

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The)	
Ohio Power Company for Authority to)	Case No. 13-2385-EL-SSO
Establish a Standard Service Offer)	
Pursuant to § 4928.143, Revised Code, in)	
the Form of an Electric Security Plan)	

In the Matter of the Application of Ohio)	
Power Company for Approval of Certain)	Case No. 13-2386-EL-AAM
Accounting Authority)	

**FIRSTENERGY SOLUTIONS CORP. MEMORANDUM CONTRA APPLICATIONS
FOR REHEARING**

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I. Introduction

The Commission's February 25, 2015 Opinion and Order (the "Order") authorized AEP Ohio to establish a placeholder PPA Rider, at an initial rate of zero, for the term of the ESP.¹ The Commission found that AEP Ohio had not carried its burden of demonstrating that the PPA Rider supported by AEP Ohio's OVEC interest would provide a significant financial hedge that would help stabilize rates.² However, the Commission also recognized that AEP Ohio has a separate proceeding pending – Case No. 14-1693-EL-RDR (the "PPA Proceeding") – in which AEP Ohio will have the opportunity to demonstrate that the PPA Rider will benefit AEP Ohio's retail customers. Thus, the PPA Rider was approved as a placeholder rider contingent on a future showing by AEP Ohio that the PPA Rider will promote rate stability.

Multiple intervenors³ have sought rehearing of this portion of the Order on the grounds that the Commission lacks authority to approve the PPA Rider, even as a placeholder. FirstEnergy Solutions Corp. ("FES") believes that these intervenors misconstrue the applicable law and are simply confused by what the Commission did, and more importantly did not do, in the Order. The Commission correctly determined that under the proper circumstances an electric distribution utility may include a stability rider in its electric security plan ("ESP") that functions as a hedge against volatile and increasing retail market prices. The law is clear on this point. Additionally, based on its reading of the record before it⁴ and on the fact that the PPA

¹ Order, p. 25.

² *Id.*

³ The intervenors contesting this portion of the Order are the Ohio Hospital Association ("OHA"); Ohio Partners for Affordable Energy and Appalachian Peace and Justice Network ("OPAE"); Industrial Energy Users-Ohio ("IEU-Ohio"); Interstate Gas Supply, Inc. ("IGS"); the Ohio Manufacturers' Association Energy Group ("OMAEG"); Constellation NewEnergy, Inc. and Exelon Generation, LLC ("Exelon"); the Office of the Ohio Consumers' Counsel ("OCC"); Environmental Law and Policy Center, Ohio Environmental Council and Environmental Defense Fund ("ELPC"); and the Retail Energy Supply Association ("RESA").

⁴ AEP Ohio has sought rehearing of the Commission's finding that the record fails to show the PPA Rider, as initially proposed, would promote rate stability. FES takes no position on AEP Ohio's application for rehearing.

Proceeding is pending, the Commission did not err by deciding to approve the PPA Rider as a placeholder only, contingent on the results of the PPA Proceeding. The Commission should deny the applications for rehearing of the intervenors contesting the Commission's approval of the PPA Rider.

In addition to the arguments raised related to state law issues, several intervenors took the misguided position that the Commission must find that the PPA Rider is preempted under the Federal Power Act ("FPA").⁵ In response to these Applications for Rehearing, the Commission may continue to refrain from making any determination on federal preemption, however the Commission may not determine that the PPA Rider is preempted by the Federal Energy Regulatory Commission's ("FERC") authority pursuant to the FPA.

II. The Commission Did Not Err In Finding That A PPA Rider, Properly Conceived, May Be Included In An ESP.

A retail stability rider that is designed to work counter to increasing retail generation pricing is a legally authorized component of an ESP. AEP Ohio is required to "provide consumers . . . a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service."⁶ AEP Ohio may comply with this requirement through a Commission-approved ESP containing provisions relating to the supply and pricing of electric generation service.⁷ Any such ESP may include nine categories of provisions, in addition to the SSO authorized by R.C.

⁵ These parties include the Office of Ohio Consumers' Counsel ("OCC"), the Retail Energy Supply Association ("RESA"), Ohio Partners for Affordable Energy ("OPAE"), Interstate Gas Supply, Inc. ("IGS") and Industrial Energy Users-Ohio ("IEU").

⁶ R.C. 4928.141(A).

⁷ R.C. 4928.143(A), (B)(1).

