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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Proposal of)
FirstEnergy Service Company to Modify) Case No. 09-778-EL-UNC
Its RTO Participation)

RESPONSE OF FIRSTENERGY SERVICE COMPANY

FirstEnergy Service Company (FirstEnergy) hereby responds to the comments submitted in this proceeding. We do not address all of the comments because many – particularly those asking for further detail regarding customer benefits – were addressed in our initial comments (Initial Comments). We do believe it is necessary, and will be helpful to the Commission, to clarify and summarize the arguments made and positions taken by some of the other parties filing comments relative to our position, to address certain erroneous information, and, importantly, to identify positions or arguments that were *not* made by others.

None of the parties presenting comments at the September 15 meeting or thereafter directly oppose FirstEnergy's proposed RTO realignment into PJM. Indeed, several parties – such as Buckeye Power, Constellation, and the Retail Energy Supply Association – affirmatively support our proposed realignment to PJM. Others, such as Industrial Energy Users ("IEU") and Ohio Energy Group (OEG), appear to offer qualified support, but raise issues that we address below.

A third group, including Office of Ohio Consumers Counsel (OCC), OEG and NUCOR, focus on the FERC proceeding, and generally urge the Commission to stake out certain positions in that proceeding. For the most part these requests were addressed in the comments that the Commission submitted to FERC on September 25, 2009.

No party supports the proposition that FirstEnergy's proposed RTO alignment is subject to approval by the Commission under Ohio law. And no party presents any evidence or

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otherwise seriously challenges our showing that the realignment will result in the benefits we discussed in our Initial Comments. By way of summary, these benefits include at least the following:

1. Alignment into a RTO that better implements Ohio's retail choice policies and provides better opportunities for consumers;
2. Wholesale capacity procurement processes that shift risk from consumers to suppliers;
3. Wholesale capacity markets where generators and demand response compete head-to-head based solely on price;
4. Increased participation by and competition between suppliers in Ohio's SSO procurement processes;
5. Increased numbers of retail suppliers of "retail choice" energy products in the Ohio Utilities' footprint; and
6. Proven market design that fosters development of demand response and energy efficiency resources.

L **CONSUMER BENEFITS**

A. A QUANTIFIED COST-BENEFIT ANALYSIS IS NEITHER NECESSARY NOR APPROPRIATE

As FirstEnergy explains in its answer in the FERC proceeding submitted today, the FERC analysis does not and should not include a cost-benefit analysis.¹ But we wish to be clear

¹ Withdrawing Midwest ISO Transmission Owners are not required to "pay future operating costs" of the RTO or "to protect remaining members from the possible reallocation of future revenues." FERC Docket Nos. EC06-4 & ER06-20, *Louisville Gas & Elec. Co.*, Order Conditionally Approving Request to Withdraw from the Midwest ISO, 114 FERC ¶ 61,282 at P 50 (*LG&E Withdrawal Order*), order on reh'g, 116 FERC ¶ 61,020 (2006). FERC should not analyze whether such withdrawal "will . . . harm the remaining Midwest ISO stakeholders" or "will . . . be less costly . . . than [such owner] staying in the Midwest ISO." *Id.* at PP 23, 24.

that our opposition to such an analysis is based on more than legal niceties. FirstEnergy understands this Commission's interest in determining how the move will affect Ohio retail customers, which is why our Initial Comments were devoted primarily to discussion of consumer benefits.

We do not believe that an effort to numerically quantify benefits, as advocated by some,² is feasible or will better address the issue of customer impacts. First, the fundamentally different approach followed by the two RTOs to resource adequacy makes comparison of capacity prices difficult. OEG, for example, acknowledges that the "MISO has a very different approach to resource adequacy."³ Other differences in market structures, particularly those related to handling of retail competition and demand response, are generally acknowledged as being handled better in PJM, but the associated benefits may be incapable of precise quantification. Attempts to do so would lead to endless rounds of "dueling experts," but as the arguments about the PJM study in this and the FERC proceeding show, it is unlikely that, in the end, there will ever be agreement. In any event, since utilities have voluntary choice regarding RTO membership (see below) under federal law, the "just and reasonable" standard is applied to utility decisions and there is no requirement for additional "cost/benefit" studies.⁴

This is not to say that FirstEnergy's decisions were not well-informed or that the benefits we predict are illusory. To the contrary, in making our decisions, we relied on the tools that are best suited to the task, namely the deep understanding that FirstEnergy has of both the Midwest

² E.g., PUCO Case No. 09-778-EL-UNC, *FirstEnergy Serv. Co., Nucor Steel Marion, Inc.'s Comments on FirstEnergy's Proposed RTO Realignment*, p. 5 (Sep. 25, 2009); PUCO Case No. 09-778-EL-UNC, *FirstEnergy Serv. Co., Motion to Intervene and Comments by the Office of the Ohio Consumers' Counsel*, p. 9 (Sep. 25, 2009) (OCC Comments).

