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

REPLY BRIEF OF

CONSTELLATION NEWENERGY, INC.

AND

EXELON GENERATION COMPANY LLC

<u>PUBLIC VERSION</u>

February 26, 2016

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I. INTRODUCTION

Ohio Edison Company, The Cleveland Electric Illuminated Company, and The Toledo Edison Company (collectively the "Companies") paint the Retail Rate Stability rider ("Rider RRS") as something other than a subsidy for the Companies' generation affiliate, FirstEnergy Solutions Corp. ("FES"). The Companies state that "[b]y pairing a market-based [Standard Service Offer] with the Economic Stability Program, Stipulated ESP IV is the quintessential electric stability plan affording retail customers market benefits while partially protecting them against market risks."[1] The Economic Stability Program, however, better known as Rider RRS, should not be part of any electric security plan ("ESP").

Exelon Generation Company, LLC and Constellation NewEnergy Inc. (collectively "Exelon") pointed out in their initial brief the many faults of Rider RRS and the fact that the real beneficiaries of Rider RRS (an eight-year, long-term high-risk hedge) are FES and its balance sheet. The Companies ignored those faults when submitting their initial brief, claiming that the ESP IV with Rider RRS is more favorable than a market rate offer ("MRO"), that Rider RRS is allowable under Ohio Revised Code ("R.C.") 4928.143(B)(2), that Rider RRS is in the public interest, and that the W.H. Sammis Plant, the Davis-Besse Nuclear Plant and the two Ohio Valley Electric Corporation ("OVEC") plants are at "risk of closure" in the near future unless the Public Utilities Commission of Ohio ("Commission") approves Rider RRS.

The record evidence tells a different story. The ESP IV with Rider RRS is not more favorable than an MRO given that Rider RRS will very likely be an aggregate charge in the millions if not billions of dollars. Rider RRS also is not a charge that is allowable under R.C.

[1] Companies Initial Brief at 3.

4928.143(B)(2), a statute that the General Assembly passed to ease the transition to competitive markets, not to destroy competitive markets and transition back to a utility monopoly construct. The Companies also did not negotiate a beneficial outcome for ratepayers, a conclusion that is easily reached by simply looking at the provisions of the Companies' term sheet.

The Commission should condition Rider RRS' approval on a competitive bidding process, if not rejecting the proposal outright. Competitive bidding is in the public interest, especially as Staff recommended bidding out the $5 million Community Connections Program in order to leverage savings for residential customers.[2] With even the Companies predicting that Rider RRS will result in an aggregate charge of $414 million in its first three years, it is incomprehensible that a competitive process would not also be conducted before approving Rider RRS.

That competitive bidding process would result in an offer by Exelon at least as good as, if not better than, the one Exelon made in this proceeding that beats FES by $2 billion (the "Exelon Offer"). The Exelon Offer was and is a real offer, approved by senior management up to and including its Chief Executive Officer. The Exelon Offer contained more than enough detail to show that it is better than the non-bid deal from FES, proving that the Stipulation will cost Ohio customers billions in above-market costs."[3]

A competitive bidding process would also likely generate other offers that easily beat the sweetheart deal that the Companies have struck with their sister company, FES. Exelon stands ready to prove the genuineness of its offer by providing Ohio customers a superior product containing 100% emissions-free power, at significantly lower cost than the current proposal, and with no customer risk.

[2] Staff Exhibit ("Ex.") 11 at 3-4.

[3] Exelon Ex. 4 at 2.

The Commission should reject Rider RRS and the ratepayer guarantees thereunder for the Davis-Besse and Sammis plants as well as the entitlement of power purchased from OVEC. Should the Commission determine otherwise, Exelon recommends that a public competitive bidding process be conducted to obtain the best deal for ratepayers.

II. RIDER RRS MAKES THE ESP IV LESS FAVORABLE THAN THE MRO

R.C. 4928.143(C)(1) requires the Commission to approve, or modify and approve an ESP if the ESP (including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals) is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142. The Companies, in this case, have not met their burden of showing that the ESP IV with Rider RRS is more favorable in the aggregate as compared to an MRO.

A. The ESP IV is not quantitatively more favorable than an MRO.

1. Rider RRS is an unknown, uncapped charge that could be in the billions of dollars.

The Companies claim that the ESP IV will provide a quantitative benefit of $612.1 million over the expected results of an MRO.[4] To justify that claim, the Companies argue that their projection of a net credit of $561 million for Rider RRS coupled with certain payments by the Companies shows that the ESP IV with Rider RRS is quantitatively better than an MRO.[5] The Companies also argue that their witness Judah Rose's projections are accurate and that he was the only witness to present "methodologically-sound forecasting models."[6] It is apparent from the Companies' argument that they are relying solely on Mr. Rose's projections to claim the ESP IV is quantitatively better than an MRO.

[4] Companies Initial Brief at 11.

[5] *Id.* at 12.

[6] *Id.* at 13.

Mr. Rose's forecasts, however, are simply forecasts and do not present a reliable measure of what the Rider RRS charges will be over an eight-year ESP IV term. Significantly, Staff witness Dr. Choueiki testified that he had zero level of comfort in the forecast past three years – and the uncertainty is over a hundred percent beyond three years.[7] Dr. Kalt, the Ford Foundation Professor of International Political Economy, emeritus, of the John F. Kennedy School of Government, Harvard University and a Senior Economist with Compass Lexecon, noted that the primary driver in Mr. Rose's projections of future energy prices was natural gas prices and that those projections from August 2014 are now outdated. More recent forecasts reveal that Rider RRS will not be a positive charge.

Dr. Kalt identified the problem with the Companies' projected natural gas prices by comparing Mr. Rose's 2014 gas price forecast to other available updated forecasts. He found that:[8]

> [redacted] to reflect the sharp declines in the markets for spot and future gas that are now evident and that rationally affect forecasts. Attachment JPK-SS-1, for example, provides a comparison of the natural gas price forecast used by Mr. Rose in his August 2014 forecasting analysis (and employed in the Companies' latest NPV calculations) against more recent natural gas price forecasts that incorporate the recent significant decline in U.S. natural gas prices. Attachment JPK-SS-1 shows that not long after Mr. Rose had completed his analysis, the U.S. federal government's Energy Information Administration ("EIA") came out with its 2015 Annual Energy Outlook ("AEO"). Released in April 2015, this outlook recognized the softening in U.S. natural gas markets and forecast softening natural gas prices going forward, [redacted]. EIA's forecasted gas prices in the short-term subsequently were even lower with the release of its latest short-term forecast in December 2015 (see Attachment JPK-SS-1).

[7] Transcript ("Tr.") Volume ("Vol.") 30 at 6258.

[8] P3/EPSA Ex. 13C at 13.

Dr. Kalt then did a comparison between Mr. Rose's August 2014 forecast of gas prices and actual forecasts in the marketplace in the form of NYMEX futures prices. As Dr. Kalt testified:[9]

> Most tellingly, Attachment JPK-SS-1 shows the comparison between Mr. Rose August 2014 forecast of gas prices and actual forecasts in the marketplace in the form of NYMEX futures prices. The latter have particular significance because they do not represent mere opinion. Rather, they represent a concise marketplace summation of the best available information on future natural gas prices. They arise from market participants of all kinds "putting their money where their mouths are" by buying and selling futures contracts. In this sense, the prices struck on the NYMEX represent the balance point between those who believe prices will go up from their current level and those that think they will go down. **In my experience over several decades, NYMEX futures prices are properly and routinely relied upon as the *markets*' forecasts in the energy sector.** The highest actual NYMEX prices in Attachment JPK-SS-1 (which occur in the later years) [redacted] as used by the Companies' in asserting that ratepayers would benefit from their proposed bailout of FES' stockholders and lenders.

