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**Via E-FILE**

February 16, 2016

Public Utilities Commission of Ohio  
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Columbus, Ohio 43215

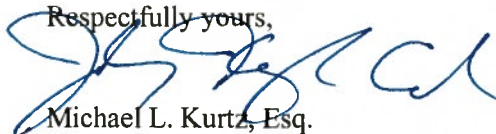
**In re: Case No. 14-1297-EL-SSO**

Dear Sir/Madam:

Please find attached the POST-HEARING BRIEF OF THE OHIO ENERGY GROUP e-filed today in the above-referenced matters.

Copies have been served on all parties on the attached certificate of service. Please place this document of file.

Respectfully yours,

A handwritten signature in blue ink, appearing to read "Michael L. Kurtz", is written over the typed name.

Michael L. Kurtz, Esq.

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Jody Kyler Cohn, Esq.

**BOEHM, KURTZ & LOWRY**

MLKkew

Encl.

Cc: Certificate of Service

**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

In The Matter Of The Application Of The Ohio Edison :  
Company, The Cleveland Electric Illuminating Company, :  
And The Toledo Edison Company For Authority To : **Case No. 14-1297-EL-SSO**  
Establish A Standard Service Offer Pursuant To R.C. :  
§4928.143 In The Form Of An Electric Security Plan :  
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**POST-HEARING BRIEF OF THE  
THE OHIO ENERGY GROUP**

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**COUNSEL FOR THE OHIO ENERGY GROUP**

**February 16, 2016**

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**POST-HEARING BRIEF OF THE  
THE OHIO ENERGY GROUP**

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The Ohio Energy Group (“OEG”) submits this Brief in support of its recommendations to the Public Utilities Commission of Ohio (“Commission”) in this proceeding. OEG’s members who are participating in this proceeding are: Air Products and Chemicals, Inc., AK Steel Corporation, Alcoa Inc., BP-Husky Refining, LLC, Cargill, Incorporated, Charter Steel, Fiat Chrysler Automobile US, LLC, Ford Motor Company, General Motors LLC, Johns Manville, Linde, LLC, Martin Marietta Magnesia Specialties, LLC, Materion Brush Inc., North Star BlueScope Steel, LLC, POET Biorefining, Praxair Inc., and Worthington Industries. OEG’s recommendations are set forth below.

**INTRODUCTION**

On August 4, 2014, Ohio Edison Company, The Toledo Edison Company, The Cleveland Electric Illuminating Company (collectively, “FirstEnergy” or “the Companies”) filed a proposed Electric Security Plan (“ESP”) in this proceeding. On December 22, 2014, pursuant to Ohio Adm. Code 4901-1-30, FirstEnergy submitted a Stipulation and Recommendation signed by OEG, Ohio Power Company (“AEP Ohio”), Nucor Steel Marion, Inc., City of Akron, Council of Smaller Enterprises, Cleveland Housing Network, Consumer Protection Association, Council For Economic Opportunities in Greater Cleveland, Citizens Coalition, Material Science Corp, Association of Independent Colleges and Universities of Ohio, and the International Brotherhood of Electrical Workers, Local 245. The Stipulation included several recommended improvements to FirstEnergy’s proposed ESP. The Stipulation was subsequently amended by a Supplemental Stipulation and Recommendation

filed on May 28, 2015 and a Second Supplemental Stipulation and Recommendation (adding The Kroger Company as a signatory party) filed on June 4, 2015.

A 35-day evidentiary hearing on the improved ESP proposal took place from August through October of 2015. Shortly after the hearing ended, the parties met several times to discuss the potential for settlement. These negotiations ultimately resulted in a Third Stipulation and Recommendation signed by the previous signatory parties as well as Commission Staff, EnerNOC, Inc, and Ohio Partners for Affordable Energy, which was filed in this proceeding on December 1, 2015. For purposes of this Brief, OEG will refer to all of the Stipulations and Recommendations filed in this case collectively as the “Stipulation” and will refer to the parties who have signed on to the Stipulation as the “Signatory Parties.”

As modified by the Stipulation, the proposed ESP is reasonable and contains many components that will benefit retail customers and promote state policies. One of the more prominent components of the modified ESP is a proposal for FirstEnergy to enter into a Purchase Power Agreement (“PPA”) with FirstEnergy Solutions Corp. (“FES”) for the output of two generating plants owned by FES - (“PPA Units”) – the Davis-Besse Nuclear Power Station and the W.H. Sammis Plant - and to flow the net costs or benefits associated with selling that output (as well as the output from FES’ entitlement in the Ohio Valley Electric Corporation generating units) to retail customers through the proposed Retail Rate Stability Rider (“Rider RRS”).

As discussed below, the Stipulation satisfies the Commission’s traditional three-prong test for reviewing settlements: 1) the Stipulation does not violate any important regulatory principle or practice; 2) the Stipulation is the product of serious bargaining among capable, knowledgeable parties; and 3) the Stipulation as a package benefits customers and the public interest. Moreover, the PPA proposal as modified by the Stipulation satisfies the Commission’s requirements for PPA proposals as set forth in AEP Ohio’s most recent ESP case.

## **STANDARD OF REVIEW**

While not binding on the Commission, the terms of stipulations are accorded substantial weight.<sup>1</sup> The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings.<sup>2</sup> The ultimate issue for the Commission's consideration is whether the agreement, which embodies significant time and effort by the Signatory Parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to customers and public utilities.<sup>3</sup>

## **ARGUMENT**

### **I. The Stipulation Satisfies the Commission's Three-Prong Test For Determining Whether A Settlement Is Reasonable And Should Be Adopted.**

Given the slew of legal challenges directed at proposals in the Stipulation, particularly Rider RRS, OEG will address the traditional three-prong test for settlements out of order, taking the third prong (whether the settlement package violates any important regulatory principle or practice) first.

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<sup>1</sup> Opinion and Order, Case No. 11-3549-EL-SSO (November 22, 2011) ("Duke ESP Order") at 41; Opinion and Order, Case No. 12-1230-EL-SSO (July 18, 2012) ("FirstEnergy ESP Order") at 24 (citing *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992) and *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978))).

<sup>2</sup> FirstEnergy ESP Order at 24; Duke ESP Order at 41 (citing 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, 1994); *Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al. (December 30, 1993); *Cleveland Electric Illum. 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)).

<sup>3</sup> Duke ESP Order at 41; FirstEnergy ESP Order at 24 (citing *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, (68 Ohio St.3d 559, 629 N.E.2d 423 (1994) and *Consumers' Counsel* at 126).

**A. The Stipulation Does Not Violate Any Important Regulatory Principle Or Practice.**

None of the individual provisions of the Stipulation is inconsistent with or violates any important Commission principle or practice. Rather, as discussed below, the Stipulation advances important policies and principles, including facilitating the state's effectiveness in the global economy, ensuring the availability to customers of adequate and reliable service, increasing rate stability, encouraging demand-side management, protecting at-risk populations, promoting innovation in technology for infrastructure, promoting fuel diversity and facilitating retail shopping. While parties are likely to attack the legality of Rider RRS, that proposal, as modified by the Stipulation, is consistent with both state and federal law and will promote state policies.

**1. Rider RRS Is Consistent With Ohio's Quasi-Market Regulatory System Established By S.B. 221.**

Parties have argued that Rider RRS should be rejected because it is inconsistent with Ohio's purported policy of complete reliance on the federally-regulated wholesale energy and capacity markets. Such arguments are based on the flawed conclusion that the Ohio Commission has no jurisdiction over generation.

For example, the Independent Market Monitor for PJM Interconnection, LLC ("PJM"), Dr. Joseph E. Bowring recommends that Rider RRS be rejected because it "*is not consistent with the market paradigm.*"<sup>4</sup> Dr. Bowring describes the two "*broad paradigms*" that he believes currently exist within PJM.<sup>5</sup> The first is the "*market paradigm,*" which applies to "*deregulated*" states such as Delaware, Illinois, Maryland, New Jersey, and Pennsylvania, as well as the District of Columbia.<sup>6</sup> According to Dr. Bowring, this paradigm "*includes a full set of markets, most importantly the energy market and capacity market, which together ensure that there are adequate revenues to incent new generation when it is needed and to incent retirement of units when appropriate.*"<sup>7</sup> This is contrasted with what Dr. Bowring deems the "*quasi-market paradigm,*" which applies to states that regulate generation on a cost-of-service basis and also rely on the PJM markets, such as Virginia, West Virginia, Kentucky, Indiana, North Carolina, Tennessee, and Michigan.<sup>8</sup> The quasi-market paradigm "*includes*

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<sup>4</sup> IMM Ex. 2 (First Supplemental Testimony of Joseph E. Bowring) at 6:6-7.

<sup>5</sup> Id. at 5:25-26.

<sup>6</sup> Id. at 5:26-30.

<sup>7</sup> Id. at 5:26-29.

<sup>8</sup> Id. at 5:31-6:5



*an energy market based on LMP but addresses the need for investment incentives via the long-term contract model or the cost of service model.”*<sup>9</sup>

Dr. Bowring’s recommendation that Rider RRS should be rejected because it is not consistent with “*market paradigm*” is not informed by Ohio law. Ohio is not a “*market paradigm*” jurisdiction that has ceded complete authority over generation pricing to PJM and the Federal Energy Regulatory Commission (“FERC”). Rather, as a result of the ESP provision of S.B. 221, Ohio has evolved from a traditionally regulated jurisdiction into a quasi-market jurisdiction that incorporates elements of both traditional cost-based pricing and market-based pricing.

