and Available Energy pursuant to the provisions of this Agreement. Each Sponsoring Company's Available Power Entitlement hereunder shall be its Power Participation Ratio, as defined in *subsection* 1.0117, of Available Power.

4.03. *Available Energy.* Corporation shall make Available Energy available to each Sponsoring Company in proportion to said Sponsoring Company's Power Participation Ratio. No Sponsoring Company, however, shall be obligated to avail itself of any Available Energy. Available Energy shall be scheduled and taken by the Sponsoring Companies in accordance with the following procedures:

4.031 Each Sponsoring Company shall schedule the delivery of all or any portion (in whole MW increments) of its entitlement to Available Energy in accordance with scheduling procedures established by the Operating Committee from time to time.

4.032 In the event that any Sponsoring Company does not schedule the delivery of all of its Power Participation Ratio share of Available Energy, then each such other Sponsoring Company may schedule the delivery of all or any portion (in whole MW increments) of any such unscheduled share of Available Energy (through successive allotments if necessary) in proportion to their Power Participation Ratios.

4.033 Notwithstanding any Available Energy schedules made in accordance with this Section 4.03 and the applicable scheduling procedures, (i) the Corporation shall adjust all schedules to the extent that the Corporation's actual generation output is less than or more than the expected Nominal Power Available to all Sponsoring Companies, or to the extent that the Corporation is unable to obtain sufficient transmission service under the Tariff for the delivery of all scheduled Available Energy; and (ii) immediately following a Minimum Loading Event, any Sponsoring Company causing (in whole or part) such Minimum Loading Event shall have its Available Energy schedules increased after the schedules of the Sponsoring Companies not causing such Minimum Load Event, in accordance with the estimated ramp rates associated with the shutdown and start-up of the Corporation's generation units as reflected in the schedules prepared by the Operating Committee and in effect as of the commencement of any Minimum Loading Event, which schedules may be adjusted from time to time as necessary by the Operating Committee.

4.034 Each Sponsoring Company availing itself of Available Energy shall be entitled to an amount of energy (herein called billing kilowatt-hours of Available Energy) equal to its portion, determined as provided in this Section 4.03, of the total Available Energy after deducting therefrom such Sponsoring Company's proportionate share, as defined in this Section 4.03, of all losses as determined in accordance with the Tariff incurred in transmitting the total of such Available Energy from the 345-kV busses of the Project Generating Stations to the applicable delivery points, as scheduled pursuant to Section 9.01, of all Sponsoring Companies availing themselves of Available Energy. The proportionate share of all such losses that shall be so deducted from such Sponsoring Company's portion of Available Energy shall be equal to all such losses multiplied by the ratio of such portion of Available Energy to the total of such Available Energy. Each Sponsoring Company shall have the right, pursuant to this Section 4.03, to avail itself of Available Energy for the purpose of meeting the loads of its own system and/or of supplying energy to other systems in accordance with agreements, other than this Agreement, to which such Sponsoring Company is a party.

4.035 To the extent that, as a result of the failure by one or more Sponsoring Companies to take its respective Power Participation Ratio share of the applicable Total Minimum Generating Output during any hour, a Minimum Loading Event shall occur, then such one or more Sponsoring Companies shall be assessed charges for any Minimum Loading Event Costs in accordance with Section 5.05.

ARTICLE 5

CHARGES FOR AVAILABLE POWER AND MINIMUM LOADING EVENT COSTS

5.01. *Total Monthly Charge.* The amount to be paid to Corporation each month by the Sponsoring Companies for Available Power and Available Energy supplied under this

Agreement shall consist of the sum of an energy charge, a demand charge, and a transmission charge, all determined as set forth in this *Article* 5.

5.02. *Energy Charge.* The energy charge to be paid each month by the Sponsoring Companies for Available Energy shall be determined by Corporation as follows:

5.021 Determine the aggregate of all expenses for fuel incurred in the operation of the Project Generating Stations, in accordance with Account 501 (Fuel), Account 506.5 (Variable Reagent Costs Associated With Pollution Control Facilities) and 509 (Allowances) of the Uniform System of Accounts.

5.022 Determine for such month the difference between the total cost of fuel as described in subsection 5.021 above and the total cost of fuel included in any Minimum Loading Event Costs payable to the Corporation for such month pursuant to Section 8.03. For the purposes hereof the difference so determined shall be the fuel cost allocable for such month to the total kilowatt-hours of energy generated at the Project Generating Stations for the supply of Available Energy. For Available Energy availed of by the Sponsoring Companies, each Sponsoring Company shall pay Corporation for each such month an amount obtained by multiplying the ratio of the billing kilowatt-hours of such Available Energy availed of by such Sponsoring Company during such month to the aggregate of the billing kilowatt-hours of all Available Energy availed of by all Sponsoring Companies during such month times the total cost of fuel as described in this subsection 5.022 for such month.

5.03. *Demand Charge.* During the period commencing with the Effective Date and for the remainder of the term of this Agreement, demand charges payable by the Sponsoring Companies to Corporation shall be determined by the Corporation as provided below in this Section 5.03. Each Sponsoring Company's share of the aggregate demand charges shall be the percentage of such charges represented by its Power Participation Ratio.

The aggregate demand charge payable each month by the Sponsoring Companies to Corporation shall be equal to the total costs incurred for such month by Corporation resulting from its ownership, operation, and maintenance of the Project Generating Stations and Project Transmission Facilities determined as follows:

As soon as practicable after the close of each calendar month the following components of costs of Corporation (eliminating any duplication of costs which might otherwise be reflected among the corporate entities comprising Corporation) applicable for such month to the ownership, operation and maintenance of the Project Generating Stations and the Project Transmission Facilities, including additional facilities and/or spare parts (such as fuel processing plants, flue gas or waste product processing facilities, and facilities reasonably required to enable the Corporation to limit the emission of pollutants or the discharge of wastes in compliance with governmental requirements) and

replacements necessary or desirable to keep the Project Generating Stations and the Project Transmission Facilities in a dependable and efficient operating condition, and any provision for any taxes that may be applicable to such charges, to be determined and recorded in the following manner:

(a) Component (A) shall consist of fixed charges made up of (i) the amounts of interest properly chargeable to Accounts 427, 430 and 431, less the amount thereof credited to Account 432, of the Uniform System of Accounts, including the interest component of any purchase price, interest, rental or other payment under an installment sale, loan, lease or similar agreement relating to the purchase, lease or acquisition by Corporation of additional facilities and replacements (whether or not such interest or other amounts have come due or are actually payable during such Month), (ii) the amounts of amortization of debt discount or premium and expenses properly chargeable to Accounts 428 and 429, and (iii) an amount equal to the sum of (I) the applicable amount of the debt amortization component for such month required to retire the total amount of indebtedness of Corporation issued and outstanding, (II) the amortization requirement for such month in respect of indebtedness of Corporation incurred in respect of additional facilities and replacements, and (III) to the extent not provided for pursuant to clause (II) of this clause (iii), an appropriate allowance for depreciation of additional facilities and replacements.

(b) Component (B) shall consist of the total operating expenses for labor, maintenance, materials, supplies, services, insurance, administrative and general expense, etc., properly chargeable to the Operation and Maintenance Expense Accounts of the Uniform System of Accounts (exclusive of Accounts 501, 509, 555, 911, 912, 913, 916, and 917 of the Uniform System of Accounts), minus the total of all non-fuel costs included in any Minimum Loading Event Costs payable to the Corporation for such month pursuant to Section 8.03, minus the total of all transmission charges payable to the Corporation for such month pursuant to Section 5.04, and plus any additional amounts which, after provision for all income taxes on such amounts (which shall be included in Component (C) below), shall equal any amounts paid or payable by Corporation as fines or penalties with respect to occasions where it is asserted that Corporation failed to comply with a law or regulation relating to the emission of pollutants or the discharge of wastes.

(c) Component (C) shall consist of the total expenses for taxes, including all taxes on income but excluding any federal income taxes arising from payments to Corporation under Component (D) below, and all operating or other costs or expenses, net of income, not included or

specifically excluded in Components (A) or (B) above, including tax adjustments, regulatory adjustments, net losses for the disposition of property and other net costs or expenses associated with the operation of a utility.

(d) Component (D) shall consist of an amount equal to the product of $2.089 multiplied by the total number of shares of capital stock of the par value of $100 per share of Ohio Valley Electric Corporation which shall have been issued and which are outstanding on the last day of such month.

(e) Component (E) shall consist of an amount to be sufficient to pay the costs and other expenses relating to the establishment, maintenance and administration of life insurance, medical insurance and other postretirement benefits other than pensions attributable to the employment and employee service of active employees, retirees, or other employees, including without limitation any premiums due or expected to become due, as well as administrative fees and costs, such amounts being sufficient to provide payment with respect to all periods for which Corporation has committed or is otherwise obligated to make such payments, including amounts attributable to current employee service and any unamortized prior service cost, gain or loss attributable to prior service years ("Postretirement Benefit Obligation"); provided that, the amount payable for Postretirement Benefit Obligations during any month shall be determined by the Corporation based on, among other factors, the Statement of Financial Accounting Standards No. 106 (Employers' Accounting For Postretirement Benefits Other Than Pensions) and any applicable accounting standards, policies or practices as adopted from time to time relating to accruals with respect to all or any portion of such Postretirement Benefit Obligation.

(f) Component (F) shall consist of an amount that may be incurred in connection with the decommissioning, shutdown, demolition and closing of the Project Generating Stations when production of electric power and energy is discontinued at such Project Generating Stations, which amount shall include, without limitation the following costs (net of any salvage credits): the costs of demolishing the plants' building structures, disposal of non-salvageable materials, removal and disposal of insulating materials, removal and disposal of storage tanks and associated piping, disposal or removal of materials and supplies (including fuel oil and coal), grading, covering and reclaiming storage and disposal areas, disposing of ash in ash ponds to the extent required by regulatory authorities, undertaking corrective or remedial action required by regulatory authorities, and any other costs incurred in putting the facilities

in a condition necessary to protect health or the environment or which are required by regulatory authorities, or which are incurred to fund continuing obligations to monitor or to correct environmental problems which result, or are later discovered to result, from the facilities' operation, closure or post-closure activities ("Decommissioning and Demolition Obligation") provided that, the amount payable for Decommissioning and Demolition Obligations during any month shall be calculated by Corporation based on, among other factors, the then-estimated useful life of the Project Generating Stations and any applicable accounting standards, policies or practices as adopted from time to time relating to accruals with respect to all or any portion of such Decommissioning and Demolition Obligation, and provided further that, the Corporation shall recalculate the amount payable under this Component (F) for future months from time to time, but in no event later than five (5) years after the most recent calculation.

5.04. *Transmission Charge.* The transmission charges to be paid each month by the Sponsoring Companies shall be equal to the total costs incurred for such month by Corporation for the purchase of transmission service, ancillary services and other transmission-related services under the Tariff as reserved and scheduled by the Corporation to provide for the delivery of Available Power and Available Energy to the applicable delivery point under this Agreement. Each Sponsoring Company's share of the aggregate transmission charges shall be the percentage of such charges represented by its Power Participation Ratio.

5.05. *Minimum Loading Event Costs.* To the extent that, as a result of the failure by one or more Sponsoring Companies to take its respective Power Participation Ratio share of the applicable Total Minimum Generating Output during any hour, a Minimum Loading Event shall occur, then the sum of all Minimum Loading Event Costs relating to such Minimum Loading Event shall be charged to such Sponsoring Company or group of Sponsoring Companies that failed take its respective Power Participation Ratio share of the applicable Total Minimum Generating Output during such period, with such Minimum Loading Event Costs allocated among such Sponsoring Companies on a pro-rata basis in accordance with such Sponsoring Company's MWh share of the MWh reduction in the delivery of Available Energy causing any Minimum Loading Event. The applicable charges for Minimum Loading Event Costs as determined by the corporation in accordance with Section 5.05 shall be paid each month by the applicable Sponsoring Companies.

ARTICLE 6

Metering of Energy Supplied

6.01. *Measuring Instruments.* The parties hereto shall own and maintain such metering equipment as may be necessary to provide complete information regarding the delivery of power and energy to or for the account of any of the parties hereto; and the ownership and

expense of such metering shall be in accordance with agreements among them. Each party will at its own expense make such periodic tests and inspections of its meters as may be necessary to maintain them at the highest practical commercial standard of accuracy and will advise all other interested parties hereto promptly of the results of any such test showing an inaccuracy of more than 1%. Each party will make additional tests of its meters at the request of any other interested party. Other interested parties shall be given notice of, and may have representatives present at, any test and inspection made by another party.

ARTICLE 7

COSTS OF REPLACEMENTS AND ADDITIONAL FACILITIES; PAYMENTS FOR EMPLOYEE BENEFITS; DECOMMISSIONING, SHUTDOWN, DEMOLITION AND CLOSING CHARGES

7.01. *Replacement Costs.* The Sponsoring Companies shall reimburse Corporation for the difference between (a) the total cost of replacements chargeable to property and plant made by Corporation during any month prior thereto (and not previously reimbursed) and (b) the amounts received by Corporation as proceeds of fire or other applicable insurance protection, or amounts recovered from third parties responsible for damages requiring replacement, plus provision for all taxes on income on such difference; provided that, to the extent that the Corporation arranges for the financing of any replacements, the payments due under this Section 7.01 shall equal the amount of all principal, interest, taxes and other costs and expenses related to such financing during any month. Each Sponsoring Company's share of such payment shall be the percentage of such costs represented by its Power Participation Ratio. The term cost of replacements, as used herein, shall include all components of cost, plus removal expense, less salvage.

7.02. *Additional Facility Costs.* The Sponsoring Companies shall reimburse Corporation for the total cost of additional facilities and/or spare parts purchased and/or installed by Corporation during any month prior thereto (and not previously reimbursed), plus provision for all taxes on income on such costs; provided that, to the extent that the Corporation arranges for the financing of any additional facilities and/or spare parts, the payments due under this Section 7.02 shall equal the amount of all principal, interest, taxes and other costs and expenses related to such financing during any month. Each Sponsoring Company's share of such payment shall be the percentage of such costs represented by its Power Participation Ratio.

7.03. *Payments for Employee Benefits.* Not later than the effective date of termination of this Agreement, each Sponsoring Company will pay to Corporation its Power Participation Ratio share of additional amounts, after provision for any taxes that may be applicable thereto, sufficient to cover any shortfall if the amount of the Postretirement Benefit Obligation collected by the Corporation prior to the effective date of termination of the Agreement is insufficient to permit Corporation to fulfill its commitments or obligations with respect to both postemployment benefit obligations under the Statement of Financial Accounting Standards No. 112 and postretirement benefits other than pensions, as determined by Corporation

with the aid of an actuary or actuaries selected by the Corporation based on the terms of the Corporation's then-applicable plans.

7.04. *Decommissioning, Shutdown, Demolition and Closing.* The Sponsoring Companies recognize that a part of the cost of supplying power to it under this Agreement is the amount that may be incurred in connection with the decommissioning, shutdown, demolition and closing of the Project Generating Stations when production of electric power and energy is discontinued at such Project Generating Stations. Not later than the effective date of termination of this Agreement, each Sponsoring Company will pay to Corporation its Power Participation Ratio share of additional amounts, after provision for any taxes that may be applicable thereto, sufficient to cover any shortfall if the amount of the Decommissioning and Demolition Obligation collected by the Corporation prior to the effective date of termination of the Agreement is insufficient to permit Corporation to complete the decommissioning, shutdown, demolition and closing of the Project Generating Stations, based on the Corporation's recalculation of the Decommissioning and Demolition Obligation in accordance with Section 5.03(f) of this Agreement no earlier than twelve (12) months before the effective date of termination of this Agreement.

ARTICLE 8

BILLING AND PAYMENT

8.01. *Available Power, and Replacement and Additional Facility Costs.* As soon as practicable after the end of each month Corporation shall render to each Sponsoring Company a statement of all Available Power and Available Energy supplied to or for the account of such Sponsoring Company during such month, specifying the amount due to the Corporation therefor, including any amounts for reimbursement for the cost of replacements and additional facilities and/or spare parts incurred during such month, pursuant to *Articles* 5 and 7 above. Such Sponsoring Company shall make payment therefor promptly upon the receipt of such statement, but in no event later than fifteen (15) days after the date of receipt of such statement. In case any factor entering into the computation of the amount due for Available Power and Available Energy cannot be determined at the time, it shall be estimated subject to adjustment when the actual determination can be made.