Dr. Kalt summarized the problem with Mr. Rose's gas prices, noting that:[10]

> In summary, Mr. Rose's gas prices – used by the Companies' to calculate claimed ratepayer impacts -- start at $[redacted]/MMBTU in 2016. They then rise to [redacted]/MMBTU [redacted] and more than [redacted]/MMBtu by the end of the 8-year term of the Companies' ESP proposal. [redacted] for the same time periods supported by actual market participants in transactions on NYMEX and the prices forecast by numerous analysts and federal agencies. For the reasons I have explained above, the effect can only be to inflate the Companies' projections of the subject plants' revenues under their proposed ESP, and to thereby understate ratepayer losses and overstate ratepayer gains.

Dr. Kalt also did a sensitivity analysis on the Companies' revenue projections based on the projected generation output from the Sammis and Davis-Besse plants. He compared the projected generation levels for the Sammis and Davis-Besse plants to the plants' actual historical

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[9] P3/EPSA Ex. 13C at 14 (emphasis added, footnote omitted).

[10] P3/EPSA Ex. 13C at 16.

generation levels to see if the Companies' projections were reasonable.[11] He found that the average levels of net plant generation that are embedded in the Companies' future projections [redacted] the average net generation the plants have actually realized over the last decade or more. Dr. Kalt noted that "the projected average annual net-generation for Sammis is [redacted] than the historical annual average (2004-2014) and for Davis-Besse it is [redacted] than the historical annual average (2004-2014)."[12] Relying on the historical average of the plants' generation output but using Mr. Rose's price forecasts and [redacted], Dr. Kalt calculated that Rider RRS would have a net present value loss of $201 million, even before considering the capacity performance penalty risk that customers would bear, a risk which the Companies' initial brief does not even acknowledge.[13]

The Exelon Offer also refutes the Companies' projections for Rider RRS. As noted in Exelon's initial brief, the Exelon Offer weighs against the ESP IV quantitatively, providing a [redacted][14] If the Companies predict a $561 million credit, a competitively bid power purchase agreement ("PPA") at the Exelon Offer price that costs at least $2 billion less will result in a credit to customers in excess of $2.5 billion.[15] The ability of a competitive bid PPA to undercut the FES deal brings into question the validity and accuracy of the Companies' Rider RRS projections.

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[11] P3/EPSA Ex. 12 at 21.

[12] P3/EPSA Ex. 13C at 21.

[13] *Id.* at 21-22.

[14] Exelon Ex. 5 at 6.

[15] Exelon Ex. 5 at 6.

What the Commission is left with is (a) the Companies' $296 million net present value projection for Rider RRS,[16] (b) Dr. Kalt's analysis showing how the projection for Rider RRS can easily drop to a net present value charge ranging from $201 million to $793 million,[17] and (c) OCC/NOPEC witness James Wilson's estimate of $3.6 billion in aggregate charges.[18] The lack of any certainty on Rider RRS weighs against accepting the Companies' quantitative measure and justifies assuming that Rider RRS will result in an aggregate charge over the eight-year term of Rider RRS. To do otherwise would be unreasonable because the record evidence points to the strong likelihood that Rider RRS will result in millions, if not billions, of dollars in charges. Given that nothing prevents the Companies from making the $51.1 million in payments that the Companies claim add additional quantitative benefits to the ESP IV through an MRO (other than Ms. Mikkelsen's belief that the Companies would not make the payments), the Commission cannot find that the ESP IV is quantitatively more favorable than an MRO.

B. The ESP IV is not qualitatively more favorable than an MRO.

The Companies also claim that the ESP IV is qualitatively better than an MRO. The unknown risk of Rider RRS and the magnitude of the possible charges outweigh any qualitative benefits that the ESP IV will provide, all of which are being separately funded by, and charged to, ratepayers.

1. Rider RRS provides no qualitative benefits.

The Companies claim that Rider RRS will "assure" customers have reliable electric service at reasonable and "more stable" prices by supporting "resource diversity" in a market that

[16] Sierra Club Ex. 89.

[17] P3/EPSA Ex. 12 at 17, 21-22.

[18] OCC/NOPEC Ex. 9 at 3, 8. Mr. Wilson is an economist and principal of Wilson Energy Economics. He has been involved in electricity restructuring and wholesale market design for over twenty years in PJM, New England, California, Russia and other regions. OCC/NOPEC Ex. 4 at 1-2.

will be "increasingly dominated" by natural gas-fired generation.[19] The Companies claim that Rider RRS will avoid $1.1 billion in transmission investments and that the benefits of Rider RRS will "spur" regional economic development.[20] The Companies conclude by saying that those reasons are why they are seeking approval of Rider RRS.[21] It is important to remember, however, that the idea for Rider RRS originated with FES and not the Companies.[22] This case is not about qualitative benefits, but rather about improving FES' balance sheet.

Regardless, Rider RRS does not have any qualitative benefits. First, Rider RRS does not provide customers with a long-term retail rate stability mechanism. The Companies claim that Rider RRS will soften the impacts of any price increases by providing a credit when prices rise. This claim ignores the fact that shopping customers can enter into long-term competitive retail electric service ("CRES") contracts that can range up to three years, and in the case of the Northeast Ohio Public Energy Council ("NOPEC"), up to nine years.[23] Likewise, Standard Service Offer ("SSO") customers receive prices set through a competitive bidding process with products ranging from one to three years, resulting in a blended price that is set for at least 12 months.[24] And as explained by P3/EPSA witness Dr. Kalt, retail rates are "not even remotely as volatile as wholesale spot market prices."[25]

The Companies liken Rider RRS to insurance, claiming Rider RRS provides "risk protection" to retail electric customers and they shrug off the fact that Rider RRS could result in

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[19] Companies Initial Brief at 21.

[20] *Id.*

[21] *Id.*

[22] Tr. Vol. 11 at 2290-2291.

[23] *See*, Initial Brief of NOPEC at 27.

[24] Staff Ex. 12 at 8, 12. *See, also*, *In the Matter of the Procurement of Standard Service Offer Generation as Part of the Third Electric Security Plan for Customers of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 12-2742-EL-UNC, in which the auctions are detailed.

[25] P3/EPSA Ex. 1 at 40.

a long-term charge by saying that customers would "continue to receive the benefit of historically low prices.[26] In making these claims, the Companies ignore the fact that no customer has asked for this insurance product[27] and that this Commission is not in the insurance business.

The Companies then make the grand statement that "[n]otably, this hedge may not be available to customers once prices increase."[28] The Companies state that it is the short-term certainty that made FES willing to transfer the "significant" potential long-term upside to customers.[29] In other words, the Companies are claiming that FES may not be willing to make this deal if prices increase. While that claim merely demonstrates that this deal is designed to benefit FES and not customers, what is notable is that FirstEnergy Corp. itself is apparently <u>not</u> willing to make this deal today with FES. That fact should be sufficient for the Commission to find that Rider RRS has no qualitative benefits.

The Companies also point to their projected $100 million in risk-sharing credits over the last four years of Rider RRS as an "enhancement" and that Rider RRS must be nonbypassable to be effective.[30] The risk-sharing credits, however, do not provide a cap on the level of charges under Rider RRS and only apply in the last four years of Rider RRS. Even with those risk-sharing credits on paper, the Companies cannot and will not guarantee that customers will see an actual credit of even one cent in any single year. And those customers currently shopping (like NOPEC) end up losing the benefit of the deals they negotiated with CRES providers by having an additional generation charge imposed on a nonbypassable basis.

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[26] Companies Initial Brief at 22.

[27] Tr. Vol. 32 at 6642-6643.

[28] Companies Initial Brief at 22.

[29] *Id.*

[30] *Id.* at 23.

