UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Chapter 11
	)	
FIRSTENERGY SOLUTIONS CORP., *et al.*,[1]	)	Case No. 18-50757 (Jointly Administered)
	)	
Debtors.	)	Hon. Alan M. Koschik
	)	
	)	**Re: Docket No. 1224**

OHIO VALLEY ELECTRIC CORPORATION'S RESPONSE AND LIMITED OBJECTION TO THE MOTION OF DEBTORS TO APPROVE SETTLEMENT AMONG THE DEBTORS, NON-DEBTOR AFFILIATES AND CERTAIN OTHER SETTLEMENT PARTIES PURSUANT TO 11 U.S.C. §§ 105, 363, 365, AND 502 AND RULE 9019 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Ohio Valley Electric Corporation ("OVEC") files this response and limited objection (the "Response") to the *Motion of Debtors to Approve Settlement Among the Debtors, Non-Debtor Affiliates and Certain Other Settlement Parties Pursuant to 11 U.S.C. §§ 105, 363, 365 and 502 and Rule 9019 of the Federal Rules of Bankruptcy Procedure* [Docket No. 1224] (the "Settlement Motion"),[2] filed by the debtors and debtors-in-possession (collectively, the "Debtors") in the United States Bankruptcy Court for the Northern District of Ohio (the "Court") on August 26, 2018. In support of this Response, OVEC respectfully states as follows.

[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.

[2] Capitalized terms used but not otherwise defined herein have the meaning ascribed to such terms in the Settlement Motion.

Preliminary Statement

1. OVEC recognizes that the revised proposed Settlement Agreement is an important development in these chapter 11 cases. However, OVEC, as an actual or contingent creditor of Debtor FES and various non-Debtors, takes issue with the Settlement Agreement for four primary reasons.

2. ***First***, Debtor FES cannot sustain its burden to show that the Settlement Agreement is in the best interests of the FES estate because a significant majority of the Settlement Consideration is unallocated among the Debtors, so no portion of it ever may be allocated to FES for distribution to FES's creditors. In exchange for all of the consideration given by FES (the "gives"), no one can assume that any material portion of the Settlement Consideration will make its way to FES and its creditors (the "gets"). Therefore, the Debtors, creditors and most importantly the Court cannot assess today if the Settlement Agreement is fair from FES's perspective.

3. ***Second***, even assuming that the Debtors are not seeking approval of the Third Party Releases today, OVEC questions the propriety of entering into a Settlement Agreement that is so contingent on the future approval of the Third Party Releases in a plan, given the Sixth Circuit's *Dow* standard for obtaining non-consensual third party releases.

4. ***Third***, several modifications need to be made to the proposed Order to effectively protect and preserve creditors' rights to object to the Third Party Releases in a plan and avoid the Settlement Agreement being a plan *sub rosa*.

5. ***Fourth***, there is no justification for FirstEnergy Corporation to obtain approval today of a super-priority administrative claim for services provided to the Debtors in the event that the Settlement Agreement is terminated in the future.

Background

6. OVEC and Debtor FirstEnergy Solutions Corp. ("FES") are party to a multi-party intercompany power purchase agreement (the "ICPA"), pursuant to which FES is entitled to purchase 4.85 percent of the power and energy generated by OVEC's plants, and is obligated to pay 4.85 percent of all of OVEC's costs and expenses of making such power and energy available, until either the year 2040 or until OVEC ceases to operate. Pursuant to the ICPA, two non-Debtor affiliates—Allegheny Energy Supply Company, L.L.C. ("AES") and Monongahela Power Company ("Monongahela")—are also party to the ICPA and are entitled to purchase 3.01 percent and 0.49 percent, respectively, of the power generated by OVEC's plants, with the same obligation to pay their proportionate share of OVEC's costs. The obligations of AES and Monongahela under the ICPA are independent of FES's obligations.

7. On July 28, 2005, non-Debtor FirstEnergy Corporation executed a guaranty agreement with OVEC (the "FirstEnergy Guarantee") pursuant to which FirstEnergy Corporation "absolutely and unconditionally guaranteed to [OVEC], its permitted successors and assigns . . . the prompt payment . . . of any and all amounts that are or may hereafter become due and payable . . . to [OVEC] by reason of [the ICPA]" up to an aggregate amount of $300 million. FirstEnergy Guarantee at 1. The FirstEnergy Guarantee was allegedly released on February 28, 2014; OVEC is currently investigating the circumstances of such alleged release, including whether such release was actually effectuated, as well as any potential resulting claims and defenses.