Before 1999, the PUCO regulated Ohio’s investor-owned electric utilities in accordance with traditional cost-of-service principles.<sup>10</sup> With respect to generation, the Commission authorized each investor-owned utility doing business in Ohio to collect a just and reasonable return on the average embedded cost (original cost less depreciation) of its power plant investments, plus the recovery of its actual cost of fuel and other expenses with no mark-up or profit margin. In return, the utility was required to provide reliable and non-discriminatory service to all customers located in its service territory. This regulatory compact allowed the utility low-cost access to the significant amounts of capital needed to build new generation and ensured that new generation would in fact be built. That system worked well. Throughout much of the 1970s, 1980s, and 1990s, parts of Ohio had among the lowest electric rates in the nation. This in turn led to the growth of energy-intensive manufacturing companies in Ohio, including the members of OEG.

In 1999, however, the Ohio General Assembly fundamentally changed the traditional regulatory compact. In 1999, Ohio enacted S.B. 3, which moved Ohio’s investor-owned utilities toward complete reliance on the federally-regulated wholesale power market to provide generation supply. Under S.B. 3, after a five-year transition period (2001-2005), the investor-owned utilities were to corporately separate or divest their generation

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<sup>9</sup> IMM Ex. 2 at 5:31-33.

<sup>10</sup> “100 Years and Counting: The History of the PUCO,” Public Utilities Commission of Ohio, available at <http://www.puco.ohio.gov/puco/index.cfm/consumer-information/consumer-topics/puco-history/>.

assets and customers were to rely solely on the wholesale market to supply their energy and capacity needs at just and reasonable rates as determined by the FERC under the Federal Power Act.<sup>11</sup>

S.B. 3 did not impose these conditions on Ohio's municipal (AMP Ohio) or customer-owned cooperative utilities (Buckeye Power). AMP Ohio and Buckeye Power both serve their customers at cost-of-service rates for generation they own, plus costs incurred in the PJM energy and capacity markets. Therefore, both AMP Ohio and Buckeye Power operate under the "*quasi-market paradigm*."

In the wholesale market, rates are not based on the cost of any given utility, but instead are based on region-wide marginal (incremental) costs. For both energy and capacity, marginal cost pricing pays each supplier the clearing price of the last incremental unit needed to meet region-wide demand. Marginal cost pricing can be beneficial for customers during periods of supply surplus or when demand is low. But marginal cost pricing is very volatile during periods of supply shortage or rising demand. In the energy market, there is almost no limit as to how high pricing can go during shortage hours. In the capacity market, RPM pricing routinely changes by 300% to 400% from one annual auction to the next. Reasonable minds can differ over whether average embedded cost pricing or marginal cost pricing will be lower over the long run. However, there can be little doubt that marginal cost pricing is more volatile.

Midway through S.B. 3's five-year transition period, the path toward complete reliance on the federally-regulated wholesale capacity and energy markets became problematic as market prices remained significantly above legacy generation pricing.<sup>12</sup> To avoid the rate shock experienced by Maryland, Illinois, and other deregulated jurisdictions,<sup>13</sup> the Commission implemented Rate Stabilization Plans that largely maintained legacy generation pricing for the 2006-2008 time period.<sup>14</sup> Stakeholders then urged the Ohio Legislature to reconsider whether complete deregulation was in fact the best course of action for the State.

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<sup>11</sup> 16 U.S.C. §824d.

<sup>12</sup> See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 128 Ohio St.3d 512, 513 (2011).

<sup>13</sup> *Id.*

<sup>14</sup> See e.g. Opinion & Order, Case No. 04-169-EL-UNC (January 26, 2005); See also Opinion & Order, Case No. 02-2779-EL-ATA (September 2, 2003) at 29.

To avert potentially drastic market price increases, new legislation was passed by the Ohio General Assembly in 2008 – S.B. 221.<sup>15</sup> Rather than moving Ohio farther toward mandatory reliance on the federally-regulated wholesale energy and capacity markets, S.B. 221 gave the Commission discretion to opt back into some of the traditional features of regulation. For example, under the newly adopted R.C. 4928.143(B)(2)(b), the Commission is authorized to grant an electric distribution utility recovery of a reasonable allowance for construction work-in-progress for the cost of constructing an electric generating facility or for an environmental expenditure for any electric generating facility. Under R.C. 4928.143(B)(2)(c), the Commission can establish a nonbypassable surcharge through which an electric distribution utility can recover costs associated with certain electric generating facilities dedicated to Ohio customers. And most significantly for this case, under R.C. 4928.143(B)(2)(d), the Commission may approve as part of 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.*<sup>16</sup>

None of these tools would be available to the Commission in a purely deregulated “market paradigm” system.

S.B. 221 introduced a hybrid regulatory approach under which investor-owned utilities could either choose to follow a path toward full reliance on the wholesale market by establishing a Market Rate Offer (“MRO”) or could maintain a more state-regulated path by establishing an ESP.<sup>17</sup> When utilities subsequently attempted to establish an MRO, however, the Commission rejected them.<sup>18</sup> Thus, while recent ESP cases have led to Ohio utilities divesting their generation assets and establishing retail Standard Service Offer (“SSO”) rates through a competitive bidding process, the Commission still maintains traditional regulatory tools through an ESP that can be used to protect utility customers from the risks and volatility of complete reliance on the federally-regulated wholesale energy and capacity markets.

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<sup>15</sup> *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 128 Ohio St.3d 512, 513 (2011).

<sup>16</sup> Emphasis added.

<sup>17</sup> R.C. 4928.142 and 4928.143.

<sup>18</sup> See Opinion and Order, Case No. 08-936-EL-SSO (November 25, 2008); Opinion and Order, Case No. 10-2586-EL-SSO (February 23, 2011).

Given that the ESP statute authorizes a quasi-market regulatory system, criticism of Rider RRS on the basis that it is not consistent with the deregulated “*market paradigm*” is misplaced. At the hearing, Dr. Bowring conceded that he did not review Ohio’s ESP statute (R.C. 4928.143) prior to drawing his conclusion that Rider RRS should be rejected because it is not consistent with the “*market paradigm*.”<sup>19</sup> This is a serious oversight because R.C. 4928.143 is the very statute permitting the Commission to approve Rider RRS. As discussed above, R.C. 4928.143(B)(2)(d) allows the Commission to approve financial limitations on customer shopping that have the effect of stabilizing or providing certainty regarding retail electric service, such as Rider RRS. The Commission acknowledged its authority under that statute in AEP Ohio’s last ESP case:

*[T]he Commission agrees with AEP Ohio and OEG that the proposed PPA rider is a financial limitation on customer shopping for retail electric generation service. Although the proposed PPA rider would impose no physical constraints on shopping, the rider does constitute, as OEG witness Taylor explained, a financial limitation on shopping that would help to stabilize rates.*<sup>20</sup>

Dr. Bowring conceded that he was not aware that the ESP statute allows the Commission to approve “*limitations on customer shopping for retail electric generation service*” before he filed his testimony.<sup>21</sup> Dr. Bowring’s view of Rider RRS is therefore based on the false premise that the Ohio Commission has no jurisdiction over generation pricing and that Ohio is fully in the “*market paradigm*.” However, in light of the ESP statute, Ohio fits squarely into the “*quasi-market paradigm*” under which some cost-based pricing is appropriate. Accordingly, criticisms that Rider RRS is inconsistent with Ohio’s regulatory scheme should be rejected.

## **2. Rider RRS Is A Financial Limitation On Shopping That Will Help Stabilize Customer Rates Consistent with R.C. 4928.143(B)(2)(d).**

While parties are likely to spend considerable time attacking the legality of Rider RRS, those assertions are incorrect. As the Commission already found when it established the PPA Rider in AEP Ohio’s last ESP case, such a mechanism can be lawfully authorized pursuant to R.C. 4928.143(B)(2)(d) because it is a financial

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<sup>19</sup> Tr. Vol. XXIV (October 6, 2015) at 4994:7-9.

<sup>20</sup> Opinion and Order, Case Nos. 13-2385-EL-SSO *et al* (February 25, 2015) at 22.

<sup>21</sup> Tr. Vol. XXIV (October 6, 2015) at 4994:7-9.

*“limitation on customer shopping” that has the effect of “stabilizing or providing certainty regarding retail electric service.”<sup>22</sup>*

Rider RRS stabilizes rates by providing customers with a blended electric rate, where part of their pricing is at market and part is at cost. And it does this without adversely affecting the competitive market. Customers would still purchase 100% of their physical energy and capacity through the SSO or from CRES providers.<sup>23</sup> Rider RRS is merely a financial device that provides a price hedge. Based on the ratio of the capacity from the PPA units to the normalized demand of FirstEnergy’s native load, Rider RRS would result in an electric rate to retail customers comprised 70% market and 30% cost.<sup>24</sup> Since cost-based rate components generally move slowly and predictably over time whereas market rates (based upon marginal costs) can be highly volatile and unpredictable, the portion of the rate based on cost will be inherently more stable.

PJM energy market rates are determined by the entire PJM footprint and are largely uncapped, spiking to as high as \$1,000 MWh at times. In contrast to the extremely volatile PJM marginal cost energy market, energy purchased under the PPA will be at the actual cost of the fuel and variable O&M from the PPA Units with no mark-up or profit margin. This stable energy pricing will vary only slightly over time as fuel costs change and plant capacity factors and heat rates change. PJM capacity market prices have also been highly unpredictable and volatile. In contrast, the capacity costs reflected in the PPA should be relatively stable. The PPA capital costs are associated with specific Commission-approved generating units whose 50% debt and 50% equity capital structure and 10.38% return on equity (“ROE”) are fixed, and whose debt costs and rate base should remain largely fixed over the PPA term.

