UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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| Ohio Valley Electric Corporation | ) | |
| v. | ) | Docket No. EL18-135-000 |
| First Energy Solutions Corp. | ) | |

**MOTION OF NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION TO INTERVENE IN SUPPORT OF COMPLAINANT OHIO VALLEY ELECTRIC CORPORATION**

On March 26, 2018, the Ohio Valley Electric Corporation and its wholly-owned subsidiary, Indiana-Kentucky Electric Corporation (collectively, "Complainant" or "OVEC"), filed a complaint against FirstEnergy Solutions Corp. ("Respondent") and an alternative request for declaratory order in the above-captioned proceeding. The National Rural Electric Cooperative Association ("NRECA") moves to intervene in this proceeding and, for the reasons discussed below, urges the Commission to grant the relief OVEC has requested.

**MOTION TO INTERVENE**

NRECA moves to intervene as a party to this proceeding. NRECA is the national service organization representing the interests of the nation's more than 900 member-owned, not-for-profit rural electric utilities. America's electric cooperatives provide electric service to approximately 42 million consumers across 47 states—about 12 percent of the nation's population. Rural electric cooperatives account for about 11 percent of all electric energy (kilowatt-hours) sold in the United States.

NRECA's members include approximately 65 generation and transmission ("G&T") cooperatives and 840 distribution cooperatives. Distribution cooperatives provide electric service to their owner-members: end-use consumers. The G&T cooperatives are owned by distribution cooperatives and provide wholesale power and related services to their distribution cooperative owner-members. Both distribution and G&T cooperatives were formed to provide safe, reliable, and affordable electric service.

OVEC's complaint and petition for declaratory order involve the interplay between the Commission's jurisdiction over wholesale power supply contracts under the Federal Power Act and the authority of the bankruptcy courts to address rejection of contracts under the Bankruptcy Code, an issue that affects NRECA members generally. In addition, FirstEnergy's plans seek rejection of the Inter-Company Power Agreement ("ICPA"), a wholesale contract to which Peninsula Generation Cooperative (owned by NRECA member Wolverine Power Supply Cooperative, Inc.) and Buckeye Power Generating, LLC (owned by NRECA member Buckeye Power, Inc.) are also parties. Accordingly, NRECA has a direct and substantial interest in the outcome of this proceeding, and no other party can adequately represent NRECA's interest. NRECA's participation would be in the public interest. NRECA respectfully requests that the Commission grant its motion to intervene in this proceeding.

## SERVICE AND COMMUNICATIONS

Service should be made on, and communications directed to, the following persons:


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## 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. The ICPA is a wholesale contract between OVEC and OVEC's owners or their utility-company affiliates (called "Sponsoring Companies") under which the output of OVEC's power plants is made available to the Sponsoring Companies. As OVEC explains in more detail in its Complaint, the contract runs until 2040 and makes the Sponsoring Companies, under a cost-based rate, individually responsible for their proportionate share of the fixed and operating costs of the project, including the costs of additions, upgrades, repairs and eventually decommissioning.[1] Relevant here, FirstEnergy is responsible for approximately five percent of these costs and OVEC's rural electric cooperative owners – Buckeye and Wolverine – are responsible, collectively, for about 25 percent of these costs.

Concerned about the impact loss of FirstEnergy's participation in the ICPA would have on OVEC and its other owners, and anticipating a FirstEnergy bankruptcy

[1] *See* ICPA Sections 7.01, 7.02, and 8.04.

filing that would come only days later, OVEC filed its complaint with FERC requesting the following relief:

> 1. A Commission order granting OVEC's Complaint (1) by making an expedited 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);
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> 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
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> 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 makes such a determination and of its ultimate conclusions.

OVEC Complaint at 4.

On March 31, 2018, FirstEnergy filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.[2] The next day it made two additional filings. It filed an Adversary Proceeding in the Bankruptcy Case to enjoin FERC from ruling on the OVEC complaint[3] and filed a Rejection Motion[4] in the main case seeking authority from the

[2] *In re First Energy Solutions Corp., et. al.*, Case No. 18-50757 (Bankr. N.D. Ohio March 31, 2018) (Jointly Administered) (the "Bankruptcy Case").