8. On March 26, 2018, OVEC initiated an action at the Federal Energy Regulatory Commission ("FERC"), requesting an order finding that FES's then-anticipated chapter 11 filing and rejection of the ICPA would constitute a violation of the ICPA and would not satisfy a "public interest" review, or, in the alternative, an order declaring that FERC has exclusive jurisdiction over the proposed rejection of the ICPA (the "FERC Action").

9. On March 31, 2018, the Debtors commenced the chapter 11 cases. On April 1, 2018, the Debtors filed 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 as of The Petition Date* [Docket No. 44] (the "Rejection Motion"), seeking to reject the ICPA.

10. On May 11, 2018, the Court granted a preliminary injunction enjoining OVEC's FERC Action and enjoining FERC from otherwise reviewing FES's requested rejection of the ICPA [Adv. Docket No. 114] (the "Preliminary Injunction Order").[3] On May 31, 2018, OVEC appealed the Preliminary Injunction Order (the "Preliminary Injunction Appeal") and filed a motion in the Bankruptcy Court for certification of the Preliminary Injunction Order directly to the United States Court of Appeals for the Sixth Circuit (the "Sixth Circuit") [Adv. Docket No. 129]. The Bankruptcy Court granted the motion for certification [Adv. Docket No. 146], the Sixth Circuit then authorized the direct appeal, and on August, 22, 2018, the appeal was docketed at the Sixth Circuit [App. Case No. 3788; Docket No. 1].

11. After a July 31, 2018 hearing on the Rejection Motion, on August 9, 2018, the Court entered the *Order (I) Authorizing the Debtors to Reject a Certain Multi-Party Intercompany Power Purchase Agreement with the Ohio Valley Electric Corporation and (II) Granting Certain Related Relief* [Docket No. 1118] (the "Rejection Order"), authorizing the Debtors to reject the ICPA no later than as of July 31, 2018.[4] OVEC has appealed the Rejection Order (the "ICPA Rejection Appeal"). On August 31, 2018, the Bankruptcy Court certified the Rejection Order for direct

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[3] *FirstEnergy Solutions Corp., et al., v. Federal Energy Regulatory Commission, et al.*, Adv. Pro. No. 18-5021 (Bankr. N.D. Ohio).

[4] The deadline for filing a proof of claims related to FES's rejection of the ICPA is October 15, 2018 at 5 p.m. ET [Docket No. 1199].

appeal to the Sixth Circuit [Docket No. 1262]. On September 4, 2018, OVEC filed in the Sixth Circuit a motion seeking permission for a direct appeal of the Rejection Order to the Sixth Circuit and seeking to consolidate the ICPA Rejection Appeal with the Preliminary Injunction Appeal, which is currently under advisement [App. Case No. 18-311; Docket No. 1].

12. If the ICPA Preliminary Injunction Order and the Rejection Order are affirmed, OVEC will be entitled—at a minimum—to an unsecured claim for its rejection damages against FES. As even the Debtors concede, OVEC's unsecured claim will be substantial. Rejection Motion at ¶ 4 (the Debtors are "expected to lose $268 million over the remaining 22 years left on the OVEC ICPA."). Additionally, as discussed above, OVEC has or may have potential claims against non-Debtor affiliates AES, Monongahela, and FirstEnergy Corporation with respect to the ICPA. Moreover, depending on the effective date of rejection—which has not been determined—OVEC will have administrative claim against FES for, among other things, unpaid amounts during the post-petition period.

13. By the Settlement Motion, the Debtors seek approval of a complex and comprehensive Settlement Agreement with FirstEnergy Corporation that, among other things, provides various forms of consideration to the Debtors' collective estates, which the Debtors have estimated in the amount of at least $1.1 billion. Settlement Motion ¶ 4. Specifically, the Settlement Agreement provides the Debtors with (i) a Cash Payment of $225 million (Settlement Agreement, section 2.1), (ii) $628 million in principal amount of new unsecured notes issued by non-Debtor FirstEnergy Corporation (the "FirstEnergy Corporation Notes") (Settlement Agreement, section 2.4); (iii) title to or the proceeds from the sale of the Pleasants Power Plant (Settlement Agreement, section 3.1); (iv) the continued provision of Shared Services by the FE Non-Debtor Parties to the Debtors under an amended shared services agreement, with a credit of up to $112.5 million for the

postpetition costs for such services (Settlement Agreement, section 2.5); (v) the payment of certain employee and retiree obligations that would allegedly be borne by the Debtors (Settlement Agreement, section 2.2); (vi) the continued performance by the FE Non-Debtor Parties under the existing intercompany tax allocation agreement for all periods or portions thereof ending on or before the Plan Effective Date (Settlement Agreement, section 2.3); and (vii) the waiver of all prepetition claims the FE Non-Debtor Parties may have against the Debtors, as well as the waiver of certain postpetition administrative expense claims (Settlement Agreement, section 2.7) (collectively, the "Settlement Consideration"). However, many components of the total Settlement Consideration going to the collective Debtors are not allocated among the various Debtor entities. For example, the two largest portions of the Settlement Consideration—the Cash Payment and the FirstEnergy Corporation Notes, which total approximately $850 million, representing a significant majority of the $1.1 billion of the total Settlement Consideration—are entirely unallocated among the Debtors.