Rider RRS is also not needed to "smooth" out retail rates. Dr. Kalt established that the volatility of daily wholesale power prices does not translate to SSO retail rates.[31] Moreover, Staff witness Dr. Choueiki testified, "Staff prefers the staggering and laddering approach that the Commission has adopted in administering past SSO procurement auctions for mitigating price volatility."[32] The Companies attempt to point to the results of October 2013 and October 2014 auctions for deliveries in June 2014 and June 2015 as a sign of retail volatility. But Dr. Choueiki pointed out that the increases were due to announced retirements by FES prior to the auctions for the 2015-2016 delivery year that caused the ATSI zone to be congested.[33] He noted that since the transmission upgrades have occurred, the price has gone down.[34]

As to resource diversity and reliability, the plants are not going to close, as noted in Exelon's initial brief. Moreover, as Dr. Kalt testified, even if the Sammis and Davis-Besse plants retire (which they will not), it would not shift the needle much at all given that according to the Commission, 70 percent of Ohio's electricity is generated using coal-fired facilities and about 13 percent is obtained from natural gas and nuclear resources.[35] Dr. Kalt also noted that because Ohio is in the PJM Interconnection, L.L.C. ("PJM") region, it is PJM's generating capacity that gives Ohio and other states resource capacity.[36] As to avoided transmission costs, the Companies' claim of $1.1 billion transmission upgrades is mooted by the fact that the units are not going to close and the fact that new generation is being sited in Ohio.[37]

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[31] P3/EPSA Ex. 5 at 27.

[32] Staff Ex. 12 at 14.

[33] Tr. Vol. 30 at 6320.

[34] *Id.*

[35] P3/EPSA Ex. 1 at 37.

[36] *Id.*

[37] Tr. Vol. 11 at 2314 (Companies witness Moul acknowledging that the Carroll County plant is under construction).

The Companies' last bit of window dressing is their claim that Rider RRS will promote economic development. It is hard to understand how an unknown charge that is assessed on both shopping and nonshopping customers will lend itself to rate stability and incentivize new businesses to relocate to Ohio. Businesses look for stability in rates – meaning being able to predict what they will be paying for electricity. Additionally, they look for the best value. Rider RRS both reduces the value of their contracts with suppliers, and results in an unknown additional charge. Rather than drawing companies to Ohio, Rider RRS will have the effect of pushing businesses away from Ohio to locations where charges are certain, and companies are guaranteed of getting the benefit of the bargain from their contracts.

As to environmental benefits, the plants are not going to close if Rider RRS is not approved, therefore any environmental attributes of the plants will remain. Rider RRS is also not needed to preserve the environmental attributes of nuclear units. For example, Exelon was able to negotiate a Reliability Support Service Agreement ("RSSA") between Rochester Gas and Electric and R.E. Ginna Nuclear Power Plant, LLC ("Ginna"), an Exelon subsidiary.[38] The RSSA process in New York is akin to the reliability must run ("RMR") process administered in PJM. As part of the process, Ginna underwent a formal reliability study conducted by the New York Independent System Operator, which found that if Ginna was to retire, there would be a negative impact on the reliability of the New York bulk electric transmission system between 2015 and 2018 until planned transmission upgrades are completed.[39] No such regional

[38] *Id.*, citing State of New York Public Service Commission, Order Directing Negotiation Of A Reliability Support Service Agreement And Making Related Findings, November 14, 2014, CASE 14-E-0270 - Petition for Initiation of Proceeding to Examine Proposal for Continued Operation of R.E. Ginna Nuclear Power Plant.

[39] Exelon Ex. 1 at 17. The reliability study was conducted in accordance with applicable North American Electric Reliability Corporation (NERC) Reliability Standards, Northeast Power Coordinating Council (NPCC), New York State Reliability Council (NYSRC) Reliability Rules and Procedures, and NYISO planning and operation practices. *Id.*

transmission organization study or finding of need exists for the FES units that are proposed for Rider RRS.

In sum, no matter how hard the Companies try to dress up Rider RRS, it remains a charge with no benefit to ratepayers. That is why the public comment docket includes thousands and thousands of letters from ratepayers opposing Rider RRS.

2. Any benefits from the Companies' continuing ESP III programs are outweighed by the cost of Rider RRS.

The Companies try to point to certain provisions of their current ESP ("ESP III") as supporting a finding by the Commission that the ESP IV is more favorable than an MRO. The Companies point to the continuation of a base distribution rate freeze for eight years as a benefit, along with continuing to procure their non-shopping load through a competitive bid process (even though the Companies are not competitively bidding out the load for Rider RRS).[40] The Companies also claim that continuing Rider DCR will be a benefit as well as continuing the Companies' Economic Load Response Program (an interruptible load program) for which recovery is accomplished through Rider ELR. The Companies also point to the continuation of the Automaker Credit Provision as providing additional qualitative benefits along with the Companies' continued funding of the Community Connections Program.[41]

These alleged benefits are either not needed as part of an ESP or are targeted to only specific classes of customers. For example, the Companies' commitment of a distribution rate freeze does not need to be made in an ESP, and nothing prohibits the commitment and cost recovery under Rider DCR as part of an MRO.[42] Continuing the SSO auction process over the

[40] Companies Initial Brief at 18.

[41] Companies Initial Brief at 20.

[42] *See*, Companies Initial Brief at 17 (noting that because distribution-related capital costs would also be recovered under an MRO through a base distribution rate case, Rider DCR would be quantitatively neutral under an ESP versus an MRO.

eight-year term also does not factor into the ESP versus MRO test because, as admitted by the Companies, an MRO will also include procurement of generation through an auction process.[43]

The ELR program and Automaker Credit Provisions are examples of programs that target a small subset of customers. The ELR program only applies to a small subset of large industrial customers,[44] and as admitted to by Ms. Mikkelsen, the economic development benefits and job retention benefits only accrue to those customers.[45] Likewise, only nine customers participate in the Automaker Credit Provisions of which only two have actually triggered credits under that program.[46]

As to the benefits of the Community Connections Program, that program is funded at $5 million per year and recoverable from customers through Rider DSE.[47] That funding should be compared to the funding of FES' balance sheet through Rider RRS, which in the first three years is projected to cost ratepayers $414 million.

Contrary to the Companies' claim, any benefits from existing ESP III programs are too remote and are far outweighed by the negative impacts of Rider RRS to justify a finding that the ESP IV is more favorable than an MRO.

3. New provisions in the Stipulation are outweighed by the cost of Rider RRS.

Rider RRS also drags down any new programs in the Stipulation. The Companies claim that the ESP IV "provides a number of other qualitative benefits including: (1) grid modernization; (2) resource diversification; (3) rate design; (4) customer optionality; and (5)

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[43] Companies Initial Brief at 16-17.

[44] Tr. Vol. 2 at 238.

[45] Tr. Vol. 3 at 492.

[46] Tr. Vol. 3 at 623.

[47] Tr. Vol. 20 at 3939 to 3940.

market enhancements."[48] A close review of these "qualitative benefits" shows that they do not provide qualitative benefits sufficient to outweigh the negative impact of Rider RRS.

The Companies first focus on grid modernization as a qualitative benefit. The Companies point to the Stipulation provisions regarding Advanced Metering Infrastructure ("AMI"), Distribution Automation Circuit Reconfiguration, VOLT/VAR control and optimization, engaging Staff on barriers for distributed generation, consulting Staff regarding net-metering tariffs, and a business plan to evaluate full smart meter implementation.[49] All of these plans, however, can be implemented within an MRO and certainly through a distribution rate case. More importantly, all of these "plans" are subject to future Commission consideration and approval, as such it is entirely possible that these "plans" are never implemented. They will not take effect upon any Commission approval of the ESP IV, and should not factor into a weighing of the qualitative benefits of the ESP IV versus an MRO in this case.

