BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

INITIAL BRIEF OF THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

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I. INTRODUCTION AND PROCEDURAL HISTORY

On August 4, 2014, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (Companies) filed an application with the Public Utilities Commission of Ohio (Commission) to establish a standard service offer (SSO), in the form of a fourth electric security plan (ESP IV), to provide generation service pricing for the period June 1, 2016 through May 31, 2019,[1] later modified to an eight-year term beginning June 1, 2016 through May 31, 2024.[2] The Companies titled its ESP IV "Powering Ohio's Progress." The Ohio Manufacturers' Association Energy Group (OMAEG), which is comprised of many members with manufacturing facilities located in the Companies' service territories, was granted intervention in the above-captioned proceeding on December 1, 2014. A hearing on the ESP proposed in the Application commenced on August 31, 2015. Since the initial filing of ESP IV, the Companies have filed four stipulations, which collectively present a new ESP, termed "Stipulated ESP IV" by the Companies.[3]

The Companies' request for approval of its proposed ESP, which includes several nonbypassable charges, is unlawful, unjust, and unreasonable and thwarts the market-based directive established by the General Assembly when it passed Senate Bill 3 in 1999. With the passage of Senate Bill 3, the General Assembly declared in unmistakable terms that generating units should be on their own in the competitive market. This resulted in a decisive shift away from traditional cost-of-service principles in favor of a competitive-market approach where

[1] Companies Ex. 1 at 3 (Application).

[2] Companies Ex. 154 at 7 (Third Supp. Stip.).

[3] As explained by the Third Supp. Stip. at 2, the Third. Supp. Stip., together with the "Prior Stipulations" (defined as the December 22, 2014 Stipulation, the May 28, 2013 Supplemental Stipulation, and the June 4, 2015 Second Supplemental Stipulation) form the "Stipulated ESP IV," which must be considered as a package. See also Companies Ex. 155 at 2 (Mikkelsen Fifth Supp.).

market forces set the price of generation services. The Ohio manufacturing sector has benefitted greatly from this deregulatory approach given that electricity is a critical cost component for manufacturers in producing their products. These positive results for an industry that is strong and prominent in the state of Ohio should continue. The importance of competitive markets and their development free from anticompetitive subsidies is embedded in the policy of the State of Ohio: "It is the policy of this state to * * * [e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates."[4]

Unfortunately, the provisions contained in the Stipulated ESP IV specific to the Power Purchase Agreement (PPA) and Retail Rate Stability Rider (Rider RRS) presented for adoption by the Companies, and others, stands in the way of building on these positive results and threatens to undermine the principle tenents of Senate Bill 3. If adopted, the Stipulated ESP IV will saddle distribution customers with the generation costs of a fleet of aging and/or uneconomic units, thereby eradicating all gains made by Ohio manufacturers from the deregulatory approach of Senate Bill 3. That outcome is unfaithful to the Genearl Assembly's unambiguous market-based directive and will thwart the state's effectiveness in the global economy.[5]

The Companies propose to purchase the capacity, energy and ancillary services output of the Davis-Besse Nuclear Power Station (Davis-Besse), the W.H. Sammis Plant (Sammis) (collectively, the Plants), and Firstnergy Solutions' (FES) share of the generating plants owned

[4] R.C. 4928.02(H).

[5] OMAEG Ex. 18 at 19-20 (Hill Supplemental).

and operated by the Ohio Valley Electric Cooperative (the OVEC entitlement).[6] The Companies will then sell the output of the Plants and the OVEC entitlement into the wholesale markets operated by PJM Interconnection, LLC (PJM) and net the revenues received from the PJM markets against the costs to be paid to the generator, crediting or charging the difference to all customers (shopping and non-shopping) through a nonbypassable rider, Rider RRS.[7] Although the Companies refer to Rider RRS as a "hedge" that will allegedly temper market volatility and bring hundreds of millions of dollars in credits to customers' bills due to a surge in wholesale market revenues, this portrayal is both unrealistic and inapposite.

At the same time that the Companies tout the purported benefits of Rider RRS, the Companies also claim the units contained in the PPA are in need of Commission assistance in order to keep them afloat. If the Companies truly believed that these uneconomic and inefficient units were well positioned to capture market revenues, there would be no need for this bailout request. An economically-rational firm would seek to capture these long-term gains for itself, not pass them on to others. The very fact that the Companies urge the Commission to approve the PPA, and consequently Rider RRS, in order to save the generating units, whose economic viability is "in doubt," serves as a tacit admission that customers could pay a significant amount under Rider RRS.

Regardless of whether the Plants survive or fail, the markets overseen by the Federal Energy Regulatory Commission (FERC) should determine the ultimate outcome, not this Commission. FERC alone has the power to oversee the operation of the wholesale markets and any Commission decision authorizing cost recovery through Rider RRS would have the effect of setting a wholesale rate, thereby usurping FERC's exclusive authority. No less than eight federal

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[6] Companies Ex. 1 at 9 (Application).

[7] Id.

judges have found that similar proposals in Maryland and New Jersey were preempted. That precedent alone defeats Rider RRS's cost recovery mechanism.

Even if the Commission had the authority to approve cost recovery through Rider RRS, the Companies have not met the factors articulated by the Commission in its Opinion and Order that modified and approved an application for a third electric security plan filed by AEP Ohio (the AEP ESP III Order).[8] First, there has been no showing of a financial need of the generating units. No evidence was presented to show that the generating units subject to the PPA would actually close if they were not subsidized by ratepayers. Second, the Companies warnings about threats to reliability and diversity if the plants close are without merit. On the contrary, the evidence presented shows that there is sufficient resource adequacy in the PJM region. Third, the increasingly-stringent environmental controls imposed by the Clean Power Plan will significantly raise the coal units' costs of compliance into the future, thereby making them even less economic. Finally, when looking at a more updated and accurate forecast and cost projection, the proposal shows that the Stipulated ESP IV could cost billions of dollars to customers, all to the detriment of economic development in the State of Ohio.

The problems do not end with Rider RRS. The Stipulated ESP IV includes a multitude of unrelated provisions that benefit a few at the expense of many. Each of the signatory parties to the Stipulated ESP IV, many of whom were originally opposed to the concept of the PPA and Rider RRS, received an inducement to join the Stipulation in return for rate discounts, subsidies, energy efficiency pledges, renewable resource investments, and more. The majority of costs associated with implementing these various provisions, many of which are unknown, will ultimately be shifted to non-signatory parties, resulting in the violation of several longstanding

[8] *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.13 in the Form of an Electric Security Plan, et al.*, Case No. 13-2385-EL-SSO, et al., Opinion and Order at 25 (Feb. 25, 2015) (AEP ESP III Order).

regulatory principles. Customer classes will be cross-subsidized, cost-causers will not bear the costs associated with their behavior, pricing signals will be distorted, and rates will increase, causing a decrease in economic activity.

No amount of artful labeling by the Companies can alter the essential character of the Stipulated ESP IV. It is a bailout request that results in re-regulation of generation services. Packaging the bailout request together with a litany of unrelated provisions into an ESP to be enjoyed by a narrow class of beneficiaries to the exclusion of all other customers only exacerbates the unreasonableness of the Companies' request. OMAEG witness Hill succinctly summarized the proposal:

> In sum, Rider RRS and the Companies' Economic Stability Program shift the uncertainty of the costs of the generating units onto the Companies' customers, including other Ohio businesses. Customers will be responsible for the cost risk forced upon them by the Companies and Signatory Parties to the Stipulation. However, the only entities guaranteed to benefit from the Program are the regulated utilities and their affiliated companies that are receiving the benefits of the PPA and those who are members of the narrowly crafted redistributive coalition assembled by the Companies to provide, through regulatory politics, what they could not gain the marketplace. The cost imposed upon other customers if Rider RRS is approved will likely stunt economic development in the Companies' service territories due to high electric prices and, in turn, throughout the state.[9]

For the reasons discussed herein, OMAEG respectfully requests that the Commission reject the Companies' proposed Stipulated ESP IV, as it does not satisfy the statutory requirements of Chapter 4928, Revised Code, or the Commission's established criteria for evaluating settlements.

[9] OMAEG Ex. 18 at 19-20 (Hill Supplemental).

II. STANDARD OF REVIEW

Section 4928.143(C)(1), Revised Code, sets forth the following standard of review, which applies to ESP cases**:**

> The burden of proof in the proceeding shall be on the electric distribution utility.
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> * * *
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> Subject to division (D) of this section, the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. Additionally, if the commission so approved an application that contains a surcharge under division (B)(2)(b) or (c) of this section, the commission shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application.

In addition to, and in conjunction with, the provisions above, Section 4905.22, Revised Code, prescribes the following:

> Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

III. DISCUSSION

A. The Companies' proposed stipulated ESP IV is unlawful and unreasonable and should be rejected.

1. The Companies' request to recover from ratepayers costs associated with Rider DCR that significantly increase the amounts currently collected under Rider DCR is unlawful, unreasonable, and unjust.

According to the Stipulated ESP IV, the Companies seek to continue the Delivery Capital Recovery Rider (Rider DCR) under the same terms and conditions, with the proposed modification to increase the value of the revenue caps for Rider DCR by $30 million for the period June 1, 2016 through May 31, 2019; by $20 million for the period June 1, 2019 through May 31, 2022; and by $15 million for the period June 1, 2022 through May 31, 2024.[10] Not only does this provision extend Rider DCR an additional eight years, it also nearly doubles the established revenue cap of $15 million per year under the current ESP.[11] The Companies state these modifications to Rider DCR will enable them to continue to make necessary infrastructure investments in their distribution systems and will ultimately benefit customers through enhanced reliability of electric service.[12] Despite the Companies' proposed modifications to and representations about Rider DCR, the Companies have not adequately demonstrated that expansion of the rider is just, reasonable, or prudent. Staff agreed and filed initial testimony recommending that if the Commission approves an extension of Rider DCR, several modifications should be adopted.[13]

[10] Companies Ex. 154 at 13 (Third Supp. Stip.).

[11] Id.; Companies Ex. 1 at 13 (Application).

[12] Companies Ex. 50 at 3-4 (Fanelli Direct); Companies Ex. 7 at 8 (Mikkelsen Direct).

[13] Staff Ex. 6 at 6-7 (McCarter Direct).

Specifically, Staff asserted Rider DCR should not be expanded to include assets recorded in "General, Other and Service Company Allocated" plant accounts given the nature of those assets are not directly related to maintaining reliability of distribution service and, therefore, are more appropriately considered for recovery in a distribution rate case.[14] Further, although the Companies purport to seek distribution expenses pursuant to Section 4928.143(B)(2)(h), Revised Code,[15] the costs sought to be recovered through Rider DCR by the Companies are not actually distribution expenses related to infrastructure modernization appropriate for an ESP.[16] Rather, the Companies seek to recover distribution, transmission, general and intangible plant costs (e.g., expenses associated with the general maintenance of a distribution system), which are more appropriately included within existing base distribution rates as part of a distribution rate case.[17]

As part of its proposed Stipulated ESP IV, the Companies seek to increase the caps on dollars that may be collected from customers under Rider DCR from the levels previously established in its ESP III case.[18] This increase in revenue caps, as well as extension of Rider DCR for an eight-year term, could result in charges to customers totaling $2.59 billion.[19] Further, as admitted by Companies witness Mr. Fanelli, it has been seven years since the Companies last distribution rate case.[20] Continued incremental increases of a distribution rate, absent a review of those rates through a distribution rate case, is not reasonable or prudent. Staff

[14] Staff Ex. 6 at 9 (McCarter Direct); OCC Ex. 18 at 19 (Effron Direct).

[15] Section 4928.143(B)(2)(h) states that an ESP may provide for, or include, among other items, provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility.

[16] OCC Exhibit 27 at 16 (Williams Direct).

[17] Id.

[18] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide for a Standard Service Offer, in the Form of an Electric Security Plan,* Case No. 12-1230-EL-SSO, et. al. (ESP III Case).

[19] Tr. Vol. XXXVI at 7575.

[20] Tr. Vol. XX at 3901.

noted this imprudent cost recovery and recommended that the annual revenue caps remain at the $15 million level, as they have been in previous SSOs.[21] Specifically, the Companies have not justified a $30 million revenue cap increase for three years or a $20 million revenue cap increase for an additional three years given that the Companies have admitted that they continue to meet their electric distribution targets under the current revenue caps and that they have not projected any major distribution capital project.[22]

As previously discussed, Section 4928.143(B)(2)(h) states that an ESP may provide for or include "provisions regarding the utility's distribution infrastructure and modernization incentives for the electric distribution utility."[23] Section 4928.143(B)(2)(h), Revised Code, also states the following about the burden of proof associated with returns on infrastructure modernization:

> As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned. . . [.]

Electric distribution utility (EDU) and customer expectations about the EDU's distribution system must be aligned if the Commission is to include, for instance, a distribution investment rider in an ESP.[24] Despite this requirement, the Companies did not sufficiently demonstrate, in the Stipulated ESP IV or through supporting testimony, that their expectations and the expectations of their customers are aligned as it relates to the distribution system.[25] Companies

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[21] Staff Ex. 6 at 7-8 (McCarter Direct).

[22] Id.

[23] See, generally, Section 4928.143(B)(2)(h), Revised Code.

[24] Id.

[25] OCC Ex. 27 at 19-21 (Williams Direct).

witness Mikkelsen testifies that the Companies' distribution system is currently reliable and the Companies have consistently met or exceeded Commission-approved reliability standards.[26] However, witness Mikkelsen also testifies that customer surveys conducted by the Companies between 2008 and 2013 did not specifically address whether customers agree with additional charges imposed for improved reliability or whether customers are satisfied with the cost of service.[27] Additional investments for improved reliability, absent research supporting the necessity of such investments, are not prudently incurred costs and should not be recoverable from ratepayers. Requesting Commission permission to continue Rider DCR and increase caps associated with the rider without conducting an analysis of how or when reliability may diminish, or the cost at which customers would forego paying more for additional distribution reliability, demonstrates a disconnect between the Companies' expectations and customer expectations.

As Ohio Consumers' Council witness Effron states in his testimony, the purpose of Rider DCR should be to allow the Companies to avoid revenue deficiencies that may result from capital expenditures associated with distribution reliability, and not to augment excess earnings.[28] If the Companies are earning returns that exceed their actual costs of capital, additional Rider DCR increases are both unnecessary and inappropriate.[29] It would be prudent, prior to implementing any further rate increases through Rider DCR, to require the Companies to file a distribution rate case in order to establish the appropriate baseline against which rate

[26] Tr. Vol. II at 251; Tr. Vol. II at 252.

[27] Tr. Vol. III at 613-614.

[28] OCC Ex. 18 at 11 (Effron Direct).

[29] Id.

changes under Rider DCR are measured. This would ensure that the effect of such rate increases would not be implemented merely to perpetuate or increase excess earnings for the Companies.[30]

In a similar ESP case, the Commission agreed with Staff and others and denied AEP Ohio's request to incorporate general plant costs into a Distribution Investment Rider (Rider DIR).[31] The Commission stated that AEP Ohio's interpretation of distribution infrastructure exceeded the intent of the statute and resulted in a significant expansion of the rider, which "far exceeds the justification offered and accepted by the Commission in approving the original DIR."[32] Further, in response to AEP Ohio's request to increase revenue caps of $15 million per year to $30 million per year (as the Companies are requesting here with Rider DCR), the Commission stated that AEP Ohio's request would be better considered and reviewed in the context of a distribution rate case, where the Company's request could be balanced against the customers' right to reasonably-priced service.[33] Rider DCR is inconsistent with the PUCO's AEP ESP III Order.

Based on the evidence and testimony presented, Rider DCR, as proposed, does not meet statutory requirements and includes unnecessary rate increases for customers. Further, according to provisions contained in the Third Supplemental Stipulation, in the event that termination must occur under Revised Code 4928.143(E) due to the quantitative and qualitative effects of the Stipulated ESP IV or a finding that the Stipulated ESP IV is no longer more favorable than an MRO test, termination will not affect the continued cost recovery of Riders DCR and RRS.[34] Under this provision, the Companies will continue to incur new costs from customers for a

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[30] Id. at 19.

[31] AEP ESP III Order at 46.

[32] Id.

[33] Id.

[34] Companies Ex. 154 at 18 (Third Supp. Stip.).

period of eight years even after a determination that the Stipulated ESP IV should be terminated.[35]

Moreover, although the Companies purport to extend the base distribution rate freeze to June 1, 2024, a period of eight years, the Stipulated ESP IV provides for two exceptions to this base distribution rate freeze.[36] The first exception is an emergency pursuant to Revised Code Section 4909.16 and the second exception is based on an agreement with Staff.[37] Thus, although the Companies claim that they do not anticipate a base rate increase for the eight-year term, the Companies could make a filing for new base distribution rates to go into effect prior to June 1, 2014 under one of the exceptions.[38] With the exceptions, the Stipulated ESP IV does not offer a guaranteed rate-freeze for the eight-year term of the ESP.

Accordingly, the Companies have failed to demonstrate that the expansion of and increased recovery under Rider DCR is reasonable or prudent. Additionally, the Stipulated ESP IV adopting Rider DCR fails to satisfy the second and third prongs of the stipulation three-part test inasmuch as Rider DCR violates an important regulatory principle adopted by the PUCO and neither benefits ratepayers nor is in the public interest.

2. **The Companies' request to expand the scope of costs collected under Rider NMB should be denied and the Commission should ensure that customers are not assessed twice for the same service costs.**

Currently, the Companies recover various costs billed by PJM through a Non-Market-Based Services Rider (Rider NMB), which is a nonbypassable rider paid by all customers (both

[35] Id.; Tr. Vol. XXXVI at 7565.

[36] Companies Ex. 154 at 13 (Third Supp. Stip); Tr. Vol. XXXVII at 7778-7779.

[37] Id.

[38] Id.

shopping and non-shopping).[39] The Companies propose to expand costs recoverable through Rider NMB to include an *additional eleven* PJM line items to be charged directly to the Companies rather than to the Standard Service Offer (SSO) suppliers and Competitive Retail Electric Service (CRES) providers.[40] As justification for this request, Companies witness Stein states that Rider NMB is designed to accomplish two goals: (1) reduce the need for a risk premium that may be added by SSO suppliers and CRES providers; and (2) ensure all customers pay only the actual costs for these items with no markups.[41] Further, witness Stein testifies that costs included in Rider NMB may be modified during the term of the ESP to reflect changes in the energy market and energy delivery business, including, but not limited to situations when, "a brand new charge/credit is imposed by FERC, an RTO, independent transmission operator, transmission owner, the State of Ohio or similar organization approved by FERC or the Commission."[42]

Staff disagreed with the Companies' request to expand Rider NMB, stating that the changes proposed by the Companies are "too broad and vague" and several of the PJM billing line items proposed to be included in Rider NMB, such as uplift charges and balancing reserves, should remain the responsibility of the SSO suppliers and CRES providers.[43] By moving RTO uplift charges to the regulated rate through Rider NMB, the risk of suppliers' purchases and hedging strategies is shifted to customers. The costs associated with managing a supplier's portfolio have historically been born by suppliers, not customers.

