BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. §4928.143 in the Form of an Electric Security Plan.	))))))	Case No. 14-1297-EL-SSO

REPLY BRIEF
OF
NORTHEAST OHIO PUBLIC ENERGY COUNCIL

Glenn S. Krassen (Reg. No. 0007610)
Counsel of Record
BRICKER & ECKLER LLP
1001 Lakeside Avenue, Suite 1350
Cleveland, OH 44114
Telephone: (216) 523-5405
Facsimile: (216) 523-7071
gkrassen@bricker.com

Dane Stinson (Reg. No. 0019101)
Dylan F. Borchers (Reg. No. 0090690)
BRICKER & ECKLER, LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
dstinson@bricker.com
dborchers@bricker.com

COUNSEL FOR NORTHEAST OHIO
PUBLIC ENERGY COUNCIL

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I. INTRODUCTION

In their initial brief, The Cleveland Electric Illuminating Company ("CEI"), Ohio Edison Company ("OE"), and The Toledo Edison Company ("TE") (collectively, the "Companies") ignore the elephant in the room: that the Public Utilities Commission of Ohio ("Commission") lacks jurisdiction to approve the Retail Rate Stability Rider ("Rider RRS"). The parties opposing the Third Stipulation and Recommendation ("Stipulation") have clearly shown in their initial briefs that the Commission lacks jurisdiction to approve Rider RRS under Ohio law[1] and that the Commission is federally preempted from assuming such jurisdiction.[2] Not only will the Commission's order be rendered *void ab initi*o upon state or federal appellate review, but the purchase power agreement ("PPA") underlying Rider RRS also will be rendered *void ab initio* once the Federal Energy Regulatory Commission ("FERC") asserts its jurisdiction over the PPA between the Companies and its affiliate (which it is in the process of doing)[3] or when a federal court declares it unconstitutional.[4] The Commission's approval of Rider RRS, only to be invalidated by appellate or FERC review, could be catastrophic for the Companies' customers, who could be required to pay as much as $3.6 billion[5] in unlawful payments under the Stipulation's proposed Severability Provision (section V(B)(3)(c)).

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[1] NOPEC Initial Br. at 5-6, 18-26; Office of the Ohio Consumers' Counsel Initial Brief at 18-25; Constellation New Energy Inc./Exelon Generation Company LLC Initial Br. at 14-22; PJM Power Providers Group/The Electric Power Supply Association Initial Br. at 14-20; Dynegy Inc. Initial Br. at 7; Cleveland Metro Schools Initial Br. at 7-18.

[2] NOPEC Initial Br. at 11-18; Office of the Ohio Consumers' Counsel Initial Brief at 11-18; The Sierra Club Initial Br. at 121-125; PJM Power Providers Group/The Electric Power Supply Association Initial Br. at 19-20; Ohio Manufacturers' Association Energy Group Initial Br. at 24-27; Cleveland Metro Schools Initial Br. at 18-26.

[3] *See EPSA, et al. v. FirstEnergy Solutions Corporation, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company*, FERC Case No. EL16-34-000 ("EPSA Complaint").

[4] *See PPL Energy Plus, LLC, et al., v. Solomon, et al* 766 F.3d 241 (3d Cir. 2014); *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014), cert. granted, 84 U.S.L.W. 3211 (U.S. Oct. 19, 2015) (No.14-614) ("*Nazarian*"). The Supreme Court of the United States heard oral arguments in Nazarian on February 24, 2016.

[5] OCC/NOPEC Ex. 9 (Wilson Second Supplemental) at 12-13.

Under these circumstances, the Northeast Ohio Public Energy Council ("NOPEC") requests the Commission to address its subject matter jurisdiction over Rider RRS in the first instance, as it is required to do,[6] and find that it lacks jurisdiction to approve Rider RRS. Alternatively, NOPEC requests (1) that the Commission delay issuing its order in this proceeding pending FERC's determination of the PPA's lawfulness, as suggested by the Office of the Ohio Consumers' Counsel; or (2) that the Commission require that payments made under Rider RRS be subject to refund in the event that the rider or the PPA is overturned or declared unlawful by FERC or upon federal or state appellate review.