The Companies also point to resource diversification as a benefit of the ESP IV. The Companies claim that they will "strive" to reduce CO_2 emissions and will pursue evaluations of battery technology as well as "reactivate and seek to expand" previously suspended EE/PDR programs.[50] The Companies also claim they will "strive" to achieve a certain level of energy savings annually and to work with EnerNOC to implement a customer "engagement" pilot program.[51] Lastly, the Companies claim they will "seek" to procure 100 megawatts of wind or solar energy from Ohio-sited renewable energy facilities.[52] But again, all of these alleged

[48] *Id*. at 30.

[49] Companies Initial Brief at 31.

[50] *Id.*

[51] *Id.* at 31-32.

[52] *Id.* at 32.

"benefits" are simply promises to take some action in the future. Not one item takes effect upon approval of the ESP IV and not one will result in an immediate benefit binding for the ESP IV.

Table 1 – Resource Diversification Future Promises[53]

Alleged Benefit	**Lack of Real Commitment**
CO_2 reduction goal (Stipulation V.E.1)	"will establish a goal to reduce CO_2 emissions"
Battery technology (Stipulation V.E.2)	"will evaluate investing in battery resources"
Unlocking Energy Efficiency (Stipulation V.E.3)	"will reactivate in 2017 all programs suspended in their EE/PDR Portfolio Plan … would strive to achieve over 800,000 MWh of energy savings annually … agree to include in their next EE/PDR Portfolio Plan filing for Commission approval a … customer engagement pilot program to be implemented with EnerNOC"
Renewable Resources	If Staff "deems it helpful to comply with future federal or state law or rule, and, to the extent such federal or state law or rule has not fostered the development of new renewable energy resources, including wind and solar, … Companies shall procure 100 MW of new Ohio wind or solar resources, … shall make a filing at the Commission demonstrating the need to procure"

The Companies may point to the EE/PDR reactivation as an immediate commitment. That program, however, will not come into effect until 2017 (after Commission approval) and more importantly, does not require the ESP IV to be implemented. Also worth noting is that all costs incurred for any of the EE/PDR programs will be recovered through Rider DSE with an increase in the Companies' after-tax annual shared savings cap from $10 million to $25 million. That is a benefit to the Companies and not to ratepayers.

The Companies also point to three rate-related changes from the Stipulation and argue that they are qualitative benefits to be incorporated into the analysis. None of the following changes provide qualitative benefits that outweigh Rider RRS:

[53] Source: Company Ex. 154 (Stipulation at page 11-12).

(a) *Decoupling Proposal*: The Companies claim that their agreement to file an application in the future proposing a straight fixed variable cost recovery mechanism for decoupling the residential customers' base distribution rates is a qualitative benefit of the ESP IV to be included in the analysis.[54] This too is another example of a future commitment. There is no current benefit and any future benefit therefrom is speculative at this time as it will not come about until sometime after Commission approval, if any. Moreover, the Stipulation reflects that "lost distribution revenue associated with the decoupled rates after the effective date shall be recovered for the variable portion of the rate."[55] This provision of the Stipulation makes clear that there will be a specific quantitative value to ascribe to the decoupling mechanism, if ever approved. For these reasons, the Commission should not include the agreement to file a decoupling application in the ESP versus MRO analysis.

(b) *Slow Phase-Out of Rider EDR(d)*: The Companies contend that a slower phase-out for Rider EDR(d) is beneficial and moves those customers to market-based pricing more gradually.[56] However, this rider is limited to few customers – the Companies' large transmission customers[57] and Rider EDR(d) will phase out in three years. Any benefit here is very narrow and of limited duration.

(c) *Rate Design for Rider DRR*: The Companies argue that the change in allocating costs of Rider DRR (delta revenue recovery rider) among the rate schedules is a qualitative benefit. More specifically, they argue that the new allocation should result in less costs being allocated to the large industrial customers.[58] This means that the other rate schedules will be allocated more of the rider costs, which is a cost-shifting among the ratepayer groups. Some customers will pay less, while others pay more. There is no overall benefit to the ratepayers and therefore this should not constitute a qualitative benefit at all.

Likewise, the three additional options for customers under the ESP IV provide little, if any, qualitative benefits:[59]

(a) *Extension of the time-of-day option under Rider GEN*: This option under Rider GEN will allow eligible SSO customers the ability to select a time-

[54] Companies Initial Brief at 32-34.

[55] Company Ex. 154 at 13.

[56] Companies Initial Brief at 32.

[57] Tr. Vol. 3 at 624.

[58] Companies Initial Brief at 33.

[59] Companies Initial Brief at 34-35.

of-use metering service.[60] The Companies have only two customers on the time-of-day option under Rider GEN.[61] With so few customers having any interest in this option, extension of it does not amount to any qualitative benefit.

(b) *The Rider NMB Opt-Out Pilot*: This pilot's availability is limited to seven customers and the members of two trade associations who are located in the Companies' service territories.[62] This is a limited pilot and few will be able to benefit. As such, the Commission should assign little to the claim that it will provide qualitative benefits.

(c) *Commercial High Load Factor Experimental Time-of-Use Pilot*: This pilot program has a long list of very specific eligibility requirements.[63] Companies witness Mikkelsen testified that no customers meet the eligibility requirements and the one customer that had expressed an interest in this pilot did not qualify.[64] With such a narrowly drawn pilot and company testimony indicating that there could be no customer able to participate, there is no basis upon which to conclude that this pilot provides any qualitative benefits for the ESP IV versus MRO analysis.

The several alleged "market enhancements" proposed in the Companies' ESP IV also have little, if any, qualitative benefits:

(a) *The Companies propose to remove the minimum stay provisions in the electric service regulations.* The minimum stay required customers who returned to the Companies' SSO to remain an SSO customer for a specified period of time.[65] On its face, removal of this tariff language seems to be a good thing for the competitive market. However, the Companies have not been requiring the minimum stay for quite some time.[66] The removal of the language is simply a house-keeping action on the part of the Companies, not a qualitative benefit for the ESP versus MRO analysis.

[60] Company Ex. 2 at 10; Company Ex. 8 at 4, 12. The experimental critical peak pricing rider and the experimental real time pricing rider were referenced in the Companies' Initial Brief at 34 as well, but those two riders are expiring, not being extended. Company Ex. 1 at Attachment 2.

[61] Tr. Vol. 2 at 468.

[62] Companies Ex. 3 at 3-4; Company Ex. 154 at 17.

[63] Company Ex. 4; Company Ex. 154 at 15.

[64] Tr. Vol. 2 at 289-290; Tr. Vol. 37 at 7788.

[65] Company Ex. 1 at Attachment 3, page 15 of 25.

[66] Tr. Vol. 5 at 1059. (Companies witness Smialek testified that the minimum stay has not been required but she did not know when the Companies stopped imposing it.)

(b) *The Companies propose to remove the minimum notice for returning customers in the electric service regulations.* These tariff provisions required certain customers to notify FirstEnergy in writing one to six months in advance of returning to the Companies' SSO.[67] Like the minimum stay, the Companies have not been requiring the minimum notice for returning customers for quite some time[68] and as a result, the removal of the language is another house-keeping action on the part of the Companies. It is not a qualitative benefit.

(c) *The Companies propose to remove time requirements for selecting a new CRES provider.*[69] This tariff language is again tariff language that has not been imposed[70] and thus its removal is not actually an enhancement of the retail market. The enhancement took place when the Companies stopped implementing these tariff provisions. This is not a qualitative benefit for the ESP IV versus MRO analysis.