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[39] Companies Ex. 1 at 15 (Application); Companies Ex. 14 at 12 (Stein Direct).

[40] Companies Ex. 14 at 12-16 (Stein Direct).

[41] Id. at 16.

[42] Id. at 16-17.

[43] Staff Ex. 7 at 11-12 (Hecker Direct).

Moreover, although Companies witness Stein explains that the expectation is a dollar-for-dollar transition whereby Rider NMB would increase by the same amount that costs assessed to suppliers would decrease,[44] many of the costs requesting to be included in Rider NMB are already being recovered by CRES suppliers through their current rates and contracts. Further, the Companies admitted they have no cost estimates for the new charges to be incurred under Rider NMB.[45] Thus, the reduction of risk premiums that the Companies claim as a benefit of the increased expansion of the costs to be recovered under Rider NMB may result in additional costs to customers. Therefore, as Staff recognized, inclusion of some of these costs into non-bypassable Rider NMB could result in certain customers being charged twice if the costs are already included in the customers' CRES provider charges.[46] Customers should not bear the risk of compensating both their CRES suppliers and their EDU for the same charges.

If Rider NMB is approved, the Companies also have the ability, during the annual reconciliation filing, to modify Rider NMB based on market behavior, including "an unanticipated outcome caused by nonmarket-based forces," such as the polar vortex.[47] Thus, customers are continuously subject to unknown determinations at the Companies' discretion, which could significantly impact the cost of their electricity service. Suppliers, not customers, are in the best positions to evaluate and price the risk. Given this, customers should not have to bear the costs associated with the risk.

[44] Tr. Vol. V at 990.

[45] Tr. Vol. V at 974-976.

[46] Staff Ex. 7 at 13-14 (Hecker Direct).

[47] Tr. Vol. V at 1003-1004.

The Rider NMB proposal also could invite the same type of mischief that the Commission sought to address in its Fixed-Means-Fixed guidelines.[48] In that case, the Commission explained that some CRES suppliers had been including pass-through clauses in the terms and conditions of fixed-rate or price contracts and variable contracts with a guaranteed percent-off the SSO rate (i.e., fixed-rate contracts).[49] These clauses allowed the CRES suppliers to pass through to customers the costs of certain pass-through events.[50] In determining whether it was unfair, unreasonable, misleading, or deceptive to market contracts as fixed-rate contracts when the contracts included pass-through clauses, the Commission concluded that CRES suppliers may not include pass-through clauses in fixed-rate contracts.[51] Further, the Commission stated that pass-through clauses may only be labeled as variable or introductory rates, and that the triggering events for pass through can only be invoked in "very limited circumstances, which must be delineated in plain language in the clause.[52] Here, Companies witness Mikkelsen confirmed that the costs associated with certain types of pass-through events previously accounted for in CRES contracts would now be captured by Rider NMB under the Companies' proposal to expand Rider NMB.[53]

The Commission should deny the Companies' request to expand the scope of costs collected under Rider NMB as proposed, and instead determine that the tariff, as it is currently written, is sufficient. Alternatively, the Commission should require the Companies and Staff to work with customers and CRES suppliers to ensure that customers are not charged twice for the

[48] See *In the Matter of the Commission-Ordered Investigation of Marketing Practices in the Competitive Retail Electric Services Market*, Case No. 14-568-EL-COI, Finding and Order (November 18, 2015).

[49] Id. at 1-2.

[50] Id. at 2.

[51] Id. at 12.

[52] Id.

[53] Tr. Vol. XXXVII at 7781.

same transmission and ancillary service costs. This recommendation is consistent with the Commission's decision in its AEP ESP III Order. In that case, the Commission directed AEP Ohio and CRES providers to work together to ensure that customers do not pay twice for the same transmission-related expenses through a Basic Transmission Cost Rider (Rider BTCR).[54]

3. The Companies' proposed Rider GDR violates Commission precedent.

According to the Application, the Companies propose to establish a Government Directives Rider (Rider GDR) to recover costs related to governmental directives, including, but not limited to, cyber and physical threats, other attacks on infrastructure, costs related to former manufactured gas plant (MGP) sites, or costs arising from implementing directives from the retail market investigation.[55] As explained by Companies witness Mikkelsen, while the Companies do not currently have any costs to include in Rider GDR, the Companies seek to establish a cost recovery mechanism at this time for "possible future charges which may be incurred as a result of legislative or governmental actions or directives . . ."[56] Witness Mikkelsen discusses several "potential" costs that may be incurred and recoverable under Rider GDR, such as costs associated with investigation and remediation of former MGP sites in Ohio, costs associated with implementation of directives arising from the Retail Market Investigation (RMI), costs incurred as a result of the Commission-ordered Corporate Separation Audit, costs incurred for distribution infrastructure protection and costs associated with the North American Electric Reliability Corporation (NERC) directives.[57] However, witness Mikkelsen admits that "[i]t is

[54] AEP ESP III Order at 68.

[55] Companies Ex. 1 at 15 (Application).

[56] Companies Ex. 7 at 24 (Mikkelsen Direct).

[57] Companies Ex. 7 at 24-25 (Mikkelsen Direct).

too early to ascertain what, if any, directives may come from such efforts."[58] Thus, it is also too early to ascertain the types of costs that will result from implementing those directives and from estimating the amount of costs to be recovered under the rider from customers. Similarly, it is premature to estimate costs associated with other regulatory proceedings or directives that may occur sometime in the future.

As proposed, Rider GDR is overly broad and anticipatory in nature. Although Rider GDR would initially be set at zero and the Companies would have to file an application to either collect deferred costs or to defer and collect costs under the rider,[59] such rider should not be established and costs should not be collected from customers unless or until the Companies incur those costs and the Commission deems them prudent for recovery. A more appropriate proposal would be for the Companies to file a rate case to recover any costs that would increase costs and cause a revenue deficiency.[60] The Companies have failed to demonstrate that the establishment of Rider GDR at this time is reasonable or prudent.

Staff agreed that the establishment and implementation of Rider GDR in this proceeding is premature given the "lack of specifics or any quantifiable expenses anticipated to be expended. . [.]"[61] In a similar ESP case involving AEP Ohio's request to implement a non-bypassable NERC compliance and cyber security rider (Rider NCCR), the Commission agreed with Staff and others and rejected the rider.[62] In that case, AEP Ohio sought to establish Rider NCCR at a value of zero, track associated costs from the date of adoption, and defer such costs until AEP

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[58] Companies Ex. 7 at 25 (Mikkelsen Direct).

[59] Id. at 25-26.

[60] Staff Ex. 18 at 23 (Effron Direct).

[61] Staff Ex. 1 at 5 (Pearce Direct).

[62] AEP ESP III Order at 62.

Ohio filed an application and the Commission approved recovery of the NCCR costs.[63] The Commission denied AEP Ohio's request to establish Rider NCCR, stating the placeholder rider was premature and noting the lack of specificity of future potential costs for the Company.[64] Similar to Rider NCCR in that case, Rider GDR, as proposed, is premature as an "open-ended recovery vehicle for any costs the Companies incur."[65] Instead, it would be more prudent for the Companies to request and for the Commission to review specific cost recovery proposals associated with government initiatives and directives as they occur.[66] Accordingly, the Commission should deny the establishment of Rider GDR as it is unlawful under its AEP ESP III Order.

Moreover, the Stipulated ESP IV adopting Rider GDR fails to satisfy the second and third prongs of the stipulation three-part test inasmuch as Rider GDR violates an important regulatory principle adopted by the PUCO and neither benefits ratepayers nor is in the public interest.

4. The Companies' request to establish proposed Rider RRS is unlawful, unreasonable, and not in alignment with the Commission's established factors.

A significant component of the Companies' proposed Stipulated ESP IV is the Economic Stability Program, which, the Companies' assert, will serve as a retail rate stability mechanism to hedge against anticipated increasing market prices and price volatility for customers.[67] Through a proposed FERC jurisdictional PPA between the Companies and its affiliate, FES, the Companies will purchase the capacity, energy and ancillary services output of FES' Plants and

[63] Id. at 59-60.

[64] Id. at 62.

[65] Staff Ex. 6 at 5 (McCarter Direct).

[66] Id. at 6, 9-12.

[67] Companies Ex. 1 at 9 (Application).

FES' OVEC entitlement.[68] The Companies will then sell the output of the Plants and the OVEC entitlement into the wholesale markets operated by PJM and net the revenues received from the PJM markets against the costs to be paid to the generator, crediting or charging the difference to all customers through Rider RRS.[69] The Stipulated ESP IV proposes an eight-year term for Rider RRS, beginning June 1, 2016 (the start of ESP IV) through May 31, 2024.[70] The Companies incorrectly claim the proposed Rider RRS will serve as a hedge against the volatility of market energy prices for all retail consumers.[71]

In AEP Ohio's ESP III case, AEP Ohio sought Commission approval to establish a similar nonbypassable PPA Rider based on AEP Ohio's contractual entitlement to the output from the Kyger Creek and Clifty Creek plants, which are owned by OVEC.[72] Under that proposal, AEP Ohio would purchase the output, capacity, energy and ancillary services, and sell the output into the wholesale markets operated by PJM.[73] If the market revenues exceeded the costs to produce the output, AEP Ohio would credit its customers through the PPA Rider.[74] Conversely, if the costs to produce the output exceeded the market revenues, AEP Ohio would charge its customers through the PPA Rider.[75]

The Commission explained that it was not persuaded, based on the record evidence, that the proposal would sufficiently benefit customers.[76] In denying AEP Ohio's request for cost

[68] Id.

[69] Id.

[70] Companies Ex. 154 at 7 (Third Supp. Stip.).

[71] Companies Ex. 1 at 9 (Application).

[72] Id. at 5.

[73] AEP ESP III Order at 5.

[74] Id.

[75] Id.

[76] Id. at 25.

recovery through the PPA Rider, the Commission established a placeholder PPA Rider at an initial rate of zero and required AEP Ohio to justify its request for cost recovery under the rider in a future filing.[77] Additionally, the Commission established the following factors that AEP Ohio would be required, at a minimum, to address in its future filing:

1) The financial need of the generating plant;

2) The necessity of the generating facility, in light of future reliability concerns, including supply diversity;

3) A description of how the generating plant is compliant with all pertinent environmental regulations and a compliance plan for all 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 the state.[78]

The Commission also emphasized that any future PPA Rider proposal must:

- Provide for rigorous Commission oversight and include a process for a periodic substantive review and audit;

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

- Include an alternative plan to allocate the rider's financial risk between itself and its customers; and

- Include a severability clause in the event that a court of competent jurisdiction renders the rider invalid in any way.[79]

Given the similarities between Rider RRS proposed by the Companies and the PPA Rider proposed by AEP Ohio, an analysis of the Commission's established factors is relevant and prudent in reviewing the Companies' proposed Rider RRS.

[77] Id.

[78] Id.

[79] Id. at 25-26.

i. FERC's exclusive authority to oversee the wholesale power market preempts the Commission from approving the Companies' proposal.

The Federal Power Act makes "the transmission of electric energy in interstate commerce" and "the sale of such electric energy at wholesale in interstate commerce" subject to federal control.[80] Although the Act speaks in terms of wholesale energy sales, it is undeniable that the Act also embraces wholesale capacity sales.[81] FERC is charged with administering the Act and it "must ensure that wholesale rates are just and reasonable."[82] Given this exclusive grant of power, the State cannot assert jurisdiction over a subject within FERC's jurisdiction.[83] As the U.S. Supreme Court recently declared, "FERC has the authority—and, indeed, the duty—to ensure that rules or practices '*affecting*' wholesale rates are just and reasonable."[84] Given this exclusive grant of power, a subject that is committed to FERC's jurisdiction means that the States cannot assert jurisdiction over that same subject.[85] Thus, the Commission cannot approve the Companies' proposal because it would usurp FERC's exclusive power to regulate the wholesale power markets in violation of the Supremacy Clause.[86]

Two recent federal appellate decisions perfectly illustrate these principles and show why the Commission is constitutionally barred under field preemption and conflict preemption grounds from approving the Companies' proposal. In *PPL EnergyPlus LLC v. Nazarian*, 753 F. 3d 467 (4th Cir. 2014), the court struck down on preemption grounds the Maryland Public Service Commission's (Maryland PSC) program to incent construction of a new generating

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[80] 16 U.S.C. 82(b)(1).

[81] See *N.J. Bd. Of Pub. Utils. v. FERC*, 44 F.3d 74, 97 (3rd Cir. 2014).

[82] *Entergy La., Inc. v. La. Pub. Serv. Comm.*, 529 U.S. 39, 41 (2003) (quotations omitted).

[83] See *Miss. Power & Light Co. v. Miss. Ex. Rel. Moore*, 487 U.S. 354, 377 (1988) (Scalia, J., concurring in the judgment).

[84] *FERC v. EPSA*, Case No. 14-840, et al., Slip Opinion at 15 (January 25, 2016) (emphasis added).

[85] Supra n.83.

[86] See U.S. Const. Art. VI, Cl. 2.

plant.[87] The program guaranteed a fixed, 20-year revenue stream to the plant's owner pursuant to a contract for differences (CFDs) with the local utilities.[88] The CFDs required the owner to bid its energy and capacity into the PJM markets.[89] If the market revenues from the output cleared above the contract price, the owner passed that gain back as a credit to the local utilities.[90] Conversely, if market revenues cleared below the market price, the loss was passed back as a charge to the utilities.[91] Ultimately, these charges or credits were borne by customers.[92] The court unanimously held that the Maryland PSC's program was "field preempted because it functionally sets the rate that [the owner] receives for its sales in the PJM auction."[93] Because the program effectively displaced the rates that would otherwise be paid in the PJM markets, the court reasoned that the program intruded on FERC's exclusive jurisdiction over the wholesale markets.[94] The court's rationale for finding conflict preemption was of a similar character. It noted that the program stood as an obstacle to achieving Congressional purposes and objectives by, among other things, threatening "to seriously distort the PJM auction's price signals" which "[m]arket participants rely on * * * in determining whether to construct new capacity or expand existing resources.."[95]

A similar proposal was later struck down in *PPL EnergyPlus, LLC v. Soloman*, 766 F.3d 241 (3rd Cir. 2014). In that case, a New Jersey statute, the Long Term Capacity Pilot Program

[87] On October 19, 2015, the U.S. Supreme Court granted a petition for a writ of certiorari to hear this case. See 2015 WL 6112868.

[88] *Nazarian*, 753 F.3d at 473.

[89] Id. at 473-474.

[90] Id.

[91] Id.

[92] Id. at 474.

[93] Id. at 476.

[94] Id.

[95] Id. at 478-479.

Act (LCAPP), guaranteed payments for 15 years from local utilities to new generators for capacity that the generators were able to clear in the PJM market.[96] Much like *Nazarian*, the payment structure was set up as a contract for differences. Capacity market revenues above the contract price were credited to the companies and market revenues below the contract price were charged to the companies.[97] As in *Nazarian*, customers ultimately bore the incidence of these charges or credits. The court struck down the LCAPP statute on a field preemption theory because it "attempt[ed] to regulate the same subject matter that FERC has regulated through PJM's Reliability Pricing Model."[98] Continuing in this vein, the court reasoned that "[b]ecause FERC has exercised control over the field of interstate capacity prices, and because FERC's control is exclusive, New Jersey's efforts to regulate the same subject matter cannot stand."[99]

The Court's holdings in *Nazarian* and *Solomon* foreclose the Commission's ability to approve the Companies' proposal.[100] Under the current proposal, and similar to those cases, the Davis-Besse, Sammis and OVEC units would receive guaranteed recovery for the output that the Companies purchase and bid into the PJM markets. Any differences between the revenues that the Companies received and the contract price for the sale of the units would ultimately be borne by customers. This arrangement would directly intrude upon FERC jurisdictional subject matter, including PJM administered wholesale prices that are set according to market forces. If approved, the Commission would be supplanting federal control over the markets by setting the

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[96] *Solomon*, 766 F.3d at 248-249.

[97] Id. at 252.

[98] Id.

[99] Id. at 253.

[100] The Commission declined on ultra vires grounds to address the preemption issues in its AEP ESP III Order. AEP ESP III Order at 26. OMAEG raises the issue here because the issue is now squarely presented. To the extent the Commission declines again, OMAEG raises the issue to preserve it for appeal.

functional equivalent of a wholesale rate and distorting wholesale price signals.[101] The prospect of guaranteed recovery would make the Companies indifferent to revenues received in the PJM markets because any shortfalls would be recovered by the customers. Insulated from the discipline of the market, the Companies would therefore be in a position to bid the output into the auctions at a level that is indifferent to the economic constraints faced by other market participants. The Commission's acceptance of the Companies' proposal would "strike at the heart of [FERC's] power to establish rates" at wholesale and thus cannot stand under the Supremacy Clause.[102] Accordingly, the Stipulated ESP IV adopting Rider RRS fails to satisfy the second prong of the three-part test for stipulations inasmuch as the proposal intrudes on FERC's exclusive jurisdiction over the wholesale markets, and, thus, violates an important regulatory principle.

ii. The Companies have not shown a financial need of the generating plants.

The first factor established by the Commission in the AEP ESP III Order is the financial need of the generating plant. Senate Bill 3 provided for deregulation of electric generation service in the state of Ohio and removed the governing power of the Commission in the area of generation services.[103] This deregulatory approach "provides for competition in the supply of electric generation services * * *."[104] Given this market construct, financial need of generating unit operations (referenced by the Commission in the first factor) must be assessed based on the revenues a generating unit receives in the competitive markets operated by PJM. According to robust competition established by the directive of Section 4928.38, Revised Code, if a generating

[101] *Nazarian*, 753 F.3d at 476.

[102] Id. at 478.

[103] *IEU-Ohio v. Pub. Util. Comm.,* 117 Ohio St.3d 486, 2008-Ohio-990 at ¶ 6.

[104] *Migden-Ostrander v. Pub. Util. Comm.,* 102 Ohio St.3d 451, 2004-Ohio-3924 at¶ 2.

unit is consistently unable to clear in the PJM auction, it should be replaced by a more efficient unit. Section 4928.38, Revised Code, states that a generating unit must be "fully on its own in the competitive market."[105] As stated by OCC witness Rose, "[b]eing on your own in the competitive market means that the Companies' unregulated generation efforts cannot be aided by a subsidy * * *."[106] Thus, market forces, should be the ultimate determinate of a generating unit's financial need.