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<sup>22</sup> AEP ESP 3 Order at 22 (*“Nonetheless, the Commission agrees with AEP Ohio and OEG that the proposed PPA rider is a financial limitation on customer shopping for retail electric generation service. Although the proposed PPA rider would impose no physical constraints on shopping, the rider does constitute, as OEG witness Taylor explained, a financial limitation on shopping that would help to stabilize rates (Tr. XI at 2539, 2559). Under AEP Ohio’s PPA rider proposal, shopping customers will still purchase all of their physical generation supply from the market through a CRES provider. Although the proposed PPA rider would have no impact on customers’ physical generation supply, the effect of the PPA rider is that the bills of all customers would reflect a price for retail electric generation service that is approximately 5 percent based on the cost of service of the OVEC units and 95 percent based on the retail market. Effectively, then, the proposed PPA rider would function as a financial restraint on complete reliance on the retail market for the pricing of retail electric generation service.”*).

<sup>23</sup> OEG Ex. 1 (Supplemental Testimony and Exhibits of Stephen J. Baron) at 7:13-21; Tr. Vol. I (August 31, 2015) at 39:11-18.

<sup>24</sup> Tr. Vol. XXXIX (January 20, 2016) at 8333:16-25.

By blending cost-based and market-based rates, Rider RRS would serve as a hedge to smooth out rate fluctuations that otherwise could occur if customers were 100% exposed to volatile marginal cost pricing.<sup>25</sup> That hedge would be countercyclical. If market prices are high during the PPA term, then Rider RRS would result in a credit. If market prices are low during the PPA term, then Rider RRS would result in a charge. In either instance, Rider RRS would counterbalance market rate impacts on customer bills.

Rider RRS is a valuable tool for achieving a diversified portfolio for Ohio electric customers, which individual customers would not be able to achieve on their own. Without Rider RRS, FirstEnergy's customers will be 100% exposed to the PJM market. While it may seem advantageous to rely 100% on market prices under current conditions when rates are low, there is no reasonable assurance that market rates will remain low over the next eight years. Adopting Rider RRS would protect customers in the event that wholesale prices in the federally-regulated PJM market increase, as has repeatedly been the case. And the fuel diversity offered by base load coal and nuclear capacity in FirstEnergy's generation portfolio has the potential to reduce risk further and provide additional rate stability.<sup>26</sup> While reasonable minds may differ as to whether market prices will increase or decrease over time, it is clear that embedded cost-based pricing is more stable than marginal cost pricing.

Rider RRS is akin to a retirement account that includes both stocks and bonds. While stocks may afford the investor an opportunity for greater growth, stocks are also more volatile and expose the investor to greater risk of loss. Bonds generally offer lower growth potential, but are less volatile and provide a stable yield. Both products can be included in a prudent investor's portfolio.

### **3. Rider RRS Is Not An Anti-Competitive Subsidy Prohibited By R.C. 4928.02(H).**

Parties have also claimed that Rider RRS is contrary to R.C. 4928.02(H) regarding anti-competitive subsidies flowing from a noncompetitive retail electric service (i.e. transmission or distribution) to a competitive retail service. These arguments are misplaced.

As an initial matter, Rider RRS is not "*anti-competitive*" because it does not impact the SSO auctions or customer shopping decisions. Nor does it skew the wholesale market since while the future of the PPA Units is

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<sup>25</sup> OEG Ex. 1 at 3:24-4:4.

<sup>26</sup> OEG Ex. 1 at 6:15-19.

“uncertain,” they are not scheduled to retire. This means that the same amount of energy and capacity will participate in the PJM markets with or without the PPA. A fixed ROE of 10.38% is an earnings floor during depressed market conditions, but is also a ceiling on earnings during high-priced market conditions.

Further, Rider RRS is not a “subsidy” because customers would be paying for a product that they actually receive – rate stability, fuel diversity, improved reliability, and adequacy of service.<sup>27</sup> And customers are in fact expected to receive rate credits through Rider RRS, which is contrary to the notion of a “subsidy.” A Rider RRS rate credit is an “anti-subsidy.”

Even if Rider RRS could reasonably be considered a “subsidy,” all subsidies are not inherently unreasonable, as some other parties would have the Commission believe. Indeed, in explaining why wholesale resources with different costs structures should all receive the same level of compensation (LMP) in the PJM energy market, the U.S. Supreme Court recited an explanation provided by the FERC:

*...compensation ordinarily reflects only the value of the service an entity provides—not the costs it incurs, or benefits it obtains, in the process. So when a generator presents a bid, “the Commission does not inquire into the costs or benefits of production...Different power plants have different cost structures. And, indeed, some plants receive tax credits and similar incentive payments for their activities, while others do not...But the Commission had long since decided that such matters are irrelevant: Paying LMP to all generators—although some then walk away with more profit and some with less—“encourages more efficient supply and demand decisions.”<sup>28</sup>*

As the U.S. Supreme Court notes, generating units in different states receive varying levels of credits, incentives, and geographical advantages at the state level, which may very well be viewed by their competitors as “subsidies.” This is especially true with respect to the heavily-subsidized renewable power industry and the mandatory purchase requirements of many state level renewable portfolio standards. Indeed, state-level policies with respect to corporate taxes, individual income taxes, taxes on electricity, property taxes, worker’s compensation laws, worker safety laws, etc. can substantially impact the cost structure and ability to profit of a given generating unit compared to its competitors. Every advantage that a generator receives that is not received by every other participant in the PJM market is not an “anti-competitive subsidy” that infringes on FERC’s jurisdiction over the wholesale market. As the U.S. Supreme Court stated “markets in all electricity’s inputs –

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<sup>27</sup> OEG Ex. 1 at 7:23-8:3.

<sup>28</sup> *FERC v. Elec. Power Supply Ass’n*, Slip Opinion in U.S. Supreme Court Case No. 14-840 (January 25, 2016) at 31-32 (emphasis added).

*steel, fuel, and labor most prominent among them – might affect generators' supply of power...So if indirect or tangential impacts on wholesale electricity rates sufficed, FERC could regulate now in one industry, now in another, changing a vast array of rules and practices to implement its vision of reasonableness and justice. We cannot imagine that was what Congress had in mind.”*<sup>29</sup>

The fact that FES will receive a cost-based rate for its PPA Units is commonplace in the PJM market. Investor-owned utilities in Virginia, West Virginia, Kentucky, Indiana, North Carolina, Tennessee and Michigan, as well as all of the municipal utilities and customer-owned cooperative utilities in the thirteen state PJM footprint, operate under cost-of-service models and also participate in the PJM energy and capacity markets. This includes Ohio's municipal (AMP Ohio) and customer-owned cooperative utilities (Buckeye Power). Tens of thousands of megawatts of generation have, for many years, received cost-based compensation for generation while fully participating in the PJM energy and capacity markets. Treating Ohio's investor-owned utilities differently would be discriminatory.

It is deeply ironic for the PJM Independent Market Monitor to claim that the cost-of-service Rider RRS is an unreasonable subsidy intended to prop up uneconomic generation when the PJM rules explicitly allow for cost-of-service compensation at the wholesale level in order to prevent generation needed for system reliability from retiring. As discussed below, a generator in PJM that is needed for reliability and that voluntarily elects to continue operating instead of deactivating is entitled to recover the entire cost of operating the unit beyond its proposed deactivation date. Yet cost-of-service recovery at the retail level is labeled an unlawful subsidy by so many parties here.

The deactivation of uneconomic generating units is covered by the Reliability Must-Run (“RMR”) provisions of Part V of the PJM Open Access Transmission Tariff.<sup>30</sup> According to the RMR provisions, a generation owner must provide PJM with notice of its intent to deactivate a unit at least 90 days prior to the unit's proposed deactivation date.<sup>31</sup> PJM will then study the transmission system to determine if the proposed deactivation could adversely affect system reliability and will notify the generation owner within 30 days of the

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<sup>29</sup> Id. at 15.

<sup>30</sup> PJM Tariff, Part V, Generator Deactivation.

<sup>31</sup> *In re GenOn Power Midwest, LP*, Docket No. ER12-1901-000, 140 FERC ¶ 61,080 (July 30, 2012).



specific reliability concerns and provide an estimate of the period of time needed to construct necessary transmission upgrades.<sup>32</sup> The generation owner has the right to deactivate a generating unit even if PJM determines that there are reliability concerns.<sup>33</sup>

This means that PJM cannot compel a generator to remain in operation even if deactivation would cause reliability problems. This is an important limitation on PJM's ability to ensure reliability, which exists because under Section 201 of the Federal Power Act, except with respect to hydroelectric facilities, FERC "*shall not have jurisdiction ... over facilities used for the generation of electric energy.*"<sup>34</sup> Under Section 207 of the Federal Power Act, if FERC determines that any interstate service of a public utility is inadequate or insufficient it is required to "*fix the same by its order, rule or regulation: Provided, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes...*"<sup>35</sup> Only state commissions (at least those which choose to exercise it) have direct jurisdiction over generating facilities. In Ohio, this authority is exercised by both this Commission and by the Ohio Power Siting Board.<sup>36</sup> There is no FERC equivalent to the Ohio Power Siting Board. In sum, FERC cannot compel the construction of new generation nor can it require that existing generation remain in operation, even if such construction or operation is needed for wholesale system reliability or adequate or sufficient interstate service. This gives state commissions a unique and important role in ensuring retail reliability and adequacy of service - a role specifically recognized by the Energy Policy Act of 2005 (discussed *infra*) and one which neither FERC nor PJM can fill.<sup>37</sup>

Getting back to PJM's RMR rules, a generation owner that voluntarily elects to continue to operate the unit past its planned deactivation date to maintain system reliability pending completion of necessary transmission upgrades is entitled to a wholesale cost-of-service rate. As FERC explains, "[i]f the generation owner chooses to

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<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> 16 U.S.C. Section §824.

<sup>35</sup> 16 U.S.C. Section §824f.

<sup>36</sup> R.C. 4906-1 through 4906-17.