NOPEC also requests the Commission to reject Interstate Gas Supply's ("IGS") extra-record proposal to approve a placeholder Retail Incentive Rider ("Incentive Rider"). The Incentive Rider is **not** a part of the Companies' application in this ESP IV proceeding, and is **not** even a part of the signatory parties' Stipulation. Rather, its merits are to be considered in a prospective proceeding that the Companies will initiate in the future.[7] Because there was **no** notice of this Incentive Rider issue in this case and because this record contains absolutely **no** evidence to support the Incentive Rider, it would be unlawful for the Commission to make any determination approving it in this proceeding.

II. ARGUMENT

A. A Commission Order Approving Rider RRS Will Be Void *Ab Initio* Whether a Reviewing Court Finds Rider RRS Unconstitutional on the Merits or FERC Exercises its Exclusive Jurisdiction over Wholesale Electricity Compensation and Invalidates the PPA Itself.

Any Commission order approving Rider RRS is not the last word on its lawfulness and risks invalidation from its inception. This is because such an order would be unconstitutional in

[6] *In re Complaint of Residents of Struthers*, 45 Ohio St. 3d 227, 231 (1989).

[7] Tr. XXXVII at 7804 (Mikkelsen Cross).

substance, and because FERC possesses exclusive jurisdiction over wholesale electricity compensation in the first instance.[8]

A Commission order approving Rider RRS, which is later found to be unconstitutional, would be rendered void *ab initio* and would have no legal effect. As the Ohio Supreme Court has made clear, "[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Middletown v. Ferguson*, 25 Ohio St. 3d 71, 80 (1986) (citing *Norton* v.. *Shelby County* (1886), 118 U.S. 425, 442; *Ex Parte Siebold* (1879), 100 U.S. 371, 376; *Chicago, I. & L. Ry. Co.* v.. *Hackett* (1913), 228 U.S. 559, 566).

What is more, FERC itself has made clear that when a state exceeds its authority and unlawfully manipulates wholesale rates, the power contracts underlying the state's action "will be considered void *ab initio*." *Connecticut Light & Power Co.*, 70 FERC ¶ 61012 (F.E.R.C.) at 61029-61030 (1995). As applied to this proceeding, the constitutional infirmities inherent in Rider RRS will result in the PPA's invalidation. For this reason, the Stipulation's Severability Provision (section V(B)(3)(c)) is unlawful because it would permit the Companies to continue to collect Rider RRS revenues, pending further negotiations, even if the rider, and the underlying PPA, were declared void *ab initio* or, in other words, were considered never to have existed. The

[8] NOPEC Initial Br. at 11-18; Office of the Ohio Consumers' Counsel Initial Brief at 11-18; The Sierra Club Initial Br. at 121-125; PJM Power Providers Group/The Electric Power Supply Association Initial Br. at 19-20; Ohio Manufacturers' Association Energy Group Initial Br. at 24-27; Cleveland Metro Schools Initial Br. at 18-26.

Companies simply cannot demand that its customers continue to pay a charge that is not allowed by law.[9]

Moreover, even if not found by a reviewing court to have been unconstitutional *per se*, a Commission order approving Rider RRS would be *ultra vires* and *void ab initio* because the Commission lacks jurisdiction over wholesale electricity compensation, which Rider RRS directly implicates.[10] "[A] jurisdictionally proper but substantively incorrect judicial decision is not *ultra vires* . . . . [But] when [administrative agencies] act improperly, no less when they act beyond their jurisdiction, what they do is *ultra vires*." *City of Arlington, Texas, et al. v. Federal Communications Commission*, et al., 569 U.S. ___, 133 S. Ct. 1863, 1868-69, 185 L.Ed.2d 941 (2013). Ohio law is explicit on the subject:

> Although the commission does exercise quasi-judicial powers, it is not a court. In fact . . . the Public Utilities Commission of Ohio is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute.

Ohio Pub. Interest Action Group, Inc. v. Pub. Util. Comm. of Ohio, 155 Ohio App.3d 46, 2003-Ohio-5395, 798 N.E.2d 1202 (1st Dist.). When the Commission issues an order that it has no jurisdiction to make, the order is "void [and] a nullity…." *State v. Western Union Tel. Co.*, 154 Ohio St. 511, 519-520 (1951). *See also, Discount Cellular, Inc. v. Public Utilities Commission of Ohio*, 112 Ohio St. 3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶51 ("The Commission, as a

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[9] *See, also*, R.C. 4905.22, which provides:

> Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. **All charges made or demanded** for any service rendered, or to be rendered, **shall be** just, reasonable, and **not more than the charges allowed by law** or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, **or in excess of that allowed by law** or by order of the commission. [Emphasis added.]