14. In exchange for the Settlement Consideration being provided to the Debtors' collective estates, the Debtors and certain Settling Parties agree to release the FE Non-Debtor Released Parties from substantially all claims and Causes of Action that the Debtors could bring against the FE Non-Debtor Released Parties ("Debtor Releases"). Moreover, the Debtors agree to seek, in a plan of reorganization, a non-consensual "third party" release of the FE Non-Debtor Released Parties from substantially all claims and Causes of Action that holders of claims against the Debtors could bring against the FE Non-Debtor Released Parties (the "Third Party Releases").

On its face, the Third Party Releases would include a non-consensual release of OVEC's potential claims against AES, Monongahela, and FirstEnergy Corporation referenced above.[5]

Response and Limited Objection

A. FES Has Not Met Its Burden to Show That the Settlement Agreement is in the Best Interests of FES and its Creditors.

15. As the party proposing the Settlement Agreement, Debtor FES has the burden of persuading the Court that the Settlement Agreement is fair and equitable and in the best interest of its estate. *See, e.g.*, *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968); *In re Lawrence & Erausquin, Inc.*, 124 B.R. 37, 38 (Bankr. N.D. Ohio 1990) ("[t]he Trustee, as proponent of the proposed settlement, has the burden of persuasion that the settlement is in the best interest of the estate"); *In re Hermitage Inn, Inc.*, 66 B.R. 71, 72 (Bankr. D. Colo. 1986) ("[t]he burden of persuading the court that a settlement should be approved rests with the party proposing the settlement"); *In re GHR Companies, Inc.*, 50 B.R. 925, 931 (Bankr. D. Mass. 1985) (same).

16. Critically, binding Sixth Circuit precedent outlines four factors to consider when reviewing a proposed settlement: (i) the probability of success in litigation; (ii) the difficulties, if any, to be encountered in the matter of collection; (iii) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and ***(iv) the paramount interest of the creditors and a proper deference to their reasonable views***. *Bard v. Sicherman (In re Bard)*, 49 F. App'x 528, 530 (6th Cir. 2012) (emphasis added). Far from meeting its burden, FES

[5] The definition of FE Non-Debtor Party includes the Debtors' non-Debtor Affiliates, which would include FirstEnergy Corporation, Allegheny Energy Supply Company, L.L.C., and Monongahela Power Company. Settlement Agreement, Art. 1.

has not shown that it will receive ***any portion*** of the material components of the Settlement Consideration.

17. In fact, there is little to no information regarding how the unallocated portions of the Settlement Consideration ultimately will be allocated among the Debtors, nor is there any process or protocol articulated for making that determination. For example, the two largest portions of the Settlement Consideration—the Cash Payment and the FirstEnergy Corporation Notes, which total approximately $850 million, representing a significant majority of the $1.1 billion of the Settlement Consideration—are entirely unallocated among the individual Debtors. It is possible that the entire amount of New FE Notes distributed to the Debtors should be allocated to FES, given that, as the Debtors note in the Settlement Motion, FES has "substantial" NOLs that FirstEnergy Corporation and certain non-Debtor affiliates would be able to use in exchange for certain guaranteed payments to the Debtors as a group. *See* Settlement Motion, ¶ 15. And yet, for its part, the Settlement Declaration[6] merely states that "the Debtors may distribute the Cash Payment to their creditors under a plan of reorganization or liquidation" and that "the Debtors may distribute the New FE Notes to their creditors under a plan of reorganization or liquidation." Settlement Declaration at ¶ 34-6.

