BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

JOINT INITIAL BRIEF OF
THE PJM POWER PROVIDERS GROUP
AND
THE ELECTRIC POWER SUPPLY ASSOCIATION

PUBLIC VERSION

February 16, 2016

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I. INTRODUCTION

A. Introductory Statement and Summary of Argument

1. Introductory Statement.

The PJM Power Providers Group ("P3") and the Electric Power Supply Association ("EPSA") urge the Public Utilities Commission of Ohio ("Commission") to reject the Stipulation[1] that modifies the Application by Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively "FE") for an electric security plan effective June 1, 2016 through May 2024. Specifically, the Commission should find that the Retail Rate Stability Rider ("Rider RRS") as proposed would violate state law, place an undue risk on all ratepayers for non-utility competitive assets, harm both the Ohio competitive wholesale and retail markets and destabilize as oppose to stabilize retail electric rates.

Rider RRS is being touted by FE as necessary for retail rate stability. But the history of its beginnings is quite different. The idea for Rider RRS originated from FirstEnergy Solutions Corp. ("FES"), a merchant generator and competitive retail electric service ("CRES") provider, with a weak balance sheet[2] looking for "certainty in return for [its] plants."[3] FES approached FE and asked if FE would buy the output of all of its generation plants.[4] FE could not take all of the output because its customer load was much smaller. Instead, FES and FE settled on the output from the Davis-Besse 908-megawatt ("MW") nuclear plant and the Sammis 2,220 MW coal units, along with FES' 4.85% entitlement to the output from the combined 116 MW Ohio Valley Electric Corporation ("OVEC") coal plants. [5] That is how Rider RRS was conceived.

[1] For ease, the December 22, 2014 Stipulation and Recommendation, as supplemented on May 28, June 4, and December 1, 2015, will be collectively referred to as "the Stipulation."
[2] Transcript ("Tr.") Volume ("Vol.") 32 at 6687.
[3] Tr. Vol. 11 at 2290.
[4] Tr. Vol. 13 at 2745.
[5] Companies Ex. 13 at Attachment SES-1; Companies Ex. 33 at 3; Companies Ex. 23 at 2, Tr. Vol. 1 at 31; Tr. Vol. 2 at 407;OCC Ex. 4 at 5.

Although it divested itself of generation assets long ago,[6] FE has added FES' proposal for a no-bid long-term power purchase agreement (the "Affiliate PPA") at a cost-plus price to its proposed electric security plan ("ESP IV"). Copying AEP Ohio's approach,[7] FE asks this Commission to approve Rider RRS which would implement FES' business initiative to sell all the output of the Sammis and Davis-Besse plants and the OVEC entitlement to FE which in turn would sell the output into the wholesale markets. FE would then net all wholesale revenues (and charges) against payments made to FES under the Affiliate PPA and the resulting charge or credit will be collected through Rider RRS. FE claims that if power prices go up, FE will be able to pass through profits to its ratepayers that, according to FE, would be counter cyclical to a rising retail power market. What is left unsaid is that FES' proposed 8-year long-term hedge to FE (and its ratepayers) has no upside. Instead, it will impose hundreds of millions of dollars of risk and net harm on FE's captive ratepayers in order to provide certainty to FES, the only winner in this business deal.

The record contains no evidence that customers, Staff or the Commission believe that retail rates are unstable. Retail customers can and do buy fixed-rate power contracts, and thus retail customers have stable rates available to them.[8] These evidentiary points and the origins of Rider RRS are significant because the Commission, as a threshold question, must decide if Rider RRS is intended to be a retail rate stability charge or just a clever bailout of FES' underperforming balance sheet.

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[6] *See* Company Ex. 1 at 19-20; *In re Ohio Edison Company, et al*, Case No. 10-388-EL-SSO, Opinion and Order at 46 (August 25, 2010) adopting stipulation recommendation to approve application for corporate separation plan in *In re Ohio Edison Company, et al*, Case No. 09-462-EL-UNC, June 1, 2009 Application at page 3 noting "Companies are now distribution companies owning no generation assets").

[7] *In re Ohio Power Company*, Case Nos. 13-3285-EL-SSO et al., Opinion and Order (February 25, 2015) ("*AEP ESP III*")

[8] Exelon Ex. 1 at 12-13; Tr. Vol. 26 at 5241, 5243, 5244.

If Rider RRS is, as proposed, a bailout for FES, then Rider RRS is simply the means to provide an anticompetitive subsidy fashioned by the utility for its affiliate. Testimony from Dr. Joseph Kalt and the PJM Market Monitor underscore the economic reality that subsidies harm competitive markets, reduce efficiencies and stifle innovation including the development of new generation.[9] Both Dr. Kalt and the PJM Market Monitor find the Rider RRS construct to be a subsidy to FES.[10]

To justify the subsidy, FE relies on forecast data from the middle of 2014 to claim that Rider RRS will produce a net present value at the end of the eight-year ESP IV term. But an examination of those numbers reveals that by FE's own projections, customers will be paying losses through Rider RRS for the first four years of the term, meaning that FE is relying on the last four years of the term to make up those loses. Dr. Kalt and Mr. Wilson, using more up-to-date data, project net present loses for the whole eight-year period.[11]

FE will no doubt argue that if its projections are wrong in the out years, the Stipulation requires FE to provide an annual differential credit starting in year five of the eight-year term. Those credits though cannot be used against the losses in the first four years, and the magnitude of the possible losses, ($3.6 billion by Mr. Wilson's calculation) will dwarf the differential credits. At a minimum, the Commission must put an annual and aggregate cap on how much ratepayers will ultimately be liable for if it is going to authorize Rider RRS. This is particularly true as the Stipulation allows FE to net PJM capacity performance penalties against revenues,[12] penalties that the PJM Market Monitor said can exceed capacity market revenue.

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[9] P3/EPSA Ex. 1 at 26-35; IMM Ex. 1; IMM Ex. 2.
[10] P3/EPSA Ex. 1 at 30-31; IMM Ex. 1 at 3.
[11] P3/EPSA Ex. 13C at 16-17, Attachment JPK-SS-2 and JPK-SS-3; OCC/NOPEC Ex. 9 at 3.
[12] Company Ex. 154 at 8.

The Commission should reject Rider RRS, and if it does not, at a minimum, ratepayers must be protected from the unknown risk and downside to Rider RRS.

2. Summary of Arguments

At the outset, Rider RRS should not be approved because the Commission lacks legal authority to implement Rider RRS. FE claims that it is a rate-stabilization mechanism authorized by R.C. 4928.143(B)(2)(d), but that statute was not intended to allow the imposition of generation-related charges on ratepayers in order to subsidize affiliated generation plants. Rider RRS would not limit customers' ability to shop for generation services and would not promote rate stability. In fact, it will create fluctuations in generation charges that do not match customer usage or weather conditions.

Rider RRS should also be rejected because it violates Ohio law in several other ways. FE is attempting to recover generation-related costs through distribution and transmission rates in order to underwrite its affiliates' generation costs, in violation of R.C. 4928.02(H), and Rider RRS violates R.C. 4928.03 because it ignores the statutory separation of a competitive service generation from regulated wire services. A charge to customers for the purpose of transferring market risk from FES to ratepayers is inherently unreasonable in violation of R.C. 4905.22.

Rider RRS is also contrary to the Commission's pursuit in developing competitive markets, and by creating a subsidy for FES' benefit, will harm both the wholesale and retail markets. FE will not be a fully incentivized market participant leading to false price signals on which generation developers and market participants rely upon. As well, FES can use the subsidy it will receive through the Affiliate PPA (that will underlay Rider RRS) to change its behavior in standard service offer ("SSO") auctions at the expense of other SSO auction participants. FES can also use the subsidy and the Affiliate PPA to enhance FES' CRES business to unfairly compete against other CRES providers.

The requisite factors outlined by the Commission in its February 25, 2015 *AEP ESP III* Opinion and Order, in Case No. 13-2385-EL-SSO,[13] also weigh against approval of Rider RRS. FE has not met its burden of proof as to the financial need of the plants, any necessity for the plants in light of supply diversity, or the impact of plant closure on economic development. Through the Stipulation, FE has also failed to provide for rigorous Commission oversight, failed to commit to full information sharing with Staff, failed to include an alternative plan to allocate risk, and failed to include an appropriate severability provision (the one provided is wholly inadequate as it specifically strips out ESP IV provisions if a signatory party loses any challenge to a modified Rider RRS that is intended to cure a termination of Rider RRS).

The proposed Stipulation should also not be approved because it fails the Commission's three-prong test: it is not the product of serious bargaining as the Stipulation appears to have been obtained through favor trading; it does not benefit ratepayers or the public interest given the magnitude of potential charges in Rider RRS; and it undermines important regulatory practices and principles by (i) binding the Commission to future actions and (ii) containing a severability provision that allows FE to strip out ESP IV provisions specific to a signatory party if that party loses any challenge to FE's attempt to cure a termination of its Rider RRS.

In short, the Commission has supported the development of competitive markets and it can continue on that path by rejecting FE's request for a subsidy and bailout for FES.