(d) *The ESP IV application includes a web-based supplier portal to provide customer information to CRES providers*.[71] Currently, CRES providers have electronic access to customer information.[72] This is because FirstEnergy agreed years ago to provide data access via three mechanisms: (a) electronic data interchange ("EDI") information; (b) a sync list; and (c) a web-based system.[73] At this time, FirstEnergy states that, through the supplier portal, it will make that information available "real time" (current as of the latest meter read, as opposed to being updated on a quarterly basis) and will include the EDI enrollment information.[74] The change does not appear significant based on what already exists. In addition, the change is not significant as reflected by the cost – the Companies estimate that the cost of the change is only $210,000.[75] This has very minimal impact on the ESP versus MRO analysis.

(e) *The Companies claim that allowing Rider ELR participants to shop is a qualitative benefit*. Rider ELR does not present a qualitative benefit that warrants consideration because it only benefits a small subset of customers

[67] Company Ex. 1 at Attachment 3, pages 15-16 of 25.

[68] Tr. Vol. 5 at 1059. (Companies witness Smialek testified that the minimum notice has not been required but she did not know when the Companies stopped imposing it.)

[69] Company Ex. 1 at Attachment 3 at page 15 of 25.

[70] Tr. Vol. 5 at 1060.

[71] Company Ex. 1 at 19.

[72] Company Ex. 15 at 5.

[73] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. §4928.143 in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, Stipulation and Recommendation at 30 and 43.

[74] FirstEnergy Ex. 15 at 6; Tr. Vol. 5 at 1049-1050.

[75] Tr. Vol. 5 at 1037.

> who can elect to shop today.[76] Moreover, Rider ELR as modified by the Stipulation would limit Rider ELR to a smaller number of customers,[77] and new customers coming to Ohio would not be eligible to participate in Rider ELR.[78]

The Companies also try to claim that not having standby charges and shopping credit caps in the proposed ESP IV tariffs is a qualitative benefit. Those items, however, are not currently in the Companies' tariffs and the Companies did not propose to include the items in the ESP IV. The Companies cannot create a qualitative benefit simply by pointing to what the ESP IV does not include.

The Companies' proposed ESP IV is not more favorable in the aggregate than an MRO. This is true especially given the unknown Rider RRS charge that all customers, shopping and non-shopping, will have to pay. Because the ESP IV with Rider RRS is not more favorable than an MRO, the Commission should remove Rider RRS from the ESP IV.

III. THE TERM SHEET WAS NOT THE PRODUCT OF REAL NEGOTIATIONS

An obvious conclusion from the provisions in the PPA term sheet is that the Companies did not engage in substantive negotiations with FES. Provisions that allow FES to avoid capacity performance penalties, that absolve FES from any liability for not running the plants for six months so long as it uses "good utility practice", that do not require FES to fully submit to Commission audits, and that do not require the best performing units to be included in the PPA all point to a less than arms-length negotiation.

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[76] Tr. Vol. 2 at 238.

[77] Tr. Vol. 2 at 259.

[78] Tr. Vol. 2 at 261.

The Companies try to spin their discussions with FES as "negotiations." They claim that they "negotiated" an outcome beneficial to customers[79] even though the Companies did not solicit the PPA through a competitive bid process. The Companies portray the PPA discussions with their affiliate as involving "extensive due diligence" and "analysis process."[80] The Companies also point to a plant tour of the Sammis and Davis-Besse plants as further evidence of the "extensive due diligence."[81] The Companies also contend that they "negotiated robust protections" for customers.[82]

The provisions in the term sheet tell a different story. For example, Section 8 of the term sheet expressly excuses FES' failure to deliver capacity, energy or ancillary services for six months if FES exercised "Good Utility Practice."[83] "Good Utility Practice" is defined as:[84]

> "Good Utility Practice" means any of the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods and acts **which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition**. Good Utility Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather to be acceptable practices, methods, or acts generally accepted in the region.

Thus, so long as FES' pre-failure actions fall under the Good Utility Practice definition in the term sheet, it will not be responsible for covering capacity, energy or ancillary services for

[79] Companies Initial Brief at 49.

[80] *Id.* at 50.

[81] *Id.* at 52.

[82] *Id*. at 53.

[83] Company Ex. 156 at 2-3.

[84] Company Ex. 156 at 14 (emphasis added).

six months.[85] Only after six months would FES be responsible for covering the plant output but even then, it would not be responsible for reimbursing the Companies for the first six months of losses and charges.[86] That would be the responsibility of the ratepayers.

FES is also excused from paying capacity performance penalties under the term sheet. The term sheet is silent on capacity performance penalties even though it was modified in November 18, 2015,[87] well after the PJM capacity performance program was implemented. Mr. Ruberto, the lead negotiator for the Companies, believed that FES' cover requirements in Section 8 of the term sheet might address PJM penalties and/or charges, but when pressed said he needed legal advice to answer the question.[88] He also admitted that this was an important business term to understand and resolve in the term sheet.[89] Mr. Moul believed that under the proposed PPA, [redacted].[90]

The failure of the Companies to address this important business term means that FES has no liability for capacity performance penalties. Moreover, because Section 8 excuses non-performance for up to six months of continuous outage, even if it did apply, FES could still avoid all capacity performance penalties because those penalties would occur during normal operations. In other words, FES could create capacity performance penalties by failing to run during certain hours, but then could simply reset the six-month clock under Section 8 of the PPA term sheet by running in the hour following the penalty hour. Today, FES has full liability for

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[85] Company Ex. 156 at 2-3.

[86] Tr. Vol. 11 at 2334-2335; Tr. Vol. 14 at 3014-3016, 3030. *See, also*, Tr. Vol. 9 at 1997-1998.

[87] *See,* Company Ex. 156 at 16.

[88] Tr. Vol. 14 at 3011.

[89] *Id.*

[90] Tr. Vol. 11 at 2463.

capacity performance penalties. That will not be the case under the PPA term sheet, where so long as its actions are "reasonable," FES will not be responsible for the penalties.

Other provisions of the PPA term sheet show that the Companies and FES conducted little in the way of negotiations. The term of the PPA was initially set at 15 years and then subsequently adjusted to eight years to match the Companies' modified ESP IV application.[91] Mr. Ruberto admitted he did not know whether [redacted][92] When the Companies asked FES to reduce the term from 15 years to eight years in November 2015,[93] the Companies did not bother to push for more concessions in exchange for the reduced term. This is important because Don Moul (former FES Vice President of Commodity Operations) testified that [redacted][94] Rather than using that fact as leverage to negotiate better terms like risk sharing, the Companies simply asked FES to reduce the term to an eight-year term along with making an adjustment to the ROE to 10.38%.[95] The Companies' actions were not the actions of a company seeking to negotiate a beneficial outcome.

The Companies also ignored Staff's recommendations when making the November 2015 changes to the proposed term sheet. Staff filed testimony in this proceeding presenting its recommendations for certain conditional terms. Staff astutely observed that FES must make

[91] Tr. Vol. 36 at 7718-7719.

[92] Tr. Vol. 14 at 2995.

[93] Tr. Vol. 36 at 7718-7719.

[94] Tr. Vol. 11 at 2442.

[95] Tr. Vol. 36 at 7603, 7718-7719.

commitments in order for the Commission to have proper oversight over the Rider RRS costs. Specifically, Staff recommended:[96]

> *Rigorous Review of Rider RRS*: In the formulaic approach that witness Savage proposes in testimony, the fixed legacy cost components and variable cost components will be included in a wholesale contract between the Companies and FES (the PPA). This contract would be under the jurisdiction of the FERC. As a result, if the Commission believed that certain future fixed cost components or variable cost components were not prudent, the Commission would have to file at FERC challenging these cost components, and the burden of proof would be on the Commission to demonstrate its case. A method to mitigate this concern would be for the Companies *and FES* to accept that all future cost components (fixed and variable) will be audited annually by Staff (or by an outside consultant representing Staff) and for the Companies *and FES* to accept a Commission's finding to the extent there is a disagreement between the Companies *or FES* and Staff and a hearing is conducted.
>
> *Full Information Sharing*: The Companies *and FES* should commit to providing access to information on all the generation fleet of FES. As an example, if Staff is assessing the reasonableness of a specific cost item for the Davis-Besse plant and deems it appropriate to compare such a cost item to a cost item of another plant; such as the Perry or Beaver Valley plants, the Companies *and FES* should make such information available to Staff. Staff recognizes that such information may be deemed market sensitive or considered Critical Energy Infrastructure Information (CEII) and will follow state and federal laws to ensure its protection.
>
> *Sharing Mechanism of the Risk Associated with Rider RRS*: The Companies *and FES* would have to develop a sharing mechanism whereby FES commits to be responsible for a portion of the costs associated with Rider RRS in exchange for a portion of the revenues associated with Rider RRS. Alternatively, the Commission may wish to include an appropriate charge and credit caps on Rider RRS.