4928.143(B)(1).⁸ As long as a provision fits within one of the nine categories, it is authorized by statute.⁹

R.C. 4928.143(B)(2) authorizes retail stability charges like the PPA Rider by providing, in relevant part:

(B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code:

* * *

(2) The plan may provide for or include, without limitation, any of the following:

* * *

(d) Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service;

AEP Ohio must make three showings, and only three showings, under R.C. 4928.143(B)(2)(d) in order to include the PPA Rider in its ESP. First, the proposed rider must be a term, condition or charge. Second, it must relate to one of the following: (i) limitations on customer shopping for retail electric generation service; (ii) bypassability; (iii) standby, back-up, or supplemental power service; (iv) default service; or (v) carrying costs, amortization periods, and accounting or deferrals. Third, it must have the effect of stabilizing or providing certainty regarding retail electric service.

⁸ See R.C. 4928.143(B)(2)(a) through (i).

⁹ *In re Application of Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 33.

A. The PPA Rider indisputably is a charge.

The PPA Rider is a “term, condition or charge.” The Staff agrees that the PPA Rider is a “charge” under R.C. 4928.143(B)(2)(d).¹⁰ Intervenors also concede that the PPA Rider is a charge.¹¹ The Commission did not err in finding that the PPA Rider is a charge.¹²

B. The PPA Rider satisfies the second criterion in R.C. 4928.143(B)(2)(d).

The legislative motivation for enacting S.B. 221 makes clear that riders such as the PPA Rider fall within the core intent of R.C. 4928.143(B)(2)(d). The ESP alternative to market-based pricing that was enacted as part of S.B. 221 was prompted by highly volatile and spiking natural gas prices in the mid-2000s. Several of the provisions in R.C. 4928.143(B)(2) were designed to shield retail customers in various ways from the impact of those price spikes on retail generation prices, with one of the options being a stability charge. The PPA Rider is designed to do exactly what the General Assembly intended by helping to shield AEP Ohio’s customers from future spikes in natural gas prices and, correspondingly, in retail electric generation prices.

OHA objects that a “financial limitation” is contrary to competitive market principles, which simply ignores the purpose of electric security plans and the plain language of R.C. 4928.143(B)(2)(d).¹³ The General Assembly authorized ESPs as an alternative to market-rate offers, with the intent that ESPs would be more stable, and thereby more favorable to retail customers, than an MRO. ESPs necessarily will include what intervenors derisively refer to as “subsidies” when they oppose them but promote as “incentives” when they support them. In an ESP, incentives that promote stability and reliability are favored. By enacting R.C. 4928.143(B)(2) in 2008, the General Assembly authorized EDUs, working with the Commission,

¹⁰ Reply Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio, p. 4 (Aug. 15, 2014).

¹¹ OHA AFR, p. 3; IGS AFR, p. 10; OCC AFR, p. 19.

¹² Order, p. 20.

¹³ See OHA AFR, p. 6.

to provide stability to their retail customers even if that stability may have secondary impacts on competitive markets.

Arguments that generation costs can be recovered only through division (B)(2)(b) or (B)(2)(c) of R.C. 4928.143¹⁴ also ignore the plain language of the statute as well as Ohio Supreme Court precedent, not to mention misconstrue what the PPA Rider is. The PPA Rider is designed to provide stability and certainty to retail customers. The statute “limits *the type* of categories a plan may include, while the phrase ‘without limitation’ allows *as many or as much* of the listed categories as the commission finds reasonable.”¹⁵ Thus, an ESP may include one or more provisions involving automatic cost recovery, construction work-in-progress for a new generating plant, cost recovery for a new generating plant, stability charges, job retention programs, etc.¹⁶ Simply because one such provision may enhance stability for retail customers does not mean that other options are foreclosed. Each clause of R.C. 4928.143(B)(2)(d) provides a separate opportunity to make an ESP more favorable than an MRO. If an EDU wants to include a stability charge (or term or condition) in an ESP, the EDU need satisfy only the criteria in R.C. 4928.143(B)(2)(d). And that is what AEP Ohio has done here.

1. The PPA Rider relates to default service.

Because the PPA Rider operates as a hedge to reduce the impact on SSO customers of increasing SSO pricing, it relates to default service. In a similar vein, the Commission found in the AEP ESP2 proceeding that AEP Ohio’s stability charge related to default service because it

¹⁴ OPAE AFR, p. 9; IEU-Ohio AFR, p. 14.