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[13] *In re Ohio Power Company*, Case No. 13-2385-EL-SSO et al., Opinion and Order (February 25, 2015) ("AEP ESP III Opinion and Order")

B. Understanding Rider RRS and the Proposed Affiliate PPA

The proposed Affiliate PPA represents a scheme by which FE's captive ratepayers would be required to effectively guarantee FES that it will be able to recover the costs plus a full return to its debt and equity investors associated with FES' Davis-Besse (nuclear-fueled) and Sammis (coal-fueled) generating units as well as FES' 4.85% entitlement to output from the OVEC's Clifty Creek and Kyger Creek plants (collectively, "the "Affiliate PPA Units."[14] The plan would operate by, first, having FE purchase all power products from the Affiliate PPA Units at prices sufficient to cover all of FES' costs for those units including labor, management, parts, taxes, debt and other associated costs, plus covering debt and yielding FES' shareholders a profit no less than what they could expect to earn in alternative investments of comparable risk.[15] Upon purchasing all of the power products yielded by the Affiliate PPA Units, FE would then resell the acquired power products into the FERC-regulated wholesale power markets.[16] Any losses that FE might experience in these transactions for any reason including excessive outages by the Affiliate PPA Units or losses due to weak power market demands would be paid by FE's captive local ratepayers via Rider RRS. Meanwhile, any gain that might be realized would be flowed through to those same ratepayers by Rider RRS. The immediate value to FES of transferring this risk from it to FE's customers is approximately $75 million.[17] In other words, FES is receiving a $75 million premium for the "hedge" it is selling FE's customers in addition to the ongoing cost-plus recovery.

[14] P3/EPSA Ex. 12 at 2-3.
[15] *Id.* at 3.
[16] *Id.* at 3.
[17] P3/EPSA Ex. 12 at 11.

C. The PJM Power Providers Group and the Electric Power Supply Association

P3 and EPSA both intervened and actively participated during the hearing process (both phases) and strongly oppose FE's application as modified by the Stipulation. P3 and EPSA promote properly designed and well-functioning electricity markets, including competitive generation markets. They bring forth a wealth of expertise because their members regularly participate in the wholesale competitive markets, own generation, purchase generation, and supply end-use customers:

- P3 is a non-profit organization whose members are energy providers in the PJM Interconnection LLC ("PJM") region, conduct business in the PJM balancing authority area, and are signatories to various PJM agreements. Altogether, P3 members own over 84,000 MW of generation assets produce enough power to supply over 20 million homes, and employ over 40,000 people in the PJM region, representing 13 states and the District of Columbia.

- EPSA is a national trade association representing leading competitive power suppliers, including generators and marketers. Competitive suppliers, which collectively account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers.

This brief does not necessarily reflect the specific views of any particular member of P3 or EPSA with respect to any argument or issue, but collectively presents P3's and EPSA's positions.

II. IMPORTANT FACTS THAT SUPPORT REJECTING RIDER RRS

Four key facts point to Rider RRS as being unreasonable. These factual points are undisputed and in the record.

A. FES Competes in Both the Wholesale and Retail Markets

FES actively participates in the PJM wholesale markets[18] and in Ohio's competitive retail markets.[19] Through its wholesale market activities, FES has cleared capacity in PJM's Base Residual Auction and transitional auctions for delivery through the 2018/2019 PJM delivery year, obligating FES to provide that capacity through at least May 31, 2019.[20] FES also participates in FE's standard service offer ("SSO") auctions which are used to procure generation for FE's non-shopping customers.[21] FES also is certified CRES provider and directly sells generation service to retail customers in Ohio.[22] Subsidizing FES by providing it with a lucrative PPA on a non- bid basis free from cost or sales pressures tilts the Ohio wholesale and retail markets and is a disincentive for competitive suppliers to build plants or compete for Ohio customers.

B. FES' Weak Balance Sheet is the Reason FES Suggested Rider RRS to FE

One fact unique to this proceeding is that the idea for Rider RRS did not originate with FE or its customers. Instead, the idea for Rider RRS appears to have been driven by FES' balance sheet. There is no doubt that FES has concerns about its balance sheet, as FE witness

[18] Tr. Vol. 32 at 6686; Tr. Vol. 11 at 2481.
[19] Tr. Vol. 11 at 2481; Exelon Ex. 1 at 12.
[20] Dynegy Ex. 1 at 10.
[21] Exelon Ex. 1 at 14.
[22] *See,* Case No. 00-1742-EL-CRS, Renewal Certificate Number 00-011E(8) dated November 4, 2014; Exelon Ex. 1 at 12.

Jason Lisowski, who is familiar with the consolidated balance sheet for FES,[23] testified that past losses and negative cash flows have weakened the balance sheet of FES.[24]

Mr. Lisowski also admitted that FES' claim that the future of the Affiliate PPA units is in "doubt"[25] was based on FES' view of its balance sheet:

> Q. And your concern for the plants, as you indicate, is in the short-term, correct?
>
> A. [Mr. Lisowski] Yes.
>
> Q. And one concern you have for the plants in the short term is that cash flow will not be sufficient to support the necessary capital investments that need to be made in the short-term correct?
>
> *** [question read]
>
> A. That's correct. That's one reason, and another reason is the condition of FES' current balance sheet.
>
> Q. **And if FES had sufficient cash liquidity and a balance sheet that was strong enough to support additional debt, you wouldn't have your short-term concerns regarding these plants, correct?**
>
> **** [question read]
>
> A. **Yes, I would agree with that hypothetical.** [26]

FES' then Vice President of Commodity Operations, Donald Moul[27] clearly had FES' balance sheet in mind when he reviewed the structure of the AEP proposal that was filed in 2013. Because he knew that the Companies were filing an ESP shortly, he "looked to see if there was something [FES] could add value to that ESP – and **provide some certainty in return for our plants**."[28] FES discussed internally the idea of doing something similar to AEP's proposal, and

[23] Tr. Vol. 8 at 1693.
[24] Company Ex. 143 at 8; Tr. Vol. 32 at 6706.
[25] Tr. Vol. 10 at 2193.
[26] Tr. Vol. 33 at 6686-6687 (emphasis added).
[27] Mr. Moul transferred to a new position at the time of hearing, to Senior Vice President, Fossil Operations and Environmental at FirstEnergy Generation , LLC. Tr. Vol. 10 at 2180.
[28] Tr. Vol. 11 at 2290 (emphasis added).

FES' internal discussions included a review of the profit and loss statements for all its plants taking into consideration "the various range of challenges at the competitive fleets."[29]

FES then approached FE to make a pitch to offer FES' entire fleet as a hedge.[30] FE accepted that pitch with the modification that a smaller subset of FES' fleet had to be included.[31] FES then reviewed its fleet and selected the Sammis units, the Davis-Besse units and FES' OVEC entitlement.[32] FES and FE then created a term sheet for a PPA that has now been coupled with the proposed Rider RRS.[33] The end result is a long-term "hedge" for FE's customers based on the wholesale markets for capacity, energy and ancillary services. The only problem is, as Mr. Moul acknowledged, no customers asked for the hedge.[34]

C. There is no Cap on Charges under Rider RRS

FE witness Mikkelsen acknowledged that there is no cap on the charges associated with Rider RRS.[35] This means that the long-term "hedge" that FE and FES are offering to ratepayers has unlimited downside. No precedent exists for the Commission assigning risk of this magnitude to captive ratepayers, and past Commission precedent has resulted in the imposition of annual and total caps (limits) on what rate payers would be forced to pay.[36]

D. Customers will be Responsible for Capacity Performance Penalties

Subsequent to FE's filing of its application in this proceeding, the FERC approved the PJM capacity performance product.[37] That product has been implemented for several recent auctions – the transitional auction for 2016/2017, the transitional auction for 2017/2018, and the

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[29] Tr. Vol. 11 at 2290.
[30] Tr. Vol. 11 at 2290-2291.
[31] Tr. Vol. 13 at 2746.
[32] Tr. Vol. 11 at 2328-2329.
[33] *See*, Company Ex. 156 (updated version of term sheet).
[34] Tr. Vol. 32 at 6642-6643.
[35] Tr. Vol. 36 at 7523-7524; 7675.
[36] *See, e.g., In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company*, Case No. 09-119-EL-AEC, Opinion and Order at 9 (July 15, 2009).

2018/2019 base residual auction.[38] One of the most significant elements of the new capacity market design is an increase to the performance incentives for capacity resources.[39] If units do not perform as required, units will pay substantial penalties.[40] ***Those penalties can exceed total capacity market revenue for a generating unit***.[41]

Customers will bear the risk of the penalties under Rider RRS. FE will sum all PJM charges and revenues and net the resulting total against FE's payments to FES. This includes all capacity performance penalties assessed against the Affiliate PPA units with the exception of any offset called for under the proposed Affiliate PPA[42] or disallowed by the Commission through its annual review of FE's actions (not FES' actions).[43] Under the Affiliate PPA, FES will have very little liability so long as its actions were reasonable (based on the facts known at the time of a decision). Likewise, FE will have limited liability to pay for any disallowed costs that are capacity performance penalties because they can be netted against capacity performance bonuses, leaving FE only responsible for the penalty amount that exceeds the bonus amounts.

FE witness Eileen Mikkelsen acknowledged that the disallowed costs will be netted against bonuses, which means the customers are paying for those netted disallowed costs.

> Q. [Mr. Settineri] Again, Ms. Mikkelsen, I believe you said in that example I gave you a $100 penalty, $80 bonus. The Commission disallows the $100 penalty. You subtract the $80 bonus, and that leaves you with $20 that the Commission -- that the companies have to absorb, correct?
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> A. [Ms. Mikkelsen] Yes.

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[37] Tr. Vol. 2 at 250.
[38] *Id. and see* Company Ex. 182 and 183; IMM Ex. 2 at 3.
[39] IMM Ex. 2 at 3.
[40] *Id.*
[41] *Id.* at 3-4. Monies that PJM receives as capacity performance penalties will then be paid as bonuses to units that did perform when called. *Id.* at 4.
[42] Company Ex. 156 at 14.
[43] Company Ex. 154 at 8.