18. The Settlement Declaration is just as cryptic when it comes to discussion of the other forms of Settlement Consideration. For example, (i) it fails to specify which Debtors will take title to the Pleasants Power Plant or its proceeds, ¶¶ 41-7; (ii) it fails to specify the quantity of employee obligations that FirstEnergy Corporation will satisfy that would otherwise allegedly be borne by FES, or address whether FirstEnergy Corporation is already responsible for such

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[6] *Declaration of Charles M. Moore in Support of the Debtors' Motion to Approve Settlement Among the Debtors, Non-Debtor Affiliates and Certain Other Settlement Parties Pursuant to 11 U.S.C. §§ 105, 363, 365 and 502 and Rule 9019 of the Federal Rules of Bankruptcy Procedure* [Docket No. 1225] (the "Settlement Declaration").

obligations, ¶ 61-3; (iii) it states that the Debtors would benefit from continued compliance with the various intercompany tax arrangements and agreements but fails to discuss how much benefit FES would be expected to receive from such compliance or otherwise explain why FirstEnergy Corporation would not otherwise be required to comply with its obligations to FES, ¶¶ 38-40; (iv) it fails to specify how the credit of up to $112.5 million of the postpetition costs for Shared Services given by the FE Non-Debtor Parties to the Debtors would be divided between FES and FirstEnergy Nuclear Operating Company, ¶¶ 56-60;[7] and (v) it fails to specify other than in the most generic terms what claims the FE Non-Debtor Parties could assert against FES specifically, rather than against other Debtors, ¶¶ 64-6. Moreover, the Settlement Motion merely states that the allocation of the Settlement Consideration "will be addressed through the negotiation and formulation of chapter 11 plans for the Debtors." Settlement Motion at ¶ 76, without any detail about who will be involved in—and what the process will be—for addressing allocation in the negotiation and formulation of chapter 11 plans for the Debtors.

19. As a result, it is impossible for OVEC, other creditors of FES, and the Court to assess whether the Settlement Agreement is fair and equitable and in the best interests of creditors with respect to FES. OVEC's concerns regarding FES's allocation are not inchoate or mere speculation. In an ultimate chapter 11 plan, the Debtors could conceivably propose an allocation scheme that provides FES (and its creditors) with: (i) none of the Cash Payment; (ii) none of the FirstEnergy Corporation Notes; (iii) none of the value (through title or sale proceeds) of the

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[7] On September 14, 2018, the Debtors filed the Amended Shared Services Agreement and Separation Agreement that the Debtors would enter into pursuant to section 2.5 of the Settlement Agreement with the Court [Docket No. 1376]. The Amended Shared Services Agreement establishes a business separation committee (the "Business Separation Committee"), comprised of representatives of the Debtors and the FE Non-Debtor Parties, that will be tasked with determining, reviewing, and addressing various issues that arise with respect to the separation of the Debtors' businesses from those of the FE Non-Debtor Parties. *See* Amended Shared Services Agreement, Article III. However, the Amended Shared Services Agreement fails to provide any delineation of FES-specific representatives on the Business Separation Committee, so FES might not even have a say on that committee.

Pleasants Power Plant; (iv) none or an unknown amount of the value that will inure to the Debtors under the Intercompany Tax Allocation Agreement (which value could otherwise inure to FES pursuant to the contract)[8]; (v) none or an unknown amount of the credit of up to $112.5 million of the postpetition costs for Shared Services granted by the FE Non-Debtor Parties to the Debtors; (vi) none or an unknown benefit from FirstEnergy Corporation's satisfaction of employee obligations that would otherwise allegedly be borne by FES (and no indication that FirstEnergy Corporation would not otherwise be required to satisfy any such obligations); and (vii) a minimal or unknown benefit from a waiver of alleged claims of the FE Non-Debtor Parties against FES.

20. How can OVEC, other FES creditors, and the Court determine whether an unknown (and potentially small or no) amount of consideration to FES and its creditors under a future chapter 11 plan supports FES's release of claims today against the FE Non-Debtor Released Parties, as well as FES's promise today to seek Third Party Releases of claim by its creditors in a plan in the future (accompanied by an unknown allocation of settlement consideration)? The answer is, simply, that creditors of FES and the Court cannot make such a determination at this time on this thin to non-existent evidentiary record. The Court and creditors are left to speculate about the value that FES will receive in exchange for the FES Debtor Release, Third Party Releases, and other consideration FES and its creditors provide under the Settlement Agreement.[9]

21. And based on the lack of clarity in the Settlement Agreement and the facts and circumstances of the chapter 11 cases, there is a real possibility that the Settlement Agreement

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[8] The Settlement Agreement states that the FE Non-Debtor Parties promise continued performance prior to the effective date under the Intercompany Tax Allocation Agreement, including a guaranteed purchase of at least $66 million in value of the Debtors' tax attributes for tax year 2018. *See* Settlement Agreement, section 2.3(c). The tax attributes in question were primarily generated by FES (*See* Settlement Motion, ¶ 15), and as such FES is entitled to their value. However, it is unclear under the Settlement Agreement what value, if anything, FES will receive on account of the FE Non-Debtor Parties' use of such attributes.