Companies witness Moul asserts that the "economic viability of the Plants is in doubt" due to the "historic lows" of the market-based revenues for energy and capacity and these revenues are insufficient for FES to continue operating and making investments in the Plants.[107] Moul's supplemental testimony presents the comparative annual costs and revenues of the Davis-Besse plant, Sammis plant and OVEC entitlement.[108] However, in assessing the financial viability of the units, witness Moul improperly considers costs additional to avoidable costs, which distorts the true financial viability of the units.[109] The Companies also assert the Plants need subsidies in order to remain competitive in the market until energy prices increase.[110] Providing subsidies threatens the policy of the state of Ohio to ensure effective competition in the provision of retail electric service.[111]

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[105] Section 4928.38, Revised Code.

[106] OCC Ex. 25 at 9 (Rose Direct).

[107] Companies Ex. 28 at 2 (Moul Direct).

[108] Companies Ex. 30-C at 1-3 (Moul Supplemental).

[109] OMAEG Ex. 18 at 7-8 (Hill Supplemental).

[110] Id. at 8.

[111] See generally, Chapter 4928, Revised Code; see also, Section 4928.02(H), Revised Code ("It is the policy of the state to [e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates.").

Given deregulation of electric generation service, it is important to assess financial need in the context of a competitive market (i.e., using market forces). As stated by both OCC witness Sioshansi and OMAEG witness Hill, if the Companies believe that the Plants and OVEC entitlement units will become profitable (by $2 billion within 15 years) in the long run, it should follow that the Companies would be willing to make the necessary investments to keep the Plants and OVEC entitlement operating in the near term.[112] "The Companies should have no interest in prematurely shutting down assets that are likely to prove valuable."[113] Further, market logic indicates that if there is a high probability the Plants will recover costs within three years (as predicted by the Companies), the Companies should be able to obtain investments in the Plants through the sale of bonds or other long-term financial instruments.[114] The Companies' arguments defy logic when, on one hand, they assert the Plants' economic viability is in doubt and they may not survive, and, on the other hand, they request customers, who have no ownership interest in the Plants or OVEC entitlement, pay costs associated with keeping those units operating because they are essential for future generation and will become profitable. The Companies own witness Moul concedes that the Companies would be able to finance capital investments if the Economic Stability Program was not approved.[115]

Moreover, allowing these subsidized units to participate in the wholesale market against unsubsidized units will destroy efficiency benefits and market price signals, thereby potentially increasing the cost of supplying customers with energy and capacity needs.[116] This undermines the efficiency of the competitive market and will ultimately result in higher customer costs as

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[112] OCC/NOPEC Ex. 1 at 20 (Sioshansi Direct); OMAEG Ex. 18 at 9 (Hill Supplemental).

[113] OMAEG Ex. 18 at 9 (Hill Supplemental).

[114] Id. at 10.

[115] Tr. Vol. X at 2199.

[116] OCC/NOPEC Ex. 1 at 4 (Sioshansi Direct).

customers will be saddled with subsidizing inefficient units that have remained in the system due to a guaranteed customer subsidy.[117] The Companies have failed to show a financial need of the generating facilities, as required by the Commission in its AEP ESP III Order.[118]

iii. The Companies fail to demonstrate a reliability concern or lack of supply diversity that necessitates continued operation of the generating plants.

The second factor established by the Commission is the necessity of the generating facility, in light of reliability concerns, including supply diversity. System reliability and the need for generating units in a particular region is determined by the Regional Transmission Organization's (e.g., PJM) procedures for meeting reliability to ensure customer demand.[119] As one federal court recently explained, "PJM was created to ensure reliability by managing interstate transmission lines and, in more recent years, by designing and operating wholesale auctions."[120] Thus, contrary to the Companies' proposal, decisions about system reliability should be made regionally by PJM, not on a plant-by-plant basis by the Commission.[121]

The Companies' warnings about the harms that would be inflicted on system reliability if the proposal is not approved are unfounded and, at best, overstated. Companies witness Phillips testifies that the estimated cost of transmission upgrades necessary to maintain reliability if the Davis-Besse and Sammis plants were to be retired would be $436.5 million.[122] However, in making this estimate, he assumes that *all* of the units at Davis-Besse or Sammis, or both, will

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[117] Id. at 14

[118] Staff Ex. 12 at 12 (Choueiki Direct).

[119] OCC Ex. 26 at 6 (Rose Supplemental).

[120] *PPL EnergyPlus, LLC v. Hanna*, 977 F.Supp.2d 372, 384 (D. N.J. 2013).

[121] Id.

[122] Companies Ex. 39 at 4 (Phillips Supplemental).

retire.[123] This assumption discounts the possibility that only a limited number of generating units might retire, while the rest remain in service, which would have a different impact on the transmission system reliability.[124] Additionally, witness Phillips admits that when making his statements regarding the impact of natural gas generation on reliability, he did not consider the impact of the PJM Capacity Performance product.[125] Further, the 2016 load forecast released by PJM shows a reduction in forecast peak demand compared to earlier forecasts, indicating that there is no looming shortage of generating capacity.[126] In fact, PJM recently stated its markets have "succeeded in providing reliable, competitively priced wholesale electricity" to Ohio.[127]

Companies witness Phillips uses the PJM regional transmission expansion plan (RTEP) 2019 base case model in his generation reliability analysis.[128] The RTEP 2019 base case model does not account for generation projects that have been added to the PJM queue, including a 960 MW natural gas-fired plant near Davis-Besse and 1,152 MW natural gas-fired plant near Sammis, which are scheduled to be in service in 2017 and 2020, respectively.[129] Additional generating plant locations have also been identified in Oregon, Middletown, Rolling Hills, Lordstown, Columbiana County and Avon Lake, Ohio.[130] These new generation resources, which were also noted by OCC witness Wilson,[131] could have a significant impact on the results of the model, especially considering the proximity in location to the Davis-Besse and Sammis

[123] Sierra Club Ex. 67 at 5 (Lanzalotta Direct).

[124] Id.

[125] Tr. Vol. XVI at 3311-3312.

[126] OCC/NOPEC Ex. 9 at 6 (Wilson Second Supplemental).

[127] Id.

[128] OCC/NOPEC Ex. 1 at 26 (Sioshansi Direct).

[129] Id.

[130] Tr. Vol. I at 137-138; OCC/NOPEC Ex. 9 at 5 (Wilson Second Supplemental).

[131] OCC/NOPEC Ex. 5 at 10 (Wilson Supplemental).

plants.[132] The Companies' assertion that transmission upgrades will create a considerable cost for customers is speculative as it is PJM who is responsible for transmission planning and who ultimately determines cost allocation.[133] As Staff witness Choueiki stated, rather than provide an independent analysis of the impact of retirement of the Plants, the Companies relied on an assessment conducted by two of their own engineers.[134] They did not provide an analysis to PJM nor did they seek an independent analysis from PJM, who would be in the best position to estimate the cost of transmission upgrades based on the needs and capabilities of the entire region.[135]

Companies witness Phillips uses an example of recent generating plant retirements by FES and GenOn Energy Inc. that necessitated transmission system upgrades as the basis for his current analysis.[136] According to Companies witness Cunningham (and adopted by witness Phillips), between 2012 and 2015, approximately 3,900 MW of coal-fired power plants in Ohio were retired, resulting in 38 separate transmission system upgrades to maintain reliability.[137] However, those upgrades were also necessitated by the retirement of additional plants beyond those owned by FES and GenOn Energy.[138] System reliability concerns are a regional issue, not a plant-by-plant issue, and are better addressed by PJM in a regional context. The Companies analysis, therefore, is flawed.

Even if the record showed the existence of a pending unit closure, PJM's reliability-must-run (RMR) arrangement is a tool that can be used to mitigate system impacts and capacity

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[132] OCC/NOPEC Ex. 1 at 26 (Sioshansi Direct); Tr. Vol. XV at 3226-3232.

[133] Tr. Vol. XV at 3238-3239.

[134] Staff Ex. 12 at 12 (Choueiki Direct).

[135] OCC/NOPEC Ex. 1 at 25 (Sioshansi Direct); Tr. Vol. XV at 3247-3248.

[136] Companies Ex. 39 at 6 (Phillips Supplemental).

[137] Companies Ex. 37 at 3 (Cunningham Direct).

[138] Tr. Vol. XV at 3241-3243.

shortfalls caused by such a closure.[139] Once a generator notifies PJM of its intent to close a unit, PJM can enter into an RMR contract with the generator to provide specific payments for a fixed period of time to keep the unit running while the reliability need is addressed.[140] Further, if a generation owner chooses to continue to operate a generating unit that it planned to deactivate, the generation owner is entitled to file a cost-of-service recovery rate with FERC in order to recover the entire cost of operating the unit beyond its proposed deactivation date.[141] The Companies are certainly aware of this process given FES, an unregulated affiliate of the Companies, currently has generators that are the subject of RMR agreements and are receiving cost recovery under those agreements.[142]

An RMR is not the only means to address a potential reliability issue. As stated above, new generation is projected to come online soon and forecasts of PJM load in 2015 have decreased compared to 2014 load forecasts.[143] Moreover, the RPM market provides incentives for existing efficient sources of capacity, incentives to attract new investments, and performance criteria and penalties for participating generators.[144] In fact, subsidizing one supplier (here, the Plants and OVEC entitlement) over others can have a detrimental impact on reliability as it may discourage new entry.[145] Creating barriers to new entry results in fewer suppliers with larger market shares, which increases the risk of suppliers raising prices above the current competitive market levels and customers paying higher costs.[146]

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[139] Sierra Club Ex. 67 at 10 (Lanzalotta Direct).

[140] Id.

[141] Id.

[142] Exelon Ex. 1 at 16 (Campbell Direct).

[143] Sierra Club Ex. 73 at 30 (Comings Supplemental).

[144] OCC/NOPEC Ex. 1 at 22 (Sioshansi Direct).

[145] OCC Ex. 26 at 6 (Rose Supplemental).

[146] Id.

In addition to focusing on reliability concerns, the Commission's second factor also addresses supply diversity. Preserving the life of the units identified in Rider RRS will not promote fuel diversity.[147] By definition, diversity means of or relating to different types.[148] The primary energy source used for electricity generation in the state of Ohio is coal.[149] The Plants and OVEC entitlement include 3,319 MW of coal-fired generation capacity and 900 MW of nuclear power.[150] Thus, they do not increase the diversity of generation fuels in the state of Ohio because they are primarily coal generating stations. Further, in 2012, coal represented 59 percent of the generating capacity installed in the state and natural gas represented 29 percent of the generating capacity.[151] If the coal-fired generators included in the Plants and OVEC were to retire and be replaced with natural gas-fired generators, the result would be a *more* diverse supply and balanced portfolio.[152] The homogeneity brought by the coal-fired units in the Plants and OVEC entitlement do not contribute to supply diversity. Subsidizing coal-fired generating units through Rider RRS will only decrease the supply diversity, making Ohio heavily dependent on coal above all other fuel sources. Therefore, the Companies have failed to demonstrate how the generating facilities are necessary to ensure grid reliability or how they contribute to supply diversity in the state of Ohio.

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[147] OMAEG Ex. 18 at 9 (Hill Supplemental).

[148] Id.

[149] OCC/NOPEC Ex. 1 at 28 (Sioshansi Direct).

[150] Id.

[151] Id. at 29.

[152] Id.

iv. Requiring ratepayers to bear the risks of current and unknown future environmental compliance costs would lead to unjust and unreasonable charges.

The Commission's third factor requests a description of how the generating plant is compliant with pertinent environmental regulations as well as a plan for compliance with pending environmental regulations.[153] Pursuant to Section 4905.22, Revised Code, the Commission has authority to protect customers against unjust or unreasonable charges in excess of that allowed by law or by order of the Commission.[154] Thus, the Commission's third factor should be reviewed in light of escalating environmental costs that the units will undoubtedly incur and which will ultimately be passed to customers in order to ensure that customers do not bear unjust or unreasonable charges associated with the units' environmental compliance costs.

Pending U.S. Environmental Protection Agency (EPA) regulations focus on improving air quality in power generation operations by reducing carbon, sulfur dioxide, nitrogen oxide, particulate matter, ozone and other hazardous air pollutant emissions.[155] Although these future requirements are not designed specifically for coal-fired generation and the timing of the rules is unknown,[156] compliance with the pending regulations will have a considerable impact on the operations of coal-fired generation.[157] The majority of generation capacity of the PPA units is coal-fired generation.[158]

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[153] AEP ESP III Order at 25.

[154] See generally Section 4905.22, Revised Code.

[155] OCC Ex. 20 at 4 (Ferrey Direct).

[156] The United States Supreme Court granted a stay of EPA's Clean Power Plan rule (80 Fed. Reg. 64,662 (Oct. 23, 2015)) on February 9, 2016.

[157] OCC Ex. 20 at 4 (Ferrey Direct).

[158] Id. at 6.

Direct testimony of OCC witness Ferrey provides detail related to the host of current and pending environmental regulations to which the Plants and OVEC entitlement are subject.[159] As witnesses Ferrey and Hill address in their testimony, specific counties in Ohio, including Jefferson County where the Sammis plant is located, have been designated as non-attainment areas by the EPA given the air quality does not meet the minimum standards.[160] State officials are required to submit a state implementation plan to restrict existing facilities or sources that emit that particular pollutant impacting the operations and protocols of coal dispatched plants. If attainment is not reached, the state could lose federal funding.[161]

Further complicating the uncertainty surrounding new and pending environmental regulations is the EPA's issuance of the Clean Power Plan final rule on August 3, 2015, which set emission guidelines for states to follow as they develop plans to reduce greenhouse gas emissions from existing fossil fuel-fired generating plants. As pointed out by witness Ferrey, even if the costs of projects to comply with the Clean Power Plan were included in the Companies' forecast, the question still remains whether the Plants would continue to be cost effective to run even with the new improvements.[162] Given carbon emissions cannot be completely eliminated from fossil fuel fired generating facilities, the only way to accomplish carbon emission reductions is by improving the heat rate or reducing plant generation output by running the plant for less time.[163] Thus, even if new improvements are made to the generating facilities, the Clean Power Plan could still have the effect of reducing generation from coal-fired power plants, which could lead to lower market revenues and higher customer costs. Moreover,

[159] See generally, OCC Ex. 20 at 6-18 (Ferrey Direct).

[160] Id. at 9-13; OMAEG Ex. 17 at 8 (Hill Direct).

[161] OCC Ex. 20 at 10 (Ferrey Direct).

[162] Tr. Vol. XXIII at 4635-4636.

[163] OCC Ex. 20 at 5 (Ferrey Direct).

because Ohio is a member of PJM, the compliance plan ultimately implemented for the state will be affected by the other 13 states in the PJM region. This increases the uncertainty surrounding future compliance with new environmental regulations and the costs associated with compliance.[164]

The Commission itself expressed concerns regarding the impact of new environmental regulations on the power market as well as customer prices. In December 2014, the Commission submitted comments to the EPA regarding carbon pollution emission guidelines for existing electric utility generation units.[165] The Commission stated that pending environmental regulation changes would alter the current dispatch order to disadvantage coal-fired units, thereby "distorting a marketplace that is based upon economic bidding and pricing."[166] Further, the Commission noted that moving from a current market-driven dispatch order to a new environmentally-affected market dispatch would increase operating costs, amounting to $2.5 billion each year by 2025 for Ohio consumers.[167] The Commission recognized these escalating rates could become unreasonable and unjust.[168]

The Commission's concern about the impact of new environmental regulations on the competitive energy market and subsequent price increases for customers should apply equally to the impact of Rider RRS and its potential impact on the competitive market and customer costs. Pending federal regulations will have a significant impact on the operations of coal-fire powered generation facilities such as Sammis and thee OVEC entitlement units.[169] Given many of these

[164] Tr. Vol. XXIII at 4701-4703.

[165] See OCC Ex. 20 at Attachment SF-2 (Ferrey Direct).

[166] Id.

[167] Id. at 28-31.

[168] Id. at 15.

[169] OCC Ex. 20 at 3 (Ferrey Direct).

pending regulations have a to-be-determined state regulatory component, it is impossible to determine with certainty the financial impact of these regulations on generation operations, costs, maintenance expenses or ability to be dispatched.[170] Under the terms of the proposed PPA, customers are responsible for any increased costs in operations and maintenance of the affected units, including pending and ongoing environmental regulatory requirements.[171] While the Companies purport to offer customers a "hedge" against price volatility under Rider RRS, the proposed PPA and Rider RRS also shift an unknown risk to customers of possibly paying above-market prices for power in order to cover the unpredictable costs of operating units that are subject to pending federal environmental regulations.[172] As operation and maintenance costs change in response to environmental regulations, the Companies' customers must absorb those costs.[173] This level of uncertainty creates a huge risk related to long-term commitments to purchasing coal-fired generation and will likely result in unreasonable and unjust charges that do not benefit customers.[174] Not only are the Companies' proposed PPA and Rider RRS inconsistent with Ohio law,[175] the Companies' have failed to demonstrate how the proposal will satisfy future compliance with pending environmental regulations as required by the Commission's third factor.

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[170] Id.

[171] Id. at 24.

[172] Id.

[173] Id.

[174] Id.

[175] Section 4905.22, Revised Code.

v. Prolonging the life of aging and/or uneconomic plants while recovering costs from ratepayers through Rider RRS will increase the price of electricity, harm economic development, and is not in the public interest.

The Commission's fourth factor requires the Companies to assess the impact a closure of the generating plants would have on electric prices and the resulting effect on economic development within the state of Ohio.[176] The Companies portray a very bleak scenario with a host of reliability and economic issues should the Plants and OVEC entitlement units close. However, these conclusions are exaggerated and meritless based on the evidence presented. Rather, the record persuasively shows that retiring an inefficient generating plant would in reality ease electric prices and boost economic development in the state compared to implementing the costly PPA. Similar to its other attempts to meet the Commission's factors, the Companies cannot convincingly demonstrate how it meets this factor.

Companies witness Mikkelsen estimates that customers could see an increase in electric prices ranging from $1.3 billion to $2.1 billion associated with transmission investment and foregone retail rate stability credits if the Plants and OVEC entitlement unites were to close and Rider RRS denied by the Commission.[177] The estimates rely on flawed assumptions. First, the estimate assumes additional transmission investments would need to be made to maintain reliability and the costs of those investments would be borne solely by customers of the Companies. As previously discussed, transmission and reliability concerns are best resolved by PJM in concert with reliability mandates promulgated by FERC and the North American Electric Reliability Corporation (NERC), as the electric reliability organization.[178] Given that transmission and reliability concerns impact entire regions, not just the specific areas where the

[176] AEP Ohio ESP III Case Opinion and Order at 25.

[177] Companies Ex. 9 at 9 (Mikkelsen Second Supplemental).

[178] OCC/NOPEC Ex. 1 at 23-24 (Sioshansi Direct).