> Q. And in that example what that means is that the customers would have $80 less than they would have otherwise had, correct, because of that penalty?
>
> A. Yes.[44]

As of today, FES is responsible for any capacity performance penalties that arise after June 1, 2016, which is the beginning of the 2016/2017 delivery year. If Rider RRS is approved, the customers will have that liability – an unknown risk that could easily wipe out the projected FE Rider RRS credits. The ratepayers (and not FE or FES) will bear the brunt of capacity performance penalties.

III. STANDARD OF REVIEW

FE seeks approval of the Stipulation filed in support of its ESP IV. Accordingly, the Commission's standard of review is multifaceted. First, as an applicant seeking approval of an ESP pursuant to R.C. 4928.143(C), FE bears the burden of proof on contested factual issues.

Second, FE seeks approval of Rider RRS under R.C. 4928.143(B)(2)(d), which requires that a proposed ESP component "must first be a term, condition, or charge; next, relate to one of the enumerated types of terms, conditions, and charges; and, finally, have the effect of stabilizing or providing certainty regarding retail electric service."[45]

Third, FE must comply with the Commission's directive in its February 25, 2015, *AEP ESP III* Opinion and Order, which required the applicant "to justify any requested cost recovery" and, "at a minimum," address eight factors:[46]

- The financial need of the generating plant;
- The necessity of the generating facility, in light of future reliability concerns, including supply diversity;

[44] Tr. Vol. 36 at 7715.
[45] *AEP ESP III*, Opinion and Order at 20.
[46] *Id*., at 25-26.

- A description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations;

- The impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state;

- In the PPA rider proposal, provide for rigorous Commission oversight of the rider, including a proposed process for a periodic substantive review and audit;

- Commit to full information sharing with the Commission and its Staff;

- Include an alternative plan to allocate the rider's financial risk between both the Company and its ratepayers; and

- Include a severability provision that recognizes that all other provisions of its ESP will continue, in the event that the PPA rider is invalidated, in whole or in part at any point, by a court of competent jurisdiction.

Fourth, R.C. 4928.143(C)(1) requires FE to demonstrate that pricing and all other terms and conditions of the ESP IV (including deferrals and future recovery of deferrals) are “more favorable in the aggregate” than the results that would be expected from an MRO.

Fifth, there must be evidence from which the Commission must find that the Stipulation is reasonable under the three-prong test: (a) is the settlement a product of serious bargaining among capable, knowledgeable parties? (b) does the settlement, as a package, benefit ratepayers and the public interest? and (c) does the settlement package violate any important regulatory principle or practice? *See, Industrial Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St. 3d 559 (1994).

Finally, the Commission’s findings on these issues must be based on evidence that is in the record. *See, AEP ESP III* Opinion and Order, *supra*, at 24, citing *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87 (1999).

IV. THE COMMISSION LACKS THE LEGAL AUTHORITY TO APPROVE RIDER RRS AS PROPOSED

A. The Commission Lacks the Legal Authority to Implement Rider RRS

FE claims that Rider RRS is a rate-stabilizing mechanism,[47] even though it is not. FE makes that claim in an attempt to obtain authorization under R.C. 4928.143(B)(2)(d), which specifies provisions that may be included in an ESP:

> 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.

As explained below, the provisions of FE's Rider RRS do not fall within this statute and cannot be approved by the Commission.

1. R.C. 4928.143(B)(2)(d) was not intended for a Rider RRS construct.

FE describes its Rider RRS as a non-bypassable generation-related rider[48] that will assess charges or credits. Rider RRS, though, will be a separate charge on the FE customers' bills that they must pay in addition to either their SSO generation charge or the generation charge that shopping customers pay to a CRES provider or aggregator.[49] Rider RRS is not a charge relating to the "supply and pricing of electric generation service," which are the only bases listed in R.C. 4928.143(B)(1). Rider RRS also is not a charge under any of the other categories listed in R.C. 4928.143(B)(2). Moreover, as to R.C. 4928.143(B)(2)(d) specifically, that subsection does not authorize the imposition of generation charges as a subsidy to affiliated generation plants, and the Commission has only the legal authority that has been expressly delegated by the

[47] Company Ex. 1 at 9; Company Ex. 7 at 3.
[48] Company Ex. 13 at 3, 6; Tr. Vol. 2 at 344.
[49] Tr. Vol. 2 at 342, 343.

legislature.[50] In this instance, R.C. 4928.143(B)(2) authorizes only ESP components that it specifically includes. *Columbus S. Power Co.* 128 Ohio St. 3d 512, 947 N.E.2d 655, 2011 Ohio 1788 (2011). It does not permit ESPs to include items other than the ones listed in the statute.

2. Rider RRS will not be a limitation on shopping.

FE claims that Rider RRS will have "no adverse impact on the CRES market in Ohio, customers' ability to shop for generation service, or on the Companies' competitive bidding process or SSO supply."[51] FE witness Strah expressly testified that it will have "no impact on customer choice."[52] FE witness Mikkelsen admitted that ratepayers will continue to obtain generation service through the SSO or by contracting with a CRES provider or aggregation.[53] Rider RRS will not change any part of the shopping process. FE's claim that Rider RRS will not affect customer choice shows that Rider RRS will not restrict or otherwise limit customer shopping.

FE witness Mikkelsen attempts to justify Rider RRS as an additional charge or credit to ratepayers' bills by claiming it "acts as a financial limitation on the consequence of a customer shopping for generation supply from a CRES provider or from electing to take competitively-sourced generation from the companies as an SSO customer."[54] Rider RRS' impact is not to limit shopping, but rather it has an economic impact on all customers, whether shopping or not because it is an additional <u>non-bypassable</u> charge or credit.

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[50] *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, 706 N.E.2d 1255, citing *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St.3d 535, 620 N.E.2d 835; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St.2d 181, 22 O.O.3d 410, 429 N.E.2d 444; *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 152, 21 O.O.3d 96, 423 N.E.2d 820; and *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St.2d 302, 18 O.O.3d 478, 414 N.E.2d 1051.

[51] Company Ex. 1 at 9.

[52] Company Ex. 13 at 3, 6-7.

[53] Tr. Vol. 2 at 342-343.

[54] Tr. Vol. 2 at 342.

3. **Rider RRS will not promote rate stability**.

According to FE, Rider RRS will promote rate stability in several ways: by (possibly) providing credits to customers to offset increases in market-based retail prices; by supporting fuel diversity and asset diversity; by keeping baseload generating plants in operation; and by providing a mechanism to stabilize the retail market when market prices rise.[55]

FE's claim is demonstrably incorrect; in fact, Rider RRS will actually result in rate *instability*. First, retail markets in Ohio are not at the mercy of wholesale spot market prices. The majority of retail customers face power prices set by power procurements carried out considerably in advance of consumption.[56] Retail prices based on forward market prices are much less volatile than day-to-day power prices.[57]

Second, the majority of customers have stable rates that "are not even remotely as volatile as wholesale spot market prices[,]"[58] For example, SSO customers do not experience volatility because they have fixed contracts based on periodic blended auctions.[59] Likewise, shopping customers with fixed-price contracts may experience price discounts for committing to long-term purchases and those fixed-rate contracts can extend for up to three years.[60]

Third, the charges under Rider RRS will not correspond to actual costs because the initial rate will be solely based on a forecast and all other subsequent rates will be "catching" up the difference between forecasted revenues, and actual costs and revenues. The annual reconciliations will be out of step with the wholesale market prices that created the

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[55] Company Ex. 13 at 3.
[56] P3/EPSA Ex. 1 at 11.
[57] P3/EPSA Ex. 1 at 11.
[58] P3/EPSA Ex. 1 at 40.
[59] P3/EPSA Ex. 1 at 40; Staff Ex. 12 at 14.
[60] Company Ex. 13 at 13; P3/EPSA Ex. 5 at 26-27; Exelon Ex. 1 at 12-13.

reconciliation. In addition, Rider RRS annual reconciliations[61] will be subject to PJM capacity performance penalties that cannot be forecasted.

As a result, Rider RRS makes it certain that customers' rates will fluctuate more than they do today.

B. Generation-Related Costs Cannot be Recovered Through Distribution or Transmission Rates

FE provides "wires only" services consisting of distribution and transmission services.[62] FE describes Rider RRS as a non-bypassable generation-related rider[63] and agrees that its costs and revenues would not be recoverable in a base rate case proceeding.[64] Although FE recognizes that it cannot recover generation costs via distribution or transmission charges, the proposed tariff sheet suggests[65] that Rider RRS applies to the distribution or transmission services provided to the ratepayers:

> Applicable to any customer <u>who receives electric service under the Company's rate schedules</u>. This Retail Rate Stability Rider (RRS) will be <u>effective for service rendered</u> beginning June 1, 2016. This Rider is not avoidable for customers during the period the customer takes electric generation service from a certified supplier. (Emphasis added.)

The implication is that even though Rider RRS is a generation charge, it will be collected as a distribution charge for the benefit of FE's generation affiliate. This violates R.C. 4928.02(H), which states that it is the policy of this state to:

> Ensure 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 any generation-related costs through distribution or transmission rates[.]

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[61] Company Ex. 43 at 3.
[62] Staff Ex. 12 at 9.
[63] Tr. Vol. 2 at 344.
[64] Tr. Vol. 2 at 401.
[65] Company Ex. 1 at Attachment 4 page 127 of each proposed tariff.