[10] NOPEC Initial Br. at 5-6, 18-26; Office of the Ohio Consumers' Counsel Initial Brief at 18-25; The Sierra Club Initial Br. at 121-125; PJM Power Providers Group/The Electric Power Supply Association Initial Br. at 19-20; Dynegy Inc. Initial Br. at 7-8; Ohio Manufacturers' Association Energy Group Initial Br. at 24-27; Cleveland Metro Schools Initial Br. at 18-26.

creature of statute, has no authority to act beyond its statutory powers"); *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 491, fn. 13, 104 S.Ct. 1936; 80 L.Ed.2d 480 (1984) (when an agency has acted *ultra vires*, its decision is "of no legal effect").

In short, any Commission order approving Rider RRS likely will be rendered void *ab initio*, either by a reviewing Court that recognizes its constitutional impropriety under the Supremacy and/or Commerce Clause of the federal Constitution, or by FERC, which has exclusive jurisdiction over wholesale electricity compensation. A finding that Rider RRS and the underlying PPA are void *ab initio* prevents the Companies from collecting any charges under the Rider RRS, directly or indirectly.

B. If the Commission Declines to Address Its Jurisdiction in the First Instance, It Should Delay Issuing Its Order in This Proceeding Until Resolution of the Current EPSA Complaint Filed with FERC, or Order that Rider RRS Revenues be Collected Subject to Refund.

As NOPEC noted in its Initial Brief, the Companies have no intent to seek FERC's approval of the PPA. In an attempt to avoid FERC review, they rely on a prior waiver of affiliate power sales restrictions that FERC granted the Companies' market-based affiliates, including FirstEnergy Solutions ("FES"), in 2008.[11] However, the Electric Power Supply Association ("EPSA") and other competitive electric suppliers (collectively "Complainants") filed a complaint with FERC on January 27, 2016, asking it to rescind the waiver and assert jurisdiction over the affiliate PPA proposed in this proceeding.[12] The waiver initially was granted because FERC found that the Companies' customers were not "captive" to the Companies' generation prices. Complainants allege that the imposition of the non-bypassable Rider RRS on all customers changes the circumstances under which the waiver was granted and warrants its

[11] Tr. III at 660-661 (Mikkelsen Cross).

[12] *See EPSA, et al. v. FirstEnergy Solutions Corporation, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company*, FERC Case No. EL16-34-000 ("Complaint").

rescission. Complainants ask FERC to review the PPA to prevent the abuses it will cause to the Companies' captive customers – namely the shifting of up to $3.6 billion of above-market energy costs from the Companies' shareholders to its customers – and the resulting harm to the PJM market structure.[13] FERC already has called for comments to the Complaint, and comments supporting the Complaint were filed on February 23, 2016 by several parties, including PJM Interconnection, Inc. and the Independent Market Monitor for PJM. The Companies also filed their answer on February 23, 2016. Complainants now are awaiting FERC's ruling and have requested fast-track processing.

The prospect that FERC will grant Complainants' requested waiver and, ultimately, invalidate the PPA, poses serious questions for the Commission. If Rider RRS is approved, only to be subsequently invalidated by FERC, the Companies' customers could be significantly, and irreparably, harmed if there is no mechanism in the Severability Provision to require refunds of amounts collected and to prevent the Companies from collecting any other charge as a surrogate for the unlawful charge. NOPEC urges the Commission to act to prevent this possibility.

As shown above, if FERC exercises jurisdiction over the PPA and ultimately invalidates it, the PPA would be rendered void *ab initio*, and would result in the return of funds from FES to the Companies for the above-market priced power. However, the Stipulation's Severability Provision (section V(B)(3)(c)) attempts to shield the Companies from having to refund to their customers these same funds collected under Rider RRS, and goes so far as to state that the provision does not affect the prohibition against retroactive ratemaking. Permitting the Companies to retain these funds would be unjust and unreasonable. To avoid this unjust result, NOPEC requests that the Commission delay ruling on the Companies' proposed Rider RRS until after FERC has resolved the Complaint and, if FERC exercises jurisdiction, until after FERC has

[13] Id., at 1-3.

adjudicated the PPA's lawfulness.[14] Alternatively, NOPEC requests that the Commission reject the Stipulation's proposed Severability Provision and require that Rider RRS be subject to the refund of all charges paid in the event the PPA or Rider RRS is invalidated by FERC or a court of competent jurisdiction and that no other charge be allowed to be collected as a surrogate for Rider RRS.