<sup>37</sup> Even though FERC cannot order that a new power plant should be built or that an existing plant should remain in operation because it has no direct jurisdiction over generation, PJM is not powerless. PJM can incentivize new construction and the continued operation of existing generation through modifications to its BRA auction rules intended to increase RPM capacity prices. This is exactly what PJM did with its Capacity Performance Plan. But this is a blunt instrument that applies to all 180,000 MW of generation on the PJM system, thus resulting in rate increases for consumers that purchase competitive generation. And changes to the BRA auction rules to increase RPM capacity prices cannot ensure results. Given the three-year forward for a one-year period structure of RPM capacity payments, increased pricing in one auction may not result in new generation being built or in existing generation continuing to be operated. And PJM is agnostic as to where new or existing generation is located. In contrast, states can take action with respect to individual power plants that provide local benefits (jobs, taxes, economic development, etc.), as is the case here.

*continue to operate the unit, it is entitled to file a cost-of-service recovery rate with the Commission in order to recover the entire cost of operating the unit beyond its proposed deactivation date.*"<sup>38</sup>

It is a sound FERC policy to authorize a cost-of-service rate to a generator needed to maintain wholesale system reliability, even if the cost-of-service rate is currently above market. That is not an unreasonable subsidy. Reliability is far more important than short-term pricing. And it is likewise a reasonable state policy to reflect the net costs/benefits of a cost-of-service PPA in retail rates to provide retail rate stability, fuel diversity, reliability, and adequacy of service, even if the cost-of-service rate is currently above market. This too is not an unreasonable subsidy.

**4. The Commission Has Authority To Approve Rider RRS As A Part Of Its Obligation To Ensure The Adequacy And Reliability Of Electric Service In Ohio.**

Parties have argued that the State of Ohio should not concern itself with the issues of resource adequacy or system reliability, but rather should leave those issues to be handled by PJM. These arguments fail to recognize that under the Federal Power Act, FERC has no direct jurisdiction over generation. As discussed extensively above, generation resource adequacy can only be directly addressed by this Commission.

Although PJM certainly has an expansive role in operating the regional electric grid, Ohio also has authority to promote policies that ensure the reliability and adequacy of electric service to retail customers within the State. After again recognizing that FERC cannot order the construction of new generation, the Energy Policy Act of 2005 specifically recognizes the states' particular authority over safety, adequacy and reliability of electric service. 16 U.S.C. 824o(i)(2) and (3), addressing electric reliability, provides:

*(2) This section does not authorize the ERO [Electric Reliability Organization] or the [Federal Energy Regulatory] Commission to order the construction of additional generation or transmission capacity or to set and enforce compliance with standards for adequacy or safety of electric facilities or services.*

*(3) Nothing in this section shall be construed to preempt any authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within that State, as long as such action is not inconsistent with any reliability standard...*

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<sup>38</sup> *In re GenOn Power Midwest, LP*, Docket No. ER12-1901-000, 140 FERC ¶61,080 at 61,081.

These sections preserve the states' ability to make decisions that would increase the reliability of their grid and ensure that adequate generation is available to meet their retail demand, even while the FERC (which regulates PJM) and Electric Reliability Organizations such as NERC are simultaneously taking actions to protect reliability and adequacy of wholesale service.

Ohio's responsibility to bolster reliability and adequacy of service is also set forth in State policy. R.C. 4928.02 provides that "[i]t is the policy of this state to...[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service."<sup>39</sup> Rider RRS will promote fuel diversity by helping maintain the operation of coal-fired and carbon-free nuclear generation, key components of fuel diversity in a region that is becoming more heavily reliant natural gas generation. In this manner, if the Commission were to approve the modified PPA proposal set forth in the Stipulation, grid reliability and adequacy of service would be enhanced and the Commission would be acting consistent both with its authority under federal law and with its responsibility under State law.

Maintaining the zero carbon Davis-Besse nuclear facility is especially important to ensure adequacy of service in light of the possibility that the U.S. E.P.A.'s Clean Power Plan will be upheld.<sup>40</sup> The Clean Power Plan requires that beginning in 2022, Ohio must reduce the average carbon intensity of all generation located in the State to 1,501 pounds of CO<sub>2</sub> per MWh (rate-based goal) or to limit the annual tons of CO<sub>2</sub> emitted by existing sources to 88,512,313 (mass-based goal). Over the next eight years, Davis-Besse is projected to generate approximately 7,500,000 MWh of zero carbon energy annually. Without the zero carbon Davis-Besse generation, achieving either mass-based or rate-based compliance will be much more difficult. The Clean Power Plan uniquely puts the CO<sub>2</sub> compliance obligation on the state itself, not on the utilities, the unregulated merchant generators, or the individual plants. Because approval of Rider RRS will ensure the continued operation of Davis-Besse for at least the next eight years, Rider RRS will help ensure adequacy of service throughout Ohio if the Clean Power Plan ultimately goes into effect.

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<sup>39</sup> Emphasis added.

<sup>40</sup> 40 C.F.R. Part 60. By Order of the United States Supreme Court issued February 9, 2016, the effectiveness of the Clean Power Plan is stayed pending judicial review.

## **5. Approval of Rider RRS Is Not Preempted By FERC's Jurisdiction Over the Wholesale Power Markets.**

Parties have argued that Rider RRS is precluded by two recent federal appellate decisions involving attempts by Maryland and New Jersey to lower wholesale market pricing by incenting the construction of new generating units in their respective states.<sup>41</sup> But such an interpretation of the Maryland and New Jersey cases is far broader than what was intended by the courts.

FirstEnergy's Rider RRS proposal is distinguishable from the Maryland and New Jersey situations. In those cases, Maryland and New Jersey attempted to incentivize new generation for the explicit purpose of driving down wholesale capacity prices.<sup>42</sup> Both states found that the PJM capacity market clearing prices in their regions were too high because of insufficient generation supply. These states also determined that the annually changing nature of PJM capacity pricing did not provide enough financial certainty for merchant generators to make the large capital investments necessary to construct new generation. Therefore, they decided to take matters into their own hands.<sup>43</sup> In the Maryland case, the Public Service Commission solicited proposals for the construction of a new power plant, offering the successful bidder a fixed, twenty-year revenue stream through a contract that the state would compel local electric utilities to enter.<sup>44</sup> In the New Jersey case, the legislature passed a statute requiring electric utilities to enter into long-term contracts to fund new natural gas-fired plants with generators chosen by the Board of Public Utilities.<sup>45</sup>

In the Maryland and New Jersey cases, the states' efforts were aimed specifically at incentivizing the construction of new power plants that would directly lower wholesale capacity prices in their region.<sup>46</sup> Even though the RPM capacity prices in the constrained Maryland and New Jersey regions were very high and resulted in high prices for customers, the annually changing nature of RPM capacity prices did not encourage new generation to be built. The states therefore decided to establish their own methods of encouragement (state-subsidized long-term contracts). However, the courts found that providing state-established methods to subsidize

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<sup>41</sup> *PPL EnergyPlus, LLC v. Nazarian*, 974 F. Supp. 2d 790 (D.MD. Sept. 30, 2013), *aff'd* 753 F. 3d 467 753 F.3d 467 (4th Cir. 2014))("Nazarian"); *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3rd Cir. 2014) ("Soloman").

<sup>42</sup> *Nazarian*; *Soloman*.

<sup>43</sup> *See Id.*

<sup>44</sup> *Nazarian* at 473.

<sup>45</sup> *Solomon* at 246.

<sup>46</sup> *Nazarian* at 473.

the construction of new generation undermined the price signals provided by the FERC-approved RPM market construct.

Here, the purpose of Rider RRS is not to lower market pricing by encouraging the construction of new generation. Rider RRS is comprised of existing units. And as explained below, Rider RRS will not affect either the supply of nor the demand for energy and capacity in the PJM market.

Rider RRS is primarily intended to provide rate stability to retail customers under R.C. 4928.143(B)(2)(d) by acting as a hedge against market fluctuations at the retail level. While reliability is the primary responsibility of PJM, Rider RRS will also help promote supply diversity and thereby mitigate reliability concerns associated with the possible retirement of base load nuclear and coal-fired generation. Maintaining a zero-carbon nuclear resource in Ohio is of particular importance given the U.S. E.P.A.'s (now stayed) Clean Power Plan. This objective is aligned with the policy of the state under R.C. 4928.02. In this sense, Rider RRS is fully consistent with federal law, which specifically recognizes state authority over reliability and adequacy of service. As noted above, the Energy Policy Act of 2005, 16 U.S.C. §824o(i)(3) provides “[n]othing in this section shall be construed to preempt any authority of any State to take action to ensure the safety, adequacy, and reliability of service within that State...”

Additionally, PJM’s FERC-approved Minimum Offer Price Rule (“MOPR”) does not apply here as it did in the Maryland and New Jersey cases. The MOPR is intended to address the concern that certain resources seeking to participate in PJM’s capacity auctions might attempt to suppress market clearing prices. The MOPR is designed to limit the ability of buyers to suppress capacity prices by subsidizing the construction of new generation. The MOPR only applies to new gas-fired combustion turbines, new gas-fired combined cycles, and new integrated gasification combined cycle units.<sup>47</sup> The MOPR therefore applied to the new gas generation at issue in the Maryland and New Jersey cases.<sup>48</sup> But it specifically does not apply to existing coal and nuclear

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<sup>47</sup> *PJM Interconnection, L.L.C.*, 143 FERC ¶61,090 (May 2, 2013) at ¶4 and ¶22 (“Currently, PJM’s MOPR protects against these forms of buyer-side market power by setting a price floor, i.e. a minimum bid, and requiring all new, non-exempted resources to bid at that floor...”); *Id.* at ¶166 (“We accept PJM’s proposal to apply the MOPR to gas-fired combustion turbine, combined-cycle, and IGCC resources. The IMM, FirstEnergy, and Dayton argue that the MOPR should apply to all resource types and that any resource type can be used to exercise market power. We agree with PJM, however, that the MOPR may be focused on those resources that are most likely to raise price suppression concerns.”).