8.02. *Provisional Payments for Available Power.* The Sponsoring Companies shall, from time to time, at the request of the Corporation, make provisional semi-monthly payments for Available Power in amounts approximately equal to the estimated amounts payable for Available Power delivered by Corporation to the Sponsoring Companies during each semi-monthly period. As soon as practicable after the end of each semi-monthly period with respect to which Corporation has requested the Sponsoring Companies to make provisional semi-monthly payments for Available Power, Corporation shall render to each Sponsoring Company a separate statement indicating the amount payable by such Sponsoring Company for such semi-monthly period. Such Sponsoring Company shall make payment therefor promptly upon receipt of such statement, but in no event later than fifteen (15) days after the date of receipt of such

statement and the amounts so paid by such Sponsoring Company shall be credited to the account of such Sponsoring Company with respect to future payments to be made pursuant to *Articles* 5 and 7 above by such Sponsoring Company to Corporation for Available Power.

8.03. *Minimum Loading Event Costs.* As soon as practicable after the end of each month, Corporation shall render to each Sponsoring Company a statement indicating any applicable charges for Minimum Loading Event Costs pursuant to Section 5.05 during such month, specifying the amount due to the Corporation therefor pursuant to *Article* 5 above. Such Sponsoring Company shall make payment therefor promptly upon the receipt of such statement, but in no event later than fifteen (15) days after the date of receipt of such statement. In case the computation of the amount due for Minimum Loading Event Costs cannot be determined at the time, it shall be estimated subject to adjustment when the actual determination can be made, and all payments shall be subject to subsequent adjustment.

8.04. *Unconditional Obligation to Pay Demand and Other Charges.* The obligation of each Sponsoring Company to pay its specified portion of the Demand Charge under Section 5.03, the Transmission Charge under Section 5.04, and all charges under *Article* 7 for any Month shall not be reduced irrespective of:

(a) whether or not any Available Power or Available Energy are supplied by the Corporation during such calendar month and whether or not any Available Power or Available Energy are accepted by any Sponsoring Company during such calendar month;

(b) the existence of any claim, set-off, defense, reduction, abatement or other right (other than irrevocable payment, performance, satisfaction or discharge in full) that such Sponsoring Company may have, or which may at any time be available to or be asserted by such Sponsoring Company, against the Corporation , any other Sponsoring Company, any creditor of the Corporation or any other Person (including, without limitation, arising as a result of any breach or alleged breach by either the Corporation, any other Sponsoring Company, any creditor of the Corporation or any other Person under this Agreement or any other agreement (whether or not related to the transactions contemplated by this Agreement or any other agreement) to which such party is a party); or

(c) the validity or enforceability against any other Sponsoring Company of this Agreement or any right or obligation hereunder (or any release or discharge thereof) at any time.

ARTICLE 9

GENERAL PROVISIONS

9.01. *Characteristics of Supply and Points of Delivery.* All power and energy delivered hereunder shall be 3-phase, 60-cycle, alternating current, at a nominal unregulated voltage designated for the point of delivery as described in this *Article* 9. Available Power and Available Energy to be delivered between Corporation and the Sponsoring Companies pursuant to this Agreement shall be delivered under the terms and conditions of the Tariff at the points, as scheduled by the Sponsoring Company in accordance with procedures established by the Operating Committee and in accordance with Section 9.02, where the transmission facilities of Corporation interconnect with the transmission facilities of any Sponsoring Company (or its successor or predecessor); provided that, to the extent that a joint and common market is established for the sale of power and energy by Sponsoring Companies within one or more of the regional transmission organizations or independent system operators approved by the Federal Energy Regulatory Commission in which the Sponsoring Companies are members or otherwise participate, then Corporation and the Sponsoring Companies shall take such action as reasonably necessary to permit the Sponsoring Companies to bid their entitlement to power and energy from Corporation into such market(s) in accordance with the procedures established for such market(s).

9.02. *Modification of Delivery Schedules Based on Available Transmission Capability.* To the extent that transmission capability available for the delivery of Available Power and Available Energy at any delivery point is less than the total amount of Available Power and Available Energy scheduled for delivery by the Sponsoring Companies at such delivery point in accordance with Section 9.01, then the following procedures shall apply and the Corporation and the applicable Sponsoring Companies shall modify their delivery schedules accordingly until the total amount of Available Power and Available Energy scheduled for delivery at such delivery point is equal to or less than the transmission capability available for the delivery of Available Power and Available Energy: (a) the transmission capability available for the delivery of Available Power and Available Energy at the following delivery points shall be allocated first on a pro rata basis (in whole MW increments) to the following Sponsoring Companies up to their Power Participation Ratio share of the total amount of Available Energy available to all Sponsoring Companies (and as applicable, further allocated among Sponsoring Companies entitled to allocation under this Section 9.02(a) in accordance with their Power Participation Ratios): (i) to Allegheny, Appalachian, Buckeye, Columbus, FirstEnergy, Indiana, Monongahela, Ohio Power and Peninsula (or their successors) for deliveries at the points of interconnection between the Corporation and Appalachian, Columbus, Indiana or Ohio Power, or their successors; (ii) to Duke Ohio (or its successor) for deliveries at the points of interconnection between the Corporation and Duke Ohio or its successor; (iii) to Dayton (or its successor) for deliveries at the points of interconnection between the Corporation and Dayton or its successor; and (iv) to Kentucky, Louisville and Southern Indiana (or their successors) for deliveries at the points of interconnection between the Corporation and Louisville or Kentucky, or their successors; and (b) any remaining transmission capability available for the delivery of

Available Power and Available Energy shall be allocated on a pro rata basis (in whole MW increments) to the Sponsoring Companies in accordance with their Power Participation Ratios.

9.03. *Operation and Maintenance of Systems Involved.* Corporation and the Sponsoring Companies shall operate their systems in parallel, directly or indirectly, except during emergencies that temporarily preclude parallel operation. The parties hereto agree to coordinate their operations to assure maximum continuity of service from the Project Generating Stations, and with relation thereto shall cooperate with one another in the establishment of schedules for maintenance and operation of equipment and shall cooperate in the coordination of relay protection, frequency control, and communication and telemetering systems. The parties shall build, maintain and operate their respective systems in such a manner as to minimize so far as practicable rapid fluctuations in energy flow among the systems. The parties shall cooperate with one another in the operation of reactive capacity so as to assure mutually satisfactory power factor conditions among themselves.

The parties hereto shall exercise due diligence and foresight in carrying out all matters related to the providing and operating of their respective power resources so as to minimize to the extent practicable deviations between actual and scheduled deliveries of power and energy among their systems. The parties hereto shall provide and/or install on their respective systems such communication, telemetering, frequency and/or tie-line control facilities essential to so minimizing such deviations; and shall fully cooperate with one another and with third parties (such third parties whose systems are either directly or indirectly interconnected with the systems of the Sponsoring Companies and who of necessity together with the parties hereto must unify their efforts cooperatively to achieve effective and efficient interconnected systems operation) in developing and executing operating procedures that will enable the parties hereto to avoid to the extent practicable deviations from scheduled deliveries.

In order to foster coordination of the operation and maintenance of Corporation's transmission facilities with those facilities of Sponsoring Companies that are owned or functionally controlled by a regional transmission organization or independent system operator, Corporation shall use commercially reasonable efforts to enter into a coordination agreement with any regional transmission organization or independent system operator approved by the Federal Energy Regulatory Commission that operates transmission facilities that interconnect with Corporation's transmission facilities, and to enter into a mutually agreeable services agreement with a regional transmission organization or independent system operator to provide the Corporation with reliability and security coordination services and other related services.

9.04. *Power Deliveries as Affected by Physical Characteristics of Systems.* It is recognized that the physical and electrical characteristics of the transmission facilities of the interconnected network of which the transmission systems of the Sponsoring Companies, Corporation, and other systems of third parties not parties hereto are a part, may at times preclude the direct delivery at the points of interconnection between the transmission systems of one or more of the Sponsoring Companies and Corporation, of some portion of the energy supplied under this Agreement, and that in each such case, because of said characteristics, some

of the energy will be delivered at points which interconnect the system of one or more of the Sponsoring Companies with systems of companies not parties to this Agreement. The parties hereto shall cooperate in the development of mutually satisfactory arrangements among themselves and with such companies not parties hereto whereby the supply of power and energy contemplated hereunder can be fulfilled.

9.05. *Operating Committee.* There shall be an "Operating Committee" consisting of one member appointed by the Corporation and one member appointed by each of the Sponsoring Companies electing so to do; provided that, if any two or more Sponsoring Companies are Affiliates, then such Affiliates shall together be entitled to appoint only one member to the Operating Committee. The "Operating Committee" shall establish (and modify as necessary) scheduling, operating, testing and maintenance procedures of the Corporation in support of this Agreement, including establishing: (i) procedures for scheduling delivery of Available Energy under Section 4.03, (ii) procedures for power and energy accounting, (iii) procedures for the reservation and scheduling of firm and non-firm transmission service under the Tariff for the delivery of Available Power and Available Energy, (iv) the Minimum Generating Unit Output, and (v) the form of notifications relating to power and energy and the price thereof. In addition, the Operating Committee shall consider and make recommendations to Corporation's Board of Directors with respect to such other problems as may arise affecting the transactions under this Agreement. The decisions of the Operating Committee, including the adoption or modification of any procedure by the Operating Committee pursuant to this Section 9.04, must receive the affirmative vote of at least two-thirds of the members of the Operating Committee, regardless of the number of members of the Operating Committee present at any meeting.

9.06. *Acknowledgment of Certain Rights.* For the avoidance of doubt, all of the parties to this Agreement acknowledge and agree that (i) as of the effective date of the Current Agreement, certain rights and obligations of the Sponsoring Companies or their predecessors under the Original Agreement were changed, modified or otherwise removed, (ii) to the extent that the rights of any Sponsoring Company or their predecessors were thereby changed, modified or otherwise removed as of the effective date of the Current Agreement, such Sponsoring Company may be entitled to rights under applicable law, regulation, rules or orders under the Federal Power Act or otherwise adopted by the Federal Energy Regulatory Commission ("FERC"), (iii) as a result of the elimination as of the effective date of the Current Agreement of the firm transmission service previously provided during the term of the Original Agreement to Sponsoring Companies or their predecessors whose transmission systems were only indirectly connected to the Corporation's facilities through intervening transmission systems by certain Sponsoring Companies or their predecessors whose transmission systems were directly connected to the Corporation's facilities, such Sponsoring Companies or their predecessors whose transmission systems were only indirectly connected to the Corporation's facilities through intervening transmission systems shall have been entitled to such "roll over" firm transmission service for delivery of their entitlement to their Power Participation Ratio share of Surplus Power and Surplus Energy under this Agreement, to the border of such Sponsoring Company system and intervening Sponsoring Company system, as would be accorded a long-

term firm point-to-point transmission service reservation under the then otherwise applicable FERC Open Access Transmission Tariff ("OATT"), (iv) the obligation of any Sponsoring Company to maintain or expand transmission capacity to accommodate another Sponsoring Company's "roll over" rights to transmission service for delivery of their entitlement to their Power Participation Ratio share of Surplus Power and Surplus Energy under this Agreement shall be consistent with the obligations it would have for long-term firm point-to-point transmission service provided pursuant to the then otherwise applicable OATT, and (v) the parties shall cooperate with any Sponsoring Company that seeks to obtain and/or exercise any such rights available under applicable law, regulation, rules or orders under the Federal Power Act or otherwise adopted by the FERC.

9.07. *Term of Agreement.* This Agreement shall become effective upon the Effective Date and shall terminate upon the earlier of: (1) June 30, 2040 or (2) the sale or other disposition of all of the facilities of the Project Generating Stations or the permanent cessation of operation of such facilities; provided that, the provisions of *Articles* 5, 7 and 8, this Section 9.07 and Sections 9.08, 9.09, 9.10, 9.11, 9.12, 9.14, 9.15, 9.16, 9.17 and 9.18 shall survive the termination of this Agreement, and no termination of this Agreement, for whatever reason, shall release any Sponsoring Company of any obligations or liabilities incurred prior to such termination.

9.08. *Access to Records.* Corporation shall, at all reasonable times, upon the request of any Sponsoring Company, grant to its representatives reasonable access to the books, records and accounts of the Corporation, and furnish such Sponsoring Company such information as it may reasonably request, to enable it to determine the accuracy and reasonableness of payments made for energy supplied under this Agreement.

9.09. *Modification of Agreement.* Absent the agreement of all parties to this Agreement, the standard for changes to provisions of this Agreement related to rates proposed by a party, a non-party or the Federal Energy Regulatory Commission (or a successor agency) acting sua sponte shall be the "public interest" standard of review set forth in *United Gas Pipeline Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) and *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

9.10. *Arbitration.* Any controversy, dispute or claim arising out of this Agreement or the refusal by any party hereto to perform the whole or any part thereof, shall be determined by arbitration, in the City of Columbus, Franklin County, Ohio, in accordance with the Commercial Arbitration Rules of the American Arbitration Association or any successor organization, except as otherwise set forth in this Section 9.10.

The party demanding arbitration shall serve notice in writing upon all other parties hereto, setting forth in detail the controversy, dispute or claim with respect to which arbitration is demanded, and the parties shall thereupon endeavor to agree upon an arbitration board, which shall consist of three members ("Arbitration Board"). If all the parties hereto fail so to agree within a period of thirty (30) days from the original notice, the party demanding

arbitration may, by written notice to all other parties hereto, direct that any members of the Arbitration Board that have not been agreed to by the parties shall be selected by the American Arbitration Association, or any successor organization. No person shall be eligible for appointment to the Arbitration Board who is an officer, employee, shareholder of or otherwise interested in any of the parties hereto or in the matter sought to be arbitrated.

The Arbitration Board shall afford adequate opportunity to all parties hereto to present information with respect to the controversy, dispute or claim submitted to arbitration and may request further information from any party hereto; provided, however, that the parties hereto may, by mutual agreement, specify the rules which are to govern any proceeding before the Arbitration Board and limit the matters to be considered by the Arbitration Board, in which event the Arbitration Board shall be governed by the terms and conditions of such agreement.

The determination or award of the Arbitration Board shall be made upon a determination of a majority of the members thereof. The findings and award of the Arbitration Board shall be final and conclusive with respect to the controversy, dispute or claim submitted for arbitration and shall be binding upon the parties hereto, except as otherwise provided by law. The award of the Arbitration Board shall specify the manner and extent of the division of the costs of the arbitration proceeding among the parties hereto.

9.11. *Liability.* The rights and obligations of all the parties hereto shall be several and not joint or joint and several.

9.12. *Force Majeure.* No party hereto shall be held responsible or liable for any loss or damage on account of non-delivery of energy hereunder at any time caused by an event of Force Majeure. "Force Majeure" shall mean the occurrence or non-occurrence of any act or event that could not reasonably have been expected and avoided by exercise of due diligence and foresight and such act or event is beyond the reasonable control of such party, including to the extent caused by act of God, fire, flood, explosion, strike, civil or military authority, insurrection or riot, act of the elements, or failure of equipment. For the avoidance of doubt, "Force Majeure" shall in no event be based on any Sponsoring Company's financial or economic conditions, including without limitation (i) the loss of the Sponsoring Company's markets; or (ii) the Sponsoring Company's inability economically to use or resell the Available Power or Available Energy purchased hereunder.

9.13. *Governing Law.* This Agreement shall be governed by, and construed in accordance with, the laws of the State of Ohio.

9.14. *Regulatory Approvals.* This Agreement is made subject to the jurisdiction of any governmental authority or authorities having jurisdiction in the premises and the performance thereof shall be subject to the following:

(a) The receipt of all regulatory approvals, in form and substance satisfactory to Corporation, necessary to permit Corporation to perform all the duties and obligations to be performed by Corporation hereunder.

(b) The receipt of all regulatory approvals, in form and substance satisfactory to the Sponsoring Companies, necessary to permit the Sponsoring Companies to carry out all transactions contemplated herein.

9.15. *Notices.* All notices, requests or other communications under this Agreement shall be in writing and shall be sufficient in all respects: (i) if delivered in person or by courier, upon receipt by the intended recipient or an employee that routinely accepts packages or letters from couriers or other persons for delivery to personnel at the address identified above (as confirmed by, if delivered by courier, the records of such courier), (ii) if sent by facsimile transmission, when the sender receives confirmation from the sending facsimile machine that such facsimile transmission was transmitted to the facsimile number of the addressee, or (iii) if mailed, upon the date of delivery as shown by the return receipt therefor.