³ PUCO Case No. 09-778-EL-UNC, *FirstEnergy Serv. Co., Comments of the Ohio Energy Group*, p. 5 (Sep. 25, 2009) (OEG Comments).

⁴ E.g., *LG&E Withdrawal Order* at P 29.

ISO and PJM, due to its unique position as an owner of substantial transmission, generation, and load in both markets, and its knowledge of retail choice, corporate separation, and POLR procurement in Ohio and Pennsylvania. This Commission similarly shares the unique characteristic of having responsibility for retail customers in both markets, and has never before seen a need to resort to a quantitative analysis about costs and benefits of membership in either PJM or the Midwest ISO. Thus, we think that we are qualified to present, and the Commission is qualified to understand consumer impacts without engaging in an unnecessary attempt for mathematical precision. That is what we did in our Initial Comments.

The PJM study “confirm[s] what reason and common sense dictate: increasing the number of FirstEnergy’s transmission ties from three with the rest of the Midwest ISO to 32 with the rest of PJM results in a gain in operational efficiency.”⁵ As PJM candidly acknowledges, “different assumptions may lower or raise the estimated reduction in congestion costs.”⁶ But PJM is firm in its conclusion that the fundamental benefits of the move are real: “no realistic change in study assumptions would change the fact that operational efficiency gains will be realized by the proposed realignment, because it reduces the long irregular transmission seam that currently exists in Ohio.”⁷ Rather than engage experts to attack each other’s study assumptions, our approach cuts to the bottom line and identifies the benefits that will come from the realignment.

⁵ PUCO Case No. 09-778-EL-UNC, *FirstEnergy Serv. Co.*, Comments of PJM Interconnection L.L.C., pp. 3-4 (Sep. 25, 2009) (PJM Comments).

⁶ *Id.* at 4.

⁷ *Id.*

B. Power Costs

Citizens Power argues that “PJM’s RPM has resulted in unnecessarily high capacity prices.”⁸ The OCC cites to its prior analysis, which concluded that membership in PJM “probably” increases wholesale electricity prices because of the “closer connection to high-priced electricity markets in the East.”⁹ The Midwest ISO took a similar position in the FERC proceeding, arguing that both capacity and energy costs are higher in PJM than in MISO.¹⁰ However, none of these parties presents a persuasive analysis that power costs will be higher.

In fact, the Midwest ISO’s representative before this Commission, Mr. Ramey, took a more granular approach, opining that higher prices in PJM are due to prices in *Eastern PJM*, and that in fact he can see no reason why the realignment should have an impact on locational prices in the *ATSI footprint*:

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25 I would agree with the comment that average energy

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1 prices in PJM are higher than average energy prices
2 in the Midwest ISO. That's probably a factual
3 statement, but customers don't pay average prices.
4 They pay local prices.
5 Efficiencies around JOA, again we can
6 direct prices together at the border. Our market
7 participant-initiated economy energy transfers
8 between the two markets works reasonably well to
9 drive those prices together, so I wouldn't anticipate
10 a significant change in energy prices for FirstEnergy
11 with the transition to PJM.
12 Capacity costs. Capacity costs, like
13 energy, to some degree are locational in nature.

⁸ PUCO Case No. 09-778-EL-UNC, *FirstEnergy Serv. Co.*, Comments by Citizen Power, p. 1 (Sep. 25, 2009).

⁹ OCC Comments at 14.

¹⁰ FERC Docket No. ER09-1589, *FirstEnergy Serv. Co.*, Intervention, Comments and Conditional Protest of the Midwest Independent Transmission System Operator, Inc., pp. 11, 19 (Sep. 25, 2009).