¹⁵ *Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 33 (emphasis in original).

¹⁶ The Commission’s ESP rule recognizes that a (B)(2)(d) charge could exist separate and apart from charges under (B)(2)(b) and (B)(2)(c). See O.A.C. 4901:1-35-03(C)(9)(c)(ii).

allowed SSO customers to have rate stability that would not have occurred absent the stability charge.¹⁷

The Commission further explained in its appellate brief addressing the AEP ESP2 Order that “default service” is not limited strictly to provider-of-last-resort service but generally includes the SSO: “A standard service offer is a default service that must be offered to current and future non-shopping customers during the entire ESP term.”¹⁸ Thus, a term, condition or charge that relates to the SSO available to current and future non-shopping customers satisfies the second condition.

The PPA Rider relates to the SSO proposed by AEP Ohio because it is designed specifically to mitigate the long-term risk of wholesale market price increases that will be incorporated directly into the SSO, via future competitive procurements. Thus, the PPA Rider relates to service offered to both current and future non-shopping customers.

C. The PPA Rider is designed to have the effect of stabilizing or providing certainty regarding retail electric service.

The Commission correctly found that the PPA Rider is designed to have the effect of stabilizing or providing certainty regarding retail electric service, thereby satisfying the third criterion of R.C. 4928.143(B)(2)(d).¹⁹ As the Commission explained, the PPA Rider is designed to stabilize retail electric service by “smoothing out the market based rates paid by shopping customers to their CRES providers, as well as the market based rates paid by SSO customers.”²⁰ The Commission previously found in the AEP ESP2 proceeding that mitigation of SSO price increases satisfies the statutory requirement that a provision have the effect of stabilizing retail

¹⁷ Case No. 11-346-EL-SSO, *et al.*, Entry on Rehearing, p. 15 (Jan. 30, 2013).

¹⁸ Second Merit Brief Submitted on Behalf of Appellee, the Public Utilities Commission of Ohio, Ohio Supreme Court Case No. 2013-521, p. 19 (Oct. 21, 2013).

¹⁹ Order, p. 21.

²⁰ Order, p. 21.

electric service.²¹ The Ohio Supreme Court also has held that an AEP Ohio's "ability to provide generation power at a cost that was below the market rate for purchased power at that time" satisfies the third condition.²² Similarly, the purpose of the PPA Rider is to provide pricing stability to AEP Ohio's retail customers, including below-market generation when the PPA Rider is a credit.

Importantly, while the Commission determined that the PPA Rider, properly configured, could provide pricing stability, it was not convinced that the PPA Rider *as presently configured* would provide pricing stability.²³ Thus, intervenors miss the mark by prematurely arguing that AEP Ohio lacked evidence to prove the PPA Rider will provide price stability.²⁴ And OCC incorrectly argues that retail customers have been "severely prejudiced" by the Commission's approval of the PPA Rider in this proceeding.²⁵ The PPA Rider is merely a placeholder today with no impact on any customer and certainly no resulting prejudice to any customer. AEP Ohio must demonstrate in the PPA Proceeding that the mix of generation resources proposed in that proceeding will produce a PPA Rider that "would have the effect of stabilizing or providing certainty regarding retail electric service."²⁶ Intervenors are free to argue in the PPA Proceeding that the PPA Rider will not result in a net benefit for retail customers.²⁷

²¹ Case No. 11-346-EL-SSO, *et al.*, Opinion and Order, p. 31 (Aug. 8, 2012).

²² *In re Columbus Southern Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863, ¶ 32.

²³ Order, pp. 21, 24-25.

²⁴ See OHA AFR, p. 4; IEU-Ohio AFR, p. 25; OCC AFR, p. 29-32; OMAEG AFR, pp. 11-12.

²⁵ OCC AFR, p. 29.

²⁶ R.C. 4928.143(B)(2)(d).

²⁷ A Commission finding in the PPA Proceeding that the PPA Rider will result in a net benefit to retail customers also eliminates the concern that deferral of this issue puts into question the Commission's ESP vs. MRO test under R.C. 4928.143(C)(1). See IEU-Ohio AFR, p. 28. Such a Commission finding, and approval of the PPA Rider, would result in AEP Ohio's ESP being more favorable than it currently is.