Yet, even with this testimony, the Companies did not bother to include provisions in the PPA term sheet that would require meaningful Commission review, require FES to comply with Commission or Staff information requests, and adequately share in the risk of Rider RRS. The PPA term sheet also does not include any cap as recommended by Staff to ensure FES bears some risk in this transaction. Mr. Lisowski (FES' assistant controller and a participant in the

[96] Staff Ex. 12 at 16-17.

term sheet discussions) indicated he could not remember there being any discussions on a cap or floor, as well as any discussions on negotiating the initial return on equity amount.[97]

The Companies' "negotiations" with FES resulted in a proposed term sheet that includes no risk sharing on the part of FES, provides a six-month grace period for a failure to perform, does not commit FES to providing information to the Companies (and the Commission) and rewards FES for its legacy costs up to December 31, 2014.[98] All of these terms were "negotiated" by the Companies even though it was FES that made the initial offer because it needed "certainty" for its plants.[99] The proposed PPA term sheet would look much different if the Companies would have negotiated it with any company other than its affiliate. The Companies cannot say that it negotiated a beneficial outcome for customers – it structured a beneficial outcome for FES and FirstEnergy Corp.

IV. COMPETITIVELY BIDDING THE OUTPUT NEEDED FOR RIDER RRS CAN LEAD TO REAL MARKET OFFERS LIKE THE EXELON OFFER

The Companies did not seek proposals from other generators,[100] even though a competitive bidding process or request for proposal ("RFP") would procure the best results for the Companies' customers. Staff testimony supports this point, recommending in this proceeding that the $5 million Community Connections Program be competitively sourced as a way to leverage energy savings for customers.[101] If Staff believes that the $5 million Community Connections Program should be bid, then certainly an eight-year hedge that even the Companies

[97] Tr. Vol. 8 at 1713, 1715.

[98] Company Ex. 156; Company Ex. 7 at 14; Tr. Vol. 36 at 7519, 7702.

[99] Tr. Vol. 11 at 2290.

[100] Tr. Vol. 13 at 2748.

[101] Staff Ex. 11 at 3-4.

project to cost ratepayers $414 million in the first three years[102] should be competitively bid to leverage any benefits for customers.

Exelon described the benefits of a competitive bid process in its initial brief[103] and certain points are worth reiterating, including the point that if a competitive process were held, Exelon would bid at least as good an offer, if not better than, Exelon's Offer of a fixed-price, guaranteed eight-year offer from 100% emissions-free power units. Under the Exelon Offer, Exelon would take on 100 percent of the capacity performance risk (unlike FES), so the Companies' customers are not exposed to that risk.[104] The Exelon Offer is a real offer approved by senior management throughout the company, and ultimately approved by Exelon's Chief Executive Officer[105] that would beat FES' offer by over $2 billion.[106] This is the type of competitive offer that could result if the Commission was to condition approval of Rider RRS on a competitive bid process. Dynegy has also expressed interest in competing through an RFP process if the Commission believes Rider RRS should be approved.[107] These offers and expressions of interest are no less real because they were made during the proceeding. If the Companies have any concern about how "real" the Exelon Offer is, the Companies can test it at any time. We encourage the Companies to seek a 60-day stay of these proceedings to reach out directly to Exelon and/or conduct a competitive procurement.

The clearest and easiest way of determining whether or not these offers are real is for the Commission to try a competitive procurement. In lieu of staying the current proceeding, the

[102] Sierra Club Ex. 89.

[103] Exelon Initial Brief at 71-72.

[104] Exelon Ex. 4 at 7.

[105] Tr. Vol. 38 at 8031.

[106] Exelon Ex. 5 at 6.

[107] Dynegy Initial Brief at 19-20.

Commission should strip out Rider RRS from the Stipulation, particularly given the fact that Rider RRS is not a necessary component for general service to the Companies' ratepayers. The Companies can start the ESP as of June 1, 2016, allowing the standard service auctions to procure generation for non-shopping customers. At the same time, the Companies can develop a request for proposal (that is not one-sided in favor of FES) that merchant generators like Exelon and Dynegy can respond to with competitive offers. When put on a level playing field, if FES' is truly the best deal, the process will prove that out. The Commission has nothing to lose by ensuring that the process is competitively bid, and customers have everything to gain.

V. NONE OF THE PLANTS PROPOSED FOR RIDER RRS IS IN FINANCIAL NEED AND NONE OF THE PLANTS WILL CLOSE IN THE SHORT-TERM

In its initial brief, Exelon pointed out that none of the plants is going to close. Exelon highlighted the fact that FES cannot unilaterally close the OVEC plants and that the OVEC financials did not support closure.[108] Exelon also noted that none of the Companies' witnesses was aware of any discussions to retire the plants, that billions have been invested in the Davis-Besse and Sammis plants, and that [redacted][109] Exelon also pointed out that Ms. Mikkelsen's updated Rider RRS projections did not include PJM capacity performance revenues, although [redacted][110]

The Companies ignore this evidence in their initial brief, continuing their claims that the plants are facing the risk of closure. The Companies claim that "FES may not be financially able to bear short-term losses even if long-term projections of market prices show significant

[108] Exelon Initial Brief at 24.

[109] *Id.* at 27.

[110] Exelon Initial Brief at 48, citing Tr. Vol. 9 at 1986-1987.

increases. Thus, '[b]ased on a weak balance sheet caused by historical losses, and near-term forecasts of the Plants, FES has identified these Plants to be financially at-risk of closure prior to the end of their useful lives.'"[111] The Companies' implied threat of closure, however, is contrary to the testimony of its own witness.

Specifically, the testimony of Mr. Moul, FES' Senior Vice President, Fossil Operations and Environmental at FirstEnergy Generation, LLC, establishes that FES is not going to close any of the plants. Mr. Moul testified [redacted][112] When reviewing his rebuttal testimony and his financial summary of the Sammis, Davis-Besse and OVEC plants from 2009 to 2014, Mr. Moul was asked the following questions:[113]

[redacted]

[111] Companies Initial Brief at 125.

[112] Tr. Vol. 11 at 2433.

[113] Tr. Vol. 11 at 2432-2433 (emphasis added).

After answering this question, Mr. Moul then acknowledged that [redacted][114]

Mr. Moul's testimony was in complete agreement with P3/EPSA witness Dr. Kalt's testimony. Dr. Kalt testified that "[redacted][115]

Using Mr. Lisowski's worksheets for each plant, [redacted]

Table 2
Sammis Total Revenue minus Total Costs
Exclusive of Income Taxes, Return on Equity and Interest Expense.

Sammis Plant	**2016 (June-Dec)**	**2017**	**2018**	**2019**	**2020**	**2021**	**2022**	**2023**	**2024 (June-May)**
Total Revenue	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]				
Total Costs	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]	
Difference	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]	

Table 3
Davis-Besse Total Revenue minus Total Costs
Exclusive of Income Taxes, Return on Equity and Interest Expense.