<sup>48</sup> *Id.*

resources such as the PPA Units. Therefore, FERC's concerns regarding buyer-side manipulation of the PJM wholesale markets are not implicated by Rider RRS.

Finally, the Court of Appeals decisions in both the Maryland and New Jersey cases expressly limited the scope of their reach. In the Maryland case, the Court specifically stated that “...it is important to note the limited scope of our holding, which is addressed to the specific program at issue.”<sup>49</sup> In the New Jersey case, the Court went even further in limiting the scope of its finding by explaining that a state action is not field preempted just because it has an “*incidental effect*” on interstate markets. The Court stated:

*[W]e have no occasion to conclude that PJM's markets preempt any state act that might intersect a market rule... [T]he law of supply-and-demand is not the law of preemption. When a state regulates within its sphere of authority, the regulation's incidental effect on interstate commerce does not render the regulation invalid...The states' regulatory choices accumulate into the available supply transacted through the interstate market. The Federal Power Act grants FERC exclusive control over whether interstate rates are "just and reasonable," but FERC's authority over interstate rates does not carry with it exclusive control over any and every force that influences interstate rates. Unless and until Congress determines otherwise, the states maintain a regulatory role in the nation's electric energy markets. Today's decision does not diminish that important responsibility.*<sup>50</sup>

The U.S. Supreme Court's recent holding, finding that FERC's jurisdiction extends only to practices that “*directly affect wholesale rates*,” is consistent with the New Jersey court's distinction between state and federal authority.<sup>51</sup>

The Courts were wise to make a distinction between “*incidental*” as opposed to “*direct*” effects on the wholesale markets since cost-based compensation for generation is prevalent in PJM and has been since the inception of PJM's capacity market in 2007. Numerous PPAs exist within PJM between electric distribution utilities and independent power providers, and the net costs of these wholesale transactions are often passed on to retail customers. Moreover, cost-of-service regulation for generation exists throughout PJM, including Ohio through Buckeye Power and AMP Ohio. Yet PJM's markets have repeatedly been deemed competitive by the PJM Independent Market Monitor over the years, assimilating and clearing thousands of megawatts of generation, whether that generation is supported only by competitive market revenues or by cost recovery from retail customers.

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<sup>49</sup> *Nazarian* at 478.

<sup>50</sup> *Solomon*.

<sup>51</sup> *FERC v. Elec. Power Supply Ass'n*, Slip Opinion in U.S. Supreme Court Case No. 14-840 (January 25, 2016), Syllabus at 3.

Here, there are probably not even “*incidental*” effects on the wholesale power market, let alone unlawful “*direct*” effects. Approval of Rider RRS will not distort the price signals resulting from the PJM wholesale markets. The generation supply bid into the PJM markets will not change if the Rider is approved. The PPA Units are *existing* generation that was previously bid into the PJM wholesale markets and will continue to bid into those markets, regardless of whether Rider RRS is approved. Nor will there be an effect on demand. Under the Rider RRS construct, customers will still purchase 100% of their physical generation needs from CRES providers or through the SSO auctions just as they do today.

Arguments that there will be price distortions are merely theoretical. No witness presented any study demonstrating that Rider RRS will change PJM energy or capacity prices by 1%, 0.1%, or 0.01%. On this point, there is only speculation.

If the Commission approves Rider RRS, it will be acting “*within its sphere of authority*” consistent with the New Jersey decision because Rider RRS is only intended to stabilize retail rates and promote power plant fuel diversity, thereby enhancing reliability and adequacy of service. The U.S. Supreme Court has long recognized that “*the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States.*”<sup>52</sup> For that police power to be preempted by Federal Power Act, the challenged state action must have an impermissible “*direct effect*” on the wholesale market. “*Incidental effects*” are allowable. The provisions of S.B. 221, which give Ohio the same rate authority as exercised by at least seven other states operating within PJM, do not cross that line.

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<sup>52</sup> *Arkansas Electric Co-Op Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 378 (1983).

## 6. Approval of Rider RRS Will Promote State Policies.

Ultimately, it is not in the best interest of Ohio customers or the Commission itself to cede its regulatory authority entirely to PJM and FERC. Ceding authority to PJM and the FERC fundamentally limits this Commission's ability to protect Ohio customers and make decisions concerning Ohio generating assets and retail generation pricing. But it is reasonable for Ohio to maintain some control over generation. Ohio is home to many energy-intensive industrial customers, several of which are located in FirstEnergy's territory. Unlike PJM, the Commission has an interest in protecting and facilitating economic development in Ohio. Hence, maintaining state control over some aspects of generation pricing provides needed flexibility for the Commission to facilitate Ohio's effectiveness in the global economy consistent with state policy.<sup>53</sup>

Why have the PJM merchant generators (P3, Dynegy, Constellation, Exelon, etc.) spent so much time and money in this proceeding? On paper, their stated purpose is to protect Ohio customers. In reality, however, the PJM merchant generators would love to see every Ohio power plant owned by their competitors retired. Reduced supply would raise market prices, thus allowing remaining power plant owners to raise rates on customers and increase their profits. Although couched in terms of economic efficiency and consumer protection, the PJM merchant generators want high market prices, the burden of which would fall on retail customers. That is not a legitimate state policy.

The free market efficiency arguments of the PJM merchant generators must be also be considered in light of the fact that PJM is not a purely "*free market*." PJM is a regulator that administratively determines market prices. For example, PJM regulates whether demand response and energy efficiency resources are able to bid into the capacity auctions, what suppliers are allowed to bid into the wholesale capacity auctions and, most significantly, PJM utilizes a complex model to administratively determine the demand curve that ultimately sets the RPM price. The most recent reminder that PJM capacity pricing is an administrative construct, not a "*free market*", is the highly complex Capacity Performance Program, which adds a series of bonus and penalty provisions intended to improve generator performance in exchange for higher capacity payments. If the PJM market were truly "*free*," then the rules governing its operation would not be three-feet thick. Hence, even a

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<sup>53</sup> OEG Ex. 1 at 6:5-11.



complete rejection of Rider RRS would not mean that electric generation pricing in Ohio would be entirely market-based, but instead would simply yield the Commission's ratemaking jurisdiction over generation to PJM's ratemaking jurisdiction.<sup>54</sup>

Not surprisingly, since this case was filed on May 15, 2015, business conditions have changed. Market on-peak and off-peak energy prices have followed natural gas downward. This hurts the economics of the proposed PPA. But with the recent implementation of Capacity Performance in PJM, Base Residual Auction ("BRA") capacity prices have risen. This helps the economics of the proposed PPA. Coal prices have come down, thus reducing the cost of producing energy. This also helps the economics of the proposed PPA. On balance, the fall in market energy prices is probably the most significant factor, and this is concerning. But the PPA is not a short-term deal. Over eight years, all of these economic factors may reverse, and then reverse again. That is precisely why a hedged blend of cost-of-service and market pricing is a reasonable mechanism to stabilize retail rates, promote reliability, and ensure adequacy of service in a carbon-constrained world. Short-term business fluctuations do not change this conclusion.

**B. The Stipulation Is The Product Of Serious Bargaining Among Capable And Knowledgeable Parties.**

The Signatory Parties to the Stipulation represent a wide variety of diverse interests, including the interests of the utility, Commission Staff, low income advocates, industrial customers, commercial customers, small and medium businesses, colleges and universities, organized labor, a demand response provider, and municipalities. Most if not all of those Signatory Parties have significant experience in Commission proceedings and each was represented by competent counsel.

The Signatory Parties had ample time to review and analyze issues surrounding FirstEnergy's proposed ESP. Many components of the proposed ESP have been discussed in previous Commission cases involving the Companies, including their previous ESP cases. Further, issues related to the proposed PPA first came to light in AEP Ohio's most recent ESP case, which commenced back in December of 2013.<sup>55</sup> And Signatory Parties have

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<sup>54</sup> OEG Ex. 1 at 8:13-9:2.

<sup>55</sup> *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Revised Code in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO *et al.* ("AEP ESP 3 Case").

had many opportunities since August 4, 2014, when FirstEnergy's PPA proposal was filed in this case, to review, analyze, and question that specific proposal, including the opportunity to participate in the 35-day long hearing process in this case. The Signatory Parties were therefore well-acquainted with the ESP-related issues during the course of settlement. With regard to the supplementary provisions contained in the Stipulation, those provisions involve issues and concepts that have arisen in other Commission proceedings or that are commonly known and understood by those in the electric industry. Hence, the Signatory Parties were knowledgeable with respect to the issues resolved by the Stipulation, capable of reasonably resolving those issues, and able to work sincerely to reach such a reasonable resolution.

### **C. The Stipulation As A Package Benefits Customers And The Public Interest.**

#### **1. The Stipulation Provides Several Beneficial Modifications To FirstEnergy's PPA Proposal.**

The Stipulation improves upon FirstEnergy's "*as filed*" PPA proposal. The Stipulation shortens the term of Rider RRS from the proposed fifteen years to eight years (beginning June 1, 2016 and concluding on May 31, 2024),<sup>56</sup> reduces the ROE received by FES from 11.15% to 10.38%,<sup>57</sup> adds a guaranteed \$100 million customer credit in the last four years of the PPA,<sup>58</sup> establishes a reasonable cost allocation and rate design for Rider RRS,<sup>59</sup> commits FES to full information sharing with Commission Staff,<sup>60</sup> includes a severability provision consistent with the Commission's PPA directives,<sup>61</sup> and expressly recognizes the Commission's authority to review Rider RRS.<sup>62</sup> These changes benefit customers by significantly reducing potential adverse rate impacts associated with FirstEnergy's PPA proposal. The reduced ROE alone improves the economics of the PPA to consumers by \$151 million over eight years. These provisions also benefit customers and the public interest because they expressly recognize the Commission's authority to engage in oversight of Rider RRS.