14 Andy mentioned earlier that capacity costs in the
15 eastern part of the footprint are significantly
16 higher than capacity costs in the western part of
17 their footprint. That's true across the combined
18 region as well. There are different locational
19 values of capacity, again, deliverability requirement
20 constraints, transmission capability for new
21 generation.

22 So I would expect to see a continuation
23 of the variation of capacity costs across the
24 combined footprint. Would I anticipate a marginally
25 different outcome in capacity costs with FirstEnergy

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1 transferring to PJM? I don't have any reason to
2 believe that would be the case.¹¹

We agree with Mr. Ramey that, over the short term, there is no reason to expect any material difference in prices. We would differ with Mr. Ramey, however, if he were to assert that price equilibrium along the border will continue into the future, particularly in capacity markets. As we explained in our initial filing, FirstEnergy believes that PJM's forward price transparency will promote efficient long-term investment decisions, thereby achieving reliability with the minimum volatility necessary to drive investment. The Midwest ISO's approach to capacity procurement lacks the transparency that results from the PJM RPM auction process, and is likely to require greater volatility to achieve the same level of reliability. In fact, just last week, the Midwest ISO reiterated its commitment to an "energy-only" resource adequacy construct,¹² meaning that there is good reason to conclude the differences in market design are such that price spikes in capacity markets will be less severe in PJM than in the Midwest ISO.

¹¹ PUCO Case No. 09-778-EL-UNC, *FirstEnergy Serv. Co.*, Transcript of September 15, 2009 Presentation, pp. 80-82 (September 15 Tr.).

¹² See FERC Docket No. ER08-394, *Midwest Indep. Transmission Sys. Operator, Inc.*, Motion for Leave to Answer and Answer of the Midwest Independent Transmission System Operator, Inc., pp. 7, 8 (Oct. 5, 2009). The Midwest ISO also noted that its approach is different than the approach used in other FERC-approved wholesale capacity markets.

It may be theoretically possible, as OEG suggests, for FirstEnergy load to benefit from capacity reserves that are owned by certain other of the Midwest ISO's vertically integrated utilities.¹³ But that does not make such a course of action prudent or advisable. FERC has said it will watch for such efforts, and will address them if necessary.¹⁴ Conversely, as we noted in our Initial Comments, the Midwest ISO has stated its intent to rely on prices in PJM and other neighboring markets to help smooth the volatility in its own capacity market. We submit that the right approach is for everyone to pay for the reliability benefits they receive, and that PJM's RPM is the most efficient means available for retail choice customers of deregulated utilities like the Ohio Utilities, and should be less susceptible to extreme price spikes over the long term.

¹³ See OEG Comments at 6 (The regulated utilities in the MISO multi-state region must build capacity pursuant to state commission requirements and their obligation to serve. The other members of MISO indirectly receive the benefit at no cost . . .).

¹⁴ In approving the Midwest ISO's proposal to allow states latitude to adjust resource requirement targets, FERC said:

93. Several commenters argue that, if we adopt this flexible approach, state requirements could be set so low as to raise "free rider" concerns. Although we recognize this possibility, we believe it is unlikely to occur for several reasons. The reliability of electric service is critical to citizens of every state and state commissions therefore have strong incentives not to undermine reliability through policies that favor short-term economic gains (such as through free riding). Moreover, this free-riding concern is less likely to materialize in the Midwest ISO region because of its ancillary services market. Under the Midwest ISO's ancillary services market, recently accepted by the Commission, areas short of energy will face scarcity pricing, thereby further deterring the incentive of any one area to be short on capacity.

94. Nonetheless, we recognize the possibility that future conflicts could arise between state and regional policies in this area. We would expect, for the reasons stated above, such conflicts to be rare. We also believe that it is important to allow the Midwest ISO region to gain experience with the role of the Midwest ISO in the area of resource adequacy. For these reasons, we decline to adopt any blanket rules to resolve potential future conflicts. If such conflicts do arise, we can address them on a case-by-case basis.

FERC Docket No. ER08-394, *Midwest Indep. Transmission Sys. Operator, Inc.*, Order on Resource Adequacy Proposal, 122 FERC ¶ 61,283 at PP 93-94 (2008).