Rider RRS violates R.C. 4928.02(H) by imposing the financial costs of FE's affiliate's generation on ratepayers. Even if revenues exceed the affiliate's costs, Rider RRS creates a subsidy from the distribution service to the affiliated generation service. It is also undisputed that ratepayers will make payments to the unregulated affiliated generator for at least several years. FE's affiliated generator, therefore, will be effectively insulated from market risks through the generation-related charge collected in the distribution or transmission charges in violation of R.C. 4928.02(H).

C. Rider RRS Will Violate R.C. 4928.03

Rider RRS also runs afoul of R.C. 4928.03, which provides:

> Beginning on the starting date of competitive **retail electric service, retail electric generation**, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility **are competitive retail electric services** that the consumers may obtain subject to this chapter from any supplier or suppliers. In accordance with a filing under division (F) of section 4933.81 of the Revised Code, retail electric generation, aggregation, power marketing, or power brokerage services supplied to consumers within the certified territory of an electric cooperative that has made the filing are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers. Beginning on the starting date of competitive retail electric service and notwithstanding any other provision of law, each consumer in this state and the suppliers to a consumer shall have comparable and nondiscriminatory access to noncompetitive retail electric services of an electric utility in this state within its certified territory for the purpose of satisfying the consumer's electricity requirements in keeping with the policy specified in section 4928.02 of the Revised Code. (Emphasis added).

This statute includes generation as a "competitive" service, not as a regulated utility service, and Rider RRS is a generation-related charge according to FE.[66] A Commission order that requires shopping customers to pay for affiliated generation would merge competitive services with regulated services in violation of R.C. 4928.03.

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[66] Tr. Vol. 2 at 344.

D. Rider RRS Will Violate R.C. 4905.22 as an Unreasonable Charge

The Ohio General Assembly has mandated through R.C. 4905.22 that "all charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable . . . and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service. . . ." In this proceeding, FE is seeking to use customer charges to transfer market risk to its ratepayers.[67] The charges are *per se* unreasonable in these circumstances.

Under FE's proposal, FES will recover its costs and a guaranteed return on capital under a contract with FE.[68] The market risks that are currently borne by FES do not simply disappear; they would be shifted to FE and then transferred to ratepayers under Rider RRS.

It is fundamentally unfair to allow FE to use customer charges to transfer market risks from FES to its customers. It is also unreasonable to impose an unlimited charge that is based solely on wholesale transactions for the benefit of FE's affiliate (covering its contractual payments to FES). Accordingly, Rider RRS would impose unreasonable charges on ratepayers in violation of R.C. 4905.22.

E. The Commission Cannot Approve Rider RRS as Proposed Because the Affiliate PPA is a Contract for the Procurement of Electricity that will be Resold at Wholesale

The Affiliate PPA will be a FERC-jurisdictional sale for resale contract, just like the agreement addressing the OVEC entitlement.[69] FE has also acknowledged that the Affiliate PPA is a FERC jurisdictional contract.[70] This fact alone would not remove it from a state commission's purview, given states' authority to review for prudence the sourcing of electricity for resale at retail.

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[67] Company Ex. 156.
[68] Company Ex. 13 at 4-5.
[69] *Cf.* Complaint Requesting Fast Track Processing, FERC Docket No. EL16-34-000 (filed Jan. 27, 2016) (complaint urging FERC to rescind a previously-granted waiver of its affiliate power sales restrictions and to require the filing of the FES PPA for FERC review under Section 205 of the Federal Power Act).
[70] Company Ex. 33 at 2.

But the Affiliate PPA will not be such a contract.[71] This is not a circumstance where FE is "obtaining" generation for its ratepayers. Instead, it is obtaining capacity and energy to be resold (potentially) into the PJM wholesale markets. The fact that FE is not "obtaining" generation for its ratepayers distinguishes any Commission action in this proceeding from a traditional vertically integrated setting. Under Rider RRS, the Commission is being asked to guarantee that FE will receive revenues from its wholesale market sales sufficient to cover its contractual payments to FES.

As a result, the Affiliate PPA will not fall within the scope of the Commission's statutory authority. The Commission's jurisdiction is limited to the authority expressly granted to it under Title 49 of the Ohio Revised Code.[72] Since Title 49 is silent as to wholesale arrangements, the Commission cannot find it prudent to enter into it or otherwise sanction it.[73] To the contrary, any proposed regulation of wholesale market transactions as contemplated here would be the exclusive domain of FERC, and any state regulation would be preempted.[74]

V. RIDER RRS DOES NOT SATISFY THE *AEP ESP III* PPA RIDER FACTORS AND REQUIREMENTS

The Commission must determine whether FE has complied with the Commission's directive in the February 25, 2015 *AEP ESP III* Opinion and Order, which required the applicant

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[71] Even if it were the appropriate subject of a prudence review, any review sought and received here cannot be characterized as one addressing the "prudence" given that there are ample alternative sources of supply (including from the PJM market) that are more economical than the supplies governed by the proposed Affiliate PPA and there was no competitive procurement pursuant to which the Affiliate PPA was entered.. *See, e.g.*, *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (establishing three methods for determining whether a wholesale power arrangement between affiliates is at an acceptable market price that can be passed on to ratepayers).

[72] *See State ex rel. Columbus S. Power Co. v. Fais* (2008), 117 Ohio St.3d 340, 343, 2008 -Ohio- 849, ¶18.

[73] Additionally, the Commission should not read jurisdiction into Title 49. *See, Bates v. United States*, 522 U.S. 23, 29, 118 S. Ct. 285 (1997) (stating, courts must "resist reading words or elements into a statute that do not appear on its face"); *Davis v. Davis*, 115 Ohio St.3d 180, 2007-Ohio-5049, 873 N.E.2d 1305, ¶¶ 13-15 (Ohio 2007) (stating we cannot add words or delete words from a statute); and *Iddings v. Jefferson Cry. School Dist. Bd. of Edn.*, 155 Ohio St. 287, 290, 98 N.E.2d 827 (Ohio 1951) ("[t]o construe or interpret what is already plain is not interpretation but legislation, which is not the function of the courts").

[74] *See, PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 475 (4th Cir. 2014); *FERC v EPSA*, No. 14-840, --- U.S. ---, Slip Op. at 26 (2016).

"to justify any requested cost recovery" and "at a minimum", address the following eight factors which are balanced by the Commission:[75]

- The financial need of the generating plant;
- The necessity of the generating facility, in light of future reliability concerns, including supply diversity;
- A description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations;
- The impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state;
- In the PPA rider proposal, provide for rigorous Commission oversight of the rider, including a proposed process for a periodic substantive review and audit;
- Commit to full information sharing with the Commission and its Staff;
- Include an alternative plan to allocate the rider's financial risk between both the Company and its ratepayers; and
- Include a severability provision that recognizes that all other provisions of its ESP will continue, in the event that the PPA rider is invalidated, in whole or in part at any point, by a court of competent jurisdiction.

FE agrees that these factors must be considered in the Commission's review of the new Rider RRS charge,[76] and in this matter, the factors do not support adopting Rider RRS as designed.

A. FE has not Established the Financial Need of the Plants

The Commission's *AEP ESP III*, Opinion and Order stated that the Commission would consider the "financial need of the generation plant."[77] FE claims that the ESP is needed to "prevent the Plants from retiring before it is economic to do so."[78] The basis for this assertion –

[75] *Id*. at 25-26.
[76] Company Ex. 9 at 2.
[77] *AEP ESP III*, Opinion and Order at 25-26.
[78] Company Ex. 42 at 4.

without any quantitative demonstration – is the claim that Davis-Besse and Sammis are "financially challenged"[79] because PJM's "market-based cash flows for energy and capacity are *chronically* and artificially too low to cover"[80] the costs of investments that are needed to "keep the Plants running."[81] At the same time, however, FE now asserts that the proposed PPA and Rider RRS promise benefits to ratepayers of approximately $260 million in net present value ("NPV").[82]

Over the initial 15-year term of the PPA, Dr. Kalt found that [redacted][83] He continued, stating:[84]

> [redacted]
>
> [redacted]

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[79] Company Ex. 42 at 12.

[80] Company Ex. 42 at 6, emphasis in the original.

[81] Company Ex. 29 at 4.

[82] Sierra Club Ex. 89.

[83] P3/EPSA Ex. 2 at 42.

[84] *Id*. at 42-44 (emphasis added, footnotes omitted).

[redacted]

Dr. Kalt summarized his analysis, stating that:[85]

[redacted]

Even Don Moul [redacted] stating that "…FirstEnergy Solutions may reach a point where these plants aren't covering their avoidable costs, at which point we would have to make a decision as to whether to continue to invest in them and to keep them online or choose to shut the units down.[86] This statement does not change Dr. Kalt's conclusion that "…[redacted][87]

Dr. Kalt maintained his conclusion after the Stipulation was filed, stating that:

> For the reasons I set out in my prior testimonies, the proposed ESP is not credibly needed to keep the subject plants in operation – either by FES or,

[85] P3/EPSA Ex. 2 at 44.
[86] Tr. Vol. 10 at 2202.
[87] P3/EPSA Ex. 2 at 43.