9.16. *Waiver.* Performance by any party to this Agreement of any responsibility or obligation to be performed by such party or compliance by such party with any condition contained in this Agreement may by a written instrument signed by all other parties to this Agreement be waived in any one or more instances, but the failure of any party to insist in any one or more instances upon strict performance of any of the provisions of this Agreement or to take advantage of any of its rights hereunder shall not be construed as a waiver of any such provisions or the relinquishment of any such rights, but the same shall continue and remain in full force and effect.

9.17. *Titles of Articles and Sections.* The titles of the Articles and Sections in this Agreement have been inserted as a matter of convenience of reference and are not a part of this Agreement.

9.18. *Successors and Assigns.* This Agreement may be executed in any number of counterparts, all of which shall constitute but one and the same document.

9.181 This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns, but a party to this Agreement may not assign this Agreement or any of its rights, title or interests in or obligations (including without limitation the assumption of debt obligations) under this Agreement, except to a successor to all or substantially all the properties and assets of such party or as provided in Section 9.182 or 9.183, without the written consent of all the other parties hereto.

9.182 Notwithstanding the provisions of Section 9.181, any Sponsoring Company shall be permitted to, upon thirty (30) days notice to the Corporation and each other Sponsoring Company, without any further action by the Corporation or the other Sponsoring Companies, assign all or part of its rights, title and interests in, and obligations under this Agreement to a Permitted Assignee, provided that, the assignee and assignor of the rights, title and interests in, and obligations under, this Agreement have executed an assignment agreement in form and substance acceptable to the Corporation

in its reasonable discretion (including, without limitation; the agreement by the Sponsoring Company assigning such rights, title and interests in, and obligations under, this Agreement to reimburse the Corporation and the other Sponsoring Companies for any fees or expenses required under any security issued, or agreement entered into, by the Corporation as a result of such assignment, including without limitation any consent fee or additional financing costs to the Corporation under the Corporation's then-existing securities or agreements resulting from such assignment).

9.183 Notwithstanding the provisions of Section 9.181, any Sponsoring Company shall be permitted to, subject to compliance with all of the requirements of this Section 9.183, assign all or part of its rights, title and interests in, and obligations under this Agreement to a Third Party without any further action by the Corporation or the other Sponsoring Companies.

(a) A Sponsoring Company (the "Transferring Sponsor") that desires to assign all or part of its rights, title and interests in, and obligations under this Agreement to a Third Party shall deliver an Offer Notice to the Corporation and each other Sponsoring Company. The Offer Notice shall be deemed to be an irrevocable offer of the subject rights, title and interests in, and obligations under this Agreement to each of the other Sponsoring Companies that is not an Affiliate of the Transferring Sponsor, which offer must be held open for no less than thirty (30) days from the date of the Offer Notice (the "Election Period").

(b) The Sponsoring Companies (other than the Transferring Sponsor and its Affiliates) shall first have the right, but not the obligation, to purchase all of the rights, title and interests in, and obligations under this Agreement described in the Offer Notice at the price and on the terms specified therein by delivering written notice of such election to the Transferring Sponsor and the Corporation within the Election Period; provided that, irrespective of the terms and conditions of the Offer Notice, a Sponsoring Company may condition its election to purchase the interest described in the Offer Notice on the receipt of approval or consent from such Sponsoring Company's Board of Directors; provided further that, written notice of such conditional election must be delivered to the Transferring Sponsor and the Corporation within the Election Period and such conditional election shall be deemed withdrawn (as if it had never been provided) unless the Sponsoring Company that delivered such conditional election subsequently delivers written notice to the Transferring Sponsor and the Corporation on or before the tenth (10^{th}) day after the expiration of the Election Period that all necessary approval or consent of such Sponsoring Company's Board of Directors have been obtained. To the extent that more than one Sponsoring Company exercises its right to purchase all of the rights, title and interests in, and

obligations under this Agreement described in the Offer Notice in accordance with the previous sentence, such rights, title and interests in, and obligations under this Agreement shall be allotted (successively if necessary) among the Sponsoring Companies exercising such right in proportion to their respective Power Participation Ratios.

(c) Each Sponsoring Company exercising its right to purchase any rights, title and interests in, and obligations under this Agreement pursuant to this Section 9.183 may choose to have an Affiliate purchase such rights, title and interests in, and obligations under this Agreement; provided that, notwithstanding anything in this Section 9.183 to the contrary, any assignment to a Sponsoring Company or its Affiliate hereunder must comply with the requirements of Section 9.182.

(d) If one or more Sponsoring Companies have elected to purchase all of the rights, title and interests in, and obligations under this Agreement of the Transferring Sponsor pursuant to the Offer Notice, the assignment of such rights, title and interests in, and obligations under this Agreement shall be consummated as soon as practical after the delivery of the election notices, but in any event no later than fifteen (15) days after the filing and receipt, as applicable, of all necessary governmental filings, consents or other approvals and the expiration of all applicable waiting periods. At the closing of the purchase of such rights, title and interests in, and obligations under this Agreement from the Transferring Sponsor, the Transferring Sponsor shall provide representations and warranties customary for transactions of this type, including those as to its title to such securities and that there are no liens or other encumbrances on such securities (other than pursuant to this Agreement) and shall sign such documents as may reasonably be requested by the Corporation and the other Sponsoring Companies. The Sponsoring Companies or their Affiliates shall only be required to pay cash for the rights, title and interests in, and obligations under this Agreement being assigned by the Transferring Sponsor.

(e) To the extent that the Sponsoring Companies have not elected to purchase all of the rights, title and interests in, and obligations under this Agreement described in the Offer Notice, the Transferring Sponsor may, within one-hundred and eighty (180) days after the later of the expiration of the Election Period or the deemed withdrawal of a conditional election by a Sponsoring Company under Section 9.183(b) hereof (if applicable), enter into a definitive agreement to, assign such rights, title and interests in, and obligations under this Agreement to a Third Party at a price no less than 92.5% of the purchase price specified in the Offer Notice and on other material terms and conditions no more

favorable to the such Third Party than those specified in the Offer Notice; provided that such purchases shall be conditioned upon: (i) such Third Party having long-term unsecured non-credit enhanced indebtedness, as of the date of such assignment, with a Standard & Poor's credit rating of at least BBB- and a Moody's Investors Service, Inc. credit rating of at least Baa3 (provided that, if such Third Party's long-term unsecured non-credit enhanced indebtedness is not currently rated by one of Standard & Poor's or Moody, such Third Party's long-term unsecured non-credit enhanced indebtedness, as of the date of such assignment, must have either a Standard & Poor's credit rating of at least BBB- or a Moody's Investors Service, Inc. credit rating of at least Baa3); (ii) the filing or receipt, as applicable, of any necessary governmental filings, consents or other approvals; (iii) the determination by counsel for the Corporation that the assignment of the rights, title or interests in, or obligations under, this Agreement to such Third Party would not cause a termination, default, loss or payment obligation under any security issued, or agreement entered into, by the Corporation prior to such transfer; and (iv) such Third Party executing a counterpart of this Agreement, and both such Third Party and the Sponsoring Company which is assigning its rights, title and interests in, and obligations under, this Agreement executing such other documents as may be reasonably requested by the Corporation (including, without limitation, an assignment agreement in form and substance acceptable to the Corporation in its reasonable discretion and containing the agreement by such Sponsoring Company to reimburse the Corporation and the other Sponsoring Companies for any fees or expenses required under any security issued, or agreement entered into, by the Corporation as a result of such assignment, including without limitation any consent fee or additional financing costs to the Corporation under the Corporation's then-existing securities or agreements resulting from such assignment). In the event that the Sponsoring Company and a Third Party have not entered into a definitive agreement to assign the interests specified in the Offer Notice to such Third Party within the later of one-hundred and eighty (180) days after the expiration of the Election Period or the deemed withdrawal of a conditional election by a Sponsoring Company under Section 9.183(b) hereof (if applicable) for any reason or if either the price to be paid by such Third Party would be less than 92.5% of the purchase price specified in the Offer Notice or the other material terms of such assignment would be more favorable to such Third Party than the terms specified in the Offer Notice, then the restrictions provided for herein shall again be effective, and no assignment of any rights, title and interests in, and obligations under this Agreement may be made thereafter without again offering the same to Sponsoring Companies in accordance with this Section 9.183.

ARTICLE 10

REPRESENTATIONS AND WARRANTIES

10.01. *Representations and Warranties.* Each Sponsoring Company hereby represents and warrants for itself, on and as of the date of this Agreement, as follows:

(a) it is duly organized, validly existing and in good standing under the laws of its state of organization, with full corporate power, authority and legal right to execute and deliver this Agreement and to perform its obligations hereunder;

(b) it has duly authorized, executed and delivered this Agreement, and upon the execution and delivery by all of the parties hereto, this Agreement will be in full force and effect, and will constitute a legal, valid and binding obligation of such Sponsoring Company, enforceable in accordance with the terms hereof, except as enforceability may be limited by applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium or other similar laws affecting the enforcement of creditors' rights generally;

(c) Except as set forth in Schedule 10.01(c) hereto, no consents or approvals of, or filings or registrations with, any governmental authority or public regulatory authority or agency, federal state or local, or any other entity or person are required in connection with the execution, delivery and performance by it of this Agreement, except for those which have been duly obtained or made and are in full force and effect, have not been revoked, and are not the subject of a pending appeal; and

(d) the execution, delivery and performance by it of this Agreement will not conflict with or result in any breach of any of the terms, conditions or provisions of, or constitute a default under its charter or by-laws or any indenture or other material agreement or instrument to which it is a party or by which it may be bound or result in the imposition of any liens, claims or encumbrances on any of its property.

ARTICLE 11

EVENTS OF DEFAULT AND REMEDIES

11.01. *Payment Default.* If any Sponsoring Company fails to make full payment to Corporation under this Agreement when due and such failure is not remedied within ten (10) days after receipt of notice of such failure from the Corporation, then such failure shall constitute a "Payment Default" on the part of such Sponsoring Company. Upon a Payment Default, the

Corporation may suspend service to the Sponsoring Company that has caused such Payment Default for all or part of the period of continuing default (and such Sponsoring Company shall be deemed to have notified the Corporation and the other Sponsoring Companies that any Available Energy shall be available for scheduling by such other Sponsoring Companies in accordance with Section 4.032). The Corporation's right to suspend service shall not be exclusive, but shall be in addition to all remedies available to the Corporation at law or in equity. No suspension of service or termination of this Agreement shall relieve any Sponsoring Company of its obligations under this Agreement, which are absolute and unconditional.

11.02. *Performance Default.* If the Corporation or any Sponsoring Company fails to comply in any material respect with any of the material terms, conditions and covenants of this Agreement (and such failure does not constitute a Payment Default under Section 11.01), the Corporation (in the case of a default by any Sponsoring Company) and any Sponsoring Company (in the case of a default by the Corporation) shall give the defaulting party written notice of the default ("Performance Default"). To the extent that a Performance Default is not cured within thirty (30) days after receipt of notice thereof (or within such longer period of time, not to exceed sixty (60) additional days, as necessary for the defaulting party with the exercise of reasonable diligence to cure such default), then the Corporation (in the case of a default by any Sponsoring Company) and any Sponsoring Company (in the case of a default by the Corporation) shall have all of the rights and remedies provided at law and in equity, other than termination of this Agreement or any release of the obligation of the Sponsoring Companies to make payments pursuant to this Agreement, which obligation shall remain absolute and unconditional.

11.03. *Waiver.* No waiver by the Corporation or any Sponsoring Company of any one or more defaults in the performance of any provision of this Agreement shall be construed as a waiver of any other default or defaults, whether of a like kind or different nature.

11.04. *Limitation of Liability and Damages.* TO THE FULLEST EXTENT PERMITTED BY LAW, NEITHER THE CORPORATION, NOR ANY SPONSORING COMPANY SHALL BE LIABLE UNDER THIS AGREEMENT FOR ANY CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST REVENUES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT OR CONTRACT, OR OTHERWISE.

[*Signature pages follow*]

IN WITNESS WHEREOF, the parties hereto have caused this Amended and Restated Inter-Company Power Agreement to be duly executed and delivered by their proper and duly authorized officers as of September 10, 2010.

OHIO VALLEY ELECTRIC CORPORATION

By _____
Its _____

ALLEGHENY ENERGY SUPPLY COMPANY, L.L.C.

By _____
Its _____

APPALACHIAN POWER COMPANY

By _____
Its _____

BUCKEYE POWER GENERATING, LLC

By _____
Its _____

COLUMBUS SOUTHERN POWER COMPANY

By _____
Its _____

THE DAYTON POWER AND LIGHT COMPANY

By _____
Its _____

DUKE ENERGY OHIO, INC.

By _____
Its _____

FIRSTENERGY GENERATION CORP.

By _____
Its _____

INDIANA MICHIGAN POWER COMPANY

By _____
Its _____

KENTUCKY UTILITIES COMPANY

By _____
Its _____

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Its _____

BUCKEYE POWER GENERATING, LLC

By _____
Its _____

COLUMBUS SOUTHERN POWER COMPANY

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Its _____

THE DAYTON POWER AND LIGHT COMPANY

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Its _____

DUKE ENERGY OHIO, INC.

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FIRSTENERGY GENERATION CORP.

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BUCKEYE POWER GENERATING, LLC

By _____
Its _____

COLUMBUS SOUTHERN POWER COMPANY

By _____
Its _____

THE DAYTON POWER AND LIGHT COMPANY

By _____
Its _____

DUKE ENERGY OHIO, INC.

By _____
Its VICE PRESIDENT

FIRSTENERGY GENERATION CORP.

By _____
Its _____

INDIANA MICHIGAN POWER COMPANY

By _____
Its _____

KENTUCKY UTILITIES COMPANY

By _____
Its _____

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Its _____

APPALACHIAN POWER COMPANY

By _____
Its _____

BUCKEYE POWER GENERATING, LLC

By _____
Its _____

COLUMBUS SOUTHERN POWER COMPANY

By _____
Its _____

THE DAYTON POWER AND LIGHT COMPANY

By _____
Its _____

DUKE ENERGY OHIO, INC.

By _____
Its _____

FIRSTENERGY GENERATION CORP.

By _____
Its _____

INDIANA MICHIGAN POWER COMPANY

By _____
Its Vice President

KENTUCKY UTILITIES COMPANY

By _____
Its _____

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Its _____

ALLEGHENY ENERGY SUPPLY COMPANY, L.L.C.

By _____
Its VICE PRESIDENT

APPALACHIAN POWER COMPANY

By _____
Its _____

BUCKEYE POWER GENERATING, LLC

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Its _____

COLUMBUS SOUTHERN POWER COMPANY

By _____
Its _____

THE DAYTON POWER AND LIGHT COMPANY

By _____
Its _____

DUKE ENERGY OHIO, INC.

By _____
Its _____

FIRSTENERGY GENERATION CORP.

By _____
Its _____

INDIANA MICHIGAN POWER COMPANY

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Its _____

KENTUCKY UTILITIES COMPANY

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Its _____

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OHIO VALLEY ELECTRIC CORPORATION

By _____
Its _____

ALLEGHENY ENERGY SUPPLY COMPANY, L.L.C.

By _____
Its _____

APPALACHIAN POWER COMPANY

By _____
Its _____

BUCKEYE POWER GENERATING, LLC

By _____
Its President & CEO

COLUMBUS SOUTHERN POWER COMPANY

By _____
Its _____

THE DAYTON POWER AND LIGHT COMPANY

By _____
Its _____

DUKE ENERGY OHIO, INC.

By _____
Its _____

FIRSTENERGY GENERATION CORP.

By _____
Its _____

INDIANA MICHIGAN POWER COMPANY

By _____
Its _____

KENTUCKY UTILITIES COMPANY

By _____
Its _____

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Its _____

APPALACHIAN POWER COMPANY

By _____
Its _____

BUCKEYE POWER GENERATING, LLC

By _____
Its _____

COLUMBUS SOUTHERN POWER COMPANY

By _____
Its _____

THE DAYTON POWER AND LIGHT COMPANY

By Gary Stephenson
Its EXECUTIVE VICE PRESIDENT
Gary Stephenson

DUKE ENERGY OHIO, INC.

By _____
Its _____

FIRSTENERGY GENERATION CORP.