[9] The current state of affairs is in contrast to other large chapter 11 cases with material intra-debtor allocation and intra-debtor claim issues, where processes and protocols are established up front to ensure fair treatment of each

consideration may be allocated to FES at a level well below the lowest range of a reasonable settlement. *Cf. In re Junk*, 566 B.R. 897, 912 (Bankr. S.D. Ohio 2017) (Bankruptcy Rule 9019 requires that a settlement falls "within a range of reasonable compromises" to be approved). At present, there do not appear to be separate independent decision makers or advisors at each of the relevant Debtor entities who are charged with advocating for their respective Debtor's portion of the Settlement Agreement proceeds.[10] While the Committee has statutory and fiduciary duties to all unsecured creditors, 11 U.S.C. § 1102(b), and certainly is to be commended for improving the total amount of settlement consideration in the improved Settlement Agreement, the Committee has only one FES-only creditor out of seven Committee members. [Docket Nos. 6, 7, 279, 547]. Moreover, the two other creditor groups who currently support the Settlement Agreement—i.e., the Ad Hoc Noteholder Group and the Mansfield Group—assert guarantee claims against multiple Debtor entities and very well may be better off if FES receives a disproportionately smaller portion of any Settlement Agreement proceeds compared to the other Debtor entities. As a result, certain FES-only creditors had to form an ad hoc group to attempt to advocate for the interests of FES-only creditors; on information and belief, to date they have had a difficult time receiving more than a rudimentary level of diligence from the Debtors, and have

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debtor and its creditors. *See In re Energy Future Holdings Corp.*, et al., Case No. 14-10979 (CSS), Docket No. 2066 (Bankr. D. Del. 2014) (establishing in interim compensation order a mechanism for each professional to allocate fees and expenses to the applicable debtor for whose direct benefit any fees and expenses were incurred); *In re Nortel Networks Inc.*, et al., Case No. 09-10138 (KG), Docket No. 993 (Bankr. D. Del. 2009) (approving agreement requiring various debtors to negotiate in good faith and attempt to reach agreement on a timely basis a protocol for resolving allocation disputes.).

[10] OVEC has raised these concerns to the Debtors and hopes that they can be addressed.

certainly not been invited into a diligence room, much less to the negotiating table, the way the other ad hoc creditor groups have been.

22. Moreover, the Debtors apparently have not made any such determinations with respect to the best interests of FES and FES-only creditors. As discussed above, the Debtors' only submitted evidence so far in support of the Settlement Agreement is devoid of any specific analysis from the perspective of FES and reference to FES-only creditors. *See* Settlement Declaration. And the Settlement Motion makes clear that nothing in the Settlement Agreement constitutes an allocation of these material components of the Settlement Agreement. Settlement Motion, ¶ 76. While the Debtors may not have wanted to dive into complex allocation issues today in connection with negotiating the Settlement Agreement, by seeking Court approval of the Settlement Agreement now, they have placed the risk of a future unknown and disparate allocation (and lack of information) on the Court and creditors.[11] Without a far more robust understanding of the FES "gets" for the requested "gives," the Debtors simply cannot meet their burden to approve the Settlement Agreement under Rule 9019.[12]

B. The Settlement Agreement Sets the Debtors on a Path to Propose a Plan that Features Non-Consensual Third Party Releases.

23. The Settlement Agreement provides that the Debtors will seek approval of the Third Party Releases in a future chapter 11 plan. *See* Settlement Agreement, section 6.3; Settlement

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[11] Equally troubling is the fact that FES is proposing to provide a release to the FE Non-Debtor Parties today (and agree to an injunction supporting that release today), upon the effective date of the Settlement Agreement, even though FirstEnergy Corporation will not provide any settlement consideration to FES or any of the Debtors until a chapter 11 plan is consummated. *Compare* proposed Order, ¶ 6 and Settlement Agreement, Section 6; *with* Settlement Agreement, Section 2. Such disparity in "gives" vs. "gets" does not appear to be in the best interests of FES and its creditors, when no one knows what consideration, if any, FES will ultimately receive.