> if FES is not capable of operating the plants efficiently, by another owner. For fiduciarily responsible plant owners, retirement is only reasonable when a plant cannot be expected to cover its going-forward costs. The shutdown decision ignores past, even if unrecovered costs (e.g., that may be due to lenders). So long as going-forward revenues can be expected to cover going-forward costs, positive cash flow is generated – and some positive cash flow is preferred to no cash flow (as occurs upon retirement) when it comes to shareholders and lenders seeking recovery of already incurred past costs. **In the case of the Sammis and Davis-Besse plants, while lower fuel costs can be expected to result in lower electricity prices, I have shown previously that gross margins far exceed the going-forward operating and capital expenditures that the Companies' own calculations show would be needed to keep the plant operating on a positive cash flow basis.**[88]

FE witness testimony from the record also supports that the Davis-Besse and Sammis plants are not at risk of closing, and not in financial need. Mr. Moul acknowledged that his job responsibilities at the time he submitted his direct testimony included advising senior FES management on whether the plants would retire.[89] Yet, no one within FES had asked his opinion as to whether the Davis-Besse and Sammis plants should close and he had not been involved in any conversations regarding the closure of those plants.[90] FE witness Mikkelsen also could not answer the question of whether the plants would retire within the next three years.[91]

FES has made over $2 billion worth of capital investments in the Davis-Besse and Sammis plants, all of which indicate that FES believes these units have a future. As P3/EPSA witness Dr. Joseph Kalt observed:[92]

> the Companies' witness Mr. Harden testifies that the plants have recently received almost $2 billion worth of capital investment in 2010 (excluding the recent reported investment of $600 million in Davis-Besse's new steam generators), indicating that FES has expected these plants to continue to operate for many years into the future. That is, these plants have recently received enormous capital investments presumably based on

[88] P3/EPSA Ex. 12 at 19-20 (emphasis added).
[89] Tr. Vol. 11 at 2305.
[90] Tr. Vol. 11 at 2305.
[91] Tr. Vol. 2 at 414-415.
[92] P3/EPSA Ex. 1 at 41, citing Harden Direct Testimony at 10 (footnote omitted).

FES' expectation that higher future power prices will compensate FES for its capital investments.

One minor point that easily removes the OVEC units from Rider RRS is that FES cannot unilaterally close these units.[93] FES owns 4.85% OVEC entitlement,[94] and [redacted][95] OVEC is not in financial need and FES' OVEC entitlement should not be included in Rider RRS.

B. FE has Not Established the Necessity of any of the Plants in Light of Future Reliability, Including Supply Diversity

FE acknowledges that PJM has responsibility for grid reliability[96] but claims $466.5 million in additional transmission investments would need to be made to maintain reliability if Sammis and Davis-Besse closed.[97] If the Commission credits testimony in this proceeding as showing that the FES units will not close, that fact rules out any concern about reliability and supply diversity. FE witness Moul acknowledged he had not been involved in any discussions about closing the units.[98]

In fact, allowing FE to continue to run these plants under Rider RRS will have a negative effect on future reliability. Under the Stipulation and Rider RRS, customers will bear the risk of capacity performance penalties,[99] leaving FES with minimal incentives to make the additional investments in capital and its daily operations to avoid outages, that although reasonable, will

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[93] Tr. Vol. 10 at 2185.
[94] Tr. Vol. 1 at 30.
[95] Tr. Vol. 9 at 1984.
[96] Tr. Vol. 2 at 473.
[97] Company Ex. 9 at 7.
[98] Tr. Vol. 11 at 2305.
[99] On December 12, 2014, PJM filed a capacity performance ("CP") proposal to significantly change the design of the PJM capacity market. FERC approved that proposal effective April 1, 2015. IMM Ex. 2 at 3; *PJM Interconnection, L.L.C. et al.*, 151 FERC ¶ 61,208 (June 9, 2015).

lead to significant capacity performance penalties.[100] As FE witness Donald Moul stated, "[u]nder the capacity performance proposal, there is no excuses structured to it, so regardless of what type of generation, whether its natural gas or any other type, it gets no excuse if it doesn't perform for its commitment."[101]

Dr. Joseph Bowring, the PJM Market Monitor, described the new capacity performance program in his supplemental stipulation testimony, stating:[102]

> PJM has run a Base Residual Auction for Delivery Year 2018/2019, a Transition Auction for Delivery Year 2016/2017 and a Transition Auction for Delivery Year 2017/2018 under the Capacity Performance design. The result was a significant increase in capacity prices for all capacity resources in PJM and particularly for capacity resources in the western part of PJM, including Ohio. One of the most significant elements of the new capacity market design is an increase to the performance incentives for capacity resources. If units do not perform as required, units will pay substantial penalties. Those penalties can exceed total capacity market revenue for a generating unit. Those penalties would be paid to units that did perform when called, as bonus payments.

Dr. Bowring also noted that "incentive issues arise when the responsibility for operating plants and the financial consequences of that operation are separated, as would occur under the proposed Rider RRS."[103] He further pointed out that "[s]hareholders and management do not have the same incentives to manage the performance of the units for which customers bear the risk as they do to manage the performance of the units for which shareholders bear the risk. This attenuation of the capacity market performance incentives is another reason to reject the Rider RRS as inconsistent with competitive outcomes in the PJM wholesale power market."[104]

PJM's Reliability Must Run process can also be used to ensure future reliability while any necessary transmission upgrades are being implemented. PJM has previously used that

[100]Tr. Vol. 36 at 7707.
[101] Tr. Vol. 10 at 2215.
[102] IMM Ex. 2 at 3-4.
[103] IMM Ex. 2 at 4.
[104] IMM Ex. 2 at 4.

process with other FES units, including the Ashtabula 5, East Lake 1-3 and Lake Shore 18 Generators.[105] The Companies have not foreclosed using RMR again for FES' units, as witness Donald Moul testified that FES was willing to evaluate any RMR offer for Davis-Besse and Sammis should the need arise.[106] Although he considered RMR a stop-gap measure, he admitted that it does allow a plant to continue to operate while any necessary transmission upgrades are made.[107]

FE has not met its burden that any of the Affiliate PPA Units are necessary for any future grid reliability concerns, including supply diversity. There is no evidence that any unit in the Affiliate PPA mix will close within the next few years (which is the time period that FE claims the Affiliate PPA units need to survive). The record, though, shows that Rider RRS will negatively affect grid reliability because FES will not have the same incentive as other market participants to fully participate in PJM's new capacity performance programs. Rider RRS as designed will have a negative effect on future grid reliability and should not be approved.

C. There is no Rigorous Commission Oversight of the Rider, Including a Proposed Process for a Periodic Substantive Review and Audit

The oversight proposed in the Stipulation does nothing to cure FE's and FES' lack of incentive under the proposed Affiliate PPA and Rider RRS construct. Commission oversight in the Stipulation's oversight process applies only to FE, and not FES.[108] Moreover, under the Stipulation (Section V.B.3.a.) the proposed oversight process consists of an initial Staff audit as to calculation verification, and then a Commission review of the costs included in the rider.[109]

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[105] *See*, FERC Docket number ER12-2710 - informational filing of FirstEnergy Generation Corporation regarding deactivation avoidable cost rate of Lake Shore 18, Ashtabula 5, and East Lake 1, 2, and 3. *See also* http://www.pjm.com/planning/generation-deactivation/gen-deactivation-rmr.aspx.
[106] Tr. Vol. 11 at 2258.
[107] Tr. Vol. 11 at 2258-2259.
[108] Tr. Vol. 36 at 7702-7703.
[109] Company Ex. 7 at 14-15.

The Commission cannot disallow costs unilaterally under the Stipulation. FE witness Mikkelsen's testimony makes this clear, stating that FE can object to any recommendations from Staff to disallow costs through a hearing.[110] FE can also pursue legal challenges for disallowed costs, and while the dispute is ongoing, can continue to recover those costs during the dispute period.[111] This means that FE can charge ratepayers for costs the Commission believes should be disallowed all the way through resolution at the Supreme Court of Ohio – a period which could take years. Also disingenuous under the Stipulation is that even if the Commission disallows a capacity performance penalty, FE can still net the disallowed penalty against any bonus payments received – meaning FE can avoid responsibility for disallowed penalties so long as its capacity performance bonuses exceed the disallowed penalties.[112] That result does not reflect a program of "rigorous Commission oversight."

D. There is no Commitment to Full Information Sharing with the Commission and its Staff

Section V.3.b. of the Stipulation states that FE "fleet information on any cost component will be provided pursuant to a <u>reasonable</u> Staff request."[113] This provision does not represent a commitment to full information sharing with the Commission and its Staff.

First, the Commission has no oversight or authority over FES under the Stipulation. While the Commission has jurisdiction and authority over FE, the draft Affiliate PPA term sheet does not provide the Commission with the right to audit the books of FES,[114] something that could be corrected through a competitive bid process between an arms-length seller and buyer.

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[110] Tr. Vol. 36 at 7739.
[111] Company Ex. 7 at 15.
[112] Company Ex. 154 at 8.
[113] Company Ex. 154 at 8 (emphasis added).
[114] *See,* Company Ex. 156.

Second, Staff does not have the right to a full record review of FES' fleet information including information related to the Sammis or Davis-Besse plants. Instead, Staff must determine what information it wants to receive and then request that information from FE, which in turn must pursue that information from FES. If FES refuses or if FES believes the information request is unreasonable, the information will not be provided until after the dispute is resolved, which again could be years by the time the dispute runs its way through the court system. This establishes a loophole, allowing the possibility that a multitude of documents may never be part of a timely Commission review.

Third, the Stipulation does not provide information access to any bilateral contracts by FE with third parties. Nothing under the Stipulation precludes FE from entering into bilateral contracts with third parties. For example, if capacity does not clear in any PJM auction, FE could seek to sell capacity through a bilateral contract. Under the Stipulation, Staff would not have access to information related to that contract because Section V.3.b. only applies to FES' fleet information. Perhaps an oversight by FE when drafting the Stipulation, but the point is that the Stipulation's information sharing provisions are not well thought out, and show the difference between the Commission's general oversight over public utilities as compared to the limited oversight the Commission will have over FES, an independent merchant generator and the provider of the long-term "hedge."