By _____
Its _____

INDIANA MICHIGAN POWER COMPANY

By _____
Its _____

KENTUCKY UTILITIES COMPANY

By _____
Its _____

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Its _____

BUCKEYE POWER GENERATING, LLC

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Its _____

COLUMBUS SOUTHERN POWER COMPANY

By _____
Its _____

THE DAYTON POWER AND LIGHT COMPANY

By _____
Its _____

DUKE ENERGY OHIO, INC.

By _____
Its _____

FIRSTENERGY GENERATION CORP.

By Gary R Leidich
Its President

INDIANA MICHIGAN POWER COMPANY

By _____
Its _____

KENTUCKY UTILITIES COMPANY

By _____
Its _____

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By _____
Its _____

FIRSTENERGY GENERATION CORP.

By _____
Its _____

INDIANA MICHIGAN POWER COMPANY

By _____
Its _____

KENTUCKY UTILITIES COMPANY

By _____
Its Sr Vice President

LOUISVILLE GAS AND ELECTRIC COMPANY

By John N Paylor Jr
Its VP Trans & Generation Services

MONONGAHELA POWER COMPANY

By _____
Its _____

OHIO POWER COMPANY

By _____
Its _____

SOUTHERN INDIANA GAS AND ELECTRIC COMPANY

By _____
Its _____

LOUISVILLE GAS AND ELECTRIC COMPANY

By _____
Its _____

MONONGAHELA POWER COMPANY

By _____
Its _____

OHIO POWER COMPANY

By _____
Its _____

SOUTHERN INDIANA GAS AND ELECTRIC COMPANY

By _____
Its _____

LOUISVILLE GAS AND ELECTRIC COMPANY

By _____
Its _____

MONONGAHELA POWER COMPANY

By _____
Its General Manager, Electric Supply

OHIO POWER COMPANY

By _____
Its _____

SOUTHERN INDIANA GAS AND ELECTRIC COMPANY

By _____
Its _____

LOUISVILLE GAS AND ELECTRIC COMPANY

By _____
Its _____

MONONGAHELA POWER COMPANY

By _____
Its _____

OHIO POWER COMPANY

By _____
Its _____

SOUTHERN INDIANA GAS AND ELECTRIC COMPANY

By Ronald E. Christian
Its President

PENINSULA GENERATION COOPERATIVE

By Daniel H. DeCoeur
Its President

APPROVED AS TO FORM:

BRIAN E. VALICE
ATTORNEY FOR PENINSULA
GENERATION COOPERATIVE

SCHEDULE 10.01(c)

Allegheny Energy Supply Company, L.L.C.

and

Monongahela Power Company

Filing with, or consent or approval of, the Federal Energy Regulatory Commission

SCHEDULE 10.01(c)

Appalachian Power Company

Filing with, or consent or approval of, the Federal Energy Regulatory Commission

Approval of the Virginia State Corporation Commission

Filing with the Public Service Commission of West Virginia

SCHEDULE 10.01(c)

Buckeye Power Generating, LLC

None

SCHEDULE 10.01(c)

Columbus Southern Power Company

Filing with, or consent or approval of, the Federal Energy Regulatory Commission

SCHEDULE 10.01(c)

The Dayton Power and Light Company

Filing with, or consent or approval of, the Federal Energy Regulatory Commission

SCHEDULE 10.01(c)

Duke Energy Ohio, Inc.

Filing with, or consent or approval of, the Federal Energy Regulatory Commission

SCHEDULE 10.01(c)

FirstEnergy Generation Corp.

Filing with, or consent or approval of, the Federal Energy Regulatory Commission

SCHEDULE 10.01(c)

Indiana Michigan Power Company

Filing with, or consent or approval of, the Federal Energy Regulatory Commission

Filing with the Indiana Utility Regulatory Commission

SCHEDULE 10.01(c)

Kentucky Utilities Company

Filing with, or consent or approval of, the Federal Energy Regulatory Commission

Consent or approval of, or filings or registrations with, the Kentucky Public Service Commission may be required

SCHEDULE 10.01(c)

Louisville Gas and Electric Company

Filing with, or consent or approval of, the Federal Energy Regulatory Commission

Consent or approval of, or filings or registrations with, the Kentucky Public Service Commission may be required

SCHEDULE 10.01(c)

Ohio Power Company

Filing with, or consent or approval of, the Federal Energy Regulatory Commission

SCHEDULE 10.01(c)

Peninsula Generation Cooperative

None

SCHEDULE 10.01(c)

Southern Indiana Gas and Electric Company

Filing with, or consent or approval of, the Federal Energy Regulatory Commission

Exhibit A

AMENDED AND RESTATED

POWER AGREEMENT

BETWEEN

OHIO VALLEY ELECTRIC CORPORATION

AND

INDIANA-KENTUCKY ELECTRIC CORPORATION

Dated as of September 10, 2010

THIS AGREEMENT, dated as of September 10, 2010 by and between OHIO VALLEY ELECTRIC CORPORATION (herein called OVEC) and INDIANA-KENTUCKY ELECTRIC CORPORATION (herein called IKEC), hereby amends and restates in its entirety, the Power Agreement (herein called the Current Agreement), dated March 13, 2006, between OVEC and IKEC.

WITNESSETH THAT:

WHEREAS, IKEC, a wholly owned subsidiary of OVEC, designed, purchased, and constructed, and continues to own, operate and maintain a steam-electric generating station (herein called Indiana Station) consisting of six turbogenerators and all other necessary equipment, at a location on the Ohio River near Madison, Indiana; and

WHEREAS, OVEC designed, purchased, and constructed, and continues to own, operate and maintain a steam-electric generating stations (herein called Ohio Station) consisting of five turbo-generators and all other necessary equipment, at a location on the Ohio River near Cheshire, Ohio (the Ohio Station and the Indiana Station being herein called the Project Generating Stations); and

WHEREAS, OVEC also designed, purchased, and constructed, and continues to operate and maintain necessary transmission and general plant facilities (herein called the Project Transmission Facilities) and OVEC established or cause to be established interconnections between the Project Generating Stations and/or the Project Transmission Facilities, and the systems of certain of the Sponsoring Companies; and

WHEREAS, IKEC owns and operates the portion of the Project Transmission Facilities located in the State of Indiana; and

WHEREAS, IKEC entered into the Current Agreement with OVEC which embodies the terms and conditions for the ownership and operation by IKEC of the Indiana Station and such portion of the Project Transmission Facilities which are to be owned and operated by it; and

WHEREAS, the owners of OVEC or their affiliates that are parties to an Inter-Company Power Agreement, have amended and restated such Inter-Company Power Agreement as of the date hereof, which defines the terms and conditions governing the rights of the "Sponsoring Companies" (as defined thereunder) to receive "Available Power" (as defined thereunder) from the Project Generating Stations and the obligations of the Sponsoring Companies to pay therefor; and

WHEREAS, concurrent with the amendment and restatement of the Inter-Company Power Agreement, IKEC and OVEC hereto desire to amend and restate in their entirety, the Current Agreement in order for IKEC to continue to sell to OVEC any and all power available at the Indiana Station, and energy associated therewith, and to transmit power and energy as provided herein.

NOW, THEREFORE, the parties hereto agree with each other as follows:

ARTICLE 1

POWER AND ENERGY TRANSACTIONS

1.01 IKEC shall transmit any and all power generated at the Indiana Station by any of the generating units thereof in commercial operation and deliver such power, together with the energy associated therewith, but less the transmission losses in the facilities of IKEC applicable thereto from the 330 kV busses of the Indiana Station, at the points of delivery hereinafter designated in *Section* 1.03 hereof, and sell such power and energy at said points of delivery to OVEC. OVEC shall purchase from IKEC all such power so delivered by IKEC to OVEC at said points of delivery, together with the energy associated therewith, and shall from time to time pay IKEC therefor, amounts which, when added to revenues received by IKEC from other sources, will be sufficient to enable IKEC to pay all of its operating and other expenses, including all income and other taxes and any interest and regular amortization requirements applicable to any indebtedness for borrowed funds incurred by IKEC. For the purposes of this *Section* 1.01 the term "operating and other expenses" shall also include, without limitation, all amounts payable to suppliers of fuel requirements (including the handling and shipment thereof) in connection with the cancellation of commitments and the extension of delivery schedules, as well as all expenses accrued to pay for postemployment and postretirement benefits and the costs of the decommissioning, shutdown, demolition and closing of the Project Generating Stations.

1.02 IKEC shall transmit and deliver to OVEC at the points of delivery hereinafter designated in *Section* 1.03 hereof, all power and the energy associated therewith supplied to IKEC by Sponsoring Companies at the points of delivery hereinafter designated in *Section* 1.03 hereof, less the transmission losses in the facilities of IKEC applicable thereto. IKEC shall transmit and deliver to Sponsoring Companies designated by OVEC at the points of delivery hereinafter designated in *Section* 1.03 hereof, all power, and the energy associated therewith, supplied to IKEC by OVEC at the points of delivery hereinafter designated in *Section* 1.03 hereof, less the transmission losses in the facilities of IKEC applicable thereto.

1.03 All power and energy sold, purchased, transmitted or delivered hereunder shall be 3-phase, 60-cycle, alternating current, at nominal unregulated voltage, designated for the points of delivery hereinbelow described. Power and energy transmitted, delivered and sold by IKEC to OVEC pursuant to the provisions of *Section* 1.01 hereof shall be delivered at the points where the transmission facilities of OVEC and the transmission facilities of IKEC interconnect and title to such power and energy shall pass from IKEC to OVEC at said points. Power and energy supplied to IKEC by a Sponsoring Company for transmission to OVEC pursuant to the provisions of *Section* 1.02 hereof, shall be delivered by said Sponsoring Company to IKEC at the points where the transmission facilities of said Sponsoring Company and the transmission facilities of IKEC interconnect and shall be delivered by IKEC to OVEC and title thereto shall pass from said Sponsoring Company to OVEC at the points where the transmission facilities of OVEC and the transmission facilities of IKEC interconnect. Power and energy supplied to IKEC

by OVEC for transmission to a Sponsoring Company pursuant to the provisions of *Section* 1.02 hereof shall be delivered by OVEC to IKEC at the points where the transmission facilities of OVEC and the transmission facilities of IKEC interconnect and title to such power and energy shall pass from OVEC to said Sponsoring Company at said points. Such power and energy shall be delivered by IKEC to said Sponsoring Company at the points where the transmission facilities of IKEC and the transmission facilities of said Sponsoring Company interconnect.

1.04 The parties hereto shall exercise due diligence and foresight in carrying out all matters related to the providing and operating of their respective power resources so as to minimize to the extent practicable deviations between actual and scheduled deliveries of power and energy among their systems. The parties hereto shall provide and/or install on their respective systems such communication, telemetering, frequency and/or tie-line control facilities essential to so minimizing such deviations; and shall fully cooperate with one another and with third parties (such third parties whose systems are either directly or indirectly interconnected with the systems of the Sponsoring Companies and who of necessity together with the Sponsoring Companies and the parties hereto must unify their efforts cooperatively to achieve effective and efficient interconnected system operation) in developing and executing operating procedures that will enable the parties hereto to avoid to the extent practicable deviations from scheduled deliveries.

1.05 OVEC shall reimburse IKEC for the difference between (a) the total cost of replacements chargeable to property and plant made by IKEC, and the total cost of additional facilities and/or spare parts purchased or installed by Corporation, during any month or prior thereto (and not previously reimbursed) and (b) the amounts paid for by IKEC out of proceeds of fire or other applicable insurance protection, or out of amounts recovered from third parties responsible for damages requiring replacement. OVEC shall pay to IKEC such amount in lieu of the amounts to be paid as above provided, which, after provision for all taxes on income, shall equal the costs of the replacements reimbursable by OVEC to IKEC as above provided. The term cost of replacements, as used herein, shall include all components of costs, plus removal expense, less salvage. The amounts reimbursed by OVEC to IKEC for such replacements shall be accounted for on the books of IKEC in a special balance sheet account provided for such purposes.

ARTICLE 2

MISCELLANEOUS

2.01 This Agreement shall become effective on September 10, 2010, or to the extent necessary, such later date on which all conditions to effectiveness, including all required waiting periods and all required regulatory acceptances or approvals, of this Agreement have been satisfied in form and substance satisfactory to OVEC, and shall terminate upon the earlier of: (1) June 30, 2040 or (2) the sale or other disposition of all of the facilities of the Project Generating Stations or the permanent cessation of operation of such facilities.

2.02 No party hereto shall be held responsible or liable for any loss or damage on account of non-delivery of energy hereunder at any time caused by act of God, fire, flood, explosion, strike, civil or military authority, insurrection or riot, act of the elements, failure of equipment, or for any other cause beyond its control.

2.03 This Agreement is made subject to the jurisdiction of any governmental authority or authorities having jurisdiction in the premises and the performance thereof shall be subject to the receipt of all regulatory approvals, in form and substance satisfactory to the parties hereto, necessary to permit the parties hereto to perform all the duties and obligations to be performed by such parties hereunder.

2.04 This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns, but this Agreement shall not be assigned by either party hereto without the written consent of the other, except (a) to a successor to all or substantially all the properties and assets of such party, or (b) to a trustee under an indenture securing any indebtedness of such party.

2.05 All notices and requests under this Agreement shall be in writing and shall be sufficient in all respects if delivered in person or sent by registered mail addressed to the party to be served at such party's general office or at such other address as such party may from time to time in writing designate.

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be duly executed as of the day and year first above written.

OHIO VALLEY ELECTRIC CORPORATION

By _____
Its

INDIANA-KENTUCKY ELECTRIC CORPORATION

By _____
Its

Attachment B

MOODY'S
INVESTORS SERVICE

Rating Action: Moody's reviews OVEC for downgrade

Global Credit Research - 04 Nov 2016

Approximately $1.5 billion of debt outstanding

New York, November 04, 2016 – Moody's Investors Service ("Moody's") today placed the ratings of the Ohio Valley Electric Corporation (OVEC) under review for downgrade. The action follows the downgrade of FirstEnergy Corp's (FirstEnergy) subsidiaries FirstEnergy Solutions Corp. (FES: Caa1 negative) and Allegheny Energy Supply Company, LLC (AES: B1 negative) which together are contractually obligated to cover about 8% of OVEC's expenditures.

RATINGS RATIONALE

The rating review is prompted by today's downgrade of FES to Caa1 from Ba2 and AES to B1 from Ba1, which followed FirstEnergy's announced intention to exit its merchant business entirely within 18 months even if it requires a restructuring or bankruptcy at FES. Although the proportion of OVEC's revenues that are derived from FES (4.85%) and AES (3.01%) are relatively modest, the payment obligations under the Inter-Company Power Agreement (ICPA), which is the basis for OVEC's revenue, are joint - not several. In addition, in the event of a payment default, there is no requirement for the non-defaulting sponsor companies to "step-up" their payments to cover any shortfall. As the ICPA essentially provides a straight pass through of the costs of operating and maintaining the plant, without the collection of any additional funds to provide a financial reserve, any payment default would result in an immediate shortfall of revenue available to fully cover expenditures for operations and maintenance, debt service, and planned capital expenditures. Although OVEC does have a significant amount of long-term investments on its balance sheet, the funds are being held for future postretirement benefits and decommissioning and demolition costs.

During the review process we will explore the options and potential actions available to the OVEC board that may mitigate the company's exposure to the decline in credit quality of the FirstEnergy subsidiaries, including the possibility of an FES bankruptcy. In our view, these options could include determining if there is interest on the part of other investment grade entities to assume the FES and AES obligations, or the establishment of a financial reserve to cover a potential future shortfall in payments. The review will also further assess the magnitude of OVEC's exposure to potential payment shortfalls, and evaluate the company's available liquidity sources, including balance sheet investments and revolving credit availability.

Rating Outlook

The rating is under review for downgrade.

Factors that Could Lead to an Upgrade

Given the review for downgrade, the ratings are highly unlikely to move upward in the near-to-medium term.

Factors that Could Lead to a Downgrade

Given the severe deterioration in the credit quality of FES and AES, and the several nature of payment obligations under the ICPA, absent a definitive near-term plan to address a potential permanent gap in project revenue, the OVEC ratings are likely to move downward.