[3] *First Energy Solutions Corp v. FERC,* Adv. Proc. No. 18-05021 (Bankr. N.D. Ohio April 1, 2018) (the "Adversary Proceeding").

[4] *Motion for Entry of an Order Authorizing FirstEnergy Solutions Corp. and FirstEnergy*

bankruptcy court to reject the ICPA. On April 2, the bankruptcy court, acting *ex parte*, granted FirstEnergy a temporary restraining order ("TRO") in the Adversary Proceeding for a period running to April 16, 2018.[5]

Shortly after the bankruptcy court entered the TRO, OVEC, citing 28 U.S.C. § 157(d), filed a motion with the United States District Court for the Northern District of Ohio to withdraw FirstEnergy's Rejection Motion from the bankruptcy court's jurisdiction. On April 5, the district court denied OVEC's motion.[6] The district court agreed with OVEC that the cited statute requires the district court to withdraw a reference to the bankruptcy court "if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." But the district court ruled that withdrawal of the Rejection Motion was unnecessary because "FERC and the Bankruptcy Court have concurrent jurisdiction over the ICPA" and the Bankruptcy court therefore would "not have to engage in any significant interpretation of the FPA." As the district court then went on to state:

> FES must seek approval from both FERC and the Bankruptcy Court to reject the ICPA. FERC will apply the FPA's public interest standard to determine if the rejection comports with federal law. 16 U.S.C. § 824b(a)(4). The Bankruptcy Court will apply its business judgment standard to determine if the rejection is consistent with Chapter 11 of the Bankruptcy Code. The order in which these decisions are issued is of no consequence because FES cannot reject the ICPA without approval from both FERC and the Bankruptcy Court.[7]

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*Generation, LLC to Reject a Certain Multi-Party Intercompany Power Purchase Agreement with the Ohio Valley Electric Corporation as of the Petition Date* (the "Rejection Motion") [ECF No. 44].

[5] Adversary Proceeding (ECF No. 11).

[6] *Ohio Valley Energy Corp. v. FirstEnergy Solutions Corp*., Case No. 5:18-mc-34 (D.C. N.D. Ohio).

[7] *Id.*

The Monday following the district court's order, April 9, 2018, was the date scheduled for a status conference before the bankruptcy court on FirstEnergy's complaint seeking a preliminary injunction against the Commission. During that conference the Justice Department entered an appearance on behalf of the Commission, indicating that the Commission supported the district court's ruling and stating that in light of the ruling, the bankruptcy court should lift the TRO. FirstEnergy contended that the district court ruling did not preempt the TRO and stated it intended to seek reconsideration of the district court's ruling (which it did on April 10, 2018). The bankruptcy judge encouraged the parties to confer, left undisturbed the April 16, 2018, preliminary injunction hearing, and scheduled a further status conference for April 10, 2018.

On April 10, 2018 the parties to the Bankruptcy Case and the Adversary Proceeding against the Commission reached agreement, subsequently approved by the bankruptcy court, that (1) OVEC would be permitted to intervene in the Adversary Proceeding, (2) the TRO would remain in effect until the preliminary injunction hearing now scheduled for May 11 unless the district court issues an order before that date limiting the bankruptcy court's authority, and (3) the automatic stay would be modified to permit the parties to submit written filings in this proceeding. In the event that the Commission and FirstEnergy are unable to reach agreement on a stipulation regarding the TRO and modification of the automatic stay, the preliminary injunction hearing may be moved up from May 11, 2018 to April 24, 2018.

On Friday, April 13, 2018, the district court reaffirmed that the Rejection Motion should be referred to the bankruptcy court and granted FirstEnergy's motion to delete the reference to concurrent jurisdiction in the district court's order of April 5.

## COMMENTS

The concerns that prompted the filing of OVEC's complaint and petition for declaratory order are also of immense importance to NRECA and its members. OVEC noted in its complaint that the very threat that FirstEnergy would seek to reject the ICPA in bankruptcy has already had an adverse effect on NRECA members—OVEC's credit ratings have declined and this, in turn has raised its borrowing costs. As NRECA members Buckeye and Wolverine have stated in their interventions (filed this date), these increases in borrowing costs are borne by OVEC's Sponsoring Companies, and particularly in the case of rural electric cooperatives whose customers are their owners, will be passed on in their entirety to consumers.