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<sup>56</sup> Company Ex. 154 (Third Supplemental Stipulation and Recommendation) at 7.

<sup>57</sup> Company Ex. 155 (Fifth Supplemental Testimony of Eileen M. Mikkelsen) at 7:6-7.

<sup>58</sup> Company Ex. 154 at 7-8.

<sup>59</sup> Company Ex. 2 (Stipulation and Recommendation) at 10; OEG Ex. 1 (Supplemental Testimony and Exhibits of Stephen J. Baron) at 5:8-13 and 19:14-21 ("*Allocating Rider RRS credits and charges for GS, GP, GSU, and GT customers on the basis of billing demand is consistent with principles of cost causation, which dictate that capacity-related credits and costs should be recovered on the basis of demand when possible.*").

<sup>60</sup> Company Ex. 154 at 8.

<sup>61</sup> Company Ex. 154 at 8-9.

<sup>62</sup> Company Ex. 154 at 8.

## **2. The Stipulation Adds Several Beneficial Components To FirstEnergy's Proposed Electric Security Plan.**

The modified and extended ESP set forth in the Stipulation includes several beneficial components important to large energy-intensive customers in FirstEnergy's territory: 1) an extension of the Company's ELR interruptible load program, which would be open to both shopping and non-shopping customers who satisfy the program eligibility requirements;<sup>63</sup> 2) continuation of the previously-established automaker credit (at a reduced level) to encourage increased production or expansion at automaker facilities in FirstEnergy's service territory;<sup>64</sup> 3) adoption of a transmission pilot mechanism that would allocate costs under the Non-Market-Based Services Rider ("Rider NMB") consistent with principles of cost causation;<sup>65</sup> and 4) a gradual phase-out of the Rate GT provision that is currently part of FirstEnergy's Economic Development Rider ("Rider EDR").<sup>66</sup>

### **a. The Commission Should Approve The Extension Of FirstEnergy's Interruptible Load Program.**

The extension of FirstEnergy's Rider ELR interruptible load program is an especially important component of the proposed ESP due to its multiple benefits.<sup>67</sup> One of those benefits is increased reliability of the system, which results from large customers agreeing to take a lower quality of service (service subject to interruption for extended periods of time on short notice) in exchange for a discounted rate.<sup>68</sup> The ELR program has already provided reliability benefits on multiple occasions. For instance, during the 2013/2014 PJM Planning Year, ELR customers were physically interrupted (with no buy-through opportunity) a total of seven times to help address grid needs.<sup>69</sup> Additionally, during the "*polar vortex*" in January 2014, PJM experienced significant outages and other weather-related reliability problems, losing roughly 20 percent of its generating capacity during the coldest, highest load periods. However, demand response resources, including interruptible load resources,

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<sup>63</sup> Company Ex. 2 at 7-8; Company Ex. 3 (Supplemental Stipulation and Recommendation) at 2-3; Company Ex. 154 at 14. While Staff initially recommended against continuation the ELR program, Staff joined the Stipulation and now recommends extension and limited expansion of that program.

<sup>64</sup> Company Ex. 2 at 9; Company Ex. 154 at 14.

<sup>65</sup> Company Ex. 3 at 3-5; Company Ex. 154 at 17.

<sup>66</sup> Company Ex. 2 at 9; Company Ex. 154 at 14-15.

<sup>67</sup> OEG Ex. 1 at 4:11-13 and 9:19-20.

<sup>68</sup> Company Ex. 8 at 11:10-12; Nucor Ex. 1 (Direct Testimony of Dennis W. Goins) at 6:8-9.

<sup>69</sup> OEG Ex. 1 at 10:18-22.

were available during that period and helped PJM to meet firm loads and maintain a reliable grid.<sup>70</sup> Company witness Steven Strah testified that Rider ELR interruptions during the “*polar vortex*” helped avoid “*what [FirstEnergy] anticipated could be load shedding on a circuit-by-circuit basis in 30-minute increments for 142,000 customers.*”<sup>71</sup> Moreover, the reliability provided by the ELR program is greater than that provided by PJM demand response programs alone since the ELR program allows both PJM and FirstEnergy to call interruptions if necessary.<sup>72</sup> And FirstEnergy has exercised its option to call local interruptions in the past, as it did in July of 2011.<sup>73</sup>

The need for and the value of reliability resources like the ELR program will be increasingly important during the proposed ESP period given that a wide array of upcoming plant retirements will likely tighten the demand/supply balance in PJM in future years. Nearly 25,000 MW of coal capacity in the U.S. was permanently retired from 2009 to October 1, 2014.<sup>74</sup> And more than 23,000 MW of additional coal capacity is scheduled to retire by the end of 2022, with many of those retirements expected to occur during the next four years.<sup>75</sup> In PJM, 10,400 MW of coal capacity was expected to be retired in just 2014 and 2015. More than half of those retirements are AEP East coal units located in Ohio, Kentucky, West Virginia, and Indiana. In addition, over 16,000 MW of non-coal operating capacity is scheduled to retire by 2025.<sup>76</sup> Retaining state-level interruptible load programs such as FirstEnergy’s ELR program going forward can help maintain the reliability of the grid during this critical period when the makeup of the electric grid is in flux.

The United States Supreme Court recently recognized the reliability benefits associated with demand response resources like interruptible load. In its January 25, 2016 decision, the Court explained:

*In periods of high electricity demand, prices can reach extremely high levels as the least efficient generators have their supply bids accepted in the wholesale market auctions. Not only do rates rise dramatically during these peak periods, but the increased flow of electricity threatens to overload the grid and cause substantial service problems. Faced with these challenges,*

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<sup>70</sup> OEG Ex. 1 at 10:12-18.

<sup>71</sup> Company Ex. 13 (Testimony of Steven E. Strah) at 9:20-23.

<sup>72</sup> Company Ex. 146 (Rebuttal Testimony of Eileen M. Mikkelsen) at 19:12-21.

<sup>73</sup> Company Ex. 146 at 19:24-20:2.

<sup>74</sup> OEG Ex. 1 at 11:3-6.

<sup>75</sup> OEG Ex. 1 at 11:6-8.

<sup>76</sup> OEG Ex. 1 at 11:8-12.

*wholesale market operators devised wholesale demand response programs...demand response can lower these wholesale prices and increase grid reliability.*<sup>77</sup>

While the U.S. Supreme Court's observations were specifically in reference to wholesale demand response, retail demand response provides similar reliability (as well as wholesale price suppression) benefits. As OEG witness Baron testified, "[t]he interruptible load of large customers can be used to reduce strains on the electric grid during peak times, increasing the reliability of the grid. In addition, interruptible resources can provide economic benefits by lowering market prices for all consumers during peak times and by reducing the need for additional capacity resources to be constructed."<sup>78</sup>

Another benefit of the ELR program is that the program facilitates economic development in Ohio. One way for Ohio to convince large energy-intensive customers (e.g. steelmakers) to remain in the State and to help them thrive here is to provide competitive rates for electricity, an important component of which is the availability of rate offsets such as interruptible credits.<sup>79</sup> Such rate offsets allow large energy-intensive customers to keep pace with their national and international competitors, many of whom receive substantial rate offsets.<sup>80</sup> All ELR customers have previously proven that they needed such economic development support, as required for participation under predecessor tariffs or special contracts that contained economic development and/or job retention clauses.<sup>81</sup>

The need to maintain competitive rates for energy-intensive customers is especially important in FirstEnergy's service territory given its large concentration of steelmakers and given that approximately 39% of the Companies' total sales are industrial sales.<sup>82</sup> Further, the economic development/job retention benefits associated with the ELR program are not limited to those customers on Rider ELR. Rather, the benefits accrue to all customers in the Companies' service territory and the community as a whole.<sup>83</sup> Continuation of the interruptible load program would also prevent rate shock to the large energy-intensive customers who have taken

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<sup>77</sup> *FERC v. Elec. Power Supply Ass'n*, Slip Opinion in U.S. Supreme Court Case No. 14-840 (January 25, 2016), Syllabus at 1-2.

<sup>78</sup> OEG Ex. 1 at 9:20-24.

<sup>79</sup> Company Ex. 8 at 11:10-12; Nucor Ex. 1 at 6:18-24 ("A strong interruptible rate program can help states promote economic development and manufacturing jobs retention. The availability of an effective interruptible service option is often a key factor in determining where a manufacturing facility is located, particularly manufacturers with energy-intensive production processes. In addition, the continuing long-term availability of a cost-effective interruptible rate option can help keep established firms competitive and growing.").

<sup>80</sup> OEG Ex. 1 at 9:24-10:3; Nucor Ex. 1 at 12; Tr. Vol. XXII at 4329.

<sup>81</sup> Mikkelsen Rebuttal Testimony at 19:1-4; Tr. Vol. XXX at 6172-75.

<sup>82</sup> Tr. Vol. XXII at 4393.

<sup>83</sup> Tr. Vol. XXI at 4040; Tr. Vol. XXXIV at 7109.

service under Rider ELR for years and who currently base their planning and operations on participation in the ELR program.<sup>84</sup>

The ELR program provides energy efficiency/peak demand reduction (“EE/PDR”) benefits as well. Interruptible load programs increase energy conservation by reducing the amount of power that would otherwise be consumed during peak times and by avoiding the impacts of constructing and operating fossil generation.<sup>85</sup> Interruptible load also serves as a demand response resource that FirstEnergy can use to satisfy its requirements under R.C. 4928.66.