On Review for Downgrade:

..Issuer: Ohio Valley Electric Corp

....Senior Unsecured Regular Bond/Debenture, Placed on Review for Downgrade, currently Baa3

..Issuer: Indiana Finance Authority

....Senior Unsecured Revenue Bonds, Placed on Review for Downgrade, currently Baa3

..Issuer: Ohio Air Quality Development Authority

....Senior Unsecured Revenue Bonds, Placed on Review for Downgrade, currently Baa3

Outlook Actions:

..Issuer: Ohio Valley Electric Corp

....Outlook, Changed To Rating Under Review From Negative

The principal methodology used in these ratings was US Municipal Joint Action Agencies published in October 2016. Please see the Rating Methodologies page on www.moodys.com for a copy of this methodology.

OVEC owns and operates two coal-fired generating power plants, Kyger Creek in Ohio and Clifty Creek in Indiana, that have a combined capacity of approximately 2,400 MW. OVEC is sponsored by nine investor-owned regulated electric utilities, two independent generating companies (subsidiaries of a utility holding company) and two affiliates of generation and transmission cooperatives (collectively, the Sponsors). The Sponsors purchase OVEC's power at wholesale, cost based, rates. The ownership structure is governed by a long-term Inter-Company Power Agreement (ICPA) expiring in 2040.

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For ratings issued on a program, series or category/class of debt, this announcement provides certain regulatory disclosures in relation to each rating of a subsequently issued bond or note of the same series or category/class of debt or pursuant to a program for which the ratings are derived exclusively from existing ratings in accordance with Moody's rating practices. For ratings issued on a support provider, this announcement provides certain regulatory disclosures in relation to the credit rating action on the support provider and in relation to each particular credit rating action for securities that derive their credit ratings from the support provider's credit rating. For provisional ratings, this announcement provides certain regulatory disclosures in relation to the provisional rating assigned, and in relation to a definitive rating that may be assigned subsequent to the final issuance of the debt, in each case where the transaction structure and terms have not changed prior to the assignment of the definitive rating in a manner that would have affected the rating. For further information please see the ratings tab on the issuer/entity page for the respective issuer on www.moodys.com.

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MJKK and MSFJ also maintain policies and procedures to address Japanese regulatory requirements.

Attachment C

Ohio Valley Electric Corporation (/gws/en/esp/issr/90236875)

FitchRatings

Fitch Rates Ohio Valley Electric Corp's Term Loan 'BBB-'; Outlook Negative

Fitch Ratings-Chicago-09 August 2017: Fitch Ratings has assigned a 'BBB-' rating to Ohio Valley Electric Corporation (OVEC) $100 million five-year term loan due Aug. 4, 2022. The Rating Outlook is Negative. The notes rank pari passu with OVEC's existing and future senior unsecured debt. Net proceeds from the offering, along with other recently completed financing activities, will be used by the company to repay debt scheduled to mature in 2017 - 2018.

KEY RATING DRIVERS

Negative Rating Outlook: The Negative Outlook reflects the risk of revenue shortfall should one of OVEC's sponsors opt to file for bankruptcy and reject their obligation under OVEC's intercompany power agreement (ICPA). While three of OVEC's sponsors have slipped to speculative credit profiles, the obligations held by FirstEnergy Solutions Corp (FES; CC; 4.85% share) and Allegheny Energy Supply Co (AES; B/Stable; 3.01% share) pose a greater concern in Fitch's opinion, given FirstEnergy Corp.'s (FE; 'BBB-'/Outlook Stable) plans to exit the merchant power business. Financial restructuring at FES, or at any sponsor, could subject OVEC to a revenue shortfall given that sponsors' responsibilities are several under the ICPA.

Short-Term Disruption Manageable: OVEC had sufficient liquidity at the end of first-quarter 2017 to meet a temporary revenue shortfall. Fitch estimates FES and AES's combined share of the demand charges at less than $30 million annually, while the short 15-day billing cycle for energy charges limits OVEC's credit exposure in the event of financial restructuring. A prolonged revenue shortfall, however, could impair OVEC's credit profile absent mitigating actions from the remaining sponsors.

ICPA Enforceability Is Key: OVEC's credit profile derives from the legal enforceability of the ICPA between OVEC and its sponsors. Sponsors are severally responsible to reimburse all of OVEC's expenditures regardless of total electricity generated and supplied by OVEC. Due to the diversity of the sponsor base, Fitch Ratings takes into consideration the average credit profile of the sponsors rather than tying OVEC's ratings to that of the lowest-rated sponsor.

Off-Takers' Ability to Recover Costs: The continued ability of the sponsors to recover OVEC-related costs is an important rating driver, because OVEC's all-in costs generally exceed prevailing wholesale energy prices. Nearly 80% of sponsors/off-takers can recover OVEC-related costs either through a regulatory construct or through sponsors' membership charter.

Efficient Operating Performance: OVEC's coal plants maintain favorable availability and utilization factors despite their age, averaging about 70% and 77%, respectively, in 2014-2016. Furthermore, capacity utilization has trended upward since the integration of OVEC's generation capacity into the PJM Interconnection, LLC region in May 2016.

Compliance with a stream of environmental regulation over the past decade has precipitated incremental capex and put upward pressure on demand costs. However, management forecasts modest environmental capex in 2017 - 2024, as the plants are currently compliant with MATS and CSAPR requirements. The impact of the Clean Power Plan currently falls outside the rating horizon. Nonetheless, Fitch will closely monitor the evolution of legislative challenges and compliance plans presented by Ohio and Indiana as these will influence OVEC's operating costs and capacity utilization over the long term.

KEY ASSUMPTIONS

Fitch's key assumptions within the rating case for OVEC include:
--Average usage factor of 75% in 2017-2019;
--Operating costs increasing by 1% annually;
--Debt repayments limited to amortization schedule.

RATING SENSITIVITIES

Positive Rating Sensitivities

Fitch would affirm the ratings should the financially stressed sponsors transfer their obligations to entities with investment grade profiles. Modification of the ICPA, incremental contributions or other similar mitigating actions from remaining sponsors or shareholders to permanently offset the loss a sponsor could also stabilize the ratings. Ratings upgrade is unlikely given that OVEC's credit profile is constrained by its sponsors' credit ratings and increasingly stringent environmental emission mandates.

Negative Rating Sensitivities

Any attempt by a sponsor to terminate the ICPA would most likely lead to a negative rating action. Alternatively, prolonged revenue shortfall leading to a material deterioration of OVEC's liquidity and financial resources would likely result in negative rating actions. Although not contemplated at this time, failure to replace a defaulted sponsor or to establish a reserve to meet permanent recovery shortfalls could result in a more-than-one-notch downgrade. Fitch would also take a negative rating action if compliance with new environmental rules materially limits OVEC's ability to achieve a high capacity factor and render the ICPA very expensive for the sponsors.

LIQUIDITY

At March 31, 2017, OVEC had $168million of available liquidity, including $53 million in cash and cash equivalents and $115 million available under its $200 million revolving credit facility (expiry on Nov. 17, 2019). OVEC could also draw on $122 million of long-term financial investments, if needed, to bolster liquidity. Semi-monthly settlement of accounts receivable from sponsors/off-takers reduces OVEC's working capital needs. Debt maturities in 2017 -2019 are minimal following refinancing activities completed on Aug. 4, 2022.

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Date of Relevant Rating Committee: Nov. 17, 2016

Summary of Financial Statement Adjustments - There were no financial statement adjustments made that were material to the rating rationale outlined above.

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I hereby certify that I have on this 26th day of March, 2018, caused a copy of the foregoing Complaint or, in the alternative, Request for Declaratory Order to be served via electronic mail or first class mail (postage prepaid) upon the list representatives of the respondent, the affected regulatory agency and others who may be affected by the Complaint, as required under Commission Rule 206(c), 18 C.F.R. § 385.206(c).

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/s/ M. Denyse Zosa

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CREDIT OPINION
13 December 2018

Update

Rate this Research

RATINGS

Ohio Valley Electric Corp

Domicile	Piketon, Ohio, United States
Long Term Rating	Ba1
Type	Senior Unsecured - Dom Curr
Outlook	Stable

Please see the ratings section at the end of this report for more information. The ratings and outlook shown reflect information as of the publication date.

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Ohio Valley Electric Corp

Update following ratings affirmation with stable outlook

Summary

Ohio Valley Electric Corporation's (OVEC) credit profile reflects the governing provisions of its long-term Inter-Company Power Agreement (ICPA) between thirteen investor-owned and cooperative utility companies (collectively, the sponsors), one of which is currently in default. Our view considers the steps taken by management and the remaining sponsors to mitigate the financial impact of the small (under 5% of revenues) defaulting sponsor as well as the overall credit quality of the sponsor group.

Under the ICPA, the sponsors pay monthly demand and transmission charges designed to cover all non- fuel related costs of owning, operating, and maintaining electric generation and transmission facilities, including debt service, irrespective of plant availability or usage. Fuel related costs are recovered through a volumetric energy charge. We currently view the sponsors' overall average credit profile to be investment grade; however, the sponsor obligations are several – not joint, which in the context of our rating methodology for US Municipal Joint Action Agencies, limits our view of their collective credit quality and caps the score for this factor at two notches above the "weakest link". Since the ICPA currently does not include a requirement for non-defaulting sponsors to "step-up" their payments in the event of a default, the weakest link is the sponsor with the lowest credit quality, First Energy Solutions Corp. (FES, unrated), which contributes under 5% of non-fuel related costs (approximately $17 million per year) and is currently in default.

Despite the limitation on methodology factor scoring noted above, our view of OVEC's overall credit profile considers the financial strength of the majority of its sponsors, which are predominately investment grade utilities, the mitigating actions taken by OVEC and the sponsors in response to the current default, and the small, manageable, size of that default. Actions taken include the ongoing funding of a debt reserve at a rate of $2.4 million per month, and the retention of earnings that could be used to offset future payment shortfalls.

Credit strengths

- Effective management of sponsor default and bankruptcy
- Fixed and variable costs, including debt service, are recovered through a strong ownership contract, albeit with a flaw
- Primarily investment grade sponsors/off-takers
- Diminished regulatory uncertainty for Ohio based utility sponsors

Credit challenges

» Sponsor obligations that are several and not joint

» Bankruptcy and subsequent payment default by one sponsor company representing about 5% of revenues

» Weak credit quality of a second merchant power sponsor company, representing about 3% of revenues, which has divested all its non-OVEC generating assets

» Challenging competitive conditions arising from current low prices for natural gas and power

» Constrained liquidity with bank credit facility due within one year

» Elevated carbon transition risk

Rating outlook

The stable outlook recognizes the credit quality of OVEC's non-defaulting sponsors, and the company's actions to address the limited financial impact of the current, ongoing, default. The outlook assumes payment shortfalls will continue to be addressed with excess operating cash, existing reserves, or via short-term borrowing. The outlook assumes OVEC will continue to collect reserve funds at the current rate at least until it has accumulated a full year of debt service (currently about 45% funded), and that it will extend the maturity of its revolving credit facility well in advance of its current November 2019 termination date.

Factors that could lead to an upgrade

» Rating upgrades are unlikely over the near-term

» Credit supportive changes to the ICPA, such as an inclusion of a step-up provision

» Longer term, an improvement in the overall credit profile of the sponsor group

» Stronger financial metrics, including a debt service coverage ratio above 1.6x

Factors that could lead to a downgrade

» An inability or unwillingness to continue collecting reserve or excess operating funds sufficient to cover payment shortfalls

» Failure to extend OVEC's revolving credit facility beyond its 2019 termination date by early 2019

» Further declines in the credit quality of any sponsors

» A sponsor payment default that was not able to be covered by existing reserves or through a swift replacement of the defaulting party

Profile

OVEC owns and operates two coal-fired generating power plants, Kyger Creek in Ohio and Clifty Creek in Indiana, that have a combined capacity of approximately 2,400 MW. OVEC is sponsored by nine investor-owned regulated electric utilities, two independent generating companies (subsidiaries of a utility holding company) and two affiliates of generation and transmission cooperatives (collectively, the sponsors). By virtue of their ownership, the sponsors purchase OVEC's power at wholesale, cost based, rates. The ownership structure is governed by a long-term Inter-Company Power Agreement (ICPA) expiring in 2040. OVEC's fuel, operating, capital and debt service requirements costs are passed-through to the sponsors pursuant to the ICPA. The sponsors participate in the management and financial planning of OVEC through the OVEC Board of Directors, and a long-standing management and services agreement with American Electric Power Company Inc. (AEP: Baa1 stable).

Detailed credit considerations

Effective management of the bankruptcy and subsequent payment default by one sponsor company representing about 5% of revenues

In March 2018, FES filed for Chapter 11 bankruptcy protection, sought to reject the ICPA, and stopped paying its approximately 5% share of OVEC's costs. In July 2018, the bankruptcy court granted FES's motion to reject the contract based on a "business judgment" rather than a "public interest" standard. OVEC is currently challenging the bankruptcy court's approval of FES' rejection of the ICPA, as well as the court's decision to bar the Federal Energy Regulatory Commission (FERC) from the process. OVEC's challenges have been accepted for review by the United States Court of appeals for the Sixth Circuit. In the meantime, OVEC has filed a rejection damages claim of approximately $540 million against FES. Any damage awards could be used to offset future FES obligations, and for debt repayment.

Following rejection of the ICPA, the FES share of energy and capacity has been allocated to the other sponsors, who have been paying their share of OVEC's variable costs; however, no one has "stepped-up" for FES' share of OVEC's fixed cost obligations. We estimate FES' share of OVEC's fixed costs to be approximately $17 million per year. In sensitivity testing taking into account FES' share of energy and capacity revenues that are being paid, we estimate the shortfall could be reduced to about $10-$13 million per year; however these revenues are currently being allocated to the non-defaulting sponsors. As such, OVEC is currently bearing the entire cost of the shortfall, illustrating the exposure created by the lack of step-up provision in the current ICPA.

Fortunately for OVEC, the shortfall created by the FES default is relatively modest and, as there was ample warning of FES' impending default, management was able to take steps to mitigate its impact. These steps include funding a debt reserve at a rate of about $30 million per year (current balance is about $60 million), and the retention of the return on equity portion of its rates (approximately $2.5 million per year) as a cushion. This equity cushion would be sufficient to cover future FES shortfalls in the event the current FES shortfall is covered by short-term borrowing.

To date, there have been no draws from the debt reserve, and as of September 30, 2018, OVEC had $60 million of unrestricted cash on hand. In addition to the debt reserve, OVEC's long-term investments include about $70 million received as part of a prior settlement with the Department of Energy (DOE) that could be utilized to cover future shortfalls. The DOE funds had been ear-marked as a source of funding for future postretirement benefits; however OVEC has the ability to include a postretirement benefits charge in the fixed costs billed to the sponsors. This liquidity provides sufficient near term coverage for the FES shortfall, and we expect the sponsors will continue to work toward implementing a longer term solution, including potential credit enhancing improvements to the ICPA, after there is resolution of the issues surrounding the FES bankruptcy.

While it has not filed for bankruptcy, FirstEnergy Corp.'s (FirstEnergy: Baa3, stable) other merchant subsidiary, Allegheny Energy Supply (AES, not rated) (3% of revenues) recently sold all of its non-OVEC generating assets and repaid all of its debt, leaving the company with very limited independent revenue generating ability. AES is continuing to meet its OVEC obligations, however we estimate its earnings shortfall to be around $5 million per year. AES' share of OVEC's fixed cost is about $10 million per year. As such, if it were also to default, the combined FES and AES shortfalls would still be less than the approximately $30 million per year OVEC is currently collecting as a reserve.

Full cost pass through of costs provided by the ICPA historically offset OVEC's weak financial profile

The ICPA contractually binds the sponsor group to pay a demand charge covering all non-fuel costs incurred by OVEC, including debt service, irrespective of plant availability or whether the sponsors take power from OVEC. Sponsor payments are semi-monthly, which we view positively versus the semi-annual payment of interest, as the timing allows OVEC to build the collection of required debt service before it is due. There is also an energy charge designed to recover all fuel-related costs and is payable based on each sponsor's pro-rata share of electricity volumes.

Prior to June 2016, the sponsors made dispatch decisions independently. If a sponsor decided not to take its allocation of the output, it was offered to the remaining sponsors. If the other sponsors did not choose to take that energy, OVEC did not generate the power. Beginning in 2016, OVEC bids over 90% of its energy into the PJM Interconnection (PJM) market on behalf of all of the sponsors, and its two plants will only generate power to the extent it is economic (dispatched by the system operator). Sponsor companies receive their pro-rata share of energy revenues and pay their pro-rata share of fuel costs.