Both OVEC (in its complaint) and Buckeye and Wolverine (in their joint intervention) have aptly explained (1) why this Commission has exclusive jurisdiction to ascertain whether termination of FirstEnergy's purchase obligations under the ICPA would violate the filed-rate doctrine and be contrary to the public interest under the *Mobile-Sierra* doctrine and (2) why termination of FirstEnergy's purchase obligations under the ICPA would be contrary to the public interest. NRECA therefore comments here briefly only to make a few additional observations.

First, as to the question of the Commission's exclusive jurisdiction, NRECA points the Commission, not only to the analysis in OVEC's complaint, but to the April 5 order of the district court. As noted earlier, the district court found that while the bankruptcy court has authority to apply the "business judgement" test to FirstEnergy's motion to reject the ICPA, the bankruptcy court has no authority to approve rejection of the contract unless FERC, exercising its concurrent jurisdiction, makes the required determination that termination of FirstEnergy's purchase obligations would be in the

public interest. That determination, as Wolverine and Buckeye show in their motion to intervene, would require the Commission to find that leaving the terms of the contract unchanged, including provisions applicable to First Energy, "seriously harms the public interest."[8]

Second, NRECA emphasizes that, on the merits, rejection of the contract by FirstEnergy, if permitted, *would* "seriously harm[ ] the public interest." Rejection would have broad and adverse ripple effects, not only on the Sponsoring Companies, but on their ratepayers and on OVEC's roughly 600 employees and a similar number of retirees.

This is not a simple, short-term bilateral arrangement, where termination by one party would have temporary and limited effects on the general public. Rather, as OVEC emphasizes, under the ICPA, the Sponsoring Companies' obligations—which run through 2040 and beyond and include the substantial costs of decommissioning—are several and not joint. Cost shortfalls resulting from FirstEnergy's rejection of the contract would not be directly payable by the other Sponsoring Companies,[9] but would become unreimbursed costs, costs that will climb over the remaining life of the contract. The adverse effect on OVEC's credit rating and its borrowing costs will not be limited to OVEC, but will increase costs to OVEC's wholesale customers.[10] As Wolverine and Buckeye state in their intervention:

> The ICPA requires the Sponsoring Companies to pay OVEC's borrowing costs, and without FirstEnergy's contributions, OVEC and the remaining Sponsoring Companies must address this gap in OVEC's cost recovery. … If OVEC fails to find a new replacement Sponsoring Company, a task which would

[8] *Morgan Stanley v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 530 (2008).

[9] OVEC Complaint at 13.

[10] *Id*. at 14.

> be unduly (and prejudicially) burdened by FirstEnergy's contractual abrogation, the remaining Sponsoring Companies will need to increase their proportionate ownership shares and corresponding cost responsibilities, which will result in higher rates paid by end-use customers.[11]

The parties to the ICPA already know, moreover, that the costs of environmentally sound decommissioning of the OVEC plants when they retire will run into many millions (if not hundreds of millions) of dollars. And it is also a certainty that, without FirstEnergy's contributions, the proportion of decommissioning costs borne by the remaining Sponsoring Companies would likely increase significantly. What remains uncertain is the ultimate magnitude of decommissioning costs (which can only be determined in the future based on environmental and other legal requirements as they exist in 2040), an uncertainty that becomes magnified if FirstEnergy were permitted to reject the ICPA.

The concerns about the impact of FirstEnergy's rejection of the ICPA on OVEC's employees and retirees and on the many customers of the Sponsoring Companies are precisely the types of factors that bear on the public interest determination that FERC is given exclusive authority to make. By contrast, these are not factors that the bankruptcy courts are either designed or equipped to address.

## CONCLUSION

For the reasons stated above, NRECA requests that the Commission both grant its motion to intervene and grant the relief sought by OVEC in its complaint and petition for declaratory order.

[11] Buckeye-Wolverine Motion to Intervene at 7.

Respectfully submitted,

/s/ Randolph Elliott

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April 16, 2018

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Arlington, Virginia, this 16th day of April 2018.

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