FirstEnergy’s interruptible program provides all of these benefits without imposing unreasonable costs on other customers. As an initial matter, Nucor witness Goins testified that the \$10/kW-month interruptible credit is less than the PJM Cost Of New Entry (“CONE”) through the 2017/18 Delivery Year, meaning that the cost of the credit is less than the long-run cost of generating capacity avoided by maintaining interruptible load resources in FirstEnergy’s territory.<sup>86</sup> Moreover, the portion of ELR program costs flowed through the Company’s Demand Side Management and Energy Efficiency Rider (“DSE Rider”) are offset by the requirement that FirstEnergy credit 80% of the revenue it receives from PJM for bidding interruptible load into its capacity auctions as a demand response resource through that Rider.<sup>87</sup> That DSE Rider offset will increase as capacity market clearing prices increase, reflecting the rising value of interruptible load.

The clearing prices in PJM’s recent capacity auctions have already begun to rise, climbing from \$134/MW-day in the Transition Auction for Delivery Year 2016/17 to \$151.50/MW-day in the Transition Auction for Delivery Year 2017/18 to \$164.77/MW-day in the Base Residual Auction (“BRA”) for Delivery Year 2018/19. Given that the PJM BRA price for the 2018/19 Delivery Year is \$164.77/MW-day, half of the \$10/kW-month interruptible credit costs incurred June 1, 2018 through May 31, 2019 (which equates to \$333/MW-day) would be offset by PJM revenues flowed back through the DSE Rider. And if PJM capacity prices continue to increase,<sup>88</sup> the offset to the interruptible credit will correspondingly increase over the course of FirstEnergy’s ESP.

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<sup>84</sup> OEG Ex. 1 at 12:25-28.

<sup>85</sup> OEG Ex. 1 at 10:4-5; Nucor Ex. 1 at 6:14-16.

<sup>86</sup> Nucor Ex. 1 at 9:3-12:18.

<sup>87</sup> Company Ex. 146 at 18:10-11; Tr. Vol. II (September 1, 2015) at 240:4-9 and 276:10-12..

<sup>88</sup> See Company Ex. 17 (Direct Testimony of Judah L. Rose) at 40:4-43:15.

Besides, even with the Stipulation provision allowing some additional interruptible load to participate in the ELR program, the total size of the ELR program will still be less than the amount of eligible ELR load that was available in the Companies' previous two ESPs.<sup>89</sup>

Finally, long-standing Commission precedent supports continuation of FirstEnergy's ELR program. Indeed, in FirstEnergy's initial 2008 SSO case, the Commission rejected the Companies' proposed rate design, in part, because it did not include interruptible rates.<sup>90</sup> Since that time, Rider ELR has been included in each of FirstEnergy's ESPs.<sup>91</sup> And the Commission has explained that "*all customer classes benefit from the rates related to ELR and OLR.*"<sup>92</sup>

The Commission has also repeatedly approved interruptible programs in the Duke and AEP Ohio service territories, recognizing the benefits of such programs. In AEP Ohio's 2011 ESP case, the Commission stated:

*The Commission finds the IRP-D credit should be approved as proposed at \$8.21/kW-month. In light of the fact that customers receiving interruptible service must be prepared to curtail their electric usage on short notice, we believe Staff's proposal to lower the credit amount to \$3.34/kW-month understates the value interruptible service provides both AEP-Ohio and its customers. In addition, the IRP-D credit is beneficial in that it provides flexible options for energy intensive customers to choose their quality of service, and is also consistent with state policy under Section 4928.02(N), Revised Code, as it furthers Ohio's effectiveness in the global economy. In addition, since AEP-Ohio may utilize interruptible service as an additional demand response resource to meet its capacity obligations, we direct AEP-Ohio to bid its additional capacity resources into PJM's base residual auctions held during the ESP.*<sup>93</sup>

In the AEP Ohio's subsequent ESP case, the Commission again approved AEP Ohio's IRP tariff, citing its benefits:

*Finally, the Commission agrees with OEG that the IRP-D offers numerous benefits, including the promotion of economic development and the retention of manufacturing jobs, and furthers state policy, which we recognized in the ESP 2 Case...We find that the IRP-D should be modified to provide for unlimited emergency interruptions and that the \$8.21/kW-month credit should be available to new and existing shopping and non-shopping customers.*<sup>94</sup>

And in Duke's 2014 ESP case, the Commission stated:

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<sup>89</sup> Tr. Vol. II (September 1, 2015) at 260:8-16.

<sup>90</sup> Opinion and Order, Case No. 08-936-EL-SSO, (November 25, 2008) at 24.

<sup>91</sup> Second Opinion and Order, Case No. 08-935-EL-SSO, (March 25, 2009) at 10; Opinion and Order, Case No. 10-388-EL-SSO (August 25, 2010) at 9; FirstEnergy ESP Order at 37.

<sup>92</sup> FirstEnergy ESP Order at 37 ("*The Commission agrees with FirstEnergy and Nucor that OCC/CP have failed to support their recommendations that the costs related to Riders ELR and OLR should not be collected from all customers, and no reason is apparent in light of the fact that all customer classes benefit from the rates related to ELR and OLR.*").

<sup>93</sup> Opinion & Order, Case No. 11-346-EL-SSO *et al.* (August 8, 2012) at 26.

<sup>94</sup> AEP ESP 3 Order at 40.

*Upon consideration of the issues raised, the Commission finds that the large customer interruptible load program should continue. As OEG discusses, the program offers numerous benefits and furthers state policy. Although Duke will no longer be an FRR entity, the advantages of the program are still available.*<sup>95</sup>

All of the benefits cited by the Commission when approving interruptible programs for FirstEnergy, Duke, and AEP Ohio persist and should be preserved by continuing the Company's Rider ELR program through May 31, 2024.

**b. The Commission Should Approve Continuation Of The Automaker Incentive Rate.**

The automaker credit was already adopted successfully in FirstEnergy's service territory.<sup>96</sup> That credit acts to bolster economic development in Ohio consistent with state policy set forth in R.C. 4928.02(N) by incentivizing existing automakers to increase their production in Ohio and providing enticement for new automakers to locate in FirstEnergy's service territory.<sup>97</sup> Further, the Stipulation reduces the level of the automaker credit to \$0.01 per kWh, which limits the exposure of other customers to the costs of that credit.<sup>98</sup> Continuation of the automaker credit throughout the proposed ESP is reasonable.

Ford's three major production facilities in Northern Ohio (Avon Lake, Brookpark and Walton Hills), Chrysler's two major assembly plants (Perrysburg and Toledo) and General Motors' three plants in Defiance, Toledo, and Warren directly employ thousands of workers. These Ohio plants compete within their own companies for increased production and capital to grow. All seven of these major production facilities are incentivized to increase production in Ohio through the automaker credit provision, thus helping to sustain and grow employment. The automaker credit also helps encourage production to be moved to Ohio from other states, as well as from Ford, Chrysler, and GM plants located overseas. In addition to *intra*-company competition, the automaker credit helps Ohio's auto industry compete with unaffiliated foreign producers.

There is no better manufacturing job than an automaker job. GM, Chrysler and Ford all pay family-sustaining wages with high benefits. And automaker jobs create additional spin-off jobs because of a high job multiplier effect. Additionally, schools and local governments rely on tax revenue from these facilities. Hence,

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<sup>95</sup> Opinion and Order, Case No. 14-841-EL-SSO (April 2, 2015)("Duke ESP 2 Order") at 77.

<sup>96</sup> FirstEnergy ESP Order at 15.

<sup>97</sup> OEG Ex. 1 at 4:19-21 and 16:16-19; Company Ex. 8 at 11:16-1.

<sup>98</sup> OEG Ex. 1 at 16:18-22.



the annual cost of the automaker credit (which is less than \$3 million), is a reasonable price to pay for helping to sustain a very important industry in Ohio.

**c. The Commission Should Approve The Transmission Pilot Program.**

If adopted, the transmission rider pilot would allow Rider NMB transmission costs to be allocated more consistently with cost causation principles than they currently are since an individual customer's allocation would be based on its own single annual transmission coincident peak demand rather than the peak demand of multiple customers in its rate class.

**d. The Commission Should Approve the Gradual Phase-Out of the Rate GT Load Factor Provision.**

The Rate GT load factor provision set forth in FirstEnergy's Rider EDR encourages large customers to increase their production and operate at a higher load factor in order to benefit from the provision.<sup>99</sup> The best way to operate at a high load factor is to increase production by adding shifts. Increased production directly translates into increased jobs and economic activity. The Rate GT provision only affects the very largest transmission voltage customers, not residential, commercial, or small to medium-sized manufacturers. While high load factor customers would likely prefer that the Rate GT Provision continue as it currently exists, other Rate GT customers may wish to modify and/or eliminate that provision. The Stipulation seeks to strike a balance between these interests by outlining a gradual three-year phase-down of the Rate GT Provision. This approach is consistent with the ratemaking principle of gradualism, which is important in this case.<sup>100</sup>

High load factor customers have budgeted and planned their businesses upon the assumption that the Rate GT Provision, which has been in effect throughout FirstEnergy's last two ESPs, would continue. Immediate elimination of that provision could substantially harm those customers through significant rate increases. The approach set forth in the Stipulation would continue some of the Rate GT provision benefits to high load factor customers while easing any adverse impacts of the provision on other Rate GT customers. It also provides a reasonable level of time for large industrial customers, many of whom face significant competitive pressures

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<sup>99</sup> OEG Ex. 1 at 4:23-5:1.

<sup>100</sup> OEG Ex. 1 at 5:1-4 and 17:12-20; Company Ex. 8 at 12:1-3.

nationally and internationally, to adjust to what would otherwise be a significant change in their power costs.<sup>101</sup> The Stipulation thus addresses the Rate GT Provision in a fair way that has consensus among the affected customers.