OCC, OP&E and IEU-Ohio, among others, challenge the theory that a properly structured PPA Rider will generate stability benefits for customers.²⁸ One variation of this argument is that the staggering and laddering in SSO auctions provides sufficient stability.²⁹ Of course, the Commission has a plentiful record on this point to decide that the PPA Rider could supplement the benefits derived from staggering and laddering.³⁰ Simply because staggering and laddering is beneficial does not mean that the PPA Rider should be rejected. Another variation on this argument is that shopping customers can eliminate market risk by entering into fixed-price contracts with CRES providers.³¹ As OCC recognizes, however, the market is not offering contracts longer than thirty-six months, which means that even contract customers will be exposed to market risk each time they switch contracts or return to SSO service. A properly-structured PPA Rider will provide enhanced price stability to all customers, including those with short-term contracts and those taking SSO service.

III. The Commission Did Not Err In Finding That The PPA Rider Does Not Violate R.C. 4928.02(H).

Several intervenors claim that approval of the PPA Rider violates R.C. 4928.02(H).³² This provision is an expression of the state's policy to "[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of

²⁸ OCC AFR, pp. 32-34; OP&E AFR, pp. 12-14; IEU-Ohio AFR, p. 25.

²⁹ *See, e.g.*, OP&E AFR, pp. 12-13.

³⁰ Order, p. 25. *See generally* Rebuttal Testimony of Karl A. McDermott Ph.D. and Rebuttal Testimony of William A. Allen filed June 20, 2014.

³¹ *See, e.g.*, OCC AFR, p. 34; OP&E AFR, p. 14.

³² OHA AFR, p. 7; IGS AFR, pp. 12-14; OCC AFR, pp. 35-39; IEU AFR, pp. 30-33; Exelon AFR, pp. 14-15; ELPC AFR, pp. 2-6; RESA AFR, pp. 12-13.

any generation-related costs through distribution or transmission rates.”³³ The PPA Rider does not violate R.C. 4928.02(H) for at least three reasons.

First, the PPA Rider is authorized by R.C. 4928.143(B)(2)(d). As long as a provision fits within one of the nine categories, it is authorized by statute.³⁴ Intervenors ignore that R.C. 4928.143(B)(2)(d) also expresses the policy of the state to support stability and certainty in the provision of retail electric service. As explained by the Ohio Supreme Court, R.C. 4928.143(B)(2) “allows unlimited inclusion of listed items.”³⁵ Any of these nine items may be included in an Electric Security Plan “[n]otwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code.”³⁶ Thus, the Commission may approve the PPA Rider as a component of AEP Ohio’s ESP under R.C. 4928.143(B)(2) notwithstanding any alleged conflict with R.C. 4928.02.

Second, and related to the first, the policies in R.C. 4928.02 are guidelines, not requirements. As the Ohio Supreme Court stated in *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 525, 2011-Ohio-1788, ¶ 62, the policies in R.C. 4928.02 do not require the Commission to do anything:

[S]uch policy statements are “guideline[s] for the commission to weigh” in evaluating utility proposals to further state policy goals, and it has been “left . . . to the commission to determine how best to carry [them] out.” *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 2010 Ohio 134, 926 N.E.2d 261, ¶39-40.

³³ R.C. 4928.02(H).

³⁴ *Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 33.

³⁵ *Id.*

³⁶ R.C. 4928.143(B)(2).

Even if the PPA Rider conflicted with R.C. 4928.02(H) (which it does not), the Commission has authority to approve the PPA Rider provided it satisfies R.C. 4928.143(B)(2)(d).

Third, R.C. 4928.02(H) does not conflict with the PPA Rider. The focus of R.C. 4928.02(H) is on anticompetitive subsidies flowing in either direction between noncompetitive and competitive retail electric services or products. As an example, the Commission should avoid an EDU transferring its distribution revenues to an unregulated affiliate in a manner that provides an anticompetitive subsidy to the affiliate's provision of competitive retail electric service. The PPA Rider does not generate any distribution revenues – i.e., revenues from distribution services or products – and is not a charge for distribution service. And any revenues the rider does generate are not being used to subsidize retail electric generation service. Instead, AEP Ohio is offering a stability rider to all of its distribution customers, both shopping and non-shopping, that provides them insurance against long-term price increases and volatility. This is not an anti-competitive subsidy to AEP Ohio's generation, but a benefit to the Companies' customers. Thus, R.C. 4928.02(H) is not a bar to approval of the PPA Rider.