[114] Tr. Vol. 11 at 2434.

[115] P3/EPSA Ex. 2 at 42-44 (emphasis added, footnotes omitted).

Sammis Plant	**2016 (June-Dec)**	**2017**	**2018**	**2019**	**2020**	**2021**	**2022**	**2023**	**2024 (June-May)**
Total Revenue	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]	
Total Costs	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]	
Difference	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]	

As both tables show, the Sammis and Davis-Besse plants will [redacted] of the proposed Rider RRS.

The record evidence demonstrates that the Davis-Besse and Sammis plants, along with the OVEC plants, are not going to close and are not in financial need. With that fact, any concerns that closure will impact grid reliability, future environmental plans and electricity pricing disappear.

VI. RIDER RRS IS NOT IN THE PUBLIC INTEREST

A. Rider RRS will negatively impact both the wholesale and retail markets.

The Companies refuses to acknowledge in their initial brief that Rider RRS will negatively impact both the wholesale and retail markets. Instead the Companies argue that Rider RRS is in the public interest because allegedly it provides certain benefits, including contributing to retail rate stability and that it will be subject to "rigorous" Commission oversight with full information sharing and risk sharing.[116] Exelon addressed these points in its initial brief, noting that Rider RRS will actually lead to rate instability, harm retail customers and the markets, and that the Commission will not have the desired "rigorous oversight."[117]

[116] *See*, the Companies Initial Brief at 41 to 76.

[117] *See*, Exelon Brief at 15, 50-51 and 56-61.

The PJM Independent Market Monitor and PJM share many of these same concerns. The PJM Independent Market Monitor (Monitoring Analytics LLC) noted in its initial brief that, as a subsidy, Rider RRS is:[118]

> Inconsistent with competition in the wholesale power markets because of its price suppressive effects. Such effects would make it difficult or impossible for generation units without subsidies to compete in the market. Competition depends on units making competitive offers that reflect their costs and the risk of paying penalties and/or receiving benefits (e.g. the offer cap for Capacity Performance resources) and on recovering revenues only from the markets and not from subsidies. Such subsidies would negatively affect the incentives to build new generation in Ohio and elsewhere in PJM and if adopted by others would likely result in a situation where only subsidized units would ever be built.

PJM, in its amicus brief, echoed the concerns of the Independent Market Monitor, noting that "[o]ffering at actual costs ensures that the PPA will not artificially suppress prices in a manner that could constrain development of new generation in Ohio."[119] As further stated by PJM in its brief, "[t]he long-term impacts of that disincentive to attract efficient new investment in Ohio would far outweigh any short term gain that may be realized by the Companies' customers from 'below cost' bidding and guaranteed clearing by this particular subset of the Companies' generating units."[120]

The Commission should not ignore the impacts to the wholesale markets because those impacts are not in the public interest. Multiple witnesses testified (Messrs. Bowring, Campbell, Ellis and Bennett) that distortions in wholesale markets can negatively impact market integrity and have a chilling effect on the development and siting of new generation.[121] And as pointed

[118] IMM Initial Brief at 6. *See also* IMM Ex. 1 at 3.

[119] PJM Amicus Brief at 5.

[120] *Id.* at 6.

[121] IMM Ex. 2 at 5 (Bowring); Exelon Ex. 1 at 13 (Campbell); Dynegy Ex. 1 at 6 (Ellis); and RESA Ex. 6 at 4 (Bennett).

out by Exelon in its initial brief, FES as a SSO auction participant[122] could use the subsidy it receives under Rider RRS to alter its bidding behavior in the SSO auctions leading to uncertainty in those auctions.[123] RESA witness Stephen Bennett also noted that the competitive electric retail market depends on a robust competitive electric wholesale market, and that the Stipulation with Rider RRS was detrimental to the wholesale market with the potential to negatively impact the retail market.[124]

Those impacts are real because FES is a CRES provider acting in the Ohio markets.[125] The guaranteed subsidy FES will receive from ratepayers under Rider RRS will provide FES with a competitive advantage over other CRES providers that must procure their commodity supply at market prices.[126] As Exelon noted in its initial brief, this undermines the integrity of the competitive retail market as the subsidy will allow FES to make offers to shopping customers that are not reflective of actual market prices.[127]

Rider RRS will also impose an unwanted charge on customers currently shopping under fixed contracts. NOPEC presents a good example. NOPEC has a nine-year contract with FES to supply full-requirements electric service to its aggregation, through 2019.[128] NOPEC noted in its initial brief that residential customers in that aggregation pay a fixed 6% off the utility's price-to-compare and small commercial customers pay a fixed 4% off the price-to-compare during the nine-year term.[129] The customers in the NOPEC aggregation will lose the bargained for price

[122] Exelon Ex. 1 at 14.

[123] Exelon Initial Brief at 61-62.

[124] RESA Ex. 6 at 5.

[125] *Id.;* Tr. Vol. 11 at 2342.

[126] Exelon Ex. 1 at 12.

[127] *See*, Exelon Initial Brief at 56.

[128] NOPEC Initial Brief at 27.

[129] *Id.*

with FES if Rider RRS is approved, but at the same time allowing FES to recoup the discount that it offered as a retail supplier through the PPA subsidy going back to the same company operating as a wholesale supplier. Likewise, other shopping customers will lose their bargained-for pricing if Rider RRS is approved, regardless whether the contract is a one-year contract or three-year contract.

Simply put, Rider RRS affords FES the opportunity to recapture any losses that it has incurred under its existing CRES contracts. That is not competition and is another reason why this Commission should not approve Rider RRS.

B. Rider RRS does not comport with R.C. 4928.143(B)(2)(d).

The Companies try various ways to argue that Rider RRS is authorized under Ohio law. Without waiving any argument as to the Companies' attempt to rely on other provisions of Ohio law, Exelon responds to the Companies' attempt to rely upon R.C. 4928.143(B)(2)(d), which as Exelon explained in its initial brief was not intended for the Rider RRS subsidy construct.

1. Rider RRS does not assist with the transition to a competitive market, which is the purpose of R.C. 4928.143.

Through the adoption of Amended Senate Bill 221, the Ohio General Assembly gave the Commission ways to ease the transition from a vertically integrated regulated electricity industry to a fully competitive retail market. That transition was complete in the Companies' service territories, as the Companies no longer hold generation and are fully dependent on SSO auctions to procure generation for those customers.[130] Yet, the Companies now seek to use a statute intended to ease the transition to competitive markets well after the transition in their service territory has taken place. Rider RRS is a step backwards from the competitive markets because

[130] Staff Ex. 12 at 8-9.

it creates a subsidy that only benefits the Companies' deregulated generation affiliate. Rider RRS is not an allowable "term, condition or charge" under R.C. 4928.143(B)(2)(d).

2. The Companies cannot claim that Rider RRS will not harm shopping and at the same time claim it is a financial limitation on shopping.

The Companies claim that Rider RRS "imposes a financial limitation on the consequences of customer shopping."[131] The Companies rely on the Commission's *AEP ESP III* [132]language to argue that Rider RRS "would function as a financial restraint on complete reliance on the retail market for the *pricing* of retail electric generation service."[133] (Emphasis in original). That argument, though, is contrary to the plain language of the R.C. 4928.143(B)(2), which as the Supreme Court of Ohio has held controls.[134]

By claiming Rider RRS is a "financial" limitation, the Companies have added words to the statute in order to try to satisfy this component. Ignoring that R.C. 4928.143(B)(2)(d) does not include the word "credit" (another reason for not allowing Rider RRS under the statute), the "term, condition or charge" must be a limitation on customer shopping, not the financial consequence of the "charge." Yet, the Companies argue at page 3 of their initial brief that "[s]hopping customers will continue to receive market-based pricing from any certified [CRES] provider they select." This statement contradicts the Companies' claim that Rider RRS will act as a "financial restraint" on complete reliance on market pricing for retail generation services.