C. IGS' Proposal that the Commission Approve the Incentive Rider is Not Properly Before the Commission in this Case is Not Supported by the Record and Must be Denied.

When IGS filed the written direct testimony of its witness White in this proceeding, as supplemented on August 18, 2015, its primary concern was with revising the Companies' billing practices. IGS also complained of a lack of robust competition in the residential class in the Companies' service territories, despite introducing figures showing that 65%, 66%, and 72% of residential customers shop in TE's, OE's and CEI's service territories, respectively.[15] IGS' concern was that a large portion of the shopping taking place resulted from opt-out governmental aggregation, rather than with competitive retail electric service ("CRES") providers,[16] and that customers are not "engaged" in the competitive marketplace. To promote its business self-interests, IGS proposed that the Commission unbundle the costs of the Companies' distribution service that are required to support the standard service offer ("SSO") and include those costs as a part of SSO service, thus raising SSO customers' price relative to those offered by CRES

[14] Similarly, it would be prudent for the Commission to delay an order on Rider RRS until the U.S. Supreme Court issues its decision in *Nazarian*, considering that oral arguments were held February 24, 2016, and initial reports indicate that the Court's justices were sympathetic to FERC's exclusive authority in the wholesale electricity markets. See attached *Md. Power Plant Subsidy Gets Cool Reception from High Court*, Law 360 (February 25, 2016).

[15] IGS Ex. 11 at 5-6 (White Supplemental).

[16] Id. at 4.

providers.[17] IGS recommended that the Commission direct the Companies to commence this unbundling process in their next ESP proceeding or next distribution rate case, not in this proceeding.[18] This recommendation was not included in the Stipulation.

IGS now recommends, for the first time on brief, that the Commission adopt the proposed Incentive Rider. The proposed Incentive Rider is designed solely to promote IGS' pure profit motives. IGS made absolutely no mention of this rider in its written direct testimony, or as supplemented.[19] The Companies did not propose such a rider in their Application in this case or through their witnesses' testimonies. The signatories to the Stipulation did not include the Incentive Rider as a part of the stipulated package in this proceeding. And no witness supported the merits of the Incentive Rider at hearing. Simply put, IGS' proposed Incentive Rider is not properly before the Commission in this case, and there is no legal basis for the Commission to consider its approval in this proceeding. Authorizing the Incentive Rider without record support would be an abuse of discretion and reversible error.[20] IGS' Incentive Rider proposal must be rejected.

To be very clear, the parties opposing the Stipulation only obtained knowledge of the Incentive Rider through the Companies' supplemental discovery response pertaining to "side agreements" between the parties. The discovery was served at the eleventh hour, the night of January 14, 2016, before the Companies' final day of testimony in support of the Stipulation.[21] Absent the discovery response, the parties opposing the Stipulation would have had no knowledge of the existence of the Companies' side agreement with IGS for the Companies to file

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[17] Id. at 17-18.
[18] Id. at 21.

[19] IGS Ex. 11 (White Supplemental).

[20] See, *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008 Ohio 990, 885 N.E.2d 195, ¶ 30.

[21] Ohio Manufacturers' Association Energy Group ("OMAEG") Ex. 24.

a separate application for the proposed Incentive Rider, because it was not a part of the Stipulation and was to be an independent proceeding to be conducted in the future. The parties opposing the Stipulation cross-examined Companies witness Mikkelsen primarily to learn of the nature of the side agreement and its effect on the serious bargaining prong of the Commission's test for approving partial stipulations.[22] Companies witness Mikkelsen did not testify in support of the Incentive Rider.

In an attempt to cite to the record, IGS attempts to create evidence out of thin air to support the Incentive Rider. IGS claims on brief that its witness White recommended "that the Commission modify FirstEnergy's ESP."[23] In reality, as explained above, witness White recommended only the further unbundling of distribution rates and an allocation of certain of those costs to the SSO in a future proceeding. He made absolutely no mention of the Incentive Rider in his direct or supplemental testimony filed in this case. Just as disingenuously, IGS intimates that Company witness Mikkelsen supported the rider in her testimony. However, Ms. Mikkelsen only supported agreements that were included in the stipulated package. The Incentive Rider is not included in the package. Ms. Mikkelsen only testified as to her understanding of the meaning of language in the independent side agreement, and did not

[22] Tr. XXXVII (Mikkelsen Cross).