IV. The PPA Rider Does Not Violate R.C. 4928.38 and 4928.39.

The PPA Rider does not recover transition costs as alleged by intervenors.³⁷ Each EDU had an opportunity, pursuant to a transition plan approved under R.C. 4928.33, to recover transition costs through transition revenues beginning on the starting date of competitive retail electric service in 2001.³⁸ These costs could only be determined by the Commission upon the filing by an EDU of an application under R.C. 4928.31.³⁹ AEP Ohio is not attempting to recover pre-2001 generation costs through the PPA Rider and is not asking the Commission to return to

³⁷ OHA AFR, p. 7; OPAE AFR, p. 16; IEU AFR, pp. 33-37; OCC AFR, pp. 39-41.

³⁸ R.C. 4928.38.

³⁹ R.C. 4928.39.

the year 2000 and award it transition revenues. Instead, AEP Ohio is attempting to provide retail price stability to its customers. Thus, the PPA Rider does not violate R.C. 4928.38 or 4928.39.

V. The PPA Rider Does Not Violate R.C. 4928.17.

Several intervenors suggest that the PPA Rider could violate the corporate separation provisions in R.C. 4928.17, but fail to convincingly explain how this might be the case.⁴⁰ RESA posits the most entertaining theory: the PPA Rider violates R.C. 4928.17 because the Commission lacks legal authority to review the terms of the power purchase agreement underlying the PPA Rider.⁴¹ Of course, FERC-jurisdictional power purchase agreements have existed concurrently with R.C. 4928.17 since it was enacted in 1999 without anyone complaining that they violate state corporate separation provisions. Indeed when FES entered into a FERC-jurisdictional power purchase agreement with the FirstEnergy Ohio EDUs to support their rate stability plan (and, later, their rate certainty plan) in 2006-2008, there was no doubt that R.C. 4928.17 was inapplicable.

The obvious answer to these misinformed claims is that the Commission must determine whether the proposed stability charge will result in a net benefit to AEP Ohio's retail customers. If such a determination is made, any financial net benefit would be funded out of the wholesale revenues of the generation that flows into the PPA Rider calculation.

VI. The PPA Rider Is Neither a Wholesale Generation-Related Service Nor A Competitive Retail Electric Service.

IEU-Ohio correctly states that the Commission's jurisdiction "does not extend to wholesale generation-related electric services,"⁴² but then makes the mystifying leap to arguing that the Commission cannot approve a retail rider expressly authorized by R.C.

⁴⁰ IGS AFR, pp. 14-15; Exelon AFR, pp. 13-14; ELPC AFR, pp. 16-18; RESA AFR, pp. 10-12.

⁴¹ RESA AFR, pp. 10-12.

⁴² IEU-Ohio AFR, p. 16.

4928.143(B)(2)(d). IEU-Ohio apparently believes that the PPA Rider is “AEP-Ohio’s compensation for wholesale generation-related electric services.”⁴³ Yet it lacks any facts or logic to support this belief. To the contrary, the PPA Rider is a retail rate stabilization mechanism, and charges may be authorized under that mechanism if those charges “would have the effect of stabilizing or providing certainty regarding retail electric service.” If PPA Rider charges will have this effect (which will be determined in the PPA Proceeding), then any revenues received by AEP Ohio are compensation for the stability insurance provided to retail customers, not for wholesale generation-related services. Likewise, any credits received by retail customers from the PPA Rider will not be compensation for wholesale generation-related electric services. IEU-Ohio’s argument should be rejected.

Similarly, the Commission easily can dispatch RESA’s argument that the PPA Rider involves a competitive service that cannot be provided by AEP Ohio as an EDU.⁴⁴ RESA believes that retail customers are being asked to “pay for the costs of competitive retail electric service that is not provided to them.”⁴⁵ Again, RESA lacks any facts or logic to support this belief. RESA’s statement is partly correct in that AEP Ohio is not providing a competitive retail electric service through the PPA Rider. Additionally, no retail customer is being asked to pay for a competitive retail electric service. Rate stabilization under R.C. 4928.143(B)(2)(d) is not a competitive retail electric service. Insurance is being provided, with the expectation that the benefits of the insurance policy will exceed the premiums paid. RESA’s argument to the contrary should be rejected.

⁴³ *Id.*

⁴⁴ RESA AFR, p. 9.

⁴⁵ *Id.*, p. 10.