A significantly stronger commitment to "full information sharing" with the Commission and its Staff must be developed and presented to the Commission (and parties) for review.

E. There is no Alternative Plan to Allocate the Rider's Financial Risk Between both FE and its Ratepayers

The Stipulation includes a provision entitled "Risk Sharing," pursuant to which the Companies may provide credits to the ratepayers beginning in year 5 of the eight-year plan if

Rider RRS provides a credit less than $10 million (year 5); $20 million (year 6); $30 million (year 7); $40 million (year 8).[115] As an initial point, these credit commitments do not apply in years 1-3 when FE projects that Rider RRS will be a charge .[116] The credits, as admitted by FE witness Mikkelsen are not intended to provide any incentive to FES in its management and operation of Davis Besse or Sammis.[117] The credits are only intended to act as an incentive for the Companies to maximize revenues received from the PJM markets.

The credits, which apply on an annual basis, are also very low in comparison to the likely charge that will result under Rider RRS over the term of the Affiliate PPA. OCC witness Wilson and P3/EPSA witness Kalt both predicted that Rider RRS would be a charge in the millions and in Mr. Wilson's case, over $3 billion. FE's annual credit contributions could easily be dwarfed on an annual basis by charges (including capacity performance penalties) and over the term of Rider RRS be insufficient to make up for any charges in the aggregate. Faced with this uncertainty, on Rider RRS, the Commission should ensure that a cap is imposed on the exposure that ratepayers have under Rider RRS. This factor does not weigh in favor of Rider RRS.

F. The Severability Provision is not Sufficient

The Commission, in its *AEP ESP III* Opinion and Order, held that an application for a PPA rider "<u>must</u> include a severability provision that recognizes that all other provisions of its ESP will continue, in the event that the PPA rider is invalidated, in whole or in part at any point, by a court of competent jurisdiction."[118] The Stipulation's severability provision, however, allows FE to try to cure any defect in Rider RRS but any party that opposes the manner of cure (and loses its challenge) automatically forfeits its stipulation provision.

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[115] Company Ex. 154 at 7-8.
[116] Sierra Club Ex. 89.
[117] Tr. Vol. 36 at 7733.
[118] *AEP ESP III*, Opinion and Order at 25.

The Stipulation language is:

> If a court of competent jurisdiction invalidates Rider RRS in whole or in part, the Companies will permit any part of the Stipulated ESP IV that has not been invalidated to continue while a good faith effort is made by the Signatory Parties to restore the invalidated provision to its equivalent value. **The Signatory Parties agree to work in good faith, on an expedited basis not to exceed 60 days, to cure any court-determined deficiency. The Companies will then file (or jointly file with Signatory Parties) the modified Rider RRS, or its successor provision, for expedited approval by the PUCO, which approval shall not be withheld if the modified Rider RRS, or its successor provision, provides a reasonable remedy to cure the deficiency.** The Companies' agreement to permit the stipulated provisions to go into effect in this matter (rather than terminate pursuant to the terms of the Stipulated ESP IV) is contingent upon the Signatory Parties supporting the modified Rider RRS, or its success or provision. **A Signatory Party may choose to oppose and express any concerns with the modified Rider RRS, or its successor provision, to the Commission; however, if such concerns are not accepted by the Commission, then any Signatory Party that opposed the modified rider RRS or its successor provision, will forfeit its stipulated provision(s).** This commitment on severability is not intended and shall not be construed to affect the prohibition against retroactive ratemaking. No amounts collected shall be refunded as a result of this severability provision.[119]

The result is that ESP IV provisions will be stripped out of the ESP. The Commission cannot accept the Stipulation's severability provision for this reason.

VI. FE HAS NOT DEMONSTRATED THAT THE ESP IV WITH RIDER RRS IS MORE FAVORABLE IN THE AGGREGATE THAN AN MRO

The Commission is required by R.C. 4928.143(C)(1) to approve, or modify and approve, an ESP, if the ESP, including its <u>pricing and all other terms and conditions</u>, including deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142.[120] The Companies have the burden of showing that the ESP IV is more favorable in the aggregate as compared to an MRO.

[119] Company Ex. 154 at 8-9; Tr. Vol. 36 at 7681 (emphasis added).
[120] R.C. 4928.143(C)(1) (emphasis added).

P3/EPSA assert that the Commission cannot approve the proposed ESP IV if it includes Rider RRS as proposed in the Stipulation.[121] The Stipulation does not contain an evaluation of the ESP versus an MRO, other than stating, in relevant part, that "[t]he Stipulated ESP IV is more favorable in the aggregate to customers as compared to the expected results that would otherwise occur under an MRO alternative and represents a serious compromise of complex issues and involves substantial customer benefits that would not otherwise have been achievable."[122] Instead, FE relies on the testimony of Eileen Mikkelsen to present FE's ESP versus MRO analysis.[123]

Her testimony stated that the expected quantitative benefit of the ESP IV was $612 million of which $561 million related to the Rider RRS.[124] The remaining $51 million related to payments by the Companies that would not be recovered by ratepayers.[125] Ms. Mikkelsen's summary table is below:[126]

Quantitative Benefit of ESP IV	Total	NPV
($ in millions)		
Economic Development Funding	$ 24.0	$ 16.9
Low Income Funding	$ 19.1	$ 13.5
Customer Advisory Agency Funding	$ 8.0	$ 5.6
Retail Rate Stability Rider	$ 561.0	$ 260.0
Total Quantitative Benefit	$ 612.1	$ 296.0

Ms. Mikkelsen stated that the total quantitative benefit in the table represented the benefit of the ESP IV over an MRO. The Rider RRS amount of $561 million would only exist under the

[121] By making this argument, P3/EPSA are not condoning the inclusion of other items in the proposed ESP IV.
[122] Company Ex. 154 at 18.
[123] Company Ex. 155 at 10-14.
[124] *Id.*
[125] Tr. Vol. 36 at 7734-7735.
[126] Company Ex. 154 at 12.

ESP IV, but Ms. Mikkelsen was not aware of any reason that prevented FE from making the other payments through a MRO, other than her belief that FE would not make the payments in that circumstance.[127] That leaves the Rider RRS amount of $561 million as the total quantitative benefit for FE's claim that the ESP IV is quantitatively more favorable than an MRO.

Rider RRS, however, is speculative and could easily cost ratepayers billions over the ESP IV term. For example, economist James Wilson reviewed three scenarios and concluded that the most likely and reasonable estimate of Rider RRS charges to retail customers was the $3.6 billion loss scenario. That scenario was based on updated market conditions.[128] P3/EPSA witness economist Dr. Joseph Kalt[129] rejected the Companies' $561 million projected credit, finding instead that with just small adjustments to use up-to-date NYMEX natural gas prices then held steady over the term, the projected impact on the Companies' captive ratepayers is a net present value loss of $858 million.[130] Using NYMEX natural gas future prices in the first three years and then the U.S. Department of Energy's EIA forecast for price increases for the rest of the term gives a net present value loss of $793 million.[131] Likewise, Dr. Kalt predicted that ratepayers will realize a net present value loss of $201 million simply by assuming that the net generation of the plants corresponded to historical averages.[132] The record establishes that no one can accurately predict the quantitative amount of Rider RRS, but the likely result is an overall charge in the millions.

The risk that Rider RRS will be a massive charge to ratepayers over the eight-year ESP IV term negates any qualitative benefits. FE witness Mikkelsen claimed in her prefiled

[127] Tr. Vol. 36 at 7736.
[128] *Id.* at 12.
[129] Dr. Kalt is the Ford Foundation Professor (Emeritus) of the International Political Economy at the John F. Kenney School of Government, Harvard University He also works as a senior economist with Compass Lexecon, an economics consulting firm. P3/EPSA Ex.15 at 1.
[130] P3/EPSA Ex. 12 at 16-17.
[131] P3/EPSA Ex. 12 at 17.
[132] P3/EPSA Ex. 12 at 21-22.

testimony that the various provisions of the stipulations filed throughout the proceeding provide many qualitative benefits.[133] A review of those claimed "benefits" shows that they are only benefits for the specific signatory parties that traded their signature for the benefits as well as commitments to take future actions (such as federal advocacy).

FE's overstatement of and overreliance on the qualitative benefits is evident from the following exchange when Ms. Mikkelsen was asked whether the ESP IV would still be more favorable than an MRO if Rider RRS resulted in a charge of $561 million instead of a credit.

> Q. Let me ask you this. **If rider RRS was forecasted to result in a charge of $561 million over the eight-year term**, would you still believe that the ESP would be more favorable than an MRO?
>
> A. I haven't thought about that question, but certainly there would still be significant qualitative benefits that we have discussed throughout this proceeding associated with the ESP versus the MRO. More specifically, what I would be referring to is the reliability enhancement; the benefit of having baseload generating units that are fuel diverse with on-site fuel storage capabilities located in the ATSI zone; the job retention benefits; the avoidance of transmission investment; the tax dollars generated associated with these plants; as well as the economic development benefits; coupled with the provisions associated with economic development funding, low-income funding, Customer Advisory Agency funding, and many of the other qualitative commitments made in the stipulation, such as the contemplation of a base rate freeze throughout the eight-year period, **so I think as I sit here today, yes.**[134]

Ms. Mikkelsen's belief that benefits to the signatory parties to a stipulation justify a loss of $561 million over the term of the ESP IV is at odds with the purpose of the statutory requirement that the ESP must always be more favorable than the market rate option. Any qualitative benefits found in the Stipulation do not outweigh the potential millions if not billions in charges under Rider RRS. This is especially true as a stop loss provision could be easily

[133] Company Ex. 155 at 13.
[134] Tr. Vol. 36 at 7736-7737 (emphasis added).

added by the Commission to stop any retail customer pass through once the losses exceeded the potential credits which FE has offered.