[23] IGS Initial Br. at 4.

support the rider.[24] Indeed, far from supporting the Incentive Rider, the Companies only agreed in the side not to oppose IGS' advocacy for the rider on brief.[25]

In addition, IGS attempts to show precedent for approving the Incentive Rider, claiming that the Commission has approved zero placeholder riders in other ESP proceedings.[26] However, IGS conveniently neglects to inform the Commission that the parties to those proceedings had notice of the proposed riders and that the facts supporting their adoption on the merits were a part of the record.[27] None of those cases involved approval of such an Incentive Rider, which is a matter of first impression for the Commission. The Incentive Rider is not, and never has been, a part of this proceeding, and the record contains no evidence to support its adoption. If the Commission deems that the rider should be considered for approval in a separate proceeding at a later date, and the Commission ultimately approves it – after notice, an opportunity for intervention by interested parties, and a hearing – the Companies then will be at liberty to seek to implement the Incentive Rider though an appropriate tariff.

IGS is attempting to obtain approval of the Incentive Rider without the parties' ability to oppose it on the merits – and NOPEC strenuously opposes it in the Companies' service territories. As a practical matter, approval of the rider will increase the cost of SSO residential

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[24] Tr. XXXVII at 7927-7928. IGS provides only a partial quote of Ms. Mikkelsen's testimony. The full quote, with items IGS deleted in bold, was as follows in response to the Examiner's question as to how the Incentive Rider could incent shopping:

> **To the extent that the price to compare is higher than it otherwise would be, that** would potentially create greater supplier interest in participating in the competitive market for the companies and , in turn, **I guess**, a more robust competitive environment for the customers of the companies.

[25] OMAEG Ex. 24 at 3. Although IGS purports to reproduce the text of the side agreement (The Retail Enhancement Agreement) on brief (at 4), it chose to omit the instructive last sentence:

> IGS agrees to advocate in its brief in Case No. 14-1297-EL-SSO for the Commission to include in the Companies' ESP a retail incentive rider set at zero and the Companies agree to not oppose IGS's position.

[26] IGS Initial Br. at 3.

[27] *See, e.g., In re Columbus Southern Power*, et al, Case No. 11-346-EL-SSO, Order (December 14, 2011).

customers' generation service. Because the prices NOPEC's approximately 500,000 customers are charged are based upon a fixed percent off the price to compare ("PTC"),[28] NOPEC's customers' prices (as well as other governmental aggregation customers' prices with percent-off PTC pricing) also would increase – and for no identifiable and justifiable reason. NOPEC's, and other parties', position that residential and small commercial customers' prices should not be arbitrarily raised must be heard before the Commission considers the Incentive Rider.

Moreover, as a legal matter, the General Assembly did not create customer choice in SB 3 and SB 221 to arbitrarily raise the majority of customers' prices for the benefit of CRES providers' business models. Rather, the intent was that market forces be brought to bear to reduce those prices, and governmental aggregation has been the primary engine to provide customers with rate relief.[29] As the Commission is aware, Ohio Rev. Code Chapter 4928 provides three options under which consumers may receive electric service in this state: (1) through the SSO (Rev. Code § 4928.141), (2) through governmental aggregation programs (Rev. Code § 4928.20), and (3) through bi-lateral contracts of CRES providers (Rev. Code 4928.08). As to opt-out aggregation, the Ohio Legislature has gone to painstaking measures to assure that citizens are engaged in the aggregation process by requiring that they approve an opt-out program through a ballot initiative and that, once approved, they have the opportunity through strident notice requirements not to join the program. Rev. Code § 4928.20. NOPEC, and other parties, deserve to be heard on the merits that the Incentive Rider will not increase customer "engagement" in the market, but only increase their rates to the benefit of CRES providers.

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[28] Tr. XXII at 4591 (Wilson Re-Cross).

[29] See Ohio Retail Choice Programs Report of Market Activity, January 2003 – July 2005, August 2005, in which former PUCO Chairman Alan Schriber described governmental aggregation groups as the "single greatest success story of Ohio's retail electric choice market."