II. MISCELLANEOUS ISSUES

A. Integration into PJM's Capacity Market

FirstEnergy sought FERC approval of an out-of-time Fixed Resource Requirement Integration Plan (the "FRR Integration Plan") – a framework developed in consultation with PJM and the PJM Market Monitor to integrate the ATSI Zone load and capacity resources into PJM's capacity markets and processes. The FRR Integration Plan includes two integration auctions to cover capacity arrangements during the period from June 1, 2011 – when FirstEnergy integrates into PJM – until May 31, 2013, since the earliest date that PJM can procure capacity for the ATSI Zone in the regular three-year forward RPM auctions is June 1, 2013.¹⁵ A transition mechanism is necessary because auctions for the 2011-12 and 2012-13 Delivery Years have already taken place. FirstEnergy and its affiliates also sought approval to participate in the May 2010 and May 2011 Base Residual Auctions (for the 2013-14 and 2014-15 Delivery Years, respectively), both as buyers and sellers of capacity.

No one has claimed here or at FERC that the FRR Integration Plan is an improper framework to use to transition into RPM. Two parties do raise narrower concerns with the specifics of FirstEnergy's plans. IEU asserts that the plans fail to recognize energy efficiency improvements and peak demand reductions in Ohio.¹⁶ OEG cites concerns about market power in the proposed integration auctions.¹⁷ We address each issue in turn.

¹⁵ The FRR Integration Plan was presented in FirstEnergy's FERC Application, FERC Docket No. ER09-1589, *FirstEnergy Serv. Co.*, Application, pp. 30-34 (the "Application").

¹⁶ See PUCO Case No. 09-778-EL-UNC, *FirstEnergy Serv. Co.*, Comments of Industrial Energy Users-Ohio, p. 3-7 (Sep. 25, 2009) (Industrial Energy Users-Ohio Comments).

¹⁷ See OEG Comments at 5.

1. Treatment of Demand Response, Energy Efficiency and Peak Load Reduction

IEU argues that the FRR Integration Plan is too vague, apparently because it does not address “how statutory requirements for FirstEnergy’s Ohio electric distribution companies to achieve energy efficiency improvements and peak demand reductions will be recognized.”¹⁸ But FirstEnergy’s FRR Integration Plan cannot and should not address compliance issues in Ohio, particularly when the mechanics of compliance by the Ohio Utilities remain uncertain.¹⁹

FirstEnergy supports use of energy efficiency and peak demand reductions in the integration auctions. Under the FRR Integration Plan, they will be able to participate in the integration auctions under the same rules as in any incremental auction. PJM’s comments before this Commission indicate, moreover, that FirstEnergy’s integration into PJM will “facilitate achieving the ‘green’ provisions of Senate Bill 221.”²⁰

FirstEnergy’s proposal is substantially similar to that approved by FERC in the *Duquesne Settlement Order*, where FERC disagreed with concerns that customers may not be able to participate in load response programs, finding that the normal rules for demand response would apply during Duquesne’s reintegration into PJM and thus that “demand resources will be incorporated in the FRR plan.”²¹ The same is true here.

IEU also raises concerns about the participation of peak demand reductions in the May 2010 and May 2011 base residual auctions.²² IEU admits, however, that they “do[] not believe

¹⁸ Industrial Energy Users-Ohio Comments at 3.

¹⁹ The Commission’s rules regarding energy efficiency and demand response are not yet in effect.

²⁰ PJM Comments at 5 (initial capitals omitted).

²¹ FERC Docket Nos. ER08-194, *et al.*, *Duquesne Light Co.*, Order Approving Settlement Agreement, 126 FERC ¶ 61,074 at P 38 (2009).

²² See Industrial Energy Users-Ohio Comments at 6-7.

that any explicit modifications are required to the May 2010 [base residual auction] to allow the peak demand reductions obligation of FirstEnergy's Ohio distribution companies to be recognized."²³ We agree that no modifications are necessary. We fully support participation of demand response in the auction by anyone that meets the PJM auctions Tariff criteria for participation as a qualified Capacity Resource. However, FirstEnergy does not control this issue. Rather, this matter is governed by the applicable sections of PJM's tariffs and manuals. To the extent, therefore, that the Industrial Energy Consumers seek changes to PJM's administration of the May 2010 and May 2011 base residual auctions, they should present these concerns in the course of the PJM stakeholder processes that can address such concerns.