FE has the burden of showing that the ESP IV is more favorable in the aggregate as compared to an MRO. To accomplish that, FE had to show that either the Rider RRS portion of the ESP IV will net at zero over the term (which it cannot), or show that Rider RRS <u>will</u> be a credit for the ESP IV term (which it cannot). FE did not meet that burden other than presenting a forecast that no other party believes is accurate or certain to occur. With charges likely to be in the millions over the term of the ESP IV, the Commission must either add provisions that require a net credit amount over the term, or must strip out Rider RRS before it can find the ESP IV more favorable than a MRO.

VII. THIS COMMISSION HAS SUPPORTED THE DEVELOPMENT OF COMPETITIVE MARKETS AND SHOULD CONTINUE TO DO SO BY REJECTING FE'S REQUEST FOR A SUBSIDY AND BAILOUT FOR FES

A. This Ratepayer Guarantee is a Subsidy and Will Harm Both the Wholesale and Retail Markets

The proposed Affiliate PPA and Rider RRS shift the responsibility for managing the disposition of the Sammis and Davis-Besse capacity and production from a generator (FES) focused on competing in competitive wholesale and retail power markets to FE, whose business is the transmission and distribution of electricity.[135] Thus, as noted by P3/EPSA witness Dr. Joseph Kalt, FE in effect becomes the *de facto* owner of these two power generation facilities.[136]

As new "owners" of these generation resources, FE's approach to offering the generating units' output into the wholesale power markets would be expected to change when compared to the plants being operated competitively.[137] At the same time, FE's interests in the maintenance

[135] P3/EPSA Ex. 1 at 28.
[136] *Id.*
[137] *Id.*

and longer-term capital investment in the facilities will not be aligned with an entity competing for sales in the wholesale markets.[138] Rider RRS incentivizes FES to overinvest in capital and reduces incentives to the FES to operate the plants efficiently.[139]

Rider RRS, as noted by Dr. Kalt, acts as a subsidy by shifting the risks of the plants to ratepayers; if operating and/or investing at a particular level or under particular conditions is potentially money-losing, doing so is made less risky to FES since ratepayers will ultimately bear the costs of uneconomic performance.[140] Dr. Kalt summarized the issue by noting that all of these factors have the same economic effects on the wholesale market: "They encourage overproduction and inefficiency, and they crowd out competitive producers."[141]

FE's Affiliate PPA proposal is an unabashed guarantee of cost-plus recovery for FES and the shareholders of FirstEnergy Corporation, all being paid for by FE's ratepayers for numerous years. As such, it provides both FES with extensive pecuniary assistance which is nothing short of a long-term subsidy. The PJM Market Monitor concurred and noted that this is a subsidy analogous to other subsidies found to be inconsistent with competition in the wholesale power markets and accordingly, should be rejected.[142] Moreover, the PJM Market Monitor stated that the Affiliate PPA will create an incentive for generators to present a "zero offer" in the PJM markets to maximize the revenue offset to the customers, which will have price-suppressive effects and make it difficult for generating units without subsidies to compete in the market.[143]

Exelon/RESA witness Campbell also agreed, highlighted the displacing effect that the Affiliate PPA and Rider RRS will have on the wholesale markets:

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[138] *Id.* at 28.
[139] *Id.* at 29.
[140] *Id.* at 29.
[141] P3/EPSA Ex. 1 at 29.
[142] IMM Ex. 1 at 3-4.
[143] IMM Ex. 1 at 3.

> Because FE will receive guaranteed cost recovery under Rider RRS, there is no incentive for FE to offer the units into the wholesale market based on market fundamentals such as the variable costs to operate the units. The lack of any incentive, or requirement, for FE to offer the units into wholesale markets based on variable costs, provides FES a competitive advantage over generation owners subject to wholesale market forces and whose offers are guided by the variable costs to operate the unit. **Ultimately, this will have a distortive effect on wholesale market price formation, and the integrity of the wholesale markets in general, as more than 3200 MW of generation will have no incentive to participate in the market based on supply and demand fundamentals.** These market distortions will have a chilling effect on the development of new, more reliable, and more efficient generation in Ohio.[144]

Dynegy witness Ellis expressed similar concerns and noted how detrimental this subsidy will be to other market participants.[145]

> For example, if low gas prices and warm weather this winter depress prices in the Duke Ohio Zone, Dynegy will have to reduce or possibly eliminate its margin, carefully control costs and carefully watch the market in order to make a profitable sale into the market for its Ohio generation assets. By contrast, with the stipulated PPA proposal in place, FES will simply bill the Companies its costs for its operation of the Sammis and Davis Besse units along with its share of costs for the OVEC entitlement, and collect its 10.38% rate of return.[146]

Exelon/RESA witness Campbell also pointed out that Rider RRS (and the Affiliate PPA proposal) is contrary to the progress made toward full retail and wholesale competition, and puts Ohio at a competitive disadvantage, as businesses will face unnecessarily higher energy costs.[147] He also explained that Rider RRS will cause ratepayers to pay two generation-related charges, thus being double-billed for generation-related costs, contrary to R.C. 4928.02(H) and undermining the market.[148] Not only will the Affiliate PPA and Rider RRS impact the wholesale markets, an annual non-bypassable charge for a long-term generation hedge is neither in the

[144] Exelon/RESA Ex. 1 at 13-14.
[145] Dynegy Ex. 1 at 21.
[146] Dynegy Ex. 1 at 7.
[147] Exelon/RESA Ex. 1 at 6;12.
[148] Exelon/RESA Ex. 1 at 10-11.

public interest nor in the interest of maintaining the progress made in Ohio's competitive retail markets.

B. Rider RRS and the Affiliate PPA Will Discourage Bidder Participation in Procurements for the SSO Supply Auctions

Exelon/RESA witness Campbell pointed out that FES has participated in multiple wholesale SSO supply procurement auctions in Ohio.[149] He testified that the Affiliate PPA subsidy to FES could allow it to participate in the SSO supply auctions without bidding in a market-reflective behavior.[150] He opined that wholesale suppliers may become hesitant to bid against a fellow wholesale supplier that is receiving a cost-plus recovery through an affiliate PPA that is ratepayer guaranteed. Moreover, Mr. Campbell stated that this could spill over and affect the outcomes in Ohio's SSO auctions.[151]

C. The PPA Rider and PPA Proposal Will Discourage New Independent Gas-Fired Generation

The PJM Market Monitor stated that the PPA proposal will also negatively affect the market incentives for building new generation and "likely result in a situation where only subsidized units would ever be built."[152] Dr. Bowring's conclusions are based on his opinion that FE will have a natural incentive to make zero offers into the PJM capacity market to ensure it receives maximum revenues to offset costs.[153] The result will be an anti-competitive suppressive effect on capacity prices that in turn means less revenue for other market participants and a risk that new generation will not be built because of artificially suppressed capacity price signals.[154]

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149 Exelon/RESA Ex. 1 at 14.
150 Exelon/RESA Ex. 1 at 14.
151 Exelon/RESA Ex. 1 at 14.
152 IMM Ex. 2 at 5.
153 IMM Ex. 2 at 5.
154 IMM Ex. 2 at 5.

FES' pitch of a long-term hedge for the Affiliate PPA Units is not worth the impact and risk to current wholesale market participants and the benefit of continued generation being developed within PJM and here in Ohio.

VIII. THE PROPOSED STIPULATION FAILS THE COMMISSION'S THREE-PRONG TEST

Rule 4901-1-30, Ohio Administrative Code, stipulations by parties in Commission proceedings are not binding on the Commission, and they should not be approved unless they are reasonable based on three considerations.[155] First is the settlement a product of serious bargaining among capable, knowledgeable parties? Second, does the settlement package, benefit ratepayers and the public interest? Third, does the settlement package violate any important regulatory principle or practice?

In this case, the Stipulation "settlement package" has multiple components, and each separate component should be reviewed under each of these three prongs.

A. The Stipulation was not the Product of Serious Bargaining

First, FE must present evidence demonstrating that the stipulation was the product of serious bargaining.[156] The Ohio Supreme Court has held that negotiations over the terms of a stipulation must be conducted fairly, and that "special considerations, in the form of side agreements among the signatory parties," may give one party an improper "unfair advantage in the bargaining process."[157]

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[155] *See, e.g., Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14,1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (March 30, 1004); *Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al (December 30, 1993); *Cleveland Electric Ilium. Co.*, Case No. 88-170-EL-AIR (January 30, 1989); *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (November 26, 1985).

[156] *OCC v. Pub. Util. Comm.* (2006), 111 Ohio St. 3d 300, 321, 2006-Ohio-5789.

[157] *Id*.

1. Favor trading demonstrates a lack of serious bargaining.

The Stipulation is honey combed with what appear to be favor trading. The City of Akron, COSE, AICUO, Cleveland Housing Network, Consumer Protection Association, Council for Economic Opportunities, Citizens Coalition, and OPAE,[158] are individually named for individual benefits totaling over $19 million during the term of the proposed ESP IV. Similarly, some of the special pilot programs, such as the ability to bypass the otherwise non-bypassable Rider NMB or the High Load Factor Time of Day pilot, are restricted to those who signed or agreed not to oppose the Stipulation. One must distinguish between bargaining to amend a program or tariff service/charge that applies to everyone and bargaining that appears to be a payment in exchange for support of the utility position. The latter is not negotiation of the utility service, it is favor trading.