VII. The Commission Should Reject Suggested Additions To Its Factors For Authorizing Cost Recovery.

Several intervenors are displeased with the factors the Commission set out in the Order “which the Commission will balance, but not be bound by, in deciding whether to approve [AEP Ohio’s] request for cost recovery.”⁴⁶ For example, intervenors who hope to redirect the Commission’s focus from an Ohio-jurisdictional retail stability charge to PJM wholesale market impacts ask that the Commission also consider PJM wholesale market impacts.⁴⁷ Another intervenor intent on pigeon-holing the PPA Rider as solely a transmission reliability measure asks that the Commission review the PPA Rider as the equivalent of a reliability must-run (“RMR”) agreement under PJM rules.⁴⁸ The Commission should reject intervenors’ requests to expand the scope of the Commission’s review beyond that required by R.C. 4928.143.

AEP Ohio has successfully demonstrated in the PPA Proceeding that the PPA Rider will provide a hedge that stabilizes rates. As such, the hedge is an independent value to customers that satisfies all statutory criteria under R.C. 4928.143(B)(2)(d) for inclusion of the PPA Rider in AEP Ohio’s ESP. Although a cost-based power purchase agreement underlies the PPA Rider, the Commission is not approving, and cannot approve that agreement. Instead, the Commission is authorizing a stability rider based on the net benefits expected to accrue to retail customers.

This does not mean that the Commission’s review of the PPA Rider must ignore the economic drivers of the costs and revenues that combine to create the annual PPA Rider charge. As the Commission noted in its Order, “there is no question that the PPA rider would produce a credit or charge based on the difference between wholesale market prices and OVEC’s costs.”⁴⁹

⁴⁶ Order, p. 25.

⁴⁷ OMAEG AFR, pp. 12-13; Exelon AFR, pp. 9-10; OCC AFR, pp. 43-44.

⁴⁸ Exelon AFR, pp. 12-13.

⁴⁹ Order, p. 21.

However, a PPA Rider that will provide rate stability does not also have to be shown to provide system reliability or additional economic benefits. As long as a PPA Rider “would have the effect of stabilizing or providing certainty regarding retail electric service” in some form, AEP Ohio may include it in its ESP.

The Commission did properly recognize in its Order the benefits other than rate stability that could support approval of a PPA Rider. In addition to rate stability, such benefits could include system stability benefits and economic development and job retention benefits for Ohio. Whether a generating plant has a financial need, and whether Ohio has a need for that plant to support system reliability and resource diversity, can be additional or independent bases for approving a stability charge. The Commission’s request to AEP Ohio to address factors that are not directly related to rate stability should be understood in this context.

With this understanding in hand, the intervenors’ requests to expand the Commission’s review of AEP Ohio’s proposal can be dismissed easily. Criticism that the Commission’s factors are vague⁵⁰ lack merit because the Commission’s review is limited by the R.C. 4928.143(B)(2)(d) criteria or, if applicable, by the R.C. 4928.143(B)(2)(i) criteria for economic development and job retention programs. Requests to include impacts on wholesale markets⁵¹ lack merit because the Commission’s sole focus under R.C. 4928.143(B)(2)(d) is the stability and certainty of retail electric service. Limiting the reliability review to a PJM-centric focus and RMR agreements⁵² lacks merit because it ignores Ohio’s need to maintain resource diversity. Requiring competitive procurement of the resources supporting the PPA Rider⁵³ lacks merit

⁵⁰ IEU-Ohio AFR, pp. 50-52; Exelon AFR, pp. 7-8.

⁵¹ OMAEG AFR, pp. 12-13; Exelon AFR, pp. 9-10; OCC AFR, pp. 43-44.

⁵² Exelon AFR, pp. 12-13.

⁵³ ELPC AFR, pp. 11-15.

because the Commission is legally obligated by R.C. 4928.143(C)(1) to consider the merits of AEP Ohio's ESP as compared to the expected results of an MRO, not to some other theoretically "better" ESP. All such recommendations fall outside of the Commission's statutory review process.

In contrast, ELPC suggests that the proponent of a stability charge should provide evidence supporting the basis for the rider.⁵⁴ OCC recommends that AEP Ohio should show the value of the hedge to customers for the term of the underlying power purchase agreement.⁵⁵ Exelon also posits that incenting the continued operation of low-carbon-emitting generation could provide a value to Ohio consumers that outweighs the cost of a stability charge.⁵⁶ These considerations, of course, are already part and parcel of the Commission's consideration of whether AEP Ohio's PPA Rider will result in a net benefit to retail customers. They are not a basis for rehearing.