2. Market Power Concerns

The OEG filed comments expressing concerns about FirstEnergy's market power in the proposed integration auctions. It asserts that this Commission "should argue for the enforcement of [the] twenty percent market share limit for all capacity providers, including FirstEnergy Solutions."²⁴ The OEG's "concerns," however, already are addressed because FirstEnergy Solutions "will bid 100% of its Generation Capacity Resources that are located within the ATSI Zone that are not committed by contract to serve other loads (whether in the ATSI Zone or elsewhere) into the FRR Integration Plan auctions" at "no greater than the Market Seller Offer Cap."²⁵ Stated more simply, FirstEnergy Solutions has already committed to bid in all of its available capacity at PJM Market Monitor-approved mitigated rates.

²³ *Id.* at 6.

²⁴ OEG Comments at 5.

²⁵ Application at 32.

In addition, FirstEnergy supports comments filed at FERC by the PJM Market Monitor and PJM itself seeking clarification that the “must offer” requirement in the two FRR Integration Plan auctions will apply to all “uncommitted generation capacity in the ATSI Zone and in PJM,”²⁶ and that these resources must be required to offer in the transition auctions at PJM Market Monitor-approved mitigated prices.²⁷ FirstEnergy also supports the PJM Market Monitor’s request that FERC “condition any order approving [FirstEnergy’s] application with the explicit proviso that the Market Monitor will play the same role and have the same authority for the transitional auctions that it does for the RPM auctions.”²⁸ These measures, combined with FirstEnergy Solution’s own “must offer” requirement – at mitigated rates – will help ensure the success and competitiveness of the integration auctions.

B. Reliability

In its Initial Comments, FirstEnergy demonstrated that RTO realignment will not affect the reliability of the bulk electric system used to provide service to customers in Ohio and Pennsylvania. The OCC, however, argues it is unknown what impact the proposed RTO realignment will have on Lake Erie loop flows and congestion caused by this phenomena.²⁹ This issue is unnecessary to consider in this case because the FERC has established a docket to address Lake Erie loop flow. Specifically, FERC directed the NYISO to work with NERC, PJM, MISO, and the Independent Electricity System Operator of Ontario to develop long-term

²⁶ FERC Docket No. ER09-1589, *FirstEnergy Serv. Co.*, Comments of the Independent Market Monitor for PJM, p.5 (Sep. 25, 2009) (PJM IMM FERC Comments); FERC Docket No. ER09-1589, *FirstEnergy Serv. Co.*, Comments of PJM Interconnection, L.L.C., p. 9 (Sep. 25, 2009).

²⁷ See PJM IMM FERC Comments at 5; see also Application at 31-32 (discussing integration auctions).

²⁸ PJM IMM FERC Comments at 3.

²⁹ OCC Comments at 11.

comprehensive solutions to the loop flow problem through a collaborative process.³⁰ This order – and others in that docket – recognize that management of Lake Erie loop flows and associated congestion requires a joint effort of all of these entities and, more importantly, demonstrate FERC’s commitment to addressing the issue.³¹ Since real time congestion between the Midwest ISO and PJM is managed under the Joint Operating Agreement, the underlying mechanisms to manage loop flow and congestion between the ATSI footprint and MISO following realignment are already in place. Further, as stated by PJM, realignment is expected to increase the operational efficiency of generation dispatch and reduce congestion.³²

C. The Ohio Utilities and Penn Power will not become transmission owners in PJM

OEG suggested at hearing and in its comments that the Ohio Utilities – and presumably Penn Power – are FERC-jurisdictional transmission owners who are directly involved in the decision to join PJM, and who own substantial amounts of FERC jurisdictional transmission facilities.³³ This is another unnecessary concern. The “transmission facilities” referred to on the Ohio Utilities’ FERC Form 1 are subtransmission facilities – typically 36, 34.5, 33, and 23 kV – and are not under the operational control of the Midwest ISO or recovered in Attachment O rates. FERC found long ago – upon recommendation of both this Commission and the Pennsylvania PUC – that the facilities owned by the Ohio Utilities and Penn Power were “local distribution

³⁰ FERC Docket No. ER08-1281, *New York Indep. Sys. Operator, Inc.*, Order Authorizing Public Disclosure of Enforcement Staff Report and Directing the Filing of an Additional Report, 128 FERC ¶ 61,049 at P 6 (2009).

³¹ See FERC Docket No. ER08-1281, *New York Indep. Sys. Operator, Inc.*, Order Granting Clarification, 128 FERC ¶ 61,239 (2009). Interestingly, neither the Commission nor the OCC have intervened in this docket.