[12] By seeking to settle—outside of a plan—all of the causes of action of each of the distinct Debtors against the FE Non-Debtor Released Parties on a collective basis, without any analysis of what the individual Debtors or their creditors will actually receive under the Settlement Agreement, the Debtors effectively assume a substantive consolidation of all of the Debtors' estates without any request (or accompanying support) to do so. This Court has previously stated that substantive consolidation is reserved for cases where the interrelationships of the

Motion, ¶ 51 ("Releases"). While the Debtors represent that they are not seeking approval of the Third Party Releases at this time, that is not consistent with the language of the Settlement Agreement, and OVEC looks forward to working with the Debtors to agree on mutually acceptable clarifying language. But more importantly, OVEC believes it is necessary to remind the Court that the Debtors are committing themselves to demonstrate that these non-consensual Third Party Releases satisfy the Sixth Circuit's very strict requirements as enunciated in *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002) ("Dow").

24. In *Dow*, the Sixth Circuit held that ***seven requirements*** must be present before a bankruptcy court can enjoin a non-consenting creditor's claim against a non-debtor: "(1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; ***(4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full*** and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions." *Id.* at 658 (emphasis added); *see also* 11 U.S.C. § 524(e).

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debtors are so "hopelessly obscured" that attempting to unscramble them would threaten the realization of any net assets for all of the creditors." *Matter of Evans Temple Church of God in Christ & Cmty. Ctr., Inc.*, 55 B.R. 976, 981 (Bankr. N.D. Ohio 1986) (quotations omitted). This Court has also noted that implicit in a determination that substantive consolidation is warranted is the court's finding that "it is in the best interest of unsecured creditors to join the assets and liabilities of two debtors," and that "the practical necessity of consolidation to protect the possible realization of any recovery for the majority of the unsecured creditors far outweighs the prospective harm to any particular creditor." *Id.* at 982. No such showing has been made here.

While other circuit courts of appeal and bankruptcy courts outside the Sixth Circuit may either prohibit non-consensual third party releases entirely, or have more forgiving standards, *Dow* is controlling here.

25. Courts in the Sixth Circuit and elsewhere interpret *Dow* to require ***all seven of these factors*** before a bankruptcy court can enjoin a non-consenting creditor's claim against a non-debtor. *See, e.g.*, *In re SL Liquidating, Inc.*, 428 B.R. 799, 802 (Bankr. S.D. Ohio 2010) ("[t]he varying positions of the parties as to which factor may be the most important reinforces this Court's interpretation of *In re Dow Corning* that, at least in the Sixth Circuit, all of the factors must be present and all the factors are important"); *In re City of Detroit*, 524 B.R. 147, 173 (Bankr. E.D. Mich. 2014) (interpreting *Dow* to outline the seven factors that "must be met for granting a third-party release"); *In re Saleh*, 427 B.R. 415, 420 (Bankr. S.D. Ohio 2010) ("[i]n *Dow Corning,* the Sixth Circuit provided a more detailed annunciation of the factors that ***must*** be present to support including a permanent injunction or release benefiting non-debtor third parties in a Chapter 11 plan of reorganization if the injunction is to be enforced against non-consenting creditors,") (emphasis added); *In re Combustion Eng'g*, 295 B.R. 459, 485 (Bankr. D. Del. 2003) (ruling that non-debtor releases did not comply with *Dow* because they did not satisfy two of the seven *Dow* factors).

26. Based on current facts and circumstances, it appears that it may be difficult for the Debtors to meet all seven *Dow* requirements, particularly factors 4 through 6, at the time the Third Party Releases are presented for the Court's approval at plan confirmation. Accordingly, OVEC questions the propriety of the Debtors seeking court approval of the Settlement Agreement today (which are conditioned on the approval of Third Party Releases that must satisfy *Dow* to be

consummated), based on an entire plan negotiation and formulation process that will occur in the future.

27. To the extent that the Court determines to approve the Settlement Agreement now and allow the Debtors to obligate themselves to seek Third Party Releases in a chapter 11 plan, OVEC specifically reserves its rights, including with regard to the propriety of those Releases.

C. Certain Clarifications to the Motion and Order Regarding the Third Party Releases are Required.

28. While the Settlement Agreement and Motion claim not to seek approval of the Third Party Releases at this time, at a minimum several modifications need to be made to the proposed Order to effectively protect and preserve the rights of third parties such as OVEC. Otherwise, the Settlement Agreement risks becoming a plan *sub rosa*, as it will dictate the terms of an ultimate chapter 11 plan. *See, e.g.*, *Braniff Airways,* 700 F.2d at 940 ("[t]he debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* ..."); *In re Iridium Operating LLC*, 478 F.3d 452, 466 (2d Cir. 2007) ("The trustee is prohibited from such use, sale or lease if it would amount to a *sub rosa* plan of reorganization." The reason *sub rosa* plans are prohibited is based on a fear that a debtor-in-possession will enter into transactions that will, in effect, "short circuit the requirements of [C]hapter 11 for confirmation of a reorganization plan.").