Plants and OVEC entitlement units provide service, the necessity of upgrades and operational costs would be assessed on a larger scale rather than a plant-by-plant basis.[179]

Further, while witness Mikkelsen describes the denial of Rider RRS as a loss in benefits for customers based on a loss of retail rate stabilization credits, she fails to note the portion of the forecast predicting a customer *loss* of $414 million during the first three years of Rider RRS.[180] The Companies' estimate of benefits is not reliable because there exists uncertainty regarding the long term price and cost projections for electricity and other forms of energy that were used by the Companies in their forecasts.[181] For example, OMAEG witness Seryak states that the Companies are "likely significantly overestimating revenue potential of their power plants included in the PPA."[182] Given that the Companies used PJM's outdated 2014 load forecast in their estimates, PJM's recent load forecast reductions of 3.5%-5% would likely reduce the Companies' projected revenue from the generating plants under the PPA, resulting in additional costs to customers.[183] This is consistent with studies of other respected load forecasts, such as the US Department of Energy (DOE) Energy Information Administration's (EIA) Annual Energy Outlook (AEO) Retrospective Review, which states that EIA forecasts "generally overestimate electricity load."[184] PJM's more recent load forecast, which predicts a reduction, will result in less generating capacity resources clearing in the PJM capacity auction, suppressing clearing prices and impacting the Companies' flawed assumptions regarding future capacity

[179] Tr. Vol. XV at 3238-3239.

[180] See Companies Ex. 33 at Attachment JAR-1 (Ruberto Direct), as updated by Sierra Club Ex. 89 (Mikkelsen Workpaper November 30, 2015); see also OCC/NOPEC Ex. 7 at 20 (Kahal Direct).

[181] OCC Ex. 25 at 10 (Rose Direct).

[182] OMAEG Ex. 28 at 8 (Seryak Supplemental). These percentages were confirmed in the January 2016 Final PJM Load Forecast Report with a slight upward modification to the range of 3.5%-5.1% (Companies Ex. 171).

[183] Id.

[184] Id. at 8-9.

market prices and revenues.[185] Moreover, the Stipulated ESP IV purports to introduce new energy resources, including 100 megawatts of wind and solar, battery resources and 800,000 megawatts of energy efficiency.[186] Adding additional resources will have the effect of reducing electricity and capacity sales from traditional generation, thereby suppressing prices in the wholesale electric energy and capacity markets.[187] Thus, the Companies' own provisions in the Stipulated ESP IV will "shift [their] PPA power plants into an uncompetitive position," reducing revenue to the Companies and increasing the cost of Rider RRS to customers.[188]

The Companies' analysis also ignores the potential economic benefits that could result from the closure of a plant.[189] Specifically, a plant closure could prompt the construction of a new, more efficient generating asset, which could create jobs, spur economic development, provide a strong tax base, and obviate the need for a ratepayer-funded subsidy.[190] This dichotomy of results demonstrates that the net impact of the proposed PPA and Rider RRS is sensitive to input and assumption parameters.[191] Therefore, the Companies' claim that closure of the Plants and OVEC entitlement units would result in increased electric prices is meritless.

The Companies also cite numerous customer benefits related to the Economic Stability Program and Rider RRS, which are enumerated in the Companies' Application.[192] However, these benefits are based on an underlying assumption that the plants do not retire or close.[193]

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[185] Id. at 10.

[186] Id. at 11.

[187] Id. at 11-12.

[188] Id. at 12-13.

[189] OCC/NOPEC Ex. 2 at 16 (Sioshansi Supplemental).

[190] Id.

[191] Id. at 11.

[192] Companies Ex. 1 at 9 (Application).

[193] Tr. Vol. I at 134-137.

Further, these alleged benefits do not account for new generating plants currently in various stages of development in Ohio, which could provide some of the same benefits the Companies assert cannot be realized absent the Economic Stability Program and Rider RRS.[194] Companies witness Murley states that the "Plants are significant contributors to their respective regions' economies, as well as the Ohio economy"[195] and articulates specific impacts on employee jobs, economic activity and tax revenue. Witness Murley's analysis is flawed.

First, witness Murley's impact analysis is restricted to a narrow geographic region involving the businesses and people who supply the power plant with goods and services.[196] A more complete impact analysis would also include the entities who purchase power from the Plants and who subsidize the Plants' operations in order to better understand the overall economic impact on the state of Ohio. This would include customers in a larger geographic region.

Second, the model used in witness Murley's analysis fails to capture the economic impacts on customers who actually purchase power and subsidize the Plants' operations.[197] In her analysis, witness Murley focuses on the impacts on the supply chain of the industry and on the supplier industries.[198] By excluding an impact analysis on the users of electricity (e.g., the customers), the model fails to account for a significant portion of the true economic impact.[199]

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[194] Tr. Vol. I at 137-138.

[195] Companies Ex. 36 at 11 (Murley Supplemental).

[196] OMAEG Ex. 18 at 11 (Hill Supplemental).

[197] Id.

[198] Id.

[199] Id.

Third, the impact analysis does not consider substitution effects or price sensitivity of customers.[200] The model used in the impact analysis does not take into account the fact that customers will shift their purchasing patterns when prices increase or decrease or that operators may shift or modify their course of business in response to the market.[201] Therefore, the conclusions from the model are based on inaccurate assumptions regarding customer behavior and economics.

Fourth, the model restricts spending patterns to the limited geographic region involving the location of the Plants.[202] Any spending that leaves the region is assumed to be lost.[203] When the lost spending is then added to the economic impact, the assumption is that when the Plant closes, the economy will be harmed because the employees will find no substitute employment and retirement benefits and unemployment compensation will not flow into the region.[204] These assumptions are inaccurate and over-exaggerate the true economic impact of the Plants' closure.[205] Therefore, the Companies' analysis and results are not definitive, provide only a partial view of the impacts and do not accurately reflect the total economic impact of closing the Plants.

Contrary to the Companies' assertions, *preserving* the Plants and OVEC entitlement units will actually *harm* economic development, and these harms will be felt most acutely in the manufacturing sector.[206] In 2010, Ohio had the highest level of manufacturing activity among the Midwestern states and the manufacturing sector is a prominent part of the state's economic

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[200] OMAEG Ex. 18 at 12 (Hill Supplemental).

[201] Id. at 11.

[202] Id. at 12.

[203] Id.

[204] Id.

[205] Id.

[206] OMAEG Ex. 17 at 5 (Hill Direct).

base.[207] Many manufacturing industries export products from Ohio, bringing revenue into the state and creating jobs for state citizens.[208] Moreover, the manufacturing sector is an energy-intensive industry, with the Companies' service territories having the highest proportion of electricity-intensive manufacturing in the state.[209] These energy-intensive industries are especially influenced by energy prices, with a correlation that higher electricity prices have a negative effect on manufacturing productivity.[210] Higher electricity prices could have a detrimental impact on the manufacturing industry currently in Ohio as well as the ability of the state to attract new business.

The proposed PPA and Rider RRS could harm the economic development of the state from an environmental perspective as well. As designed, the proposed PPA and Rider RRS will ensure the continued operation of the Plants and OVEC entitlement units. Due to both the age of the plants and the introduction of methane as an alternative fuel source, it may be uneconomic to continue operating those facilities.[211] Additionally, and as previously discussed, new regulations designed to reduce the amount of carbon released into the atmosphere from coal plants are currently pending, which will increase the cost of generating electric power from coal, making it less economical.[212] Existing levels of air pollution have an impact on the attraction, retention and expansion of businesses in the state's metropolitan areas, which ultimately impact the state's economic development.[213] Permitting the continued operation of uneconomic coal-based

[207] Id.

[208] OMAEG Ex. 17 at 11 (Hill Direct).

[209] Id.

[210] Id. at 11-12.

[211] Id. at 6.

[212] Id.

[213] Id.

generating plants for electricity generation will likely lead to redistribution of economic activity away from Ohio to other states and cause local businesses to either move or close.[214]

Finally, the proposed PPA and Rider RRS prevent a free market from evolving,[215] which ultimately impacts overall economic development. If the Plants and OVEC entitlement units are operating at a loss, the costs to operate the facilities will be passed onto customers through Rider RRS and FES will be fully compensated for its costs, thereby removing some of the price differential between FES and its competitors.[216] This will deter new entrants from entering the power generation market because the market has been altered to their detriment.[217] The result of fewer market competitors is higher electricity costs and a less robust market to contribute to economic development.[218]

The Companies fail to demonstrate that closure of the Plants and OVEC entitlement units would lead to increased electricity prices or negatively impact the economic development of the state. Rather, as the evidence shows, *preserving* uneconomic generating facilities, especially through the pockets of ratepayers, could result in increased electric prices and have significantly negative effects on the economic development of the state of Ohio.

vi. The Companies fail to demonstrate compliance with the additional factors established by the Commission.

The Companies' proposal fails to meet the four factors articulated by the Commission in the AEP ESP III Order. For this reason alone, Rider RRS should be denied. Even more, the Companies fail to satisfy the other criteria the Commission stated must be addressed in order to

[214] OMAEG Ex. 17 at 16-17 (Hill Direct).

[215] OMAEG Ex. 18 at 6 (Hill Supplemental).

[216] Id. at 7.

[217] Id.

[218] Id.

justify cost recovery through Rider RRS.[219] The Companies' inability to meet these additional criteria provides yet another compelling reason why the Commission should deny Rider RRS and the Companies' attempt to transfer the risk of aging and/or uneconomic plants to ratepayers for a period of eight years.

First, the Companies do little to comply with the Commission's stated expectation that the proposal allow for rigorous Commission oversight of the rider and provide a process for review and audit. Companies witness Mikkelsen stated in her testimony:

> Approval of this ESP IV shall be deemed as approval to recover all Legacy Cost Components through Rider RRS as not unreasonable costs.
>
> * * *
>
> Rider RRS will be subject to two separate reviews. In the first review, the Staff will have from April 1 to May 31 to review the annual Rider RRS filing for mathematical errors, consistency with the Commission approved rate design, and incorporation of prior audit findings, if applicable. In the second review, the Staff will have the opportunity to audit the reasonableness of the actual costs (excluding Legacy Cost Components which shall not be included in this second review or challenged in any subsequent audit or review) contained in Rider RRS and the actual market revenues contained in Rider RRS.[220]

Based on these statements, the proposed PPA associated with Rider RRS lacks appropriate regulatory oversight.[221] It does not provide for a Commission prudency review of legacy costs,[222] which includes previous decisions by the unregulated affiliate that will now be borne by ratepayers.[223] It also does not provide for a meaningful Commission prudency review of costs that will be incurred moving forward and passed through Rider RRS.[224] Additionally, any costs associated with the audit process will be passed to customers through Rider RRS,

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[219] AEP ESP III Order at 25.

[220] Companies Ex. 7 at 14-15 (Mikkelsen Direct).

[221] OCC Ex. 25 at 4 (Rose Direct).

[222] Witness Mikkelsen defines legacy costs as "any cost that arises from a decision or commitment or a contract entered into prior to December 31st of 2014." (Tr. Vol. I at 160-161.)

[223] OCC Ex. 25 at 4 (Rose Direct); Tr. Vol. I at 67.

[224] Id.

regardless of the findings of that audit.[225] If costs are determined to be unreasonable by the Commission, those disputed costs would continue to be recovered from customers through Rider RRS until the Companies received final resolution through a non-appealable order (presumably by the Supreme Court of Ohio).[226] Moreover, reviews conducted by the Commission will not occur until after the bids and auctions have occurred and when the resulting revenue from the energy, capacity or ancillary services is realized, based on the facts and circumstances that were known at the time the offer was made.[227] These costs are unreasonable and lack appropriate Commission oversight.

Staff agreed that the commitment to Commission oversight made by the Companies is vague and not "rigorous," contrary to the Commission's request.[228] Although Staff initially recommended an annual audit of all future cost components (fixed and variable) by Staff or an outside consultant to mitigate this concern, Staff also recognized that the Commission has no authority to order FES to submit to such an audit or to accept the Commission's findings from the audit.[229] FES would have to voluntarily agree to this condition.[230] Further, given that both reviews are proposed to occur after the terms and conditions of the contract are executed, the payment price negotiated under the contract and corresponding costs borne by customers is independent of any determination by the Commission regarding the prudency and reasonableness of cost recovery.[231] This is not a commitment to rigorous Commission oversight.

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[225] Tr. Vol. I at 69-70.

[226] Id. at 70-71.

[227] Tr. Vol. XXXVI at 7618.

[228] Staff Ex. 12 at 13 (Choueiki Direct).

[229] Staff Ex. 12 at 15-16 (Choueiki Direct); Tr. Vol. XXX at 6253-6254.

[230] Tr. Vol. XXX at 6254.

[231] Tr. Vol. I at 68-69.

Further, the Stipulated ESP IV does little to provide an increased commitment to rigorous Commission oversight. In fact, the Third Supplemental Stipulation merely restates the Companies' initial review process and includes only a clarification of rigorous review related to performance requirements in the PJM markets and a commitment to information sharing.[232] Importantly, the proposed PPA between the Companies' and FES is silent as to Commission oversight.[233]

Second, the Companies offer little more than a feeble commitment to share information with the Commission and Staff. Although Companies witness Mikkelsen asserts that the Companies would make all information available at Staff's request,[234] the underlying documents containing the terms of the PPA agreement between the Companies and FES provide no such guarantee or requirement. Specifically, the terms governing the proposed PPA associated with Rider RRS states the following:

> Seller shall reasonably and timely provide all data and information requested by Buyers: (i) to respond to a Governmental Authority request for information; (ii) to prepare for and make other regulatory filings; and (iii) as required by law with respect to Buyers.[235]

Similar to the lack of reference to the Commission or Staff with regard to the oversight or review of transactions and operations under the PPA contract, the PPA contract terms also are silent as to the Commission's or the Staff's rights to access the information. The contract includes no explanation of what constitutes "reasonably" or "timely" providing such information. Further, the document specifies that seller (FES) shall provide data and information to buyer (the Companies), not the Commission or its Staff. Therefore, the Commission and Staff would have

[232] Tr. Vol. XXXVI at 7516-7517.

[233] Companies Ex. 156 at 9 (IEU Set 1-INT-25 Attachment 1 Revised).

[234] Tr. Vol. II at 442.

[235] Companies Ex. 156 at 9 (IEU Set 1-INT-25 Attachment 1 Revised).

to rely on the Companies to request information from FES in order to obtain any data or information.[236] Absent an affirmative document providing rights of access to the Commission or Staff, the current terms of the PPA contract and the testimony of Ms. Mikkelsen do not adequately satisfy the "full information sharing" contemplated by the Commission's AEP ESP III Order.[237]

Third, the Commission's directive for the Companies to allocate the rider's risk between itself and the ratepayers is wholly unmet here. Ratepayers bear all the cost and economic risk under the Companies' proposed Rider RRS.[238] If the costs of the Plants and OVEC entitlement units exceed market revenues, customers will be charged 100% of that difference through Rider RRS.[239] The customers though, do not own the plants, operate the plants, and are not responsible for bidding the plants' output into the wholesale market. Those responsibilities fall squarely on the shoulders of the Companies, FES, and OVEC. The Companies assert the audit and review process is a mechanism for allocating the financial risk of Rider RRS between the Companies and its customers.[240] However, as previously discussed, the review process is far from rigorous and does not provide adequate prudency review of all costs that customers may incur under Rider RRS. Further, no provision exists in the Companies' Application that allocates any portion of the financial risk to FES rather than the customers.[241]

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[236] Tr. Vol. I at 83.

[237] Staff initially agreed that the Companies failed to provide evidence demonstrating a full commitment to information sharing (Choueiki Direct at 13).

[238] OCC/NOPEC Ex. 1 at 19 (Sioshansi Direct).

[239] Id. at 20.

[240] Companies Ex. 9 at 12 (Mikkelsen Second Supplemental).

[241] Tr. Vol. I at 65.

The Companies also assert that credits provided for in the Stipulated ESP IV serve as additional risk sharing between the Companies and its customers.[242] Under this provision, customers would be provided up to $100 million in credits from the Companies, independent of any credits that may naturally occur, for the eight-year term of the ESP.[243] However, Companies witness Mikkelsen concedes that this provision does not guarantee that Rider RRS will result in a credit to customers in any given year of the eight-year term and does not require that the Companies provide such a credit to customers if certain conditions are not met.[244] Moreover, if the Companies' projected credits over the last four years of Rider RRS are accurate, the Companies will not have to pay even $1 of the credits listed as part of the risk sharing element in the Stipulated ESP IV. Conversely, if the projections of Mr. Wilson are accurate, the cost to customers under Rider RRS will always be greater than the maximum credit provided by the Companies, resulting in the credit being applied. But, the customers will still always pay a net charge even after application of the credit.[245] Given the structure of Rider RRS, which passes all net costs to customers, there is no incentive for the Companies, or their affiliates, to contain costs or maximize revenues of the units.[246] The $100 million credit (if ever applied) merely reduces the cost to customers, but does not change the premise that net costs are passed to customers at 100%.[247] This is hardly a risk for the Companies.[248]

On the other hand, the Stipulated ESP IV includes no cap on the charges that could flow to customers through Rider RRS and contains no provision that would preclude the Companies

[242] Companies Ex. 154 at 7-8 (Third Supp. Stip.); Companies Ex. 155 at 3-4 (Mikkelsen Fifth Supplemental).

[243] Tr. Vol. XXXVI at 7523.

[244] Tr. Vol. XXXVI at 7523; Tr. Vol. XXXVI at 7595-7596.

[245] OCC/NOPEC Ex. 9 at 18-19 (Wilson Second Supplemental).

[246] Id. at 9.

[247] Id.

[248] Tr. Vol. XXXVII at 7771-7772.

from recovering the cost of providing such credits to customers in a future Commission proceeding.[249] Moreover, in the event the Stipulated ESP IV is terminated, and all shareholder-funded contributions for economic development, low income funding and customer advisory agency funding are also terminated, Rider RRS will continue to be collected from customers.[250] The Companies, therefore, bear no risk under the Stipulated ESP IV. The Companies' proposal, which insulates itself from any risk and transfers all risk to ratepayers, who have no control over the operations and bidding of the plants, is wholly unresponsive to the Commission's directive.

Finally, although the Companies include a severability provision in their Application, the severability provision does not protect consumers from the risk that the Commission's decision authorizing implementation of Rider RRS will be over-turned.[251] In the event this occurs, the Stipulated ESP IV explicitly states that customers will not be entitled to a return of any collections already made under Rider RRS given case precedent in Ohio, which precludes retro-active ratemaking.[252] Based on recent forward gas prices and the 2015 Annual Energy Outlook, which indicates that Rider RRS will result in a charge of $2.7 billion over the eight year term,[253] customers may pay costs under Rider RRS, which are then deemed unlawful with no recourse for recovery.[254]

Although the Supreme Court of Ohio's decision in *River Gas v. Pub. Util. Comm.* explains that the prohibition against retroactive ratemaking does not apply in a rider true-up

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[249] Tr. Vol. XXXVI at 7523-7526.