³² September 15 Tr. at 23.

³³ September 15 Tr. at 31; OEG Comments at 3 n.2.

facilities”, and that the facilities owned by ATSI were FERC jurisdictional transmission facilities.³⁴

Nor are the Ohio Utilities signatories to the Midwest ISO Transmission Owners Agreement.³⁵ The Commission approved the transfer of all 69 kV and above transmission facilities to ATSI nearly a decade ago, and only those facilities are included in the Midwest ISO tariff.³⁶ ATSI will be the only new signatory to the PJM Transmission Owners’ Agreement upon integration, and only its facilities will be transferred to the operational control of PJM.

D. Exit Fees and Integration Costs

Several parties raise concerns about pass-through of Midwest ISO exit fees and costs of integration into PJM.³⁷ Such concerns are premature. FirstEnergy and the Midwest ISO are working on a calculation of exit fees. There has been no proposal to pass exit fees or integration costs through in any rate. Therefore, pass-through issues are not ripe.

III. STATE-FEDERAL ISSUES

Not one of the commenting parties in this proceeding advance a theory that this Commission has jurisdiction to regulate the proposed exit from the Midwest ISO and proposed entry into PJM. This doubtless reflects all parties’ awareness of the absence of specific statutory authority to review RTO membership, and the exclusivity of federal law in this area.

Federal law gives FERC exclusive jurisdiction over unbundled transmission service, and under the Supremacy Clause, preempts state attempts to regulate in this area. Indeed, this

³⁴ FERC Docket No. EL01-65, *FirstEnergy Operating Companies*, 95 FERC ¶ 61,375 (2001).

³⁵ Midwest ISO, FERC Electric Tariff, First Revised Rate Schedule No. 1.

³⁶ PUCO Case Nos. 99-1212-EL-ETP, *et al.*, *In re Application of FirstEnergy Corp.*, Opinion and Order, pp. 54-58 (July 19, 2000).

³⁷ *E.g.*, Industrial Energy Users-Ohio Comments at 8; OCC Comments at 19-21.

Commission's comments in the *New PJM Companies* case³⁸ – which were based on Section 202(a) of the Federal Power Act³⁹ - reflected an awareness of, and agreement with, FERC's preemptive jurisdiction to override the Virginia commission's efforts to block AEP's decision to join PJM.

This Commission's reliance on FPA Section 202(a) in the *New PJM Companies* case was well grounded in the statutory text, and in court and agency decisions interpreting that text. For example, in the *Atlantic City* case, the United States Court of Appeals for the D.C. Circuit identified FPA Section 202(a) as providing utilities with voluntary choice regarding RTO membership.⁴⁰ The Court went on to point out that since utilities have voluntary choice about RTO membership under FPA Section 202(a), FERC could not compel a particular choice under other sections of the Federal Power Act, including Section 203. According to the Court, it would be anomalous for Congress to authorize utilities to have voluntary choice regarding RTO membership under FPA Section 202(a) if FERC had jurisdiction under other sections of the statute to prohibit such choice. The Court ruled, however, that FERC may review entry or exit to an ISO and the agreements governing such entry or exit under the just and reasonable standard of Section 205.

FPA Section 202(a) contains other language that – although not in front of the Court in *Atlantic City* – doubtless factored into this Commission's analysis in the *New PJM Companies* case. Specifically, the last sentence of FPA Section 202(a) provides that when utilities exercise

³⁸ See FERC Docket No. ER03-262, *New PJM Companies*, Motion of the Pennsylvania Public Utility Commission for Leave to Intervene Out-of-Time, and Joint Comments and Motion for Relief of the Michigan Public Service Commission, the Public Utilities Commission of Ohio and the Pennsylvania Public Utility Commission, ¶ 44 (Mar. 14, 2003) (State Commissions' Joint Comments).

³⁹ 16 U.S.C. § 824a(a).

⁴⁰ See *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 12 (D.C. Cir. 2002).

their 202(a) rights regarding RTO membership, state commissions, like this Commission, are to have reasonable opportunity to present their views and recommendations for FERC's consideration, and FERC is to consider all such views when ruling on the matter. However, state authorization is not required for FERC or the utility to act.