### **3. The Supplemental Provisions In The Stipulation Are Meant To Benefit Customers And The Public Interest.**

A number of provisions were inserted into the Stipulation in order to supplement the benefits that could be derived from this proceeding. Many of these provisions are aimed at achieving environmental benefits, including the provisions in which FirstEnergy commits to expand its current EE/PDR offerings,<sup>102</sup> establishes a carbon emissions reduction goal under which FirstEnergy Corp. would reduce CO<sub>2</sub> emissions by at least 90% below 2005 levels by 2045,<sup>103</sup> agrees to procure at least 100 MW of new Ohio wind or solar resources to diversify the State's generation portfolio,<sup>104</sup> pledges money to support EE/PDR efforts of a variety of customers and a low-income fuel fund,<sup>105</sup> states that it will explore grid modernization initiatives,<sup>106</sup> and consents to evaluate investing in battery resources.<sup>107</sup> Additionally, FirstEnergy's Stipulation commitment to engage in federal advocacy could result in reliability benefits to retail customers in Ohio.<sup>108</sup> And FirstEnergy's commitment to maintain its corporate headquarters and a nexus in operations in Akron, Ohio during the term of the RRS Rider will provide economic benefits to the State.<sup>109</sup> As Company witness Mikkelsen explained:

*Customers will benefit from this...Stipulation because it is designed to provide adequate, safe, reliable and predictably priced electric service. The...Stipulation supports economic development and job retention; continues the regulatory principle of gradualism to stabilize rates and helps transition customers to fully market based prices; supports competitive markets; encourages energy efficiency and peak demand reduction; protects at-risk populations through low income programs; provides benefits to large industrial customers that will allow them to better compete in the global marketplace; and supports federal advocacy for improvements in the capacity market; CO<sub>2</sub> emission reductions; grid modernization; and resource diversification. The aforementioned provisions, in addition to other*

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<sup>101</sup> OEG Ex. 1 at 17:22-18:5.

<sup>102</sup> Company Ex. 154 at 11.

<sup>103</sup> Company Ex. 154 at 11.

<sup>104</sup> Company Ex. 154 at 12.

<sup>105</sup> Company Ex. 2 at 10-12; Company Ex. 154 at 15-16.

<sup>106</sup> Company Ex. 154 at 9-10.

<sup>107</sup> Company Ex. 154 at 11.

<sup>108</sup> Company Ex. 154 at 9.

<sup>109</sup> Company Ex. 154 at 17.

*comprehensive components of the Stipulated ESP IV, will benefit customers and are in the public interest.*<sup>110</sup>

## **II. The Modified PPA Proposal Contained In The Stipulation Satisfies The Requirements Set Forth By The Commission In AEP Ohio's Most Recent ESP Case.**

In AEP Ohio's last ESP case, the Commission explained that *"a PPA rider proposal, if properly conceived, has the potential to supplement the benefits derived from the staggering and laddering of the SSO auctions, and to protect customers from price volatility in the wholesale market."*<sup>111</sup> As guidance for future filings, the Commission set forth a minimum of four factors that utilities must address in a PPA rider proposal:

- 1) the financial need of the generating plant requested for inclusion in the PPA;
- 2) the necessity of that generating plant, in light of future reliability concerns, including supply diversity;
- 3) how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations; and
- 4) the impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within a state.<sup>112</sup>

The Commission also required that future utility PPA proposals must provide for Commission oversight of the PPA rider (including a process for a periodic substantive review and audit), commit to full information sharing between the Commission and its Staff, propose an alternative plan to allocate the PPA rider's financial risk between both the Company and its customers, and include a severability provision that recognizes that all other provisions of the utility's ESP will continue in the event that the PPA rider is subsequently invalidated by a court of competent jurisdiction.<sup>113</sup>

FirstEnergy sufficiently addressed the Commission's ESP directives in this proceeding.<sup>114</sup> But the Stipulation goes even further in satisfying the Commission's ESP requirements. As discussed above, the Stipulation expressly recognizes the Commission's authority to engage in Commission oversight of the RRS Rider,<sup>115</sup> commits FES to full information sharing with Commission Staff,<sup>116</sup> includes a

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<sup>110</sup> Company Ex. 155 at 10:3-13.

<sup>111</sup> AEP ESP 3 Order at 25.

<sup>112</sup> Id.

<sup>113</sup> Id. at 25-26.

<sup>114</sup> Company Ex. 9 (Second Supplemental Testimony of Eileen M. Mikkelsen) at 3:9-14:9.

<sup>115</sup> Joint Ex. 1 at 8-9.

<sup>116</sup> Id. at 7-8.

proposal to allocate the RRS Rider's financial risk between FirstEnergy and its customers,<sup>117</sup> and inserts the severability provision requested by the Commission.<sup>118</sup> Hence, as modified by the Stipulation, FirstEnergy's PPA proposal is compliant with the Commission's ESP requirements.

### **III. The Commission Should Make Several Express Findings To Reinforce The Terms Of The Stipulation.**

#### **A. The Commission Should Make Several Findings In Anticipation Of Potential Arguments Regarding The FERC *Edgar* Standards.<sup>119</sup>**

Some parties argue that the PPA may violate FERC's *Edgar* standards for affiliate transactions, alleging that the costs of the PPA are higher than what FirstEnergy would pay at market.<sup>120</sup> In fact, on January 27, 2016, a complaint was filed at FERC collaterally attacking this proceeding by requesting that FERC rescind FirstEnergy Corporation's affiliate power sales waiver and undertake the same review process to allegedly protect Ohio consumers as this Commission.<sup>121</sup> The FERC complainants, many of whom are also parties to this case, apparently feel that this Commission is ill-equipped to protect Ohio customers through the conditions it imposes for RRS Rider approval. It is important that this Commission demonstrate to the public, to FERC, and to the courts that its review and approval process is consistent with state law and will result in rates that are stable, just, and reasonable. To that end, and in addition to all of the other benefits contained in the Stipulation, FirstEnergy's projections demonstrate that the costs of the PPA are estimated to be below-market over the eight-year term of the PPA.<sup>122</sup> Consequently, the Commission should make an express finding that the most credible evidence demonstrates that the long-term costs of the PPA are projected to be below-market.

Similarly, the Commission should make two additional findings to avert potential *Edgar* arguments. First, the Commission should make an express finding that FirstEnergy's customers are not "*captive*" given that there is retail competition in Ohio. Second, the Commission should expressly find that FirstEnergy's Rider RRS

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<sup>117</sup> Id. at 5-6.

<sup>118</sup> Id. at 35.

<sup>119</sup> *Boston Edison Co. Re: Edgar Energy Co.*, 55 FERC ¶61,382 (1991).

<sup>120</sup> *Boston Edison Co. Re: Edgar Energy Co.*, 55 FERC ¶61,382 (1991).

<sup>121</sup> Complaint Requesting Fast Track Processing, FERC Docket No. EL16-34 (January 27, 2016).

<sup>122</sup> Company Ex.146 at 11:5-7.

proposal is consistent with Ohio corporate separation laws and that there is no definitive evidence of affiliate abuse within the record of this case.

**B. The Commission Should Make A Finding That There Is No Definitive Evidence Demonstrating That Approval Of Rider RRS Would Have A Direct Effect On The PJM Wholesale Markets.**

Parties have alleged that approval of Rider RRS would lead to a distortion of the PJM wholesale markets, claiming that the PPA Units would retire if not included in the Rider. These allegations are not supported by the record in this proceeding.

As discussed earlier, the U.S. Supreme Court recently held that practices that “*directly affect wholesale rates*” are within the FERC’s jurisdiction.<sup>123</sup> But there is no evidence that Rider RRS will “*directly affect*” either wholesale supply or demand in the PJM system. Demand will not be impacted because Rider RRS is merely a financial mechanism to stabilize rates. All customers will still purchase 100% of their physical generation supply either from the market through CRES providers or through SSO auctions.<sup>124</sup> Therefore, approval of Rider RRS will not limit the amount of generation sold directly to consumers from CRES providers nor will it limit the amount of generation procured through the SSO auctions. In that sense, Rider RRS was specifically designed to have no impact on demand in the PJM market.

There is also no evidence that the proposed PPA will impact supply in the PJM market. While FirstEnergy has indicated that the future of the PPA Units is “*uncertain*,”<sup>125</sup> there is no evidence that any of the PPA Units will shut down absent approval of Rider RRS, thereby impacting PJM supply. Therefore, the Commission should make an express finding that there is no definitive evidence demonstrating that approval of Rider RRS would have an unlawful “*direct effect*” on the PJM markets.

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<sup>123</sup> *FERC v. Elec. Power Supply Ass’n*, Slip Opinion in U.S. Supreme Court Case No. 14-840 (January 25, 2016), Syllabus at 3 (“*The practices at issue directly affect wholesale rates. The FPA has delegated to FERC the authority—and, indeed, the duty—to ensure that rules or practices ‘affecting’ wholesale rates are just and reasonable. §§824d(a), 824e(a). To prevent the statute from assuming near-infinite breadth..., this Court adopts the D. C. Circuit’s common-sense construction limiting FERC’s ‘affecting’ jurisdiction to rules or practices that ‘directly affect the [wholesale] rate...’*”).

<sup>124</sup> OEG Ex. 1 at 7:13-21; Tr. Vol. I (August 31, 2015) at 39:11-18.

<sup>125</sup> Tr. Vol. I (August 31, 2015) at 97:6-99:7.

**CONCLUSION**

**WHEREFORE**, for the foregoing reasons, the Commission should clarify and approve the Stipulation.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Michael L. Kurtz", is written over a horizontal line.

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