[250] Companies Ex. 154 at 18 (Third Supp. Stip.); Tr. Vol. XXXVI at 7563-7564.

[251] OCC Ex. 20 at 27 (Ferrey Direct).

[252] Companies Ex. 154 at 9 (Third Supp. Stip.).

[253] OCC/NOPEC Ex. 9 at 12 (Wilson Second Supplemental).

[254] Even the Companies' own projections in Mikkelsen Workpaper November 30, 2015 indicate a charge during the first three years of Rider RRS. Sierra Club Ex 89.

case,[255] and the Commission has made this very argument to the Ohio Supreme Court in two pending cases,[256] the Stipulated ESP IV specifically prohibits the refund to customers of dollars collected.[257] This is true even if the Court finds Rider RRS to be unlawful. Such a provision in the Stipulated ESP IV is unjust and unreasonable and violates Ohio law. Accordingly, the Stipulated ESP IV adopting Rider RRS fails to satisfy the second and third prongs of the stipulation three-part test inasmuch as Rider RRS violates an important regulatory principle and neither benefits ratepayers nor is in the public interest.

vii. The Companies fail to demonstrate how market conditions have changed to warrant a return to monopoly regulation.

The Companies have not demonstrated that circumstances have changed to warrant a retreat from a competitive market construct that brings low power prices and new generation supply options to the market. Historically, the Companies and their corporate representatives have advocated for the continuation of competitive markets in Ohio and explained that competitive markets work. Specifically, Executive Vice President, Markets and Chief Legal Officer of FirstEnergy Corp., Ms. Leila Vespoli, testified on behalf of the Companies to promote competitive markets, stating that:

> measures that restrict customer shopping or subsidize one electric generator over another are throw- backs to monopoly regulation. Such efforts that pick 'winners' and 'losers' in the energy market would create obstacles to private investment in generation and increase prices for customers.[258]

[255] *River Gas Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 509, 433 N.E.2d 568 (1982).

[256] *In the Matter of the Review of the Alternative Energy rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 2013-2026, Commission's Brief at 8-9 (October 22, 2014); *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distribution Rates, et al.*, Case No. 2014-328, Commission's Brief at 2-4 (August 12, 2014).

[257] Companies Ex. 154 at 9 (Third Supp. Stip.).

[258] IGS Ex. 13 at 8 and Attachment MW Ex. 1 at 2 (Testimony of Lela Vespoli, Competitive Markets Work, House Public Utilities Committee (Oct. 19, 2011)).

Ms. Vespoli also stated:

> We're also concerned about any effort to subsidize certain generating facilities. Much of the rhetoric around these efforts involves a misguided notion of Ohio's energy security –that our state could experience outages if it doesn't generate as much energy as it consumes. This notion simply ignores how the electric grid operates, and how competitive markets always secure generation from the lowest-cost sources – no matter where they are located.[259]

Additionally, she testified regarding the subsidization of certain generation resources in Ohio, arguing that energy efficiency should compete with other forms of generation in an unsubsidized market.[260] Ms. Vespoli's testimony focused on three key reasons why the energy efficiency provisions should be modified, including the changing economics related to power prices and energy sources; the impact on economic growth due to the cost of meeting future benchmarks; and the low participation rates.[261] Specific to the changing economics surrounding power prices, Ms. Vespoli argued that the current state of affairs included lower power prices, flat electricity demands, new generation supply options, and stagnant load growth.[262] Related to the impact on economic growth, she acknowledged the importance of electricity in an energy-intensive manufacturing state like Ohio as a "key indicator of economic success" and argued against "costly programs that discourage electric load growth despite low power prices and adequate generation supply."[263] Ms. Vespoli also cautioned against restricting the development of "low-cost, domestic energy source in our state," such as new gas-fired generating plants that

[259] IGS Ex. 13 at 8 and Attachments MW Ex. 1 at 4-5.

[260] EWH Supplemental Attachment A to OMAEG Ex. 19 at 2 (Testimony of Leila Vespoli Before the Senate Public Utilities Committee (April 9, 2013)).

[261] Id.

[262] Ms. Vespoli states that "[e]lectric demand remains flat, and wholesale power prices are at their lowest levels in 10 years. But the game changer is the new generation supply option. A gas plant fired by shale gas – an abundant resource that we didn't really know existed five years ago." Id. at 3-5.

[263] Id. at 5.

could lead to economic development within the state.[264] Ms. Vespoli concluded her testimony by stating the following:

> Ultimately, businesses and consumers should be allowed to make their own decisions on how to meet their specific energy needs. We cannot afford arbitrary and overly prescriptive requirements that raise electricity prices.[265]

Ms. Vespoli's testimony is surprising in light of the Companies' arguments in the current proceeding. Her comments regarding low power prices and new generation supply options contradict the testimony provided by the Companies in this case. Moreover, she cautioned against programs that will restrict the development of new energy sources in the state of Ohio, which is exactly what the proposed PPA and Rider RRS seek to do. Ms. Vespoli recognized the importance of electricity prices to "an energy-intensive manufacturing state like Ohio,"[266] yet proposed Rider RRS has been forecasted to result in *additional costs* to customers, including manufacturers, of up to $2.7 billion for the eight-year term of ESP IV based on updated market conditions.[267] If electric use is a "key indicator of economic success,"[268] as Ms. Vespoli testified, Rider RRS as proposed by the Companies is both unreasonable and imprudent given it will distort the competitive market and inhibit economic growth and development in the state.

The conclusion of Ms. Vespoli's testimony is telling. Ms. Vespoli stated that customers have "good reasons"[269] for not participating in the energy efficiency programs (e.g., the long-term paybacks do not justify the up-front costs). This is the same argument as to why customers who choose long term agreements with CRES suppliers may not want the Companies' alleged

[264] Id. at 6.

[265] Id.

[266] Id. at 5.

[267] OCC/NOPEC Ex. 9 at 12 (Wilson Second Supplemental).

[268] EWH Supplemental Attachment A to OMAEG Ex. 19 at 5 (Testimony of Leila Vespoli Before the Senate Public Utilities Committee (April 9, 2013)).

[269] Id. at 7.

beneficial financial hedge of Rider RRS. Rather, as Ms. Vespoli stated, "businesses and customers should be allowed to make their own decision on how to meet their specific energy needs,"[270] including how they purchase electricity and whether they purchase a hedge against volatility in the market (e.g., a long-term, fixed-price contract).

The Commission should deny Rider RRS given, if approved, it "would amount to a bail-out funded by the customers of the Companies for two of its unregulated generation plants."[271] Under a competitive market construct, customers should not be responsible for guaranteeing the profitability of the Companies' affiliate-owned generation units.[272] Moreover, given that all risk would be assumed by customers, there is no incentive for FES or the Companies to manage costs and maximize revenues. This further exposes customers to high costs and allows generation that might be uneconomic to continue to operate for additional years at the expense of ratepayers.[273] An analysis of Rider RRS should include an assessment regarding the impact on customers' rates, especially given the potential anti-competitive subsidies inherent in the proposed PPA and Rider RRS.[274] Based on the evidence presented, the Companies' alleged benefits of Rider RRS do not outweigh the unjust and unreasonable bill increases and detrimental impact on economic development and the competitive market.

[270] Id.

[271] OCC Ex. 25 at 9 (Rose Direct).

[272] OCC Ex. 25 at 14 (Rose Direct).

[273] OCC/NOPEC Ex. 5 at 4 (Wilson Supplemental).

[274] OCC/NOPEC Ex. 2 at 11(Sioshansi Supplemental).

B. The Companies fail to demonstrate that the Stipulated ESP IV is more favorable in the aggregate than an MRO as required by Section 4928.143(c)(1), Revised Code.

As stated in Section II, before approving an ESP, the Commission must determine that the ESP is more favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO ("the MRO test").[275] The Companies have the burden of demonstrating that their proposed ESP is, in fact, more favorable than an MRO.[276] In support of this requirement, Companies witness Mikkelsen states that the Stipulated ESP IV is more favorable than an MRO through a quantitative benefit of $296 million and several qualitative benefits.[277] In summary, the Companies posit that an ESP provides flexibility, compared to an MRO, and offers advantages for the Companies, ratepayers, and the public.[278]

The Companies' claims and analysis are flawed. The Commission has considered both quantitative and qualitative factors in determining whether a proposed ESP is more favorable in the aggregate than the expected results of an ESP.[279] Although the Companies allege several quantitative and qualitative benefits resulting from the Stipulated ESP IV, the Companies fail to consider the negative effects of many provisions contained in its ESP.

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[275] Section 4928.143(C)(1), Revised Code; see also *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan,* Case No. 12-426-EL-SSO, Opinion and Order at 48 (September 4, 2013).

[276] Id.

[277] Companies Ex. 155 at 12 (Mikkelsen Fifth Supplemental).

[278] Id. at 8-9.

[279] *See* Case No. 12-1230-EL-SSO, Opinion and Order at 55-57 (July 18, 2012); Case No. 11-346-EL-SSO, Opinion and Order at 73-77 (August 8, 2012); and Case No. 12-426-EL-SSO, Opinion and Order at 48-52 (September 4, 2013).

1. The Companies fail to show that the quantitative benefits of the Stipulated ESP IV are more favorable than an MRO.

The Companies claim that the total quantitative benefits from the Stipulated ESP IV equal $296 million on a net present value basis.[280] This total includes a $36 million shareholder funded commitment to provide economic development funding, low income funding and customer advisory agency funding, as well as a $260 million net benefit resulting from Rider RRS.[281]

In response to the Companies claimed quantitative benefits, OCC witness Wilson notes that the Companies only provided a revised estimate of benefits based on changes contained in the Third Supplemental Stipulation.[282] That is, the Companies revised their analysis based on the new eight-year term of Rider RRS and an updated Return on Equity (ROE) of 10.38%; however, the Companies did not update their analysis to reflect more accurate energy price forecasts.[283] Companies witness Mikkelsen admitted in her testimony that the Companies' price projections contained in her November 30, 2015 workpaper were based on energy, capacity, natural gas, and CO-2 price forecasts that were each more than 17 months old.[284]

The Companies' reliance on stale information that no longer reflects reality is in no way just or reasonable. In fact, other state commissions have rejected attempts by utility companies to rely on stale or outdated information in their price forecasts. For example, in *Gulf States Utilities Company*, the Louisiana Public Service Commission (Louisiana PSC) held that it would not give credence to Gulf States' arguments regarding the prudence of restarting construction of

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[280] Companies Ex. 155 at 12 (Mikkelsen Fifth Supplemental).

[281] Id. at 11-12.

[282] OCC/NOPEC Ex. 9 at 10 (Wilson Second Supplemental).

[283] Id.

[284] Tr. Vol. XXXVI at 7513.

a nuclear unit, River Bend I, where the utility used an "official" estimate of $1.7 billion, although the updated cost estimated was over $2 billion.[285] The Louisiana PSC stated the higher estimates undermined the credibility of the evidence presented by the utility, explaining that "[t]he knowing use of inaccurate cost estimates strongly indicates that Gulf States knew that cost studies employing accurate estimates would not support the nuclear alternative."[286] Further, the Michigan and Nevada Public Service Commissions have also judged the reasonableness of utility forecasts based in part on whether the information relied upon was up to date. The Michigan PSC denied a request by the International Transmission Company (ITC) for a certificate of public convenience and necessity to build an electric transmission line because ITC justified the line based on a demand forecast much higher than more recent forecasts completed by the regional transmission operator, Midcontinent Independent System Operator, and ITC.[287] Additionally, the Nevada Public Service Commission reached a similar conclusion regarding another load forecast of the Nevada Power Company to support a proposed PPA where it found that "the data used to develop the base load forecast does not sufficiently capture the effects of the economic downturn in Southern Nevada in order to be a reliable tool to determine whether there is a need for the" PPA.[288]

OCC witness Wilson, on the other hand, provides three alternative scenarios based on more recent forward prices, accessed December 22, 2015, as well as the 2015 Annual Energy Outlook.[289] Wilson states in his testimony that the most likely scenario, which is based on

[285] Case No. U-17282, 1988 La. PUC LEXIS 2 at 16-17 (Nov. 15, 1988).

[286] Id.

[287] *In re Application of ITC for a Certificate of Public Convenience and Necessity*, Case No. U-14933, 2008 Mich. PSC LEXIS 43 at 31-32 (Feb. 22, 2008).

[288] *Application of NPC for Approval of the Eleventh Amendment to the Action Plan of the 2007 - 2026 Integrated Resource Plan*, 14 Case No. 09-03005, 2009 Nev. PUC LEXIS 140 at 36 (July 22, 2009).

[289] Tr. Vol. XXXVIII at 8118-8119.

updated market conditions, results in a $2.7 billion cost to customers.[290] Further, he considers his estimates to be conservative given his use of the Companies' capacity price forecasts and fixed plant costs. Thus, the actual cost to customers could be much higher.[291]

As stated previously, OMAEG witness Seryak also explains that the Companies are using outdated load forecasts.[292] The Companies are using PJM's outdated 2014 load forecast in their estimates, but PJM has recently updated its load forecast, resulting in reductions to the projected load forecast.[293] Updating the stale load forecast data with the more recent forecasts will likely reduce the Companies' projected revenue from the generating plants under the PPA, resulting in additional costs to customers.[294] OMAEG witness Seryak also explains that introducing new energy resources through the Third Supplemental Stipulation "will have the effect of reducing electricity sales from traditional generation, reducing capacity sales from traditional generation, and will suppress prices in wholesale electric energy and capacity markets."[295] All of which will further modify the Companies' cost estimates.[296]

Additionally, the Companies and other Signatory Parties fail to include any costs associated with the provisions in the Third Supplemental Stipulation, which extend or expand specific riders and/or programs, in their bill impact analyses.[297] These provisions include costs associated with the extension of Rider DCR for an additional five years and expansion of the

[290] OCC/NOPEC Ex. 9 at 12 (Wilson Second Supplemental).

[291] Id. at 13.

[292] OMAEG Ex. 28 at 8 (Seryak Supplemental).

[293] Id.

[294] Id.

[295] Id. at 11.

[296] Id.

[297] Tr. Vol. XXXVII at 7795; OMAEG Ex. 28 at 6-7 (Seryak Supplemental).

revenue cap;[298] costs related to new battery technology;[299] costs incurred for programs related to additional and expanded energy efficiency and demand response recovered through Rider DSE (including an increase in the after-tax shared savings cap);[300] costs associated with renewable resources;[301] costs associated with grid modernization initiatives;[302] costs related to additional and expanded low-income programs;[303] and costs related to the Economic Load Response Program ("Rider ELR") and the High Load Factor tariffs.[304] The Companies reasoning for not including such costs in their bill impact analysis is that these provisions are revenue neutral to the Companies given they are collected from customers and paid to customers.[305] This logic, however, fails to consider that while the provisions are revenue neutral to the Companies, they may result in significant additional costs to customers who do not participate under and do not receive the benefits of the particular provisions. Those customers, many of whom are manufacturers, will be forced to pay additional costs for programs that ultimately benefit only some other customers.

OCC witness Kahal disagrees with the Companies' claim that Rider DCR will have no net effect on customer rates given the Rider DCR rate would be the same additional distribution investment under an MRO.[306] Rather, witness Kahal finds a net cost to customers from Rider DCR of $240 to $330 million for the eight-year term of ESP IV as compared to the MRO

[298] Companies Ex. 154 at 13 (Third Supp. Stip.); Tr. Vol. XXXVII at 7797.

[299] Id. at 11; Id. at 7797-7798.

[300] Id. at 11-12, 15; Id. at 7797-7798.

[301] Id. at 12; Id. at 7797-7798.

[302] Id. at 9-10; Id. at 7799.

[303] Id. at 16-17; Id. at 7795.

[304] Id. at 14-15; Id. at 7799-7800.

[305] Tr. Vol. XXXVII at 7800.

[306] Companies Ex. 50 at 7 (Fanelli Direct).

alternative.[307] Witness Kahal notes that the rate of return proposed for Rider DCR was set by the Commission in 2008 and does not reflect cost reductions in capital market conditions in recent years.[308] An update in the rate of return alone would not only be prudent, but also result in significant savings for customers.[309] Moreover, if the Commission were to adopt the Stipulated ESP IV, the Companies would have a total of 16 years between reviews of their base rate case (i.e., from 2008 to 2024), which is unjust and unreasonable and a departure from the policy for cost-based ratemaking.[310]

Under witness Kahal's analysis, the Stipulated ESP IV would cost customers a total of $2.9 billion, in addition to costs that are currently unknown and not quantified by the Companies.[311] It is noteworthy that the Companies' quantified benefits include a $36 million shareholder-funded commitment to provide economic development funding, low income funding, and customer advisory agency funding. While the Companies assert that this commitment is pursuant to the ESP and would not be made pursuant to an MRO, there is no prohibition that would preclude the Companies from making this commitment through an MRO.[312]

The Companies have failed to appropriately consider all costs associated with the Stipulated ESP IV, including the costs associated with extending many of the ESP riders for an additional five years. Therefore, the Companies' stated quantified benefits of Stipulated ESP IV

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[307] OCC/NOPEC Ex. 11 at 22-23 (Kahal Second Supplemental).

[308] Id.

[309] Id. at 23.

[310] Id. at 25.

[311] Id. at 26-27.

[312] Tr. Vol. XXXVI at 7735-7736.

are understated. Taking into consideration all of the quantifiable costs as well as all the unknown costs, the Stipulated ESP IV is not more favorable than an MRO.[313]

2. The Companies fail to show that the qualitative benefits of the Stipulated ESP IV are more favorable than an MRO.

Despite claims to the contrary, the Companies' MRO test fails to provide sufficient non-quantifiable benefits as well. The Companies assert the Economic Stability Program, which includes Rider RRS, will promote retail electric stability, certainty and security regarding the long term pricing of retail electric service for all customers.[314] Further, Companies witness Mikkelsen asserts the Stipulated ESP IV provides additional qualitative benefits by expanding the benefits of specific programs over an eight-year term rather than a three-year term and adds additional qualitative benefits such as federal advocacy for a longer term capacity product, grid modernization, a commitment to environmental stewardship, battery resource investment, energy efficiency offerings, increased in-state renewable resources, and commitments to file a case to transition to decoupled rates, amend partial service tariffs, and modify Electric Service Regulations.[315]

As previously explained, Rider RRS does not enhance price stability or certainty for customers given that the projected costs associated with Rider RRS during the term outweighs any claimed benefits.[316] For SSO customers, rates will be established through a blending of the results of multiple competitive auctions over varying terms for different products, which reflect forward prices and tend to be fairly stable.[317] Rider RRS will be reconciled on an annual basis

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[313] OCC/NOPEC Ex. 11 at 14-15 (Kahal Second Supplemental).