Atlantic City, coupled with *New PJM Companies*, highlights the limitations on attempts by state commission to restrict a utility's decision RTO membership. Congress has provided that state commissions can submit their views regarding utility choices about RTO membership for FERC's consideration, and FERC is to take such viewpoints into consideration in ruling on whether the terms of the proposed utility entry or exit are just and reasonable.⁴¹ In addition, as this Commission recognized on the record in *New PJM Companies*, FERC can utilize the hearing process described in Section 205(a) of the Public Utilities Regulatory Policy Act of 1978⁴² to override a state commission's efforts to block utility participation in a RTO.⁴³

This Commission's citation to PURPA Section 205(a) in the Joint Comments was well founded. That provision states that, after notice and opportunity for a public hearing, FERC can exempt any utility from any provision of state law, or from any state rule or regulation, which prohibits or prevents, among other things, a utility from exercising its voluntary choice regarding RTO membership.⁴⁴ Speaking to the standard of review, PURPA Section 205(a) provides that FERC need only find that the proposed RTO membership is designed to obtain economical

⁴¹ 16 U.S.C. § 824a(a); *Atlantic City*, 295 F.3d at 12.

⁴² 16 U.S.C. § 824a-1(a).

⁴³ See State Commissions' Joint Comments at ¶ 44.

⁴⁴ See 16 U.S.C. § 824a-1(a).

utilization of facilities and resources in any area; and there is no requirement for the utility to demonstrate the “benefits” exceed the “costs.”⁴⁵

Speaking to procedure and timing, the applicable precedent is that FERC can grant PURPA Section 205(a) relief from state action without waiting for a specified period to determine if a state is prohibiting or preventing utility action.⁴⁶ That is, FERC need not wait for the outcome of any state proceeding before exercising its PURPA Section 205(a) authority. Notably, FERC needed just seven months in the *New PJM Companies* docket to override the Virginia commission’s efforts to regulate AEP’s choices regarding RTO membership. Given this clear precedent, there is every reason to believe that FERC would move even faster if in the future a state commission through state proceedings attempted to block – directly or indirectly – voluntary utility decisions regarding RTO membership.

While FERC used statutory analysis in *New PJM Companies* to support its exercise of preemptive jurisdiction, this Commission reached the same conclusion in that case on “commerce clause” grounds. Specifically, this Commission advised FERC in *New PJM Companies* that the Virginia commission was attempting to exercise *de facto* jurisdiction over wholesale electric markets, based on theories that parts of AEP’s system and operations were subject to Virginia’s jurisdiction under state law.⁴⁷ According to this Commission, Virginia’s actions amounted to economic protectionism and, as such, were contrary to the interstate commerce clause of the federal Constitution, the Federal Power Act, the Energy Policy Act of

⁴⁵ *Id.*; accord FERC Docket No. ER03-262, *New PJM Companies*, Opinion No. 472 at P 52 (2004) (Opinion No. 472), *reh’g denied*, Order Dismissing Requests for Rehearing and Rejecting Offer of Settlement, 110 FERC ¶ 61,009 (2005).

⁴⁶ Opinion No. 472 at P 75.

⁴⁷ State Commissions’ Joint Comments at ¶ 25.

1992, and FERC's orders and regulations.⁴⁸ As noted, this Commission's suggested remedy was for FERC to exercise its authority under PURPA Section 205(a) to override the Virginia commission's actions.⁴⁹

This Commission's legal analysis in the *New PJM Companies* docket was consistent with controlling precedent. Passage of the Federal Power Act preempted state regulation of interstate transmission service and wholesale sales of electric energy products.⁵⁰ As such, while the Federal Power Act preserves state commission jurisdiction over "local" distribution facilities and retail sales of energy products, the statute confers exclusive – that is, preemptive – jurisdiction on FERC to regulate unbundled transmission service and wholesale transactions.⁵¹ In fact, FERC can require utilities that are members of RTOs to purchase capacity in specified amounts, and also can allocate capacity costs among RTO members if necessary to prevent unfairness.⁵² And state commission efforts to regulate these matters – such as theories that state law permits a state commission to regulate rates or terms of service that follow from the PJM Transmission Owners Agreement or theories that state law permits a state commission to approve LSE decisions to sign the PJM Reliability Assurance Agreement – amount to unlawful efforts to regulate matters that lie squarely within FERC's exclusive jurisdiction.⁵³

⁴⁸ *Id.* at ¶ 26.

⁴⁹ *Id.* at ¶ 44.