Following FES' March 2018 bankruptcy filing, and the court's July 2018 acceptance of FES' rejection of the ICPA, FES' share of energy has been taken by the remaining sponsors. The sponsors have accepted their allocations and have been paying their pro-rata share of the related variable production costs, but not fixed costs.

The cost recovery provided by the ICPA helps to offset financial metrics that are weak when viewed in the context of Moody's rating methodology for regulated electric and gas utilities (which applies to the majority of the off-takers). In 2017, cash flow from operations excluding changes in working capital (CFO pre-WC) to debt was about 7.5%, marginally stronger than the 5.0% and 4.1% demonstrated in 2016 and 2015. Within the context of our rating methodology for regulated electric and gas utilities, these metrics are typically reflective of a speculative grade credit profile.

On the other hand, the sponsor take-or-pay type obligations that are created under the ICPA result in a structure that, within our rated universe, is more akin to that of a municipal joint action agency, (albeit with primarily non-municipal participants). As a result, we evaluate OVEC under the US municipal joint action agencies rating methodology (JAA Methodology). It is fairly common for joint action agencies to look to recover their costs with little or no margin. Within the context of the JAA Methodology for take-or-pay projects, a fixed obligation charge coverage ratio in the range of 1.0x-1.6x receives a score of "Baa". For 2017, we calculate OVEC's fixed obligation coverage ratio as 1.23x, and its three year historical average is 1.21x. Going forward, even with the shortfall created by the FES bankruptcy, we expect that OVEC will produce a fixed obligation coverage ratio above 1.0x, incorporating the ongoing debt reserve funding, the metric should remain around 1.2x.

Primarily investment grade credit quality of owner/off-takers

With the exception of FES and AES, we view the remainder of OVEC's sponsors (approximately 92%) as having strong investment grade characteristics. However, as the obligations are several and not joint, within the context of our JAA Methodology scorecard grid, the score for this factor is capped at two notches above the weakest link. Since there currently is no "step-up" requirement in the OVEC ICPA, the "weakest link" is the lowest rating in the sponsor group (currently FES which is in default), thereby constraining the score for this factor (45% weight) at B3 - the floor for this factor in the scorecard grid.

The OVEC sponsor group includes: American Electric Power Company, Inc. (AEP), the largest shareholder with 43.5% in total, through its subsidiaries Ohio Power Company (OPCo: A2, stable) at 19.9%, Appalachian Power Company (Baa1, stable) at 15.7%, and Indiana Michigan Power Company (A3, stable) at 7.9%. Buckeye Power Generating LLC (Baa1, stable) is the next largest shareholder with about 18.0%, followed by Duke Energy Ohio, Inc. (Duke Ohio: Baa1, stable) with 9.0% and FirstEnergy Corp. (FirstEnergy: Baa3, stable) with 8.4% through its wholesale generating subsidiaries FirstEnergy Solutions Corp. (not rated) at 4.9%, Allegheny Energy Supply (not rated) at 3.0% and regulated utility Monongahela Power (Baa2, stable) at 0.5%. PPL Corporation (Baa2, stable) has an 8.1% stake through Louisville Gas and Electric (A3, stable) at 5.6% and Kentucky Utilities (A3, stable) at 2.5%, with the remainder held by Peninsula Generation Cooperative (not rated) at 6.7%, Dayton Power & Light (DPL, Baa2, positive) at 4.9%, and Southern Indiana Gas & Electric (A2, negative) at 1.5%. Peninsula Generation Cooperative (Peninsula) and its parent company, Wolverine Power Supply (Wolverine), are not rated by Moody's. However, we view Peninsula and Wolverine as having investment grade-like characteristics.

Regulatory uncertainty for Ohio based sponsors has diminished

The state of Ohio's transition to a deregulated market for electricity resulted in some uncertainty regarding the permanency and mechanics by which the Ohio based OVEC participants that were once vertically integrated utilities (OPCo, Duke Ohio and DPL) would recover their OVEC obligations. Importantly, the OVEC obligations of these entities remain with the utilities that are parties to the ICPA, even though the sponsors may no longer own any generating assets. The ICPA does not contain a "regulatory out" provision, so the risk of non-recovery lies with the sponsor participants.

In prior rate proceedings, the Public Utilities Commission of Ohio (PUCO) allowed the establishment of placeholder riders, initially set at zero, for the recovery of costs associated with the Ohio utilities' OVEC obligations. In 2016 and 2017, the PUCO authorized OPCo and DPL's utilization of their specific OVEC riders through 2024 and 2023, respectively. The PUCO'S OPCo decision was recently upheld by the Ohio Supreme Court. Duke Ohio's request is still pending. Legislative efforts to make utility cost recovery of OVEC obligations more permanent are also underway.

OVEC's plants are challenged to be cost competitive in current low priced power markets

The low natural gas price environment and greater customer efficiencies/conservation efforts have kept the market price for on-peak energy at the AEP-Dayton hub of PJM during 2018 around $40 per MWh; off-peak prices have generally been around $30 per MWh. This is considerably less than OVEC's all-in cost of power to its participants, which in 2018 is estimated to be about $55 per MWh (including fixed costs and debt service). OVEC has been undertaking cost reduction efforts and estimates its energy only costs are currently around $25 MWh, which frequently allows the plants to run as base load, as they were designed, which reduces operational costs and brings down their overall cost per MWh. For example, OVEC's 2018 all-in cost of $55 MWh is a significant improvement from the $64-65 MWh experienced in 2013 and 2015, and below the $56 MWh experienced in 2014 when production spiked due to severe winter weather. For 2019, OVEC estimates the all-in cost of power to its sponsor companies will be similar to 2018.

Beginning in June 2016, OVEC became responsible for bidding all of the PJM sponsor's available energy into the market, so the entirety of the plants are dispatched on a consistent basis when it is economic. This dispatch practice has improved the plant's use factor (percentage of power scheduled versus power availability) to approximately 84% in 2018 and 2017 compared to approximately 71% in 2016. Increased usage contributes to a lower all-in per MWh cost of power for the sponsors. We note that as a strictly merchant plant, in today's market, the plant would not be able to generate sufficient cash flow cover its fixed costs and service its $1.4 billion of debt.

Elevated carbon transition risk

OVEC has an elevated carbon transition risk profile because its operations are limited to the generation of electricity from two coal-fired electric generating plants: the Kyger Creek Plant (1,086 MW) in Ohio and the Clifty Creek plant (1,304 MW) in Indiana. This places the company at a higher risk than other joint action agencies or regulated and municipal utilities that may have a more diversified generating base or own transmission and distribution assets.

Liquidity analysis

OVEC's liquidity is constrained as its partially drawn bank credit facility, which includes a material adverse change clause for new borrowings, is current and due in less than one year. For the twelve months ended September 30, 2018, OVEC generated approximately $123 million in cash flow from operations (CFO), invested $14 million in capital expenditures and made no dividend payments, resulting in free cash flow (FCF) of approximately $109 million. Over the next 12 months, with limited capital expenditures and no dividend payments, the company should continue to be free cash flow positive. In addition, as of December 31, 2017, OVEC had approximately 97 days of liquidity (including the liquid portion of long term investments) on hand, an increase compared to the 68 days at the end of 2016. These figures fall within the range of 30 – 100 days indicated for a score of "Baa" on this factor in the JAA methodology.

Additional external liquidity is provided by OVEC's $200 million unsecured bank revolving facility which matures in November 2019, but is currently in the process of being extended. Our rating and stable outlook assume this extension is completed in the early part of 2019. At September 30, 2018, OVEC had $85 million borrowed under this line of credit. The facility has a covenant requiring maintenance of a minimum of $11 million of consolidated net worth (defined as stockholders' equity); as of September 30, 2018, we estimated the level to be about $23 million. Draws under the facility require a representation of no material adverse change, a credit negative as it may preclude borrowing under the facility when it is needed most. As such, we have not included revolver availability in our calculation of days liquidity on hand.

As mentioned earlier, management has taken proactive steps to shore up its available liquidity in order to provide near-term coverage for the FES shortfall. Traditionally, joint action agencies will establish a debt service reserve (typically covering one year of debt service) for the benefit of the lenders. At its December 2016 meeting, the OVEC Board authorized the funding of a $44 million debt service reserve over 18 months beginning January 2017, which was equivalent to approximately one third of a year of debt service. OVEC now plans to continue funding this debt reserve at a rate of about $30 million per year (current balance is about $60 million), at least until there is one year of debt service. To date, there have been no draws from the reserve and as of September 30, 2018, OVEC had $60 million of unrestricted cash on hand. In addition to the debt reserve, OVEC's long-term investments also include about $70 million received as part of a prior settlement with the Department of Energy, which could be utilized to cover shortfalls.

Over the next twelve months, we expect OVEC's scheduled debt amortization of approximately $50 million to be recovered through the sponsor's demand charge payments. The company's next non-amortizing debt maturity is in October 2019, when $100 million of revenue bonds mature. In addition, OVEC's upcoming maturities include: 1) $25 million of Ohio Air Quality Development Authority

(OAQDA) variable rate revenue bonds (due in 2026) with letter of credit backing expiring in November 2019, and 2) $50 million of Indiana Finance Authority (IFA) variable rate revenue bonds (due in 2040) with a bank agreement expiring in August 2020. OVEC expects to extend the maturities of these upcoming facilities.

Structural considerations

The strength of the OVEC ICPA is a key factor in determining its credit quality. However, as noted above, the sponsor obligations under the ICPA are several, and there is no requirement for a step-up in payments in the event of a shortfall. A step-up provision, which is common for joint action agencies, would typically require the non-defaulting participants to increase their payments by a maximum percentage (typically 15-25%) in the event a participant default. The ICPA limits assignments of the sponsor obligations to entities that have investment grade ratings from both Moody's and Standard & Poor's. However, there is no ongoing requirement that the existing Sponsors maintain investment grade ratings.

Rating methodology and scorecard factors

Moody's evaluates OVEC's financial performance relative to the US Municipal Joint Action Agencies rating methodology and, as depicted below, based on a lowest possible sponsor score of "B3", the scorecard indicated rating for OVEC is Ba3, two notches below OVEC's Ba1 rating. The Ba1 rating recognizes the small, manageable size of the defaulting sponsor and the overall credit quality of the sponsor group. Our view reflects our expectation that the non-defaulting sponsors will continue to support OVEC through reserves or other means until a longer term solution to the FES shortfall is achieved. Notching factors reflect the current lack of a traditional step-up feature.

Exhibit 1

Factor	Subfactor/Description	Score	Metric
1. Participant Credit Quality and Cost Recovery Framework	a) Participant credit quality. Cost recovery structure and governance	B3	
2. Asset Quality	a) Asset diversity, complexity and history	Baa	
3. Competitiveness	a) Cost competitiveness relative to market	Ba	
4. Financial Strength and Liquidity	a) Adjusted days liquidity on hand (3-year avg) (days)	Baa	69
	b) Debt ratio (3-year avg) (%)	Baa	97%
	c) Fixed obligation charge coverage ratio (3-year avg) (x)	Baa	1.21
Material Asset Event Risk	Does agency have event risk?	No	
Notching Factors		**Notch**	
	1 - Contractual Structure and Legal Environment	-0.5	
	2- Participant Diversity and Concentration	0	
	3 - Construction Risk	0	
	4 - Debt Service Reserve, Debt Structure and Financial Engineering	0	
	5 - Unmitigated Exposure to Wholesale Power Markets	0	
Scorecard Indicated Rating:		**Ba3**	

Source: Moody's Investors Service

Ratings

Exhibit 2

Category	Moody's Rating
OHIO VALLEY ELECTRIC CORP	
Outlook	Stable
Sr Unsec Bank Credit Facility	Ba1
Senior Unsecured	Ba1

Source: Moody's Investors Service

REPORT NUMBER 1154297

CLIENT SERVICES

Americas	1-212-553-1653
Asia Pacific	852-3551-3077
Japan	81-3-5408-4100
EMEA	44-20-7772-5454

JIF-11

DUKE ENERGY OHIO EXHIBIT _____

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates.	))	Case No. 17-32-EL-AIR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	))	Case No. 17-33-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	))	Case No. 17-34-EL-AAM
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Modify Rider PSR.	))	Case No. 17-872-EL-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Amend Rider PSR.	))	Case No. 17-873-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	))	Case No. 17-874-EL-AAM
In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service.	)))))	Case No. 17-1263-EL-SSO
In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Amend its Certified Supplier Tariff, P.U.C.O. No. 20.	)))	Case No. 17-1264-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Defer Vegetation Management Costs.	))	Case No. 17-1265-EL-AAM
In the Matter of the Application of Duke Energy Ohio, Inc., to Establish Minimum Reliability Performance Standards Pursuant to Chapter 4901:1-10, Ohio Administrative Code.	))))	Case No. 16-1602-EL-ESS

REVISED

PUBLIC VERSION

SUPPLEMENTAL TESTIMONY OF

JUDAH L. ROSE

ON BEHALF OF

DUKE ENERGY OHIO

July 10, 2018

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY

Q. STATE YOUR NAME, TITLE, AND BUSINESS ADDRESS.

A. My name is Judah L. Rose. I am an Executive Director of ICF. My business address is 9300 Lee Highway, Fairfax, Virginia 22031.

Q. HAVE YOU PREVIOUSLY TESTIFIED IN THIS MATTER?

A. Yes.

Q. ON WHOSE BEHALF ARE YOU TESTIFYING?

A. I am testifying on behalf of Duke Energy Ohio.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to provide updated economic forecasts for Ohio Valley Electric Corporation's (OVEC's)[1] two coal-fired power plants, Clifty Creek and Kyger Creek, related to the request of Duke Energy Ohio to adjust Rider PSR as resolved through a settlement. Specifically, I provide updated forecasts based on two sets of assumptions, ICF's and ICF's with the Reference Case natural gas price forecasts of the US Department of Energy (DOE) Energy Information Agency's (EIA) 2018 Annual Energy Outlook (AEO).

Q. DESCRIBE THE OVEC AND DUKE ENERGY OHIO'S RELATIONSHIP TO OVEC.

A. Duke Energy Ohio has a 9 percent equity interest in OVEC. Additionally, Duke

[1] For simplicity, I am not addressing the subsidiary of OVEC.

Energy Ohio is a counterparty to, and sponsoring company[2] of, the Inter-Company Power Agreement (ICPA) pursuant to which its power participation ratio is 9 percent. Hence, Duke Energy Ohio is entitled to 107 MW from Clifty Creek and 88 MW of Kyger Creek for a total of 195 MW. Over the 2012 to 2017 period, average generation from the 195 MW was 0.98 million MWh.

Q. DOES YOUR DIRECT TESTIMONY PROVIDE ADDITIONAL DESCRIPTION OF OVEC?

A. Yes, my Direct Testimony describes the OVEC plants and their: (1) access to coal delivered via barge on the Ohio River, (2) extensive emission controls, (3) OVEC's diverse ownership, and (4) unique contract and history.

Q. HAS YOUR MODELING APPROACH CHANGED SINCE YOUR DIRECT TESTIMONY WAS PREPARED/FILED?

A. No. I use the same modeling approach described in my Direct Testimony. As discussed, I use the PROMOD and IPM production cost models.

Q. HAS YOUR FORECAST PERIOD CHANGED?

A. Yes. My forecast is for the period January 1, 2018 to May 31, 2025. Previously, my forecast was through mid-2040 when the ICPA expires. The January 1, 2018 to May 31, 2025 period covers the timing of the Stipulation and Recommendation filed in this proceeding on April 13, 2018. Furthermore, I sometimes report 2025 full year results to facilitate comparison with other full years.

[2] Allegheny Energy Supply Company LLC, Appalachian Power Company, Buckeye Power Generating LLC, The Dayton Power and Light Company, Duke Energy Ohio Inc., FirstEnergy Solutions Corp., Indiana Michigan Power Company, Kentucky Utilities Company, Louisville Gas and Electric Company, Monongahela Power Company, Ohio Power Company, Peninsula Generation Cooperative and Southern Indiana Gas and Electric Company comprise of the sponsoring companies.