[314] Companies Ex. 13 at 3-4 (Strah Direct).

[315] Companies Ex. 155 at 13 (Mikkelsen Fifth Supplemental).

[316] OCC/NOPEC Ex. 4 at 49-52 (Wilson Direct).

[317] Id.

depending on whether market prices were high or low in the previous year.[318] The SSO rates will move based upon forward prices. But, the Rider RRS movement could move in the same or opposite direction of the changes in SSO rates.[319] Additionally, for customers who instead take service from a CRES supplier, an additional charge or credit might work counter to the decisions they already made regarding how they purchase their electric supply within the competitive market.[320] If the customer is on a fixed-rate contract, Rider RRS will destabilize their otherwise fixed rate, creating uncertainty for those customers.

Rate fluctuations based upon prior year performance do not represent price stability for customers. Rider RRS will cause customers' rates to change on an annual basis—it will in no way stabilize rates or create rate certainty. Even if Rider RRS results in a charge to customers that works counter to rates that would otherwise increase, the year-to-year impact on stability of rates is minimal compared to the potential cost to customers, which is estimated at $2.7 billion for the eight-year term of the ESP.[321]

The Companies also claim that Rider RRS will promote reliable retail electric service and ensure diversity of generation fuel supply and plant type.[322] This assertion is inflated. As Company witness Ruberto admits, the Companies' distribution system would have no change in reliability if the Plants and OVEC entitlement units were to continue to operate as they do today.[323] In fact, witness Ruberto admits he is uncertain as to what the actual impact would be if

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[318] Id. at 49-50.

[319] Id. at 50.

[320] Id. at 51-52.

[321] OCC/NOPEC Ex. 9 at 12 (Wilson Second Supplemental).

[322] Companies Ex. 13 at 2 (Strah Direct).

[323] Tr. Vol. XIII pg. 2797- 2798.

the Commission chose not to approve Rider RRS.[324] Further, access to reliable power is based on a much broader geographical footprint through wholesale electricity markets, namely PJM's RPM capacity construct.[325] As OCC witness Wilson states, "[w]hether or not the FE Companies choose to retire the Rider RRS Generation, there will be sufficient reliable capacity to serve Ohio * * * If the plants are retired, new resources, which may be new power plants, demand response, or energy efficiency, will be developed; if the plants are not retired, it is likely that some new resources will be delayed.[326]

Finally, the Companies claim that the Economic Stability Program and Rider RRS will contribute to the economic vitality of Ohio given the generating plants involved in the proposed PPA and Rider RRS produce over $1 billion in benefits to Ohio's economy.[327] As previously discussed in Section III(A)(4), this assertion is flawed and fails to accurately reflect the impact of Rider RRS on the costs to customers and the resulting economic development in the state. Companies witness Moul also acknowledges that the Plants and OVEC entitlement units may not be economic and difficult decisions regarding whether to continue to operate or retire the plants may be faced in the coming years.[328] Under the proposed arrangements of the PPA and Rider RRS, the Companies and affiliated owners of these generating plants would have no incentive to make these hard decisions, as they will be guaranteed full cost recovery until May 31, 2024.[329] In his rebuttal testimony, witness Moul argues that the Plants are economical in PJM's markets

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[324] Tr. Vol. XIII at 2797.

[325] OCC/NOPEC Ex. 4 at 53 (Wilson Direct).

[326] Id.

[327] Companies Ex. 13 at 2 (Strah Direct).

[328] Companies Ex. 28 at 3-4 (Moul Direct).

[329] OCC/NOPEC Ex. 4 at 47-48 (Wilson Direct); OCC/NOPEC Ex. 9 at 19 (Wilson Second Supplemental).

and typically dispatch before many gas-fired plants.[330] The Companies cannot claim that Rider RRS will contribute to economic vitality if they themselves are indecisive as to whether or not the plants are economical as currently operating. Moreover, the change in Rider RRS from a fifteen-year term to an eight-year term undermines the Companies' argument that Rider RRS will provide transmission investment cost savings.[331] Transmission costs will only arise in the event the plants are retired and assuming the generation from those plants would not be replaced by new generation.[332] Not only have the Companies failed to provide any evidence that retirement will occur if Rider RRS is not approved by the Commission, but truncating the term of Rider RRS from fifteen years to eight years makes transmission benefits even less likely.[333] If the plants are so uneconomic that retirement is the only course of action, Rider RRS only serves to delay the inevitable plant retirement, which will ultimately occur after Rider RRS expires.[334] At this point, transmission investment will still need to be made, only now at a later point in time when costs are likely greater due to inflationary effects.[335]

The only benefit provided by Rider RRS is to the Companies, its affiliate, and parent company as owner of the generating facilities as Rider RRS will allow the generator to recover all costs associated with the Plants and OVEC entitlement units. Rather than provide a positive benefit to customers, the result of Rider RRS is a negative impact on the continuing effectiveness of the competitive wholesale and retail markets in PJM and Ohio.[336] As stated by Exelon witness Campbell: "The guaranteed subsidy FES will receive from ratepayers under Rider RRS

[330] Companies Ex. 141 at 6 (Moul Rebuttal).

[331] OCC/NOPEC Ex. 11 at 20 (Kahal Second Supplemental).

[332] Id.

[333] Id.

[334] Id. at 20-21.

[335] Id. at 21.

[336] Exelon Ex. 1 at 6 (Campbell Direct).

will allow FES to make offers to customers that are not reflective of actual market prices, and will provide FES with a competitive advantage over other CRES providers that must procure their commodity supply at market prices."[337] Further, given the guaranteed cost recovery under Rider RRS, "there is no incentive for FE to offer the subsidized units into the wholesale market based on the variable costs of operating the units and other supply and demand fundamentals," which could have the effect of distorting wholesale market prices and de-incentivizing new generation in Ohio.[338]

The expansion of Rider DCR to include increased revenue caps and lengthening of the term of Rider DCR, Rider GDR, Rider ELR, Rider EDR, and the commercial high load factor from three years to eight years is worse for customers.[339] As previously stated, Riders DCR and GDR will result in additional costs to customers, some of which are currently unknown.[340] Moreover, Rider DCR violates an important regulatory principle given the Companies have failed to present evidence that the expenses collected by the Companies under the Rider are related to infrastructure modernization as required by R.C. 4928.143(B)(2)(H).[341] Rather, the Companies seek to collect additional costs from customers with no commitment to actual reliability improvement.[342] Rider GDR raises a concern for customers given the Companies seek to collect costs associated with unknown and anticipated legislative or governmental directives without showing that such costs will actually result in revenue deficiencies.[343] Requiring customers to be responsible for costs that are unknown and without requiring the Companies to

[337] Id. at 6-7.

[338] Id. at 7.

[339] OCC/NOPEC Ex. 11 at 15 (Kahal Second Supplemental).

[340] Id. at 22-2; Companies Ex. 7 at 24-25 (Mikkelsen Direct).

[341] R.C. 4928.143(B)(2)(H); OCC Ex. 27 at 16 (Williams Direct).

[342] OCC Ex. 27 at 17 (Williams Direct).

[343] Id. at 23.

file a distribution rate case to recover those costs is hardly beneficial to customers.[344] Although Companies witness Fanelli claims these riders will promote investment in infrastructure, thereby providing more efficient, safe and reliable service, the Companies fail to document or explain these alleged efficiencies.[345] Rather, the expansion of Rider DCR and implementation of Rider GDR will increase customer rates with no supporting justification for the increase. Further, there is a lack of specificity regarding what costs are recoverable under the riders and ultimately charged to customers.[346]

Although the Companies assert the provisions contained in the Stipulated ESP IV will provide additional qualitative benefits, the reality is these provisions will benefit some customers to the detriment of others. For example, the Stipulated ESP IV provides for an extension of the Rider ELR credit through the eight-year term of the ESP.[347] While this extension is beneficial to Rider ELR customers, as well as the Companies who retain 20 percent of PJM revenues from selling those interruptible resources into the capacity market,[348] it does not benefit the large number of other customers who do not take service under Rider ELR but must continue to pay the costs associated with providing the ELR credits for a period of eight years under Riders DSE and EDR.[349] Moreover, while some of the provisions may seem desirable, they add more cost and shift risk from the Companies to the ratepayers, destroying benefits that result from competition in the market.[350] In their supporting testimony of the Third Supplemental

[344] Id.

[345] Companies Ex. 50 at 9 (Fanelli Direct); OCC/NOPEC Ex. 7 at 18-19 (Kahal Direct).

[346] See e.g., Staff Ex. 6 at 7-8 (McCarter Direct); Staff Ex. 1 at 5 (Pearce Direct).

[347] Companies Ex. 154 at 14 (Third Supp. Stip.).

[348] Tr. Vol. XXXVII at 7890.

[349] Companies Ex. 154 at 14 (Third Supp. Stip.).

[350] OMAEG Ex. 26A at 33 (Hill Third Supplemental).

Stipulation, the Companies provided no substantive analysis to demonstrate that the Stipulated ESP IV provided qualitative benefits to customers.[351]

Given this evidence, the ESP is not more favorable in the aggregate than an MRO and does not satisfy the MRO test. The Companies have failed to provide sufficient evidence to show that the benefits of the multitude of provisions contained in the Stipulated ESP IV outweigh the costs.[352] As stated by OMAEG witness Hill, "The costs associated with providing incentives to a group of parties, much of which are funded by ratepayers that have been excluded from the settlement, are far outweighed by the returns."[353] As proposed and without significant modifications, the Stipulated ESP IV should not be approved.

C. The Stipulated ESP IV fails to satisfy the policy of the State of Ohio.

Among other things, Section 4928.02, Revised Code, provides that it is the policy of the state of Ohio to do the following:

> (A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;[354]
>
> * * *
>
> (H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates[.][355]

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[351] OCC/NOPEC Ex. 11 at 26 (Kahal Second Supplemental).

[352] Id. at 13.

[353] OMAEG Ex. 19 at 21 (Hill Second Supplemental).

[354] R.C. 4928.02(A).

[355] R.C. 4928.02(H).

As noted by OCC witness Williams, "Nothing in the FirstEnergy ESP IV Application addresses the affordability of rates for customers."[356] To the contrary, "FirstEnergy appears to be using Rider DCR as a way to collect ever-increasing amounts (incrementally $30 million per year) of routine investment expenses from its customers on an expedited basis without considering the impact on affordability."[357] In the course of this proceeding, the Companies have shown little attention to the cost impacts associated with the multiple riders proposed and advanced in its Stipulated ESP IV. The Companies' disregard for these cost impacts on several classes of customers demonstrates that the proposed ESP was not created in alignment with the policy of Section 4928.02(A), Revised Code to ensure the availability of reasonably-priced retail electric service to its customers.

Further, the approval of and collection of costs through proposed Rider RRS would amount to the recovery of generation-related costs through distribution rates, in contravention of state policy set forth in Section 4928.02(H), Revised Code.[358] Despite the Companies' arguments to the contrary, any net costs that arise from the "financial hedge" proposed by the Companies through Rider RRS have their origins in the context of generation.[359] Rider RRS is a generation charge that will be assessed through non-competitive distribution utilities (i.e., the Companies) and collected from all distribution customers.[360] Any charges collected through Rider RRS provide additional revenue to one supplier, which other suppliers do not receive. Simply put, Rider RRS amounts to a customer subsidy of an unregulated corporate affiliate of the Companies, which is inconsistent with Ohio policy.

[356] OCC Ex. 27 at 6 (Williams Direct).

[357] Id.

[358] Exelon Ex. 1 at 11 (Campbell Direct).

[359] Id.

[360] OCC Ex. 25 at 22 (Rose Direct).

FERC has also placed restrictions on affiliate transactions. These restrictions were designed to protect customers served by public utilities from subsidizing the affiliates of those utilities and incurring financial harm from unreasonable charges.[361] The Companies proposal to charge *all* retail customers in order to provide guaranteed cost recovery to its affiliate generation plant undermines the policy goals of the FERC restrictions.[362] As stated by witness Campbell: "The Rider RRS would make all customers, shopping and non-shopping, captive to paying a subsidy that would flow from the utility to its merchant affiliate, for the ultimate benefit of the affiliate."[363] Consequently, the Companies' proposed Rider RRS is contrary to both state and federal policy, and should be rejected.

D. The proposed Stipulated ESP IV does not meet the Commission's three-part test for assessing the reasonableness of a stipulation and should be rejected.

Following the Companies' filing of its ESP IV Application with the Commission on August 4, 2014, the Companies state that they met with various parties to review the Application and discuss the opportunity to reach a settlement.[364] The Companies explain that their meetings resulted in four stipulations: (1) the Stipulation and Recommendation filed on December 22, 2014, as modified by the Errata on January 21, 2015; (2) the Supplemental Stipulation and Recommendation filed on May 28, 2015; (3) the Second Supplemental Stipulation and Recommendation filed on June 4, 2015; and (4) the Third Supplemental Stipulation and Recommendation filed on December 1, 2015. The Companies posit that the collective

[361] Exelon Ex. 1 at 18 (Campbell Direct). Although FES was granted a waiver on affiliate power sales restrictions, a complaint was recently filed to rescind this waiver. See *FirstEnergy Solutions Corp.*, 125 FERC ¶ 61,356, on reh'g, 128 FERC ¶ 61,119 (2009) and *EPSA, et al. v. FirstEnergy Solutions, et al.*, FERC Docket No. EL16-34-000, Complaint (January 27, 2016).

[362] Exelon Ex. 1 at 18 (Campbell Direct).

[363] Id. at 19.

[364] Companies Ex. 8 at 5 (Mikkelsen Supplemental).

stipulations (the Stipulated ESP IV) provide additional quantitative and qualitative benefits to customers, and meets the Commission's established criteria for determining the reasonableness of a proposed settlement.[365] OMAEG disagrees.

In evaluating the reasonableness of a proposed settlement, the Commission has established the following criteria:

1. The stipulation must be the product of serious bargaining among capable, knowledgeable parties;
2. The stipulation must not violate any important regulatory principle or practice; and
3. The stipulation must, as a package, benefit ratepayers and the public interest.

The Stipulated ESP IV fails this three-part test.

1. The Stipulated ESP IV is not the product of serious bargaining among capable, knowledgeable parties.

i. One of the Signatory Parties ceases to be a functioning or operating entity, and therefore, cannot be a knowledgeable, capable party.

During the course of the second hearing in this proceeding, new information was discovered regarding the viability of one of the signatory parties, the Consumers' Protection Association (CPA), and how that party's participation would affect its signature on multiple settlement agreements, including the benefits that CPA is to obtain through the Stipulated ESP IV. When OMAEG's witness attempted to raise at the hearing newly-discovered information that CPA is no longer in operation and explain how the information affects the first prong of the three-part test concerning stipulations in response to the Companies' cross examination, the Attorney Examiners granted an oral motion to strike a portion of OMAEG witness Hill's testimony and would not allow further questioning on the status of CPA as a non-profit

[365] Companies Ex. 155 at 2 (Mikkelsen Fifth Supplemental).

organization.[366] Although the Attorney Examiners stated that the question and answer were beyond the scope of cross examination,[367] the information provided by OMAEG witness Hill was directly related to the first prong of the Commission's three-part test for assessing the reasonableness of a stipulation: whether the stipulation is a product of serious bargaining among capable, knowledgeable parties.

Information regarding whether one of the entities that the Companies have touted as supporting the Stipulated ESP IV and low-income customers, and who has signed all four stipulations as a Signatory Party,[368] is still operating or functioning is not only relevant, but essential to the Commission in assessing whether the Stipulated ESP IV is reasonable and comprised of a broad-based group of signatories that represent diverse interests. It also raises questions as to the validity and credibility of the signatures as well as the Stipulated ESP IV.

Under Ohio Administrative Code 4901-1-15(F), a party adversely affected by an oral ruling may raise the propriety of that ruling in its initial brief as a distinct issue for the Commission's consideration. Accordingly, OMAEG respectfully requests that the Commission find that the Attorney Examiners erred in granting the motion to strike witness Hill's testimony and the preclusion of taking additional testimony as the information provided was well within the scope of cross examination and critical to the issue of whether the stipulation presented by the Companies is a product of serious bargaining among capable, knowledgeable parties and whether the Companies and other signatory parties relied upon CPA's support of the Stipulated

[366] Tr. Vol. XXXIX at 8386-8393.

[367] Id. at 8393.

[368] CPA filed a request for dissolution on November 20, 2015 with the Secretary of State's Office, requesting an effective date of November 15, 2015 and stating that its Directors adopted a resolution of dissolution and notified the Ohio Department of Tax and Ohio Job & Family Services on November 11, 2015. The request was granted and a certificate issued with an effective date of November 20, 2015. Thus, as of the filing and execution of the Third Supp. Stipulation on December 1, 2015 (see CPA signature on page 22), CPA no longer existed and could not validly execute the stipulation as a Signatory Party.

ESP IV in rendering their support. The information is also essential in determining the validity of the Stipulated ESP IV and the provisions contained therein that provided funding to CPA inasmuch as CPA filed for dissolution with the Secretary of State on November 20, 2015,[369] and is under investigation for fraud as noted by OMAEG witness Hill.[370]

The validity of a signature and the operational capabilities of an entity receiving funding under the Stipulated ESP IV for eight years are also germane to the second and third prongs of the three-part test.[371] Providing funding to an organization that is no longer operational or in existence that is supposed to support low income programs negates any claimed benefits touted by the Companies,[372] violates an important regulatory principle, is not in the public interest, and does not benefit ratepayers. Importantly, since the information came to light, the Companies or CPA's counsel have neither informed the Commission of this important fact nor moved to remove CPA from the stipulations as a Signatory Party and revise the Stipulated ESP IV to recognize that monies should no longer be flowing to a defunct entity.

Not allowing OMAEG witness Hill's testimony into the record is unfair, unjust, and prejudicial to the opposing parties. It is also misleading to the record in this proceeding as CPA cannot be a valid signatory party. On the other hand, allowing a complete record for the Commission to consider whether the Stipulated ESP IV satisfies the three-part test does not prejudice the Companies. As such, the Commission should accept the testimony of OMAEG

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[369] See supra n.368. Notably, on January 21, 2016, the Secretary of State cancelled the certificate of dissolution for a technical filing error as CPA's check was returned to the Secretary of State's Office. Therefore, it is unclear the status of CPA's legal request for dissolution before the Secretary of State's Office, but CPA appears to no longer be in operation.

[370] Tr. Vol. XXXIX at 8389.