VIII. The Commission Should Reject the Incorrect Preemption Arguments.

The parties pursuing preemption arguments on rehearing argue that AEP's PPA Rider raises the same issues that led the Third and Fourth Circuit Courts of Appeals to find that the New Jersey and Maryland plans at issue in those cases were preempted by FERC's exclusive jurisdiction under the FPA.⁵⁷ In particular, these parties argue that the PPA Rider is preempted because FERC has exclusive jurisdiction over the setting of wholesale capacity and energy prices, and the PPA Rider interferes with this authority by setting wholesale prices.⁵⁸ However,

⁵⁴ ELPC AFR, p. 10.

⁵⁵ OCC AFR, pp. 43-44.

⁵⁶ Exelon AFR, pp. 11-12.

⁵⁷ *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014), *petition for cert. filed* (U.S. Nov. 26, 2014) (No. 14-634) ("*Solomon*"); *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014), *petitions for cert. filed* (U.S. Nov. 24, 2014) (No. 14-623) (U.S. Nov. 25, 2014) (No. 14-614) ("*Nazarian*").

⁵⁸ OCC AFR, p. 15; RESA AFR, pp. 13-14; OPAC AFR, p. 19; IGS AFR, pp. 5, 9; IEU AFR, p. 41.

the PPA Rider does not set wholesale rates, and the *Solomon* and *Nazarian* cases involve state programs that are fundamentally different from the PPA Rider.

Federal courts do not make determinations that state actions are preempted by federal law lightly. The Third Circuit has held that “[o]nly a clear and manifest conflict with federal law, or clear and manifest Congressional intent to override state choices, will overcome the presumption against preemption.”⁵⁹ The question presented in the applications for rehearing is whether the PPA Rider interferes with FERC’s exclusive jurisdiction over wholesale rates. The relevant authority is in Section 205 of the FPA, which grants to FERC the authority to review all rates and charges for the sale of electric energy by a wholesale seller to ensure that such rates and charges are just and reasonable and not unduly discriminatory or preferential.⁶⁰ Accordingly, FERC’s exclusive jurisdiction focuses on the “sale” of a wholesale power transaction. If a state program does not set rates for the “sale” of wholesale power, then there would be no interference with Section 205 of the FPA.

There is no disagreement that the New Jersey and Maryland programs at issue in *Solomon* and *Nazarian* each required public utilities in those states to enter into 15-20 year contracts with selected generators that required the utilities to pay a fixed price to the generator for capacity.⁶¹ Both the Third and Fourth Circuits determined that the New Jersey and Maryland programs at issue in those cases awarded generators the right to sell a specified amount of capacity to designated utility purchasers at pre-determined prices. Furthermore, the New Jersey and Maryland programs conditioned the award to the generator on the requirement that the

⁵⁹ *Farina v. Nokia Inc.*, 625 F.3d 97, 116 (3d Cir. 2010). The presumption against preemption does not apply where state regulation has traditionally been absent. *Id.* However, AEP requested that the Commission approve a rider relating to cost recovery, which is no different than what the Commission does on a routine basis when evaluating whether to allow recovery of a utility’s costs.

⁶⁰ 16 U.S.C. § 824d(a) (2012).

⁶¹ *Solomon*, 766 F.3d 241, 245; *Nazarian*, 753 F.3d 467, 473; OCC AFR, p. 7; RESA AFR, p. 13; IEU AFR, p. 39.

generator bid and clear in the PJM capacity auction.⁶² As a result, the Third and Fourth Circuits found that these programs set the prices for the sale of wholesale capacity, and determined that these programs were preempted by FERC's exclusive jurisdiction over wholesale prices.