Another fact that makes the Stipulation appear to be favor trading as opposed to negotiation of a public utility service is the wording of the severability provision which mandates that a signatory party will forfeit its "stipulated provision" if it loses a challenge to any attempt by FE to cure a termination of Rider RRS. The language gives the appearance that Rider RRS support is being traded for the specific signatory provisions.

> If a court of competent jurisdiction invalidates Rider RRS in whole or in part, the Companies will permit any part of the Stipulated ESP IV that has not been invalidated to continue while a good faith effort is made by the Signatory Parties to restore the invalidated provision to its equivalent value. The Signatory Parties agree to work in good faith, on an expedited basis not to exceed 60 days, to cure any court-determined deficiency. The Companies will then file (or jointly file with Signatory Parties) the modified Rider RRS, or its successor provision, for expedited approval by the PUCO, which approval shall not be withheld if the modified Rider RRS, or its successor provision, provides a reasonable remedy to cure the deficiency. The Companies' agreement to permit the stipulated provisions to go into effect in this matter (rather than terminate pursuant to the terms of the Stipulated ESP IV) is contingent upon the Signatory Parties

[158] Company Ex. 154; Company Ex. 2-4.

> supporting the modified Rider RRS, or its success or provision. **A Signatory Party may choose to oppose and express any concerns with the modified Rider RRS, or its successor provision, to the Commission; however, if such concerns are not accepted by the Commission, then any Signatory Party that opposed the modified rider RRS or its successor provision, will forfeit its stipulated provision(s).** This commitment on severability is not intended and shall not be construed to affect the prohibition against retroactive ratemaking. No amounts collected shall be refunded as a result of this severability provision.[159]

Favor trading in stipulations is similar to secret side deals, and should be considered in every stipulation review. Because favor trading has been implicated, the Stipulation does not meet the first prong of the three prong test.

B. The Stipulation, as a Package, does not Benefit Ratepayers and the Public Interest

The Stipulation also fails the second prong of the Commission's balancing test, *i.e.*, it does not benefit ratepayers and the public interest. It is composed, on one hand, of the endorsement of Rider RRS over an eight-year period and, on the other hand, of a variety of terms that simply do not amount to a benefit for ratepayers or for the public interest. Numerous terms in the Stipulation constitute (a) monetary inducements, (b) promises to take a future action which may not ever result in a benefit, (c) terms providing minimal benefits and (d) terms targeted to just select parties who agreed to support Rider RRS.

These terms do not justify Rider RRS' negative impact on the public interest. Rider RRS will "impose hundreds of millions of dollars of net harm on the Companies' captive ratepayers."[160] FE's Rider RRS will also:

> … undermine the federally-regulated competitive wholesale power markets of PJM. It would do so by using Ohio state regulation to force captive retail ratepayers to subsidize the subject plants' participation in the PJM wholesale markets. This subsidization will benefit the shareholders

[159] Company Ex. 154 at 8-9 (emphasis added).
[160] P3/EPSA Ex. 12 at 23.

> and lenders who own less efficient producers (i.e., Davis-Besse and Sammis), but will come at the expense of newer, more efficient and cost-effective generators that would otherwise supply additional power and/or enter the federally-regulated wholesale market. In the absence of a subsidy, the Companies' captive rate payers in Ohio will payer lower prices and the nation's energy production will have lower total cost to the economy.[161]

The minimal benefits (if any) of these provisions of the Stipulation do not make it reasonable to approve the Stipulation.

Dr. Kalt summarized the problem with combining Rider RRS with other provisions when considered separately may have benefit. In response to a question from Commissioner Haque on social utility, Dr. Kalt responded:

> I will try to give you a briefer answer. That's sort of the topic of public policy economics. That's what we teach about. The first principle that we invoke is the public has an abiding interest in an economically efficient economy meaning you deliver what consumers want at the lowest possible cost. You don't waste resources. And you -- that's principle No. 1. Principle No. 2 is that where you have some inefficiency the appropriate public policy approach to that we sometimes say to the students you go at it head on. What we mean by that, if you need grid modernization among your regulated companies, then what you do is you get grid modernization for its own sake. **And, you know, to go to the heart of this case in some sense, you don't, for example – in other words, if it's efficient to do it, you ought to do it. You don't, for example, say we will do that as part of a trade. We'll let you shift all these costs and have the captive ratepayers and use their captivity to guarantee the rates of return and so forth on a couple of plants in order to get grid modernization. You want to separate those from a public policy point of view.** And there's actually theorems about this in the work of Nobel Prize Winner Paul Samuelson about how you want to take on those things because - *** if you try to mess up, if you will, make this inefficient over here in order to get some inefficiency over here, you are going to end up distorting the whole economy, and that's contrary to the public interest. **And so we have this principle of separation we call it, approach the problem head on. Want a better, cleaner environment? Go regulate the plants for environmental cleanliness. Don't trade it away by doing something**

[161] P3/EPSA Ex. 12 at 24.

> **like, you know, using your captive ratepayers to cut a deal.** I think that's trying to be responsive.[162]

As a package, the Stipulation does not benefit ratepayers generally and does not benefit the *public* interest.

C. The Stipulation Violates Important Regulatory Principles and Practices

Favor trading also implicates the third prong of the three-part test – whether the Stipulation violates any important regulatory principle or practice. The Stipulation implies that favor trading occurred in its formation. For example, OPAE is receiving under the Stipulation (page 17) a no-bid contract for the administrative services it will perform, and that cost will be recovered through Rider DSE. If the value of the no-bid contract to the Companies and FES is OPAE's support for the ESP IV (including Rider RRS)**,** then the rate is unjust, unreasonable and in contravention of R.C. 4905.22.

There are other independent provisions in the Stipulation that violate important regulatory principles and practices. For example, the stipulating parties agree that, if a longer term capacity process to address state resource adequacy needs is not approved by September 1, 2017, "the Commission will solicit comments from interested parties no later than October 30, 2017, addressing the State's long term resource adequacy needs."[163] By approving the Stipulation, the Commission would be binding itself to a future action. This type of provision is improper and it and any other similar provision purporting to bind a future Commission should be stricken.

The severability provision also is contrary to the Commission's express requirement in its *AEP ESP III* Opinion and Order that any proposed charge through a PPA rider be severable from the rest of the ESP terms. The Stipulation's severability provision, as noted above, allows FE to

[162] Tr. Vol. 41 at 8717-8718 (emphasis added).
[163] Company Ex. 154 at 9.

strip out ESP IV provisions specific to a signatory party if that party loses a challenge to any attempt by FE to cure a termination of Rider RRS. Because the Stipulation is directly contrary to the Commission's mandate in its *AEP ESP III* Opinion and Order, it must be rejected.

IX. THE COMMISSION SHOULD NOT APPROVE THE PPA PROPOSAL ABSENT ASSURANCES THAT FE WILL SEEK TO MAXIMIZE REVENUES THAT OFFSET RATEPAYER OBLIGATIONS

If the Commission finds it has authority to approve Rider RRS as proposed, the Commission should not ignore the harm to the wholesale markets and to ratepayers that will result from FE's Affiliate PPA proposal and Rider RRS. The Commission, in the past, has taken steps to ensure appropriate actions were taken to use best efforts. For example, Ohio Power Company is currently subject to a Commission directive to sell into the PJM markets the energy, capacity and ancillary services that it purchases from OVEC.[164] The Commission was clear in its directive about the OVEC entitlement:[165]

> AEP Ohio shall cause the energy from its OVEC contractual entitlements to be sold into the day-ahead or real-time PJM energy markets, or on a forward basis through a bilateral arrangement. Any forward bilateral sales must be done at a liquid trading hub at the then-current market wholesale equivalent price. Intercontinental-Exchange or a singular publicly available document shall be used as a form of measure of the then-current market wholesale equivalent pricing. Staff, or, at the Commission's discretion, an independent auditor, shall semi-annually audit AEP Ohio's records to ensure compliance with this provision.

The testimony from witnesses, including the PJM Market Monitor, on how the Affiliate PPA and Rider RRS affect the wholesale markets warrant a similar directive from the Commission to FE if the Commission allows Rider RRS to remain in FE's proposed ESP IV (which it should not). In order to provide a maximum benefit to ratepayers, FE must engage in best efforts to maximize revenues from the PJM markets.

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[164] *In the Matter of the Application of Ohio Power Company for Approval of Full Legal Corporate Separation and Amendment to Its Corporate Separation Plan*, Case No. 12-1126-EL-UNC, Finding and Order (December 4, 2013).
[165] *Id*. at 8-9 (footnote omitted).

X. CONCLUSION

FE proposes to expose all of its captive ratepayers to the risks – known and unknown – of 3,244 MWs of generation for at least eight years – up to May 31, 2024. FE bears the burden of proof in this proceeding, but it has not provided evidence that demonstrates that Rider RRS will amount to a hedge or to provide rate stability for FE's ratepayers. Indeed, the evidence reflects just the opposite. Nor has FE established that Rider RRS is reasonable or in the public interest. There are numerous reasons why the proposed Rider RRS does not comport with Ohio law. Moreover, a review the various terms in the Stipulation demonstrates that it is not reasonable, is not in the public interest and was not the product of serious bargaining. For all of the foregoing reasons, the Commission should reject Rider RRS as proposed in FE's ESP IV . Additionally, the Commission should reject the Stipulation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on the 16th day of February 2016 upon all persons/entities listed below:

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