Q. HOW IS YOUR TESTIMONY ORGANIZED?

A. My testimony contains the following sections:

- Summary;
- Updated Assumptions;
- Updated Market Forecasts;
- Updated Plant Forecasts;
- Uncertainty and hedge value; and
- Conclusions

Q. WHAT SPECIFIC FORECASTS ARE YOU PROVIDING?

A. I provide the following forecasts:

- **Wholesale market electricity prices** (firm, electrical energy and capacity);
- **OVEC plant utilization rates** (*i.e.*, capacity factors);
- **OVEC plant revenues** (primarily from sales of electrical energy and capacity into PJM's wholesale power markets; my Direct Testimony discusses these products in greater detail);
- **OVEC plant gross margins** (revenues less short run variable costs; variable costs are primarily the costs of the coal and secondarily variable non-fuel Operation and Maintenance (O&M) and emission allowance costs); and
- **OVEC plant net margins** (*i.e.*, gross margins minus demand charges). Demand charges have two components:
  - Fixed cash going forward costs such as fixed (as opposed to short run variable O&M) annual O&M. property taxes, General and Administrative (G&A); and

- Recovery of and on already spent capital costs referred to as sunk costs.

I report two net margins. The first is net of cash going forward costs excluding sunk costs (*i.e.*, net of a portion of the demand charge). The second is net of total demand charges including sunk costs.

Lastly, my testimony briefly discusses the issue of annual price volatility, the relationship between my year-by-year price forecasts and annual price volatility, and hedge value of contracts like the ICPA that have less volatility than wholesale market prices.

Q. HOW IS YOUR SUMMARY ORGANIZED?

A. My summary has four main parts:

- **Approach and Updated Assumptions;**
- **PJM Market Price Forecast** – Firm Electricity, Electrical Energy, Capacity Prices and Annual Price Volatility;
- **Plant Specific Forecasts** – Dispatch, Revenues, Gross Margins, Demand Charges, Net Margins;
- **Annual Cost and Price Volatility and Hedge Value;** and
- **Conclusions**

I.1 APPROACH

Q. SUMMARIZE YOUR APPROACH.

A. My approach has three parts. First, I compare the costs of power from Clifty Creek and Kyger Creek with the costs of purchasing the same amount of power from the market under ICF's Base Case conditions. I base my recommendations on the operations of Clifty Creek and Kyger Creek on the cash

going-forward economics *i.e.,* excluding sunk costs. I also compare market purchases and the costs of OVEC power including sunk costs. I do not opine on the treatment of sunk costs in terms of recoverability, though I present perspectives on their treatment.

Second, I consider a second scenario using the EIA natural gas price reference case forecast instead of ICF's updated natural gas price base case forecast. This is the only public forecast that uses a theoretically correct methodology. Gas prices are an important uncertainty. This is especially relevant because ICF forecasts that over the next 8 years, demand for natural gas will increase so much that we expect US production will increase from 74 Bcfd to 98 Bcfd – (*i.e.* by 32%). This demand will come from numerous sources including major increases in natural gas exports.

Third, I compare the annual volatility of the costs of the two procurement approaches (*i.e.,* ICPA contract and market) basing the comparison on recent historical data. I do not opine on what if any trade-offs should be made between cost and volatility to the extent the results indicate there is a trade-off, though I do believe expected costs and cost volatility are both appropriate considerations.

Q. SUMMARIZE YOUR ASSUMPTION UPDATES.

A. Key updates include:

- **Lower ICF Natural Gas Prices** – Over the 2018-2025 period, ICF gas price forecasts are lower on average by [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] relative to those used in my Direct Testimony. All else equal, lower gas prices lower wholesale electricity prices, albeit at a

significantly lower percentage rate than the percentage change in gas prices. Lower wholesale power prices in turn lower revenues and margins for OVEC. My gas price forecast is lower primarily because of updated gas supply forecasts that effectively decreased the long-term price elasticity of gas supply. As a result, even though updated natural gas demand is still forecast to grow significantly (*i.e.,* by approximately one-third over the next eight years), my updated gas price increases over time are less than they were in my previous forecast. The key supply side developments include: even greater improvements in drilling efficiency, well completion techniques, and fracturing technologies than previous forecast. Having noted ICF gas prices are lower, they still increase 39 percent in nominal terms between 2018 and 2025 due to significant demand growth, general inflation, and other factors.

- **Lower EIA Natural Gas Prices** – EIA also updated its forecasts of natural gas prices. Between 2018 and 2025, EIA's average gas price decreased by an amount similar to ICF's decrease: $0.65/MMBtu for EIA versus [BEGIN CONFIDENTIAL] [redacted] for ICF. However, EIA updated gas prices are significantly higher than ICF's. [END CONFIDENTIAL]
- **Lower OVEC Delivered Coal Prices** - Over the 2018-2025 period, updated delivered OVEC coal prices are [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] This in part mitigates the impact of lower gas prices on OVEC's economics.

- **Lower OVEC Demand Charges** – OVEC demand charges are forecast to be [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] This in part mitigates the impact of lower gas prices on OVEC's economics.
- **Higher PJM Retirements** – Firm PJM power plant retirements in 2018 to 2021 increased by approximately 11 GW relative to my Direct Testimony, which include First Energy Solution's announced retirement of more than 4 GW of nuclear units made in late April, 2018. Firm new combined cycle unit additions 2018 to 2021 increased by approximately 2 GW. Greater retirements increased wholesale power prices, thus in part mitigating the impact of lower gas prices on OVEC's economics.
- **Other Assumptions Updates** – I updated several other parameters demand, capacity auction results, and other parameters.

I.2 MARKET PRICE FORECASTS

Q. WHAT ARE FIRM ALL-HOURS POWER PRICES?

A. Firm all-hours power prices have two components, all-hours electrical energy and capacity[4]. Firm power prices are the most comprehensive measure of wholesale prices, and I focus here on prices at PJM's AEP Dayton Hub.

[3] 2025 is a full year for comparison.
[4] The capacity price is averaged across the 8760 hours of the year and added to the all-hours average electrical energy price. The result is a single $/MWh price often referred to as a unit contingent firm price or a bundled price.

Q. WHAT ARE YOUR FIRM ALL-HOURS POWER PRICE FOR THE AEP DAYTON HUB?

A. My updated forecast for the average firm all-hours 2018 to 2025 wholesale power price is [BEGIN CONFIDENTIAL] [redacted] my Direct Testimony where the average projected firm all-hours AEP Dayton hub price for the 2018-2025 period was [redacted] [END CONFIDENTIAL]

Q. WHAT IS THE 2016 TO 2025 TREND IN YOUR FIRM ALL-HOURS POWER PRICES?

A. The trend is positive, and has already started. Prices increased in 2017 and early 2018 from their low point in 2016, and this increase is forecast to continue on an expected value basis. In 2016, firm all-hours prices were $31.6/MWh. In 2017, power prices increased from $31.6/MWh to $33.2/MWh. In addition, in the most recent PJM capacity auction, RTO capacity prices increased by more than 80 percent. The 2018 – 2025 average firm all hours electricity price will be [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] My forecast is of the yearly (and sub-yearly) expected value (*i.e.*, probability weighted average) assuming average normal weather.

[5] 2025 is considered full year.

Q. WHY DO YOU COMPARE YOUR FORECAST TO 2016 PRICES?

A. 2016 was an unsustainable low point and evidence of high price volatility. This conclusion about 2016 levels is based on several considerations:

- **Extreme Conditions** - The winter of 2015/2016 was one of the warmest in US history, and oil prices fell from $108/barrel in early 2014 to less than $30/Barrel in early 2016.
- **Historically Low Prices** - AEP Dayton electrical energy prices were the lowest since 2005, and Henry Hub, Louisiana natural gas prices were the lowest since 1999. Gas prices at Dominion South, another gas price market location north of Pittsburgh, were the lowest ever.
- **Evidence of Non-sustainability** – Between 2014 and 2016, US drilling for oil and gas dropped 75 percent and there were over 100 bankruptcies in small and mid-size oil and gas producers.
- **Price Increases Between 2016 and 2017 and 2018 YTD** – Many spot and forward prices increased over the course of 2016, 2017 through early 2018. The increase in 2017 occurred in spite of 2017 being a warm winter compared to average.
- **Modeling** - Computer model simulations capturing the long-term dynamics of the power and related industries support higher average prices than 2016. This modeling also accounts for general inflation, long-term conditions including regulatory changes, rising demand for gas, etc.

Q. WHAT ARE ELECTRICAL ENERGY PRICES?

A. PJM purchases and OVEC sells electrical energy hourly and sub hourly and prices are expressed in $/MWh. Competitive prices equal the marginal costs of producing electrical energy by time-period and location. Electrical energy is the larger of the two components of firm wholesale electricity prices; specifically, I forecast that on average[BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].

Q. WHAT IS YOUR FORECAST OF ELECTRICAL ENERGY PRICES?

A. I project that over the 2018 to 2025 period, all hours electrical energy prices will [BEGIN CONFIDENTIAL] [redacted]. I also project that they will increase from 2016 levels [redacted] My updated forecast for 2018 to 2025 nominal average electrical prices of [redacted] is [redacted] or [redacted] lower than by forecast in the Direct Testimony for 2018 to 2025. This primarily reflects impacts of lower gas prices and lower coal prices offset by other factors. [END CONFIDENTIAL]

Q. WHY DO YOU FORECAST INCREASING ELECTRICAL ENERGY PRICES OVER TIME?

A. The key drivers of higher electrical energy prices over time include higher natural gas prices, and higher energy demand as weather returns to average conditions, load growth and retirements, potential new regulations, new unit costs and general inflation (*i.e.,* average economy wide inflation measured using GDP deflator).

Q. WHAT IS YOUR CAPACITY PRICE FORECAST?

A. PJM purchases and OVEC can sell capacity three years forward and the price is expressed as $/MW-day, $/kW-month and $/kW-year. I forecast that [BEGIN CONFIDENTIAL] [redacted] Thus, my updated forecast is [redacted] than my forecast in the Direct Testimony for 2018 to 2025. [END CONFIDENTIAL] This reflects several factors. First, there are changes in historical PJM auction results which I directly incorporate in my forecast. This includes the more than 80% increase in PJM RTO capacity prices the May 2018 auction relative to the May 2017 auction. Second, my post auction forecasts are modestly lower. This is because lower gas prices lead to higher dispatch for marginal capacity price setting units, and I assumed slightly lower physical heat rates for new combined cycles for delivery in 2024/2025.

Q. DOES YOUR CAPACITY PRICE FORECAST REFLECT ALREADY HELD CAPACITY AUCTIONS?

A. Yes, as noted. Specifically, PJM already purchased capacity through May 31, 2022, and my price forecast incorporates these results. Therefore, the majority of the forecast capacity prices reflect forward auction results.

[6] This includes full year pricing for 2025. Also we note that the January 1, 2018 to May 31, 2022 capacity prices in this analysis are set equal PJM capacity auction prices.

Q. DOES YOUR CAPACITY PRICE FORECAST INCREASE OVER TIME?

A. When disaggregated into periods of "already auctioned capacity" and "ICF projections" of capacity sales, [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] The key drivers of higher capacity prices between June 1, 2022 and 2025 compared to 2018 through May 31, 2022 include:

- The decrease in excess capacity due to retirements;
- Less depression of capacity prices levels by base capacity product; and,
- Likely additional reforms to the PJM capacity market such as correction of the current inappropriately low penalty rates for capacity performance,[7] efforts to curtail buy-side market power,[8] and resiliency initiatives[9]. These reforms provide qualitative support for my forecast of higher prices over time.

While prices increase, the increased price is lower than key PJM capacity price benchmarks. One benchmark for capacity prices is the net Cost of New Entry (CONE), and another is net CONE times the Balancing Ratio (typically 78 percent to 90 percent of CONE). Net CONE times the Balancing Ratio is the maximum safe harbor bid price and is designed to be the indifference point between providing energy only or entering into capacity agreement and then

[7] See MIC Balancing Ratio, April 4, 2018, Monitoring Analytics, Joe Bowring, Siva Josyula. See also discussion of this issue in Direct Testimony.
[8] PJM, "*Capacity Market Repricing Proposal*", 2017; PJM, "*Proposed Enhancements to Energy Price Formation*", November 15, 2017.
[9] PJM, *Valuing Fuel Security*",2018; PJM,*"Ott_Fuel Security Member Letter"*, April 30, 2018.

providing firm energy subject to penalties. I project the average PJM RTO capacity price will [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]

[BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]

Q. WHAT IS YOUR ESTIMATE OF ANNUAL WHOLESALE ELECTRICITY PRICE VOLATILITY?

A. Power prices have exhibited very significant annual volatility. I anticipate this significant annual price volatility will continue around my forecast of the expected (*i.e.,* probability weighted) value. I focus on one measure of annual volatility namely the range of annual all hours electrical energy prices for the AEP Dayton Hub. This measure is modestly higher relative to my Direct Testimony. Over the 2012-2017 six-year period, the range was $27.8/MWh to $44.1/MWh with a spread of $16.3/MWh. This spread is 49 percent of the average price, and hence, indicates high volatility. When I factor in capacity prices, the firm price range over the same period was $31.6/MWh to $47.6/MWh and spread was $16/MWh or 44 percent of the average. The high volatility is driven in large part by variation in weather conditions (*e.g.,* weather was warm in the winters of 2012, 2016 and 2017 while the winters were cold in 2014 and 2015 and average[10] in 2013 and 2018), the lack of storage, natural gas price volatility,

[10] Compared to the 15 year national Heating Degree Day average.

variation in generation supply costs, industry cycles and changes in FERC regulations. Greater reliance on natural gas will increase spot power price volatility, especially in situations where natural gas production and delivery infrastructure falls behind increased natural gas consumption.

Q. HOW DOES THE MARKET VOLATILITY COMPARE TO THE VOLATILITY OF THE OVEC CONTRACT COST?

A. It is five times higher.

I.3 POWER PLANT FORECASTS

Q. WHAT IS YOUR FORECAST OF CLIFTY CREEK AND KYGER CREEK DISPATCH?

A. Between 2018 and 2025, I forecast the average[11] plant utilization rates will be [BEGIN CONFIDENTIAL] [redacted] The increase reflects increasing natural gas and electrical energy prices, the impact of retirements, growing electricity demand and the lack of new coal power plant construction. While higher than historical, my updated [redacted] for Kyger Creek and Clifty Creek respectively, than my forecast in the Direct Testimony for 2018 to 2025. [12] [END CONFIDENTIAL]

[11] Average plants utilization rates include 2025 as partial year.
[12] 2025 is a full year for comparison

Q. WHAT IS YOUR FORECAST OF CLIFTY CREEK AND KYGER CREEK REVENUES?

A. Over the 2018 to 2025 period, in nominal dollars, I forecast the annual average total revenues for Clifty Creek and Kyger Creek will be [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]

Q. WHAT ARE YOUR FORECASTS OF CLIFTY CREEK AND KYGER CREEK GROSS MARGINS?

A. Gross margin equals revenues less fuel and other short run variable costs. Over the 2018 to 2025, in nominal dollars, I forecast gross margins will have a present value of [BEGIN CONFIDENTIAL] [redacted] [END

[13] Duke Energy Ohio (DEO) owns 9% of the ICPA contract. In this annual average calculation, 2025 is considered as a full year.
[14] In average revenue rate calculation, 2025 is a full year. Revenues on average are higher than all-hours price because dispatch is high but not 100%.
[15] Partial year 2025.
[16] In gross margins average calculation, 2025 is a full year

CONFIDENTIAL] Revenues increase faster than costs and margins increase faster than revenues – *i.e.*, there is operating leverage.

Q. WHAT IS THE FORECAST OF OVEC DEMAND CHARGES?

A. OVEC demand charges are paid pursuant to the ICPA originally entered into in 1953. The demand charges are set in the same manner as cost recovery of a traditional rate base power plant. Duke Energy Ohio provided ICF the forecast of OVEC's projected demand charges.[17] Between 2018 and 2025[18], total demand charges average approximately [BEGIN CONFIDENTIAL] [redacted] As noted, this forecast [redacted] in my Direct Testimony. [END CONFIDENTIAL]

Q. HOW SHOULD SUNK COSTS BE TREATED?

A. Society's economic value[19] is maximized by maximizing the cash going forward net margins and treating previously incurred capital investment as sunk – *i.e.*, by not including sunk costs in the decision regarding the asset's utilization. My economic analysis excluding sunk costs concludes that OVEC should continue to operate its power plants. This is especially true when the hedge value of the contract and the improving price trend is considered.