[371] Companies Ex. 2 at 13-14 (December Stipulation) and Companies Ex. 154 at 16 (Third Supp. Stip.) ($463,333 per year for eight years is allocated to CPA in fuel fund monies, including $46,300 per year in administrative fees).

[372] Companies Ex. 8 at 8, 10-11 (Mikkelsen Supplemental); Companies Ex. 155 at 2, 5, 7-12 (Mikkelsen Fifth Supplemental).

witness Hill's as evidence in the record and allow the record to be reopened to accept further evidence and documentation regarding the same.

ii. The Signatory Parties constitute a redistributive coalition that is not a diverse group representing a broad range of interests.

The Stipulated ESP IV fails the first prong of the three-part test in numerous ways. First, contrary to the assertion of Companies witness Mikkelsen, the signatory parties do not "represent a broad range of interest * * *."[373] Rather, the signatory parties represent an "ad hoc, collection of corporate and institutional interests that benefit directly from specific aspects of the Third Supp. Stipulation or other stipulations comprising the Stipulated ESP IV. [They] only represent themselves and provide a façade of representational diversity."[374] While the Stipulated ESP IV contains a number of signatory parties, there are "also numerous, active parties not supporting the Stipulation, representing a range of interests and customer groups as well as public policy perspectives."[375] For example, the Stipulated ESP IV is opposed by the Independent Market Monitor for PJM (an organization created to objectively monitor the competitiveness of PJM markets); OMAEG (a non-profit entity that represents a range of manufacturing and commercial customers that are an integral part of the state's economy); OCC (a state agency that represents and defends the interests of residential customers); the Ohio Hospital Association (a non-profit trade association that represents 219 hospitals and 55 healthcare systems); Wal-Mart Stores East, LP and Sam's East, Inc.; Northeast Ohio Public Energy Council (NOPEC) and Northwest Ohio Aggregation Coalition (NOAC) (coalitions representing approximately 185 communities that are opt-out governmental aggregators); City of Cleveland; Ohio Schools Council (a regional council of governments comprised of approximately 197 school districts, educational service centers,

[373] Companies Ex. 155 at 8 (Mikkelsen Fifth Supplemental).

[374] OMAEG Ex. 26A at 7 (Hill Third Supplemental).

[375] OCC/NOPEC Ex. 11 at 28 (Kahal Second Supplemental).

joint vocational districts and developmental disabilities boards); the Cleveland Municipal School District (a political subdivision of the state of Ohio responsible for the operation of the public school system in the city of Cleveland); Sierra Club, Environmental Defense Fund, and Environmental Law & Policy Center (representing various environmental and alternative energy interests); Mid-Atlantic Renewable Energy Coalition (a coalition representing renewable energy interests); Energy Professionals of Ohio (a trade group comprised of licensed power brokers and consultants); and several CRES providers and generators, such as PJM Power Providers, the Electric Power Supply Association, and Retail Energy Supply Association, Direct Energy Services LLC, Exelon Generation Company, LLC, Constellation NewEnergy, Inc., and Dynegy, Inc. Therefore, the support of the Signatory Parties in and of itself is insufficient to approve the Stipulated ESP IV given the extensive and broad opposition by a number of non-signatory parties.

Second, all parties (including the Signatory Parties) were not privy to the side-agreement between IGS Energy and the Companies. It is critical that in order for parties to be able to seriously negotiate over the terms of a deal, there must be transparency regarding the terms of that deal. In this case, it was not known that the Companies reached a side deal with Interstate Gas Supply, Inc. (IGS), titled the "Competitive Market Enhancement Agreement," until after the Stipulated ESP IV was executed by the other Signatory Parties and until after the hearing on the Stipulated ESP IV had commenced.[376] This side agreement includes a request by IGS for the Commission to approve a retail competitive incentive mechanism, an agreement by the Companies to file and implement a customer referral program, and an agreement by the Companies to include a residential smart thermostat program in their next Energy Efficiency and

[376] Tr. Vol. XXXVII at 7812-7813; OMAEG Ex. 24 (OCC Set-17-RPD-004, OCC Set-17-RPD-005, Competitive Market Enhancement Agreement).

Peak Demand Reduction Portfolio Plan with IGS as the exclusive provider.[377] The terms of these deals were not disclosed to the parties during the bargaining process, which thereby deprived all parties (including the Signatory Parties) of important information that could have been used to evaluate the impact of the Stipulated ESP IV on their respective interests. This raises a serious question regarding the transparency of the bargaining process and whether the Stipulated ESP IV was a product of serious bargaining. As the Supreme Court of Ohio previously held, the lack of knowledge regarding the "existence of side agreements between [utility] and the signatory parties entered into around the time of the stipulation could be relevant to ensuring the integrity and openness of the negotiation process."[378]

Third, many of the commitments contained in the Stipulated ESP IV contain no accountability measures and lack any cost benefit analysis or assessment.[379] For example, and as explained more fully above, the Stipulated ESP IV provides no estimates on the expected costs of: the extension and expansion of Rider DCR for an additional five years; new battery technology; programs related to energy efficiency and demand response recovered through Rider DSE; development of new renewable energy resources; grid modernization initiatives; extended and expanded Rider ELR credit and High Load Factor tariffs.[380] Given the complete absence of any expected cost assessment related to these commitments, it is difficult to envision the parties engaging in serious bargaining over such an obscure proposal. Further, provisions in the Stipulated ESP IV related to carbon dioxide reductions, renewable projects, and federal advocacy

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[377] Id.

[378] See *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 111 Ohio St.3d 300, 2006-Ohio-5789, ¶ 85.

[379] Tr. Vol. XXXVII at 7795.

[380] Companies Ex. 154 at 11-13 (Third Supp. Stip.); Tr. Vol. XXXVII at 7797-7799.

for market enhancements such as longer-term capacity products are not commitments, but goals, with no clear accountability measures or penalties for failing to meet such commitments.[381]

Finally, a critical factor in assessing the first criterion of the three-part stipulation test was articulated by Commissioner Roberto in FirstEnergy's initial ESP case filed in 2008:

> In the case of an ESP, the balance of power created by an electric distribution utility's authority to withdraw a Commission-modified and approved plan creates a dynamic that is impossible to ignore. I have no reservation that the parties are indeed capable and knowledgeable but, because of the utility's ability to withdraw, the remaining parties certainly do not possess equal bargaining power in an ESP action before the Commission. The Commission must consider whether an agreed-upon stipulation arising under an ESP represents what the parties truly view to be in their best interest – or simply the best that they can hope to achieve when one party has the singular authority to reject not only any and all modifications proffered by the other parties but the Commission's independent judgment as to what is just and reasonable. In light of the Commission's fundamental lack of authority in the context of an ESP application to serve as the binding arbiter of what is reasonable, a party's willingness to agree with an electric distribution utility application cannot be afforded the same weight due as when an agreement arises within the context of other regulatory frameworks. As such, the Commission must review carefully all terms and conditions of this stipulation.[382]

When bargaining with utility companies in the ESP proceeding, the bargaining favors the utility as they have the ability to reject proposed modifications to the ESP.[383] With the lack of knowledge regarding the existence of side agreements, the lack of knowledge regarding the expected cost assessments related to the various provisions in the Stipulated ESP IV, and the imbalance of power when bargaining with utility companies, the Stipulated ESP IV cannot be deemed a product of serious bargaining among capable, knowledgeable parties and, thus, fails the first prong of the three-part test.

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[381] Companies Ex. 154 at 9-11 (Third Supp. Stip.); Tr. Vol. XXXVI at 7528-7529.

[382] *In re FirstEnergy's 2008 ESP Case,* Case No. 08-935-EL-SSO, Second Finding and Order, Opinion of Commissioner Cheryl L. Roberto Concurring in Part and Dissenting in Part at 1-2 (March 25, 2009).

[383] OCC/NOPEC Ex. 11 at 7 (Kahal Second Supplemental).

2. The Stipulated ESP IV violates several important regulatory principles.

The second prong regarding the reasonableness of a proposed settlement involves an analysis of whether the proposed stipulation violates any important regulatory principles or practices. In addition to violating the ESP statute, the Supremacy Clause, and the policy of the state of Ohio, as discussed previously, adoption of the Stipulated ESP IV would violate several other important regulatory principles and have the effect of:

- Thwarting competition and deterring new entry;
- Harming interstate commerce and out-of-state investment;
- Establishing an opaque system of income transfers and cross-subsidies among consumers;
- Distorting economic incentives of pricing mechanisms;
- Denying customer protections; and
- Undermining and violating previous Commission orders.

The following discussion illustrates the ways in which these violations will occur if the Stipulated ESP IV is adopted.

Thwarting competition and deterring new entry.[384] By guaranteeing a cost-plus revenue stream to the Plants and OVEC entitlement units, the Stipulated ESP IV insulates these units from the discipline of the market.[385] Proposed Rider RRS subsidizes operating and capital costs of the Plants and OVEC entitlement units, which eliminates any incentives to reduce those costs.[386] This outcome is contrary to Ohio's policy decision to require market participants in the electric generating sector to "compete for sales and bear the risk of lost revenues if they do not

[384] OMAEG Ex. 26A at 8 (Hill Third Supplemental).

[385] Dynegy Ex. 1 at 7 (Ellis Direct).

[386] OCC/NOPEC Ex. 1 at 18 (Sioshansi Direct).

competitively price their generation output."[387] By advantaging the Plants and OVEC entitlement units over other market participants, the Stipulated ESP IV will not only distort the competitive markets, but place the jobs and tax revenues associated with non-subsidized generating units at risk."[388] This will have the damaging and harmful effect of "encourag[ing] the continued operation of less efficient, less cost effective plants and disourag[ing] the modernization of generation sited in Ohio.[389] Moreover, the subsidies granted to the Plants and OVEC entitlement units will have the effect of deterring new entry. Market participants considering locating in Ohio may decide, in view of the subsidies, that they cannot compete with the generating units and locate their operations elsewhere.[390]

Harming interstate commerce and out-of-state investment.[391] Given the interconnectedness of the grid, the Stipulated ESP IV could cause adverse ripple effects beyond Ohio's borders.[392] For example, an assurance of financial guarantees to the Plants and OVEC entitlement units through a state-sponsored PPA will prevent those generating units from exiting the market and affect investment decisions in generating capacity across PJM"s grid.[393] Ohio's demand will inevitably be tied to the generating units through the PPA, resulting in a decrease in out-of-state production capacity. [394] The overall result is "less efficient Ohio plants staying in the market while unsubsidized, more efficient, out-of-state generation will be forced to exit."[395]

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[387] Dynegy Ex. 1 at 7 (Ellis Direct).

[388] Id. at 4-5.

[389] Id. at 5.

[390] Id. at 6.

[391] OMAEG Ex. 26A at 31 (Hill Third Supplemental).

[392] Id.

[393] Id. at 31-32.

[394] Id. at 32.

[395] Id.

Further, other states may also adopt similar PPAs in order to boost the competitiveness of their own local distribution utilities.[396]

Establishing an opaque system of income transfers and cross-subsidies among consumers.[397] The Stipulated ESP IV violates cost-causation principles by passing costs along to customers that do not directly benefit. Under the established structure, "[i]f you are a member of the club that negotiated benefits to support the PPA politically, then you receive the benefits of membership while others pay for the privilege."[398] While the Companies present the provisions of the Stipulated ESP IV as economic development incentives, the incentives are "targeted price reductions and discounts that are being offered by the Companies through the regulatory process to only those customers or groups that have been invited to join the exclusive club formed by the Companies" with the majority of the costs, discounts and incentives being passed along to ratepayers in the service territories.[399] For example, customers will be charged for energy efficiency programs for specific Signatory Parties through Rider DSE, the Commercial High Load Factor Experimental Time-of-Use Rate through Rider GCR;[400] the ELR credit through Riders DSE and EDR; and customers will pay up to $48 million over the eight-year term of the ESP associated with the Community Connections Program. [401] The ELR Program will include up to $280 million in curtailable load interruptible credits, which will be charged to customers at an undetermined amount.[402] Additionally, customers will be charged $200,000 for the Association of Independent Colleges and Universities of Ohio (AICUO) Efficiency Resource Program and

[396] Id.

[397] Id. at 8.

[398] Id. at 9.

[399] Id. at 31.

[400] Tr. Vol. XXXVI at 7653-7654.

[401] Id. at 7654.

[402] Tr. Vol. XXXVII at 7782-7786.

$240,000 for the Council of Smaller Enterprises (COSE) Ohio Energy Efficiency Resource Program through May 31, 2019.[403] The Companies then may seek approval from the Commission for recovery of an additional $200,000 and $300,00, respectively, which shall not be "unreasonably withheld."[404] Further, under the expanded NMB pilot program which includes up to five additional Rate GT customers, remaining ratepayers may face higher charges.[405] The result of the Stipulated ESP IV is that "[a]fter successfully extracting benefits from the Companies, the Signatory or Non-opposing Parties agree to recommend approval of the Companies' proposed ESP IV."[406] Therefore, some intervening parties who agree to the Stipulated ESP IV "will receive cash equivalents and other benefits that are to be paid by consumers who oppose the settlement."[407]

Using customer funds to pay parties to join the Stipulation is antithetical to sound ratemaking principles. As stated by OMAEG witness Dr. Hill:

> Here, the Companies have assembled a coalition to promote a policy that benefits their affiliate, FirstEnergy Solutions, and the other coalition members.
>
> * * *
>
> The large heterogeneous group that has to pay for the majority of this proposed policy, as well as the other costs embedded in the stipulations, consists of the remaining commercial, industrial, and residential ratepayers of northern Ohio who are not members of the redistributive coalition. This large ratepayer group would be very difficult and expensive to organize for purposes of advocating the group's interests.[408]

[403] Tr. Vol. XXXVII at 7789-7793.

[404] Companies Ex. 154 at 15 (Third Supp. Stip.); Tr. Vol. XXXVII at 7788-7794.

[405] Id. at 7656.

[406] OMAEG Ex. 19 at 5 (Hill Second Supplemental).

[407] OCC/NOPEC Ex. 11 at 8 (Kahal Second Supplemental).

[408] OMAEG Ex. 19 at 19-20 (Hill Second Supplemental).

Distorting economic incentives of pricing mechanisms. Markets function optimally with transparent pricing signals. The subsidy granted by Rider RRS, however, would distort pricing signals and impose an impediment to the proper functioning of the wholesale power markets.[409] As the PJM Independent Market Monitor explained, instead of bidding the generating units into the markets at prices that will cover operating costs and maximize margins, Rider RRS creates a situation where "[t]he logical offer price for these resources in the PJM Capacity Market * * * would be zero."[410] Offering in at zero "would be rationale because this would maximize the revenue offset to the customers who would be required to pay 100 percent of the costs of this capacity and bear all of the performance risks."[411] Under this scenario, pricing signals would be distorted because market participants would be offering in at less than competitive levels, which in turn would have a price suppression effect on the markets.[412] Over time, distortions to pricing signals caused by Rider RRS could disincentivize both the retirement of aging and inefficient units as well as investments in new units, all to the detriment of reliability.[413]

Denying customers protection. In addition to shifting enormous costs and risk onto ratepayers, the Stipulated ESP IV provides that "[n]o amounts collected shall be refunded" in the event a court of competent jurisdiction invalidates "Rider RRS in whole or in part * * *."[414] This one-sided provision is adverse to sound ratemaking principles. If a rate or charge is unlawful, then customers should not have to pay for it and the Companies should not be permitted to keep the benefits of the unlawful charge. To protect against this contingency, the Commission should

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[409] Dynegy Ex. 1 at 6 (Ellis Direct).

[410] IMM Ex. 2 at 5 (Bowring Supplemental).

[411] Id.

[412] Id.

[413] Id.

[414] Companies Ex. 154 at 8-9 (Third Supp. Stip.).

strike the Stipulated ESP IV provision that attempts to prohibit a refund. Additionally, the Commission should make its order in this proceeding subject to refund.

As explained previously, the Supreme Court of Ohio's decision in *River Gas v. Pub. Util. Comm.* explains that the prohibition against retroactive ratemaking does not apply in a rider true-up case.[415] The Commission has made this very argument to the Supreme Court in two pending cases.[416] Because Rider RRS is proposed to be trued-up on a quarterly basis, customers would be entitled to a refund if a court of competent jurisdiction invalidated Rider RRS. A Commission decision making cost recovery under Rider RRS subject to refund would alleviate any doubts and protect customers.

Undermining and violating previous Commission orders. The Stipulated ESP IV is a collateral attack on various previous Commission orders. For example, the Commission denied AEP Ohio's request to expand the Distribution Investment Rider (Rider DIR) to include general plant costs in its AEP ESP III Order, stating that investments would "be better considered and reviewed in the context of a distribution rate case where the costs can be evaluated in the context of the Company's total distribution revenues and expenses, and the Company's opportunity to recover a return on and of its investment can be balanced against customers' right to reasonably priced service.[417] Here, the Companies seek to continue and expand Rider DCR by increasing the revenue caps and including assets recorded in "General, Other and Service Company

[415] *River Gas Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 509, 433 N.E.2d 568 (1982).

[416] *In the Matter of the Review of the Alternative Energy rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 2013-2026, Commission's Brief at 8-9 (October 22, 2014); *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distribution Rates, et al.,* Case No. 2014-328, Commission Brief at 2-4 (August 12, 2014).

[417] AEP ESP III Order at 30.

Allocated" plant accounts into Rider DCR.[418] This request is in clear contravention of the Commission's decision issued in the AEP ESP III Order. Similarly, the Commission denied AEP Ohio's request to establish a placeholder rider for NERC compliance and cybersecurity costs through NERC Compliance and Cybersecurity Rider (Rider NCCR).[419] In denying that request, the Commission noted the request was "premature" given the types and magnitudes of investments AEP Ohio sought to recover was unknown. Further, the Commission stated AEP Ohio had an "existing means through which to seek recovery of its costs, such as through a distribution rate case."[420] In the present case, the Companies also seek to establish a NERC compliance and cybersecurity rider, Rider GDR. Again, this request contradicts the Commission's order in its AEP ESP III Order.

By altering many of these features, the Stipulated ESP IV destabilizes the certainty that comes along with prior Commission orders and threatens to undermine the predictability of future Commission orders. In order to maintain a level of consistency and predictability, parties should not be permitted to "stipulate" their way around previous orders.

Finally, the proposed extension and rate increases specific to Riders DCR and GDR also violate regulatory principles, namely the regulatory principle of single-issue ratemaking.[421] Mechanisms such as Rider DCR and Rider GDR are "cost trackers" outside of traditional base rate cases and should only be considered for utility costs "that are large, volatile, and outside of the utility's control."[422] The Companies fail to present evidence that Riders DCR and GDR meet

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[418] Staff Ex. 6 at 9 (McCarter Direct).

[419] AEP ESP III Order at 38.

[420] Id. at 39.

[421] OCC/NOPEC Ex. 8 at 22 (Kahal Supplemental).