III. CONCLUSION

As previously stated, NOPEC respectfully requests that the Commission reject the Stipulation and the Companies' ESP IV Application. Alternatively, NOPEC requests the Commission to delay issuing an order in this case until resolution of the current FERC complaint or otherwise modify the Companies' ESP IV application in any order issued in this case consistent with NOPEC's Initial and Reply briefs.

Respectfully submitted,

Glenn S. Krassen (Reg. No. 0007610)
Counsel of Record
BRICKER & ECKLER LLP
1001 Lakeside Avenue, Suite 1350
Cleveland, OH 44114
Telephone: (216) 523-5405
Facsimile: (216) 523-7071
gkrassen@bricker.com

Dane Stinson (Reg. No. 0019101)
Dylan F. Borchers (Reg. No. 0090690)
BRICKER & ECKLER, LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
dstinson@bricker.com
dborchers@bricker.com

COUNSEL FOR NORTHEAST OHIO
PUBLIC ENERGY COUNCIL

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply Brief was served *via electronic mail* upon the parties of record this 26th day of February, 2016.

Glenn S. Krassen

burkj@firstenergycorp.com
cdunn@firstenergycorp.com
dakutik@jonesday.com
jlang@calfee.com
talexander@calfee.com
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
stnourse@aep.com
mjsatterwhite@aep.com
yalami@aep.com
Jennifer.spinosi@directenergy.com
ghull@eckertseamans.com
myurick@taftlaw.com
dparram@taftlaw.com
Schmidt@sppgrp.com
ricks@ohanet.org
tobrien@bricker.com
mkl@bbrslaw.com
gas@smxblaw.com
wttpmlc@aol.com
lhawrot@spilmanlaw.com
dwilliamson@spilmanlaw.com
blanghenry@city.cleveland.oh.us
hmadorsky@city.cleveland.oh.us
kryan@city.cleveland.oh.us
mdortch@kravitzllc.com
rparsons@kravitzllc.com
mitch.dutton@fpl.com
DFolk@akronohio.gov
mkimbrough@keglerbrown.com
sechler@carpenterlipps.com
gpoulos@enernoc.com
twilliams@snhslaw.com
larry.sauer@occ.ohio.gov
maureen.willis@occ.ohio.gov
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
cmooney@ohiopartners.org
callwein@keglerbrown.com
joliker@igsenergy.com
mswhite@igsenergy.com
Bojko@carpenterlipps.com
barthroyer@aol.com
athompson@taftlaw.com
Christopher.miller@icemiller.com
Gregory.dunn@icemiller.com
Jeremy.grayem@icemiller.com
blanghenry@city.cleveland.oh.us
hmadorsky@city.cleveland.oh.us
kryan@city.cleveland.oh.us
tdougherty@theOEC.org
jfinnigan@edf.org
Marilyn@wflawfirm.com
todonnell@dickinsonwright.com
matt@matthewcoxlaw.com
mfleisher@elpc.org
rkelter@elpc.org
drinebolt@ohiopartners.org
meissnerjoseph@yahoo.com
LeslieKovacik@toledo.oh.gov
trhayslaw@gmail.com
Jeffrey.mayes@monitoringanalytics.com
mhpetricoff@vorys.com
mjsettineri@vorys.com
glpetrucci@vorys.com
msoules@earthjustice.org
sfisk@earthjustice.org
Thomas.mcnamee@puc.state.oh.us
Thomas.lindgren@puc.state.oh.us
Steven.beeler@puc.state.oh.us
dwolff@crowell.com
rlehfeldt@crowell.com

Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Md. Power Plant Subsidy Gets Cool Reception From High Court

By **Keith Goldberg**

Law360, New York (February 24, 2016, 5:46 PM ET) -- U.S. Supreme Court justices on Wednesday appeared poised to back a lower court ruling that threw out power plant construction subsidies offered by the state of Maryland, sharply questioning assertions the incentives didn't usurp the Federal Energy Regulatory Commission's authority over wholesale electricity markets.

The Maryland Public Service Commission, joined by power developer and subsidy beneficiary Competitive Power Ventures Holdings LLC, are seeking to overturn a Fourth Circuit ruling upholding the invalidation of the state's program to provide incentives for new gas-fired power plant construction through long-term power purchase agreements with local distribution utilities. Electricity providers including a Talen Energy Corp. unit say the program, as well as a similar program enacted by New Jersey, would artificially depress wholesale power prices in auctions conducted by regional grid operator PJM Interconnection LLC that are regulated by FERC.