⁵⁰ *New York v. FERC*, 535 U.S. 1, 21 (2002).

⁵¹ *See id.* at 23-24.

⁵² *See Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 483 (D.C. Cir. 2009).

⁵³ *See Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 376 (1988); accord State Commissioners' Joint Comments at ¶ 42 (regulation of the interstate grid is under FERC's jurisdiction and states may not, under the guise of local regulation, establish laws or rules which regulate the interstate grid).

ATSI is an unbundled transmission company. As such, ATSI's sales of unbundled transmission service – whether in PJM or in the Midwest ISO – are subject to FERC's exclusive jurisdiction.⁵⁴ And FPA Section 202(a) means that ATSI has “voluntary choice” as to which interconnection it chooses to enter, and that the Ohio Utilities – as well as other LSEs and generators in the ATSI zone – will, subject to FERC approval, follow ATSI into PJM.⁵⁵ Here, ATSI is choosing to exit the Midwest ISO interconnection and enter the PJM interconnection. Based upon the foregoing precedent and statutory authority, the proper course at this time is for this Commission to submit its views for FERC's consideration.⁵⁶ FERC is required to consider the Commission's views when ruling on whether the terms of the combined utilities' exit from the Midwest ISO and entry into PJM are just and reasonable.⁵⁷

Regarding the path forward, the OCC said it best – the Commission should avoid any action that raises the prospect of a state/federal conflict that could be resolved in favor of federal law.⁵⁸ As demonstrated herein, there is little doubt about how any such conflict would end – indeed, the Commission would be hard pressed to explain the inconsistency between its position in the *New PJM Companies* docket⁵⁹ and its attempt to regulate RTO membership choices of

⁵⁴ See State Commissioners' Joint Comments at ¶ 41 (while state jurisdiction to regulate retail markets is preserved, nothing in federal law authorizes any state to assume direct jurisdiction over the rates, rules or regulations of the interstate transmission grid).

⁵⁵ See *Connecticut Dept. of Public Utilities Control v FERC*, 569 F.3d 477, 484 (D.C. Cir. 2009); *Duquesne Light Company, Order Addressing Conditional RTO Withdrawal Request*, 122 FERC ¶ 61,039, at P. 6 (2008).

⁵⁶ 16 U.S.C. § 824a(a).

⁵⁷ *Atlantic City*, 295 F.3d at 12.

⁵⁸ OCC Comments at 6.

⁵⁹ New PJM Companies Joint Comments at ¶¶ 25 (Virginia commission exercising *de facto* jurisdiction over wholesale electric markets under theory of state jurisdiction), 42 (regulation of the interstate grid is under FERC's jurisdiction and states may not, under the guise of local regulation, establish laws or rules which regulate the interstate grid).

ATSI. As such, the Commission should follow the course it identified in the *New PJM Companies* docket⁶⁰ – a course that also is mapped out in the last sentence of Section 202(a) of the Federal Power Act⁶¹ – which is to submit its views and recommendations for consideration in applicable FERC dockets.

Finally, the OEG advances a theory that the Commission may wish to exercise *Pike County* “prudence review” of wholesale rates (presumably the capacity costs that follow under PJM’s Reliability Assurance Agreement).⁶² Even assuming, *arguendo*, that such review is appropriate, the question of whether such review should be done is premature at this time because no PJM wholesale rates have been incurred. Consequently, ATSI and the Ohio Utilities reserve their rights to address the application of *Pike County* should it be relevant in a future Commission proceeding.

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⁶⁰ See State Commissions’ Joint Comments at ¶ 29 (Preference is that utility choices regarding RTO membership should be implemented expeditiously).

⁶¹ 16 U.S.C. § 824a(a).

⁶² OEG Comments at 9-10.

CONCLUSION

The proposed RTO realignment permits FirstEnergy to consolidate its generation, transmission, and distribution operations into a single RTO thereby sharpening its business focus and increasing the efficiency of its operations. PJM operates under market rules that better facilitate retail choice and competitive POLR procurement, and offers new opportunities for participation of demand response and energy efficiency on an equal footing with generation resources. FirstEnergy believes that realignment into PJM will benefit its customers and ensure continued reliability of service in Ohio.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of FirstEnergy Service Company's response in Case No. 09-778-EL-UNC was delivered via regular U.S. mail, postage prepaid, this 13th day of October, 2009 to the parties of record in this proceeding.

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