[422] OCC Ex. 18 at 4 (Effron Direct).

this standard.[423] Yet, the Companies seek to circumvent a base rate case where the Commission could insure proper review of rate increases by including Riders DCR and GDR in a request to increase its base rates. Approval of Riders DCR and GDR will only intensify the excessive earnings of the Companies at the expense of customers.[424] Moreover, the Companies have proposed to include distribution expenses beyond "infrastructure modernization" in Rider DCR, which goes beyond the Ohio statutory limits for distribution expenses in an ESP.[425] Thus, the Stipulated ESP IV violates numerous regulatory principles, accepted policies related to competitive generation service, and Ohio statutes.

3. The Stipulated ESP IV does not benefit ratepayers or the public interest.

The Stipulated ESP IV also fails the third prong of the three-part test as the Stipulated ESP IV will harm ratepayers and the public interest. Though providing an image of universal support, the redistributive coalition that signed the Stipulated ESP IV extracted benefits for their own personal interests, not ratepayers as a whole or the public interest.[426] The unfortunate effect is that the redistributive coalition has managed to shift risk away from itself and onto customers.[427] "The major beneficiaries from the Stipulated ESP IV are FirstEnergy, its stockholders, and management."[428]

The subsidies arising out of the Stipulated ESP IV will be damaging in two central ways. First, "losses incurred in the operation of the plants covered by the PPA are passed on to all

[423] OCC/NOPEC Ex. 8 at 21 (Kahal Supplemental).

[424] Id. at 22.

[425] Id. at 24.

[426] OMAEG Ex. 26A at 7-9 (Hill Third Supplemental).

[427] Id. at 8.

[428] Id.

electricity users in the Companies' service territories."[429] Second, the costs associated with the negotiated rate discounts, subsidies, and energy efficiency commitments "are not born by [the Companies], but instead * * * passed on to ratepayers that do not directly benefit."[430] Beyond this, the harm to the competitive markets could be substantial. By trying to use the Commission's regulatory power to undermine market-determined outcomes, the Stipulated ESP IV could deter investment and new entry into the generating market and harm the long-term reliability of the electric system.[431] Ultimately, this will harm the "economic prospects for businesses that are not members of the redistributive coalition and of residents of the state of Ohio."[432] As testified by the Independent Market Monitor, this is "inconsistent with competition in the PJM wholesale power market."[433] A subsidy like Rider RRS could have a price suppression effect, which makes it difficult for unaffiliated generating units to compete.[434] Without proper market incentives, generating units without subsidies may never be built.[435]

The Companies have failed to demonstrate, through the evidence presented, that the Stipulated ESP IV benefits ratepayers and the public interest. Many of the provisions contained in the Stipulated ESP IV are a product of negotiations between the Companies and individual intervening parties, which amounts to piecemeal ratemaking.[436] As stated by ELPC/OEC/ EDF witness Rabago, the policy problem behind piecemeal ratemaking is that significant issues are addressed in isolation, resulting in a "risk of discriminatory impacts that haven't been fully

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[429] Id.

[430] Id. at 8-9.

[431] Id. at 9.

[432] Id.

[433] IMM Ex. 2 at 2 (Bowring Supplemental).

[434] Id. at 5.

[435] Id.

[436] Tr. Vol. XXXVIII at 8202.

evaluated."[437] ELPC/OEC/ EDF witness Rabago notes that the evidentiary record in this case is "weak" for such important issues as grid modernization and a shared savings cap and therefore should be given no weight regarding the Commission's approval of the PPAs on the merits.[438] Rather, the Commission's consideration of the affiliate transaction PPA agreements "should not be obscured by a whole lot of speculative discussion and quasi-commitment about unrelated issues," which may adversely inform the Commission regarding the public interest merits of the PPAs.[439]

The central feature of the Stipulated ESP IV is Rider RRS. As previously discussed, Rider RRS fails to follow the factors articulated in the AEP ESP III Order, which the Commission indicated was important in evaluating future PPA Rider proposals. It follows that if the central feature of the Stipulated ESP IV is incongruent with Commission precedent, the Stipulated ESP IV should not be approved. Additionally, and also as previously discussed, the multitude of unrelated provisions in the Stipulated ESP IV only further compounds the harms to the public interest and ratepayers.

As explained herein, Rider RRS not only harms the public interest but could also result in a $2.7 billion cost to customers based on recent forward prices and the 2015 Annual Energy Outlook.[440] The Companies claim a range of public interest benefits related to Rider RRS, including rate stability for customers, employment, tax revenue, and economic viability. All of these benefits are based on several assumptions, which are speculative at best.[441] For example, the Companies assume that if Rider RRS is not approved, the Plants and OVEC entitlement units

[437] Id.

[438] Id. at 8202-8203.

[439] Id. at 8206.

[440] Tr. Vol. XXXVIII at 8118-8119.

[441] OCC/NOPEC Ex. 8 at 34-35 (Kahal Supplemental).

will close. No evidence has been presented to show this will in fact occur.[442] Rather, the Companies should be operating the Plants based on their position in the market and "would not be behaving reasonably if they continued to operate power plants deemed uneconomical as compared with the PJM wholesale market."[443] If the Companies behave as they should with respect to economic management, the retirement issue and all of the public interest arguments connected to retirement of the plants become moot.[444] More importantly, if Rider RRS is used to prevent a retirement that should occur under market forces, utility customers will be forced to pay the cost difference to cover the plants' operating costs as well as legacy capital investment.[445] The resulting ratepayer losses will actually *harm* the local economies, impair new job creations, and impede overall economic development in the state.

While the Companies promise to initiate a federal advocacy campaign for market enhancements such as a longer-term capacity product, the specifics of this proposal are vague and include merely a "good faith" effort with no actual commitment.[446] Moreover, given that the Independent Market Monitor and so many others view Rider RRS as posing a threat to the health of the competitive markets, it remains to be seen whether the Companies will take positions that truly have the best interests of the markets in mind. If the proposals put forth in this proceeding are any guide, parties would be more than justified in remaining skeptical of the Companies' federal advocacy commitments.

The Stipulated ESP IV includes a provision for grid modernization initiatives including examples such as advanced metering infrastructure, distribution automation circuit

[442] Id.

[443] Id. at 35.

[444] Id.

[445] Id. at 36-37.

[446] Companies Ex. 154 at 9 (Third Supp. Stip.).

reconfiguration, and VOLT/VAR.[447] While the Companies agree that customers will be charged for grid modernization efforts, the Companies do not have an estimate of the actual costs to be charged to customers for these efforts,[448] nor have the Companies provided a description of potential benefits to customers from the grid modernization business plan as it is still being developed.[449] Further, although the Companies have committed to filing a grid modernization business plan with the Commission for consideration and further vetting, the ROE established by the Companies is higher than the currently established ROE for grid modernization.[450] This provision is too premature to determine whether it will provide a benefit to customers.

The provisions in the Stipulated ESP IV related to CO-2 reduction, battery technology investment, and an increase of 100 megawatts of wind or solar renewable resources are nothing more than goals of the Companies (or other Signatory Parties), rather than firm commitments. The Companies offer to reactivate energy efficiency programs in 2017; [451] however, they are required by law to do so, rendering the commitment meaningless. Although the Companies indicated a goal of reducing CO-2 emissions by at least 90% below the 2005 level, they have no plan to achieve this goal and there are no established penalties for failure to meet this goal.[452] The provision related to battery technology states "[t]he Companies will *evaluate* investing in battery resources contingent on Commission approval that all investment for such resources shall be rate-based * * *."[453] However, the Companies currently have not identified the specific

[447] Id.

[448] Tr. Vol. XXXVI at 7647-7649.

[449] Tr. Vol. XXXVII at 7847.

[450] Tr. Vol. XXXVII at 7774-7775.

[451] Companies Ex. 154 at 11 (Third Supp. Stip.).

[452] Tr. Vol. XXXVI at 7528-7532.

[453] Companies Ex. 154 at 11(Third Supp. Stip.)(emphasis added).

investments to be made.[454] Regardless, all costs associated with Commission-approved investments in battery technology will be charged to and recovered from customers through Rider AMI.[455] Additionally, the commitment to procure 100 megawatts of wind or solar is only triggered if the staff determines such new renewable energy resources would be helpful for a future law or rule.[456] Thus, the Companies would make a filing with the Commission, at Staff's request, demonstrating the need to procure new renewable energy resources of 100 megawatts.[457] The Commission would then have to approve the application prior to the Companies procuring the resources.[458] Once approved, all costs would be recoverable from customers through a newly established rider, Rider ORR.[459] Further, the Clean Power Plan is not considered a future law or rule and therefore would not trigger this provision.[460] All three of these provisions, which the Companies tout as public interest benefits, are merely illusory and contain no firm commitments by the Companies and, if implemented, will result in additional costs to customers.

The Stipulated ESP IV also commits the Companies to file a case to transition to straight-fixed-variable rates for the residential class prior to April 3, 2017.[461] These rate designs remove a large amount of price signals between use of electricity and cost of electricity, thereby undermining the cost incentive for efficiency programs and discouraging energy efficiency.[462]

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[454] Tr. Vol. XXXVII at 7776.

[455] Tr. Vol. XXXVI at 7649.

[456] Id. at 7541.

[457] Id. at 7542-7543.

[458] Id.

[459] Tr. Vol. XXXVII at 7777.

[460] Tr. Vol. XXXVI at 7542-7543.

[461] Companies Ex. 154 at 12-13 (Third Supp. Stip.).

[462] OMAEG Ex. 28 at 14 (Seryak Supplemental).

Thus, efficient users will spend similar amounts on electricity as inefficient users.[463] Ultimately, this provision could shift "energy efficiency focus away from the residential class to the business class in an inequitable manner."[464]

In further violation of the third prong of the three-part test, the Companies seek to extend and expand Rider DCR by increasing the revenue caps for the eight-year term of the ESP thereby harming ratepayers.[465] Not only will this result in additional costs to customers of $2.59 billion dollars,[466] it also includes cost recovery of assets that are not directly related to maintaining the reliability of the distribution system, and, therefore, are not appropriately recoverable under Rider DCR.[467] Moreover, the Companies failed to provide justification for an increase in the revenue caps, especially given they have not projected any major distribution capital project and continue to meet their electric distribution targets.[468] This significant increased cost to customers is clearly not in the public interest.

The Companies also seek to continue and expand the ELR program through the Stipulated ESP IV even though the Companies did not initially propose to continue Rider ELR in the ESP IV as it is intended to expire under its own terms on May 31, 2016. [469] However, in the Stipulated ESP IV, the Companies agreed to renew Rider ELR with modifications, expanded participation, and a new expiration date of May 31, 2019.[470] Under the terms of the renewed Rider ELR, customers will be eligible to participate in the ELR program, including customers

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[463] Id.

[464] Id.

[465] Companies Ex. 154 at 13 (Third Supp. Stip.).

[466] Tr. Vol. XXXVI at 7575.

[467] Staff Ex. 6 at 9 (McCarter Direct); OCC Ex. 18 at 19 (Effron Direct).

[468] Staff Ex. 6 at 7-8 (McCarter Direct).

[469] Companies Ex. 1 at 12 (Application).

[470] Companies Ex. 2 at 7 (Stipulation).

currently taking service under Rider ELR and those historically eligible up to an additional 136,250 kW of curtailable load.[471] Moreover, ELR customers will be permitted to shop during the term of ESP IV and the Companies would be limited to curtail these customers for emergency situations only.[472] Participating customers receive an interruptible credit of $10 per kW per month per unit of curtailable load in exchange for participation in the program and subjecting their load to interruption.[473] Two credit provisions comprise the total credit provision under Rider ELR - $5 per kW per month per unit of curtailable load recovered through Rider DSE1 and $5 per kW per month per unit of curtailable load recovered through Rider EDR(e).[474] Although the Companies claim Rider ELR provides a number of customer benefits,[475] the Companies have failed to quantify any of these alleged benefits.[476]

While there may be some justification for continuing a type of demand response program for economic development purposes, the proposed modified Rider ELR, as presented by the Companies, may result in expanding the amounts recoverable from customers under the rider and limit the alleged benefits inuring to customers. For example, one of the ELR credits is collected from GP and GS customers only and then credited to customers taking service under Rider ELR.[477] Further, customers taking service under Rider ELR may avoid charges collected under DSE1, while all other customers are subject to collection of said costs.[478] Additionally, the Companies may retain 20 percent of the revenues received in the PJM market from bidding the

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[471] Tr. Vol. II at 259; Companies Ex. 3 at 2 (Supplemental Stipulation).

[472] Id. at 8.

[473] Id at 7-8.

[474] Tr. Vol. II at 275.

[475] Companies Ex. 8 at 11 (Mikkelsen Supplemental).

[476] Tr. Vol. III at 574.

[477] Tr. Vol. II at 274.

[478] Id. at 274-276.

demand response resources into PJM.[479] Thus, customers who pay the costs associated with the credits will not receive the full benefit or netting of the demand response resources being bid into PJM.

Due to the limitations on who may participate in the ELR program, new customers that enter the service territory, including new customers, new buildings or new accounts of existing customers, will not be eligible to take service under the ELR program.[480] Even those customers with available curtailable load may not be permitted to participate in Rider ELR given the eligibility restrictions.[481] Admittedly, the Companies stated that five new customers, who have historically been eligible to take service under Rider ELR but are not currently taking service, have already notified the Companies they would like to participate in the program and these five customers will fully subscribe the 136,250 kW of curtailable load provided per the Stipulated ESP IV.[482] Additionally, two of those customers did not notify the Companies of their intent to participate in the program until after the deadline established by the initial Stipulation, and were only permitted to participate in the program after the Supplemental Stipulation provided for an extension of the deadline and an increase the amount of the curtailable load cap from 75,000 kW to 136,250 kW.[483] While this arrangement may provide benefits to those few participating customers taking service under Rider ELR, it is not widely available, not uniformly applied, and thus, not beneficial to all customers. The Companies purported economic development benefits and job retention benefits accrue only to those customers participating under Rider ELR.[484]

[479] Id. at 240.

[480] Id. at 261.

[481] Tr. Vol. III at 492-493.

[482] Tr. Vol. II at 265.

[483] Id. at 263-266.

[484] Tr. Vol. III at 492

Moreover, with the extended eight-year term of ESP IV, the incremental ELR credits will total $280 million.[485] The cost of the credits will be substantially borne by GS and GP customers, impacting those two customer classes the most. This will increase the costs of the Stipulated ESP IV to those customers, negatively impacting their price of electricity and cost to do business in Ohio.

The evidence shows that contrary to the Companies' claims, preserving aging and uneconomic plants through the proposed PPA and Rider RRS will actually harm economic development and those harms will be felt most acutely in the manufacturing sector. Manufacturing industries are a critical part of the Ohio's economic bases. Energy-intensive manufacturing industries "export their products from Ohio in return for dollars that are brought into the state, resulting in job creation."[486] If OCC witness Wilson's scenario materializes, predicting a potential cost to customers of $2.7 billion, Ohio manufacturers will be faced with some tough decisions.

Electricity is one of the key inputs to the production process and its price plays a critical role in where manufacturers decide to site their locations and when they decide to ramp up their scale of operations.[487] Research shows that "higher electricity prices have had a statistically significant negative effect on manufacturing productivity in Ohio, as well as in four neighboring states."[488]

Ohio's manufacturers will be placed at a competitive disadvantage if the Companies' proposal ends up costing as much as some are predicting. Some industries can and will pick up

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[485] Tr. Vol. XXXVII at 7786.

[486] OMAEG Ex. 17 at 11 (Hill Direct).

[487] Id.

[488] Id. at 12.

and leave the State, but others cannot.[489] The Commission should safeguard Ohio's economic future and competitiveness in the global economy.[490] Mindful of this obligation, the Commission should deny this proposal.

The Stipulated ESP IV will harm ratepayers and is not in the public interest. The Stipulated ESP IV fails the third prong of the three-part test and should be rejected.

E. The Commission should reject the Stipulated ESP IV.

As presented, the Stipulated ESP IV is nothing more than a package of independent benefits for members of a redistributive coalition at the expense of the greater public interest.[491] The Stipulated ESP IV includes Signatory Parties that provide only a "façade of representational diversity," contains terms that threaten to completely undermine the policy of the state of Ohio, including the market-based approach advanced by Senate Bill 3, and provides for a subsidy to failing generating units of the Companies' unregulated affiliate at the expense of the public interest.[492] Most importantly, the impacts of the Stipulated ESP will be detrimental to the economic development of the state as new businesses will be deterred from investing in the state.[493] As a policy matter, the Stipulated ESP IV shifts the focus from the important questions regarding the energy future of the state, to isolated features that appease certain parties in return for their support while resulting in a negative impact on interstate commerce and investment in

[489] Id. at 17.

[490] R.C. 4928.02(N)

[491] OMAEG Ex. 26A at 7-8 (Hill Third Supplemental).

[492] Id.

[493] Id. at 9.

Ohio's electric generating infrastructure.[494] This outcome is "deleterious for the state of Ohio."[495]

For all of the afore-mentioned reasons, the Stipulated ESP IV does not satisfy the Commission's three-part test for assessing the reasonableness of a stipulation and should be rejected.

IV. CONCLUSION

The Companies' Stipulated ESP IV and Amended Application (as modified), which will burden its distribution customers with the generation costs of aging and/or uneconomic plants is antithetical to the open market-based approach of Senate Bill 3, fails to satisfy the ESP v. MRO test, fails to satisfy the factors articulated in the AEP ESP III Order, undermines the Commission's mission to safeguard Ohio's competitiveness in the global economy, fails to satisfy the Commission's standard for approving stipulations, is unjust and unreasonable, and is not in the public interest.

Even if FERC's exclusive jurisdiction to oversee the wholesale market did not preempt the Commission's ability to authorize the Companies' bailout request, the Commission should emphatically deny what could end up costing customers billions of dollars. An administratively-imposed construct that picks winners and losers in the marketplace is an inappropriate way to assess a plant's financial need, address system reliability, and ensure that economic development remains vibrant in Ohio. Moreover, the multitude of unrelated provisions in the Stipulated ESP IV that the Companies have used to entice signatory parties to join the Stipulated ESP IV will benefit a very narrow subset of customers to the exclusion of other customers. To the extent the Commission is not otherwise preempted by federal law from authorizing cost recovery under

[494] OMAEG Ex. 19 at 30 (Hill Second Supplemental); OMAEG Ex. 26A at 31-32 (Hill Third Supplemental).

[495] OMAEG Ex. 26A at 7 (Hill Third Supplemental).

Rider RRS, the Commission should deny the Stipulated ESP IV and Amended ESP Application in their entirety. The Stipulated ESP IV is not the product of serious bargaining, violates numerous regulatory principles, and will harm customers and the public interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on February 16, 2016.

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