Supreme Court justices expressed sympathy for the Maryland program's challengers during Wednesday's oral arguments, from Chief Justice John Roberts asking why the state enacted the program if not to keep power prices down, to Justice Ruth Bader Ginsburg questioning why it had to step into FERC's wholesale turf at all when crafting the incentives.

If anything, the only issue the justices appeared to be wrestling with was how broadly to craft its opinion: whether only Maryland's program conflicts with FERC's wholesale authority under the Federal Power Act, or if the commission occupies the entire field of wholesale electricity markets — which **some states claim** could undermine its authority over new generation development.

"Mr. Clement, can you tell me how I write this opinion?," Justice Sonia Sotomayor asked Bancroft PLLC's Paul Clement, who represents Talen. "And I'll ask you why. As I look at the relevant statutory provisions ... it says it can do rules and regulation that control how the rates are set so ... I'm not sure how this is field preemption," Justice Sotomayor said. "At best, I think it might be conflict preemption. And so if I think it's conflict preemption, that something about Maryland's plan conflicts with the system that FERC has set in place, how do I articulate the rule in this case?"

While Clement also made a case for field preemption, he said that Maryland is directly affecting the prices in PJM's auction, since CPV gets no PPAs with Maryland utilities unless it bids and clears

PJM's auction and must sell all of its electric generation capacity into PJM's markets once its bid is accepted.

"It's the state action forcing the [electric load-serving entities] to make these payments, and essentially conditioning CPV's participation on the PJM market on the bid-and-clear requirement," Clement told the justices. "That's state action that's preempted."

Meanwhile, the justices threw cold water on the MPSC's argument that while the incentives handed out to CPV may have been subject to FERC jurisdiction, that doesn't mean they're preempted under the FPA.

"I'm not sure why it is that when you say it was subject to FERC's jurisdiction, that doesn't end the case right there against you, because if it's subject to FERC's jurisdiction, that means it's a wholesale sale," Justice Elena Kagan told Spiegel & McDiarmid LLP's Scott Strauss, who represents the MPSC. "And that's for FERC to do is to set the rates and other terms of wholesale sales, and that's not for the states to do. So that means you're preempted."

Strauss said that CPV set the rate through a long-term power purchase agreement with a local utility regulated by Maryland, and the developer bid its projects into a FERC-approved PJM wholesale auction.

"What FERC sought to do was to reconcile the issue of the state programs and how they would interact with the auction, and FERC did that," Strauss told the justices. "It set a different bidding process, and Maryland followed that bidding process. The CPV resource bid in accordance with it and cleared on that basis."

But Justice Samuel Alito expressed skepticism that those action don't directly affect auction prices.

"As originally set up, CPV had no incentive to bid anything other than zero; isn't that right? All it was interested in was clearing the market," Justice Alito said. "And that affects the dynamic ... of the PJM auction, does it not?"

Crowell & Moring LLP partner Cliff Elgarten, representing CPV, said the incentives were used to finance construction of the power plant and that FERC set up the wholesale auction knowing that states have the authority to direct long-term PPAs between local utilities they regulate and generators.

"So FERC didn't, just as an act of grace, allow constant sales of capacity outside the auction," Elgarten told the justices. "They constructed the auction against the existing authority of the states to do exactly what was done here."

The Maryland Public Service Commission is represented by Scott H. Strauss, Peter J. Hopkins and Jeffrey A. Schwarz of Spiegel & McDiarmid LLP and James A. Feldman.

CPV is represented by Clifton S. Elgarten, Larry F. Eisenstat, Richard Lehfeldt and Jennifer N. Waters of Crowell & Moring LLP.

PPL EnergyPlus is represented by Paul D. Clement of Bancroft PLLC.

The cases are Hughes et al. v. PPL EnergyPlus LLC et al., case number 14-614, and CPV Maryland LLC v. PPL EnergyPlus LLC et al., case number 14-623, in the Supreme Court of the United States.

--Editing by Rebecca Flanagan.

Summary: Reply Brief of Northeast Ohio Public Energy Council electronically filed by Teresa Orahood on behalf of Glenn S. Krassen