Duke Energy Ohio is requesting recovery of all costs, including sunk costs, via Rider PSR. I note that this request may be appropriate in spite of the complexities of OVEC's situation, notably the plants are not owned by or rate

[17] Demand Charges are from OVEC "20yearbillable.xls" spreadsheet
[18] 2025 is a full year in the average demand charge calculation.
[19] Assuming efficient pricing.

based by Duke Energy Ohio but are rather subject to a long term power agreement under which Duke Energy Ohio has little control of OVEC. It is my understanding that the specific contract was undertaken long ago (though amended in 2004 and 2011) and well before deregulation of any power markets. The diversity of the players and regulatory frameworks and the regional scope of the situation does not lend itself to easily changing the contract or establishing a policy regarding the future of the plants (*e.g.,* unanimous decision making). This arrangement is consistent with this situation being a legacy of a former era in which the form was secondary to the intent which was to urgently support reliable production of enriched uranium in the early 1950s. While the form of the arrangement is contractual, it may have been the original intent to treat the Department of Defense similar to or better than other firm customers and treat the plants in a manner similar to jointly owned, rate base power plants – *i.e.,* similar to other power plants approved and included in the rate base. Evidence for this is that the payments are determined the same way traditionally regulated costs are determined. This argues for recovery of costs including sunk costs because they were prudently incurred.

Notwithstanding the above, I have not conducted a detailed history of the contract, the plant's regulation, and I defer to the expertise of the PUCO on how to treat the sunk costs with regard to rate recovery for the Company. I also acknowledge that this is a different, complex and unique situation. Finally, it is my understanding that most decisions and changes to the contract require

unanimous consent. Accordingly, I also report the results based on the total demand charge including recovery of sunk capital.

Q. WHAT IS THE FORECAST OF CLIFTY CREEK AND KYGER CREEK NET MARGINS USING CASH GOING FORWARD COSTS?

A. [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]

Q. WHAT IS THE FORECAST OF CLIFTY CREEK AND KYGER CREEK NET MARGINS USING EIA'S UPDATED GAS PRICES?

A. Also in Exhibit 1, I present the net present value of pre-tax net margins on a cash going-forward basis using the DOE Energy Information Agency (EIA) Annual Energy Outlook (AEO) 2018 Reference Case gas price forecast.[21] [BEGIN CONFIDENTIAL] [redacted]

[20] [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]

[21] US EIA's "*Annual Energy Outlook 2018*." This case assumes no national CO_2 regulations for all time periods.

[redacted] [END CONFIDENTIAL]

Q. DO THE NET MARGINS INCLUDE HEDGE VALUE?

A. No, the results shown do not include any hedge value even though the contracts costs are less volatile than relying on market. Adding hedge value would make the results more positive.

Q. HOW DOES THIS FORECAST COMPARE TO THE FORECAST IN THE DIRECT TESTIMONY?

A. In my Direct Testimony [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]

Q. WHAT IS THE FORECAST OF CLIFTY CREEK AND KYGER CREEK NET MARGINS USING TOTAL DEMAND CHARGES?

A. I present results with and without considerations of sunk costs (*i.e.*, with demand charges excluding sunk costs and including sunk costs) in Exhibits 1 and 2. [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]

[22] Partial year 2025.

[BEGIN CONFIDENTIAL]

Exhibit 1
Duke Energy Ohio's Share of the OVEC Portfolio Net Margins
(Present Value millions $)

Case	Sunk Costs Included	2018-May 2025
ICF Base Case	No	0
AEO 2018 Reference Case	No	15

Source: ICF projections with supplementary data from AEO 2018, FERC Form 1, and OVEC

Note: Present value calculated for Jan 1, 2018 to May 31, 2025 using a discount rate of [redacted]

Exhibit 2
Duke Energy Ohio's Share of the OVEC Portfolio Net Margins
(Present Value millions $)

Case	Sunk Costs Included	2018-May 2025
Base Case	Yes	(77)
AEO 2018 Reference Case	Yes	(62)

Source: ICF projections with supplementary data from AEO 2018, FERC Form 1, and OVEC

Note: Present value calculated for Jan 1, 2018 to May 31, 2025 using a discount rate of [redacted]

[END CONFIDENTIAL]

Q. WHAT IS YOUR ASSESSMENT OF THE PLANT'S ANNUAL COST VOLATILITY?

A. Annual wholesale market price volatility is five times higher than volatility in the costs of Clifty Creek and Kyger Creek. I discussed above the volatility of market prices. [BEGIN CONFIDENTIAL] [redacted]

[redacted]

[redacted] [END CONFIDENTIAL]

I.4 CONCLUSIONS

Q. WHAT ARE YOUR CONCLUSIONS?

A. The updated ICF Base Case value of net margins for OVEC between 2018 and 2025 is lower than in my Direct Testimony. This reflects lower gas and power prices with the impact mitigated in part by lower coal and non-fuel costs at the OVEC plants and retirements in the market including the effect of recent nuclear power plant retirements in and near Ohio.

My update to my 2018 to 2025 forecast concludes OVEC plants provide electricity on a going forward cost basis [BEGIN CONFIDENTIAL] [redacted]

[redacted] [END CONFIDENTIAL]

My updated volatility estimates are nearly unchanged for both the market and the OVEC contract – *i.e.*, market is five times more volatile. Therefore, the lower volatility of OVEC contract is an advantage and the contract acts like a hedge. Adding any hedge value would make the plants positive or better than market on a cash going forward basis.

In the updated US EIA gas price case, net margins on a cash going forward basis are positive and very close to the ICF Base Case forecast in my Direct Testimony. [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]

This also supports and reinforces the conclusion that continued plant operation through 2025 is economic.

Accordingly, I conclude the plants should continue to operate.

[BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]

My current 2018-2025 forecasts do not include quantitatively three sets of regulatory developments that are favorable to the economics of Clifty Creek and Kyger Creek and that occurred since the filing of my Direct Testimony. First, it is now very likely that potential national CO_2 emission and other environmental regulations adverse to OVEC's plants will be significantly deferred beyond 2025 compared to national CO_2 controls starting in 2022 as per the Clean Power Plan (CPP). While my Direct Testimony assumed no national CO_2 regulations until after 2025, prospects are now even more remote. Second, PJM has been developing capacity and energy market reforms that would increase prices. While these reforms do not quantitatively affect my forecast, they qualitatively support

the upward trend in prices that commenced in 2017 and is continuing. Third, PJM, FERC and others may pursue grid resiliency initiatives economically favoring units like Clifty and Kyger Creek because they have significant amounts of on-site fuel. I have not quantitatively accounted for this possibility in my analysis.

II. RECENT WHOLESALE POWER PRICING TRENDS

Q. WHAT WERE THE WHOLESALE PRICES FOR ENERGY FOR THE LAST 9 YEARS?

A. Exhibit 3 below provides wholesale electrical energy market prices for the period from 2009 to 2017.[23] Electrical energy prices are set node-by-node, but PJM reports load weighted zonal averages for demand nodes and hubs and simple averages for supply nodes. Between 2012 and 2017, AEP Dayton Hub all-hours electrical energy prices averaged $33.8/MWh in real 2016 dollars, and $33.1/MWh in nominal dollars. Historically, Clifty Creek and Kyger Creek nodal prices averaged 5.5 percent lower compared to AEP Dayton Hub's all-hours prices. In nominal dollars, the range of AEP Dayton Hub's prices was from $44.1/MWh in 2014 to $27.8/MWh in 2016 or $16.2/MWh – *i.e.,* the lowest prices were in 2016. As noted, 2015/2016 winter weather was among the warmest on record and electrical energy prices and natural gas prices were very low.

[23] Historical energy pricing data come from publicly available sources including Platts, Ventyx, SNL Financial and ICE data compilations. Capacity pricing data is publicly available through the PJM BRA results, available on the PJM website and through various news sources.

JIF-12

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
AKRON DIVISION

In re:	Chapter 11
FIRSTENERGY SOLUTIONS CORP., *et al.*,1	Case No. 18-50757 (Request for Joint Administration Pending)
Debtors.	Hon. Judge Alan M. Koschik

EXPERT DECLARATION OF JUDAH L. ROSE IN SUPPORT OF: (1) THE MOTION OF FIRSTENERGY SOLUTIONS CORP. AND FIRSTENERGY GENERATION, LLC FOR PRELIMINARY AND PERMANENT INJUNCTION AND *EX PARTE* TEMPORARY RESTRAINING ORDER AGAINST THE FEDERAL ENERGY REGULATORY COMMISSION; (2) THE MOTION FOR ENTRY OF AN ORDER AUTHORIZING FIRSTENERGY SOLUTIONS CORP. AND FIRSTENERGY GENERATION, LLC TO REJECT CERTAIN ENERGY CONTRACTS; AND (3) THE MOTION FOR ENTRY OF AN ORDER AUTHORIZING FIRSTENERGY SOLUTIONS CORP. AND FIRSTENERGY GENERATION, LLC TO REJECT A CERTAIN MULTI-PARTY INTERCOMPANY POWER PURCHASE AGREEMENT WITH THE OHIO VALLEY ELECTRIC CORPORATION

I, Judah L. Rose, hereby declare under penalty of perjury:

1. My name is Judah L. Rose. I am an Executive Director of ICF International ("ICF"). My business address is 9300 Lee Highway, Fairfax, Virginia 22031.

2. I respectfully submit this expert Declaration in support of (i) *the Motion of FirstEnergy Solutions Corp.* ("FES") *and FirstEnergy Generation, LLC* ("FG") *for Permanent and Preliminary Injunction and Ex Parte Temporary Restraining Order Against the Federal Energy Regulatory Commission* ("FERC") in the above captioned adversary proceeding; (ii) *the Motion of FES and FG for Entry of an Order Authorizing FES and FG to Reject Certain Energy*

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: FE Aircraft Leasing Corp. (9245), case no. 18-50759; FirstEnergy Generation, LLC (0561), case no. 18-50762; FirstEnergy Generation Mansfield Unit 1 Corp. (5914), case no. 18-50763; FirstEnergy Nuclear Generation, LLC (6394), case no. 18-50760; FirstEnergy Nuclear Operating Company (1483), case no. 18-50761; FirstEnergy Solutions Corp. (0186); and Norton Energy Storage L.L.C. (6928), case no. 18-50764. The Debtors' address is: 341 White Pond Dr., Akron, OH 44320.

Contracts; and (iii) *the Motion of FES and FG for Entry of an Order Authorizing FES and FG to Reject a Certain Multi-Party Intercompany Power Purchase Agreement with the Ohio Valley Electric Corporation.*

3. I received a degree in economics from the Massachusetts Institute of Technology and a Master's Degree in Public Policy from the John F. Kennedy School of Government at Harvard University. I have worked at ICF for over 35 years. I am an Executive Director and Chair of ICF's Energy Advisory and Solutions practice. I have also served as a member of the Board of Directors of ICF International and am one of three people among ICF's roster of approximately 5,000 professionals to have received ICF's honorary title of Distinguished Consultant.

4. ICF works with a variety of clients across the private and public energy sectors including governmental entities (such as the Federal Energy Regulatory Commission, the U.S. Department of Energy, state regulators and energy agencies), and private companies such as American Electric Power, Allegheny, Arizona Power Service, Dominion Power, Delmarva Power & Light, Dominion, Duke Energy, FirstEnergy, Entergy, Exelon, Florida Power & Light, Long Island Power Authority, National Grid, Northeast Utilities, Southern California Edison, Sempra, PacifiCorp, Pacific Gas and Electric, Public Service Electric and Gas, PEPCO, Public Service of New Mexico, Nevada Power, and Tucson Electric. ICF also works with Regional Transmission Organizations and similar organizations. I have personally consulted with or testified as an energy industry expert on behalf of most of the listed clients.

5. I have extensive experience in assessing wholesale electric power market design and regulation. I also have extensive experience forecasting wholesale electricity prices, power plant operations and revenues, transmission flows, and fuel prices (e.g., coal, natural gas,

renewable energy). I also have extensive experience in valuing individual power plants in the context of projected market conditions.

6. ICF was retained by counsel to the Debtors in April of 2017 to calculate the losses to the Debtors associated with: (a) eight burdensome executory power purchase agreements (the "PPAs") under which FES buys energy, capacity, and renewable energy credits ("RECs"); and (b) a certain multi-party intercompany power purchase agreement with the Ohio Valley Electric Corporation (as amended and restated, the "OVEC ICPA" and together with the PPAs, the "Executory PPAs"). Specifically, ICF was retained to determine the short and long-term costs of continued performance. ICF performed an initial analysis of the Executory PPAs in mid-2017, and then updated its work commencing in January 2018.

7. The background of the Executory PPAs, which expire between 2024 and 2040, is described in greater detail in the Declaration of Kevin T. Warvell. At the time ICF was retained, the Debtors had already identified these contracts as burdensome and unnecessary to their business, and had performed preliminary calculations. I, along with my colleague David Gerhardt, have reviewed documents made available to me by counsel, including the Executory PPAs, and numerous operational and financial reports from the Debtors, and performed other investigations to determine the facts and circumstances in this declaration. This declaration is based on my personal knowledge and a review of relevant documents and various calculations and data. I have used principles generally accepted in the energy markets for estimating the costs to the Debtors of the Executory PPAs and forecasting the future value of energy and renewable energy credits. If called as a witness, I could and would testify competently thereto.

8. Market circumstances have resulted in an extended period of commodity prices and REC prices much below those prices found in the Executory PPAs. The main drivers to the collapse in prices include:

- Lower natural gas prices due to continued improvements in natural gas fracking;
- Excess generating capacity due in part to lower than expected load growth;
- Lower cost of construction for renewable technologies, and/or improved performance (*e.g.*, higher capacity factors); and
- Surplus of RECs.

Taken together, these market forces have decreased wholesale electricity prices, and prices of RECs, to levels not envisioned at the time the Executory PPAs were signed. Such market forces have prevailed for the last three to four years and are now expected to continue for the next few years, at a minimum.

9. ICF has individually assessed the Executory PPAs to determine the estimated losses to FES and FG of performing such contracts over their lifetime. These calculations took into account the length of the contracts, the contract price, the expected volume using historical data, and the expected revenue streams. With respect to the OVEC ICPA, ICF took into account both fixed and variable costs such as fuel, coal, variable and fixed operations and management costs, capital expenditures, financing costs and emissions costs associated with that agreement. ICF's calculations used an internal production cost model which simulated the specific power markets in which the Ohio Valley Electric Corporation ("OVEC") and the other contract counterparties operate.

10. To determine the future losses, ICF compared the cost of the contracts over their lifetime with the forecasted future power prices in the market. In forecasting these rates, ICF looked separately at energy price, capacity price, and REC price. For the years 2018-2020, ICF was able to use the actual PJM auction price for capacity prices.[2] For energy prices and for capacity prices in later years, ICF used both a long-term 30-year pricing model and an annual model maintained in the ordinary course of business by ICF specific to the PJM marketplace which takes into account the individual players in that marketplace.

11. The assumptions underlying all calculations in the model are the results of external inputs such as OVEC production cost projections and NYMEX futures, as well as internal inputs which reflect the views of ICF's nationally recognized power practice group, which includes decorated experts in natural gas, coal, renewable energy, power modeling and energy markets. The inputs drawn from ICF's data and model are used by ICF generally (as then currently maintained) in all of its advisory, consulting and expert testimony work related to the future performance of the PJM market.

12. Based on the above-described analysis, I concluded that the estimated cost of maintaining the Executory PPAs to the estate would be $765 million on an undiscounted basis from April 1, 2018 to December 31, 2040. On a net present value ("NPV") basis over this same time period, and using a 7% discount rate, the estimated cost to the estate would be $475 million.

[2] "PJM" is PJM Interconnection, LLC. FES and FG conduct all of their business operations within the regional transmission organizations overseen by PJM, which is a regional transmission organization that covers all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia. PJM coordinates, controls, and monitors multi-state electricity grids, and controls generation and transmission operations 24 hours a day, providing instructions to producers to ensure that the electric grid performs as desired.

In the near term (i.e., 2019-2023), the cost to the estate would be approximately $58 million per year.

13. Based on my review of the Warvell Declaration and diligence respecting FES generally, the capacity, power and RECs purchased under the Executory PPAs are unnecessary to FES's business, and the rejection of such agreements will not adversely impact FES's compliance with any other capacity, generation or retail obligations or the price or availability of power within PJM.

14. The estimated costs reflect an expected or base case. This case is based on available information about market and regulatory conditions. I have also examined sensitivity cases and all cases show high estimated damages. In the event of new information becoming available, I may update or refine these estimates.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED:

Respectfully submitted,

Judah L. Rose