29. Specifically, Articles 6.3 through 6.5 of the Settlement Agreement provide, in pertinent part, that "***any FES Plan*** will provide . . . [that] each holder of a Claim against the Debtors will be deemed to forever release, waive and discharge the FE Non-Debtor Released Parties of and from all claims and Causes of Action . . .", Settlement Agreement, section 6.3, "[the Plan Releases] ***shall be supported by an injunction in the Confirmation Orders*** . . .", Settlement

Agreement, section 6.4, and that "the Debtors . . . agree to . . . include the FE Non-Debtor Released Parties and the [Plan Releases] in the FES Plans and any Confirmation Orders", Settlement Agreement, section 6.5. Moreover, section 10.2(c) of the Settlement Agreement requires, as a condition precedent to the Effective Date of any plan of reorganization, that such plan contain the Plan Releases, including the Third Party Releases.

30. Additionally, section 6.4 of the Settlement Agreement provides that "[t]he releases set forth in Section 6.1 . . . shall be supported by an injunction in the ***Settlement Approval Order*** and any Confirmation Orders barring the Debtors ***and all entities who have held, hold, or may hold Claims against the Debtors***, from pursuing, commencing, or continuing in any manner any action or other proceeding against the FE Non-Debtor Released Parties on account of, in connection with or with respect to any Claims or Causes of Action that are released pursuant to such Section." Settlement Agreement, section 6.4 (emphasis added). While the proposed Order provides that only the "Settlement Parties" are enjoined from pursuing, commencing, or continuing such actions, the proposed Order also provides that the Settlement Agreement shall control in the event of any inconsistencies between the proposed Order and the Settlement Agreement. *Compare* proposed Order, ¶ 11; *with* proposed Order, ¶ 9. Accordingly, the proposed Order can be interpreted to enjoin the Debtors' creditors ***today*** from prosecuting claims the FE Non-Debtor Parties, regardless of whether the seven *Dow* requirements are satisfied, and permanently so, since neither the proposed Order nor the Settlement Agreement establish any temporal restriction on

such an injunction. Such a result would be in direct contravention of the requirements the Sixth Circuit outlined in *Dow*.[13]

31. Thus, nothing in the proposed Order provides clarification that the Third Party Releases are not being approved in full at this time. Indeed, as discussed above, the proposed Order cannot, as the proposed Order provides at paragraph 9 that in the event of a discrepancy between the Settlement Agreement and the Order, the Settlement Agreement—not the Order—controls. Accordingly, the Order must be amended to make clear that: (i) the Debtors are merely agreeing in the Settlement Agreement to seek to include the Third Party Releases in future plan; (ii) the Third Party Releases are not being approved now; (iii) and all parties' rights to contest those Third Party Releases, as well as the Court's ability to independently review and approve such Third Party Releases (without any constraints arising out of approval of the Settlement Agreement), are preserved. OVEC believes that the following paragraph is appropriately added to the Order:

> For the avoidance of doubt, notwithstanding anything to the contrary herein (including, without limitation, paragraph 9 hereof) or in the Settlement Agreement, (i) the Debtors are merely seeking to agree to seek approval of a plan of reorganization containing releases by holders of Claims against the Debtors at a future date; (ii) entry of this Order does not constitute approval of or a finding with respect to the propriety of any releases by holders of claims against the Debtors of claims or causes of action against (a) the Debtors; (b) the FE Non-Debtor Released Parties, or (c) any other parties, or an injunction with respect to the ability of such holders to assert any such claims or causes of action, and (iii) all parties' rights to

[13] Again, the Debtors have purported they are not seeking such a result, but if they were, such an injunction would constitute an improper and prospectively broad preliminary injunction against thousands of creditors that is not supported by facts or law, without proper notice and due process, that would need to be commenced in an adversary proceeding. Rule 7001(7) of the Federal Rules of Bankruptcy Procedure provides, in relevant part, that "a proceeding to obtain an injunction or other equitable relief" is an adversary proceeding. *See Lyons v. Lyons (In re Lyons)*, 995 F.2d 923, 924 (9th Cir. 1993) (holding that, when a Rule 7001 category was at issue, the movant "may obtain the authority he seeks ***only*** through an adversary proceeding") (emphasis added); *see also* In re Commercial W. Fin. Corp., 761 F.2d at 1337 (stating that if a party wants the benefits of the Bankruptcy Code, it "must carry the burden of following the mandated procedures"). Indeed, when the Debtors sought to enjoin the FERC Proceeding, they filed an adversary proceeding to obtain such injunction. *FirstEnergy Solutions Corp., et al. v. Federal Energy Regulatory Commission*, Case No. 18-50757 (AMK), Docket No. 4 (Bankr. N.D. Ohio 2018).

contest any such releases and injunctions (without any constraints arising out of approval of the Settlement Agreement), and the Court's ability to independently review and approve such releases and injunction, are fully preserved.