However, AEP's PPA Rider is very different from the New Jersey and Maryland programs. The PPA Rider does not award a generator the right to sell a specified amount of capacity or energy at a designated price and does not require a utility to pay a designated price for a specified amount of capacity or energy. In fact, the PPA Rider does not impose *any* obligations on the sale of wholesale capacity or energy. Instead, the PPA Rider simply allows AEP the ability to seek to recover the costs of the PPA Rider. Utility cost recovery is and has always been squarely within the Commission's authority. Additionally, unlike in *Solomon* and *Nazarian*, the PPA Rider does not require any entity to bid into or clear (or take any other actions) with respect to the PJM capacity auction. In short, the PPA Rider does not set wholesale prices and is not preempted by the FPA.⁶³

While certain parties claim that the Commission has no jurisdiction over reliability,⁶⁴ the Commission, courts and FERC have repeatedly found otherwise. The Commission regularly makes reliability determinations. In fact, states retain significant discretion to make determinations regarding generation sufficiency and reliability. The Third Circuit has ruled that states are free to determine how to satisfy their electricity needs.⁶⁵ FERC has explained that

⁶² See OCC AFR, p. 7 (the "generator was obligated to bid the capacity into the PJM capacity auctions so that the resource cleared the auction").

⁶³ While OCC argues that "[i]t is not the PPA wholesale price that runs afoul of the FPA," (at 9), OCC also cites *Solomon* at 253 for the proposition that: "what matters is not the reasonableness of the price, but the fact that the state program set the price in the first place." OCC AFR, p. 16.

⁶⁴ See, e.g., IEU AFR, p. 43.

⁶⁵ *New Jersey Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3rd Cir. 2014).

states have authority over the administration of utility buy-side decisions, including authority to impose non-bypassable charges.⁶⁶

The parties requesting rehearing also argue that, even if the PPA Rider does not set rates, the PPA Rider is preempted because of the alleged impacts it may have on market prices.⁶⁷

However, the Third and Fourth Circuits explained that incidental effects on electricity prices or markets are insufficient to find preemption. *Solomon* and *Nazarian* held that states may take numerous actions that might indirectly impact the wholesale markets without being subject to preemption, including providing a *direct subsidy* to a generation owner without being preempted.⁶⁸ The Fourth Circuit stated that “it goes without saying that not every state statute that has some indirect effect on wholesale rates is preempted.”⁶⁹ Simply because a program impacts the availability of supply, the demand for electric energy or capacity, or the price of either is not sufficient to satisfy the test for preemption. The Third Circuit stated that the “law of supply-and-demand is not the law of preemption.”⁷⁰

Accordingly, unlike the facts involved in *Solomon* and *Nazarian*, the PPA Rider does not set wholesale rates. While the Commission may continue to refrain from making any

⁶⁶ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, Order No. 888, 75 FERC ¶ 61,080 at n. 544 (1996). IGS asserts that a “PPA Rider, in any form, would require the Commission to regulate the wholesale price of capacity and energy and would undermine [RPM].” IGS AFR, p. 5. However, FERC explicitly rejected such a position in recognizing states’ authority to impose non-bypassable charges in Order No. 888.

⁶⁷ See, e.g., OCC AFR, p. 9 (“the issue is the effect of the retail rate rider programs on the PJM wholesale auction clearing prices”).

⁶⁸ *Solomon*, 766 F.3d 241, n. 4; *Nazarian*, 753 F.3d 467, 478.

⁶⁹ *Nazarian*, 753 F.3d 467, 478 (citing *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988)).

⁷⁰ *Solomon*, 766 F.3d 241, 255.

determination on preemption, the Commission may not determine that the PPA Rider is preempted by FERC's authority pursuant to the FPA.⁷¹

IX. Conclusion

For the foregoing reasons, FES respectfully requests that the Commission deny the intervenors' applications for rehearing of the portion of the Commission's Order authorizing the PPA Rider as a placeholder.

Respectfully submitted,

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⁷¹ The remaining arguments asserted by certain parties regarding preemption do not merit a serious response. For example, OPAE states that "[a]ll wholesale generation must be treated the same in the PJM market." OPAE AFR, p. 18. Such a statement is simply untrue. FERC has approved numerous tariff amendments in PJM that treat generation differently, including the Minimum Offer Price Rule for new generation. Furthermore, many states have developed programs that provide advantages for certain generation (e.g., renewable generation and distributive generation). IGS also argues that "FERC could very well require that any ratepayer subsidy be deducted from the capacity revenues received," in an effort to suggest that future FERC requirements could prevent a resource from clearing a capacity auction. IGS AFR, p. 8. Potential future FERC orders approving PJM Tariff amendments is speculative, irrelevant to this inquiry, and has no bearing on the preemption issues raised in this proceeding.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served this 6th day of April 2015, via e-mail upon the parties below.

/s/ Scott J. Casto

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