D. The Settlement Agreement Inappropriately Attempts to Grant the FE Non-Debtor Parties Superpriority Administrative Expense Status.

32. The Settlement Agreement provides that the Debtors' failure to obtain entry of a Settlement Approval Order by September 28, 2018, the occurrence of a Condition Failure Scenario (including the Debtors' failure to obtain the Third Party Releases), or the occurrence of an Adverse Ruling[14] shall trigger the FE Non-Debtor Parties' right to terminate the Settlement Agreement and be reimbursed on a superpriority administrative expense basis (pursuant to section 507(b) of the Bankruptcy Code), pari passu to all other superpriority claims, for the actual costs of goods and services provided to the Debtors under the Settlement Agreement. Settlement Motion, ¶ 91. There is no estimate of what those goods and services may be, or their costs.

33. Section 507(b) of the Bankruptcy Code provides a mechanism to grant a secured creditor a superpriority claim ahead of all other unsecured claims (including all administrative expenses) if the adequate protection granted to safeguard a secured creditor's collateral proves to be inadequate. *See In re Barrett*, 149 B.R. 494, 499 (Bankr. N.D. Ohio 1993) ("[Section 507(b)] provides a statutory link between administrative expense claims and adequate protection claims."); *see also In re Mary Holder Agency, Inc.*, No. 11-34280 MBK, 2012 WL 4434362, at *1 (Bankr. D.N.J. Sept. 24, 2012) ("The super-priority of § 507(b) is intended to compensate the secured claimant for the difference between the adequate protection provided by the debtor and any actual

[14] Pursuant to the Settlement Motion, "'Adverse Ruling' means an order or ruling of the Court which (i) denies, or has the effect of denying, approval of the Plan Releases set forth in section 6.3 of the Settlement Agreement or (ii) renders it unlikely, in the reasonable judgment of the FE Non-Debtor Parties or the Debtors (in consultation with Committee and the Supporting Creditors), that the Plan Releases set forth in Section 6.3 of the Settlement Agreement will be approved by the Court." [Settlement Motion, n. 19].

decrease in the value of the collateral occurring during the pendency of the bankruptcy action."); 4 Collier on Bankruptcy P 507.14 (16th 2018) ("The priority claim granted by section 507(b) is often referred to as the 'superpriority.' More simply, this priority claim is for the loss or shortfall not covered by adequate protection.").

34. Section 507(b) of the Bankruptcy Code simply does not authorize the prospective grant of a superpriority administrative expense claim to the FE Non-Debtor Parties. There is no assertion that the FE Non-Debtor Parties are secured creditors of the Debtors' estates ***with respect to the provision of goods and services for which they seek a superpriority administrative claim***, and the Debtors have not put forth any record to justify that the FE Non-Debtor Parties are not adequately protected with "simple" administrative priority treatment (to the extent that they can satisfy section 503(b)) but instead require a superpriority administrative expense claim. The Debtors' only justification for agreeing to a superpriority administrative expense claim is that FirstEnergy Corporation should not have to "fund" the Debtors' operations during the case; but the same can be said for other administrative creditors, including OVEC. Consequently, the FE Non-Debtor Parties should not be granted a right to assert a superpriority administrative expense claim pursuant to section 507(b) of the Bankruptcy Code.

[Remainder of this page left blank intentionally]

Dated: September 17, 2018

/s/ Michael P. Esser

Marc Kieselstein, P.C. (admitted *pro hac vice*)
David R. Seligman, P.C. (admitted *pro hac vice*)
KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
300 North LaSalle
Chicago, IL 60654
Telephone: (312) 862-2000
Facsimile: (312) 862-2200
Email: marc.kieselstein@kirkland.com
david.seligman@kirkland.com

Mark McKane, P.C. (admitted *pro hac vice*)
Michael P. Esser (admitted *pro hac vice*)
Kevin K. Chang (admitted *pro hac vice*)
KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
555 California Street
San Francisco, California 94104
Telephone: (415) 439-1400
Facsimile: (415) 439-1500
Email: mark.mckane@kirkland.com
michael.esser@kirkland.com
kevin.chang@kirkland.com

Matthew Fagen (admitted *pro hac vice*)
KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900
Email: matthew.fagen@kirkland.com

Counsel to Ohio Valley Electric Corporation