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[131] Companies Initial Brief at 117. *See, also*, Tr. Vol. 2 at 342.

[132] *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO et al., Opinion and Order (February 25, 2015) ("*AEP ESP III*").

[133] Companies Initial Brief at 118.

[134] *In re Columbus S. Power Col.* 128 Ohio St. 3d 512, ¶34 (2011).

3. Rider RRS does not relate to bypassability or default service.

The Commission has held that "relating to bypassability" alone is an *insufficient basis* upon which a rider like Rider RRS can meet R.C. 4928.143(B)(2)(d).[135] The Commission reached this conclusion because nearly any charge can be non-bypassable or bypassable.[136] The Companies claim otherwise, arguing that Rider RRS relates to bypassability on the theory that because the rider is non-bypassable, it also relates to bypassability.[137] Under the Companies' theory, the bypassability element of the statute would be met all the time, effectively rendering the other provisions of the statute meaningless. As a result, the Commission should reject the Companies' argument.

As to the Companies' claim that Rider RRS relates to default service (the Companies' proposed SSO), the record establishes that Rider RRS is a separate charge from the Companies' default service. It will be a distinct rider added to the ratepayers' bills; it will not be included in the SSO component of the bills. Testifying on behalf of the Companies, Ms. Mikkelsen indicated that Rider RRS will be separate from default service and not have any bearing on default service:[138]

> Q. Okay. Great. Instead the companies' nonshopping customers would continue to receive their energy through a Standard Service Offer even if this proposed transaction were finalized; is that right?
>
> A. The companies' nonshopping customers would continue to receive market-based generation that the company procures on their behalf through a competitive bid process.
>
> Q. Okay. And that would not change one way or the other if the proposed transaction were finalized; is that right?

[135] *AEP ESP III*, Opinion and Order at 22.

[136] *Id*.

[137] FirstEnergy Initial Brief at 118.

[138] Tr. Vol. 1 at 38.

A. Yes.

Q. Okay. And the -- and if the proposed transaction were finalized, that would not impact the price of the energy received by nonshopping customers under the standard service offer; is that right?

A. The price that the SSO customers pay for the physical energy would not change * * *.

Ms. Mikkelsen also acknowledged that Rider RRS will not affect the companies' default service because they are not related:[139]

Q. * * * Would the companies nonshopping customers continue to receive their energy through a standard service offer even if rider RRS were approved?

* * *

A. Yes, absent any change in the Commission-approved structure for providing service to customers who choose not to shop.

Q. Okay. But under the current proposal -- application from the companies, there would be nonshopping customers who would continue to receive their energy through an SSO even if rider RRS were approved, correct?

A. The physical provision of energy and capacity to the nonshopping customers would occur through the competitive bid process and delivered to the SSO customers.

Q. Okay. And the companies' customers' ability to shop for their own energy service would remain unchanged, whether or not rider RRS were approved, correct?

A. Correct.

The Companies try but cannot fit Rider RRS into a "term, condition or charge" that relates to bypassability or default service.

[139] Tr. Vol. 1 at 107-108.

4. Rider RRS will not have the effect of stabilizing retail electric service.

The Supreme Court of Ohio has held that an electric security plan may only include the nine categories of cost recovery listed under R.C. 4928.143(B)(2).[140] The Companies argue that Rider RRS would have the effect of stabilizing rates or providing certainty regarding retail electric service. Exelon, however, noted in its initial brief that Rider RRS will actually lead to rate instability by creating a separate add-on charge to customer bills that will not change in a corresponding fashion with SSO or CRES provider generation charges. Fixed-rate contracts will remain in place, but customers will now be paying an additional generation charge calculated out of time with the customer's actual usage. Moreover, Rider RRS will be reconciled well after wholesale market shifts occur, creating further instability on customer bills. Rider RRS will create rate instability, not rate stability.

As to "providing certainty regarding retail electric service," the Companies seem to rely on Company witness Strah's testimony that Rider RRS will provide certainty by keeping the plants open and promoting generation resource diversity.[141] But as noted above and in Exelon's initial brief, the plants are not at risk of closure in the short term, eliminating concerns about reliability, resource diversity and transmission upgrades. Moreover, a charge that is speculative with no cap does not provide certainty to ratepayers. It is ironic that the Companies witness Moul, then FES' Vice President of Commodity Operations, said that when coming up with the idea of the long-hedge that he "looked to see if there was something [FES] could add value to that ESP – and provide some <u>certainty in return for our plants</u>."[142] In other words, FES has

[140] *In re Columbus S. Power Col.* 128 Ohio St. 3d 512, ¶32 (2011).

[141] Companies Initial Brief at 121.

[142] Tr. Vol. 11 at 2290.

transferred the uncertainty of its plants' market risks to the ratepayers. That is not "providing certainty" regarding electric service.

VII. THE RIDER RRS CONSTRUCT IS A SLIPPERY SLOPE BACK TO THE VERTICALLY INTEGRATED UTILITY CONSTRUCT

A. Every other Ohio utility with affiliate generation has asked for a PPA rider.

1. Ohio Power Company lost its first bid but it has a new, bigger request pending.

Ohio Power Company ("AEP Ohio") was the first Ohio utility to ask for this type of risk-shifting construct. In 2013, AEP Ohio filed a request as part of its third ESP application for a rider pursuant to which the risk of its affiliate generation from OVEC (440 MW) would be shifted to the ratepayers just like Rider RRS.[143] That request was rejected by the Commission in 2015, because the Commission concluded that the rider would not provide customers with sufficient benefit from the rider's financial hedging mechanism or any other benefit that is commensurate with the rider's potential cost.[144]

AEP Ohio now has a new request pending before the Commission for a similar construct.[145] This pending request involves significantly more affiliate generation, with AEP Generation Resources, Inc. (AEPGR) and OVEC, and is for an eight-year term:[146]

AEP Ohio Affiliated Plants	Megawatts in Proposed Transaction
AEPGR's Cardinal (Unit 1)	592 MW
AEPGR's Conesville (Units 4-6)	1,149 MW

[143] *AEP ESP III*, , AEP Ohio Ex. 1 at 12.

[144] *Id*., Opinion and Order at 25 (February 25, 2015).

[145] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case Nos. 14-1693-EL-RDR, et al.

[146] *Id*. at AEP Ohio Ex. 1 at 12; Joint Ex. 1 at 4, 5, 7; Dynegy Ex. 1 at 5.

AEPGR's Stuart (Units 1-4)	600 MW
AEPGR's Zimmer (Unit 1) t	330 MW
OVEC's Clifty Creek Plant	200 MW
OVEC's Kyger Creek Plant	240 MW
TOTAL	**3,111 MW**

2. The Dayton Power & Light Company has filed an application for a PPA rider.

The Dayton Power and Light Company ("DP&L") filed just this week a rider request pursuant to which the risk of the generation it currently owns but must divest (by January 1, 2017) would be shifted to the ratepayers like Rider RRS.[147] DP&L has requested a rider construct that includes all of its generation assets for a 10-year term:

DP&L Generation Assets	Megawatts in Proposed Rider
Stuart (Units 1-4)	808 MW
Zimmer (Unit 1)	371 MW
Miami Fort (Units 7 and 8)	368 MW
Killen (Unit 2)	402 MW
Conesville (Unit 4)	129 MW
OVEC	103 MW
TOTAL	**2,181 MW**

3. Duke Energy Ohio, Inc. will likely file another request.

In 2014, Duke Energy Ohio, Inc. ("Duke") filed a request as part of its third ESP application for a rider pursuant to which the risk of its affiliate generation from OVEC (200

[147] *In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan*, Case Nos. 16-395-EL-SSO et al.

MW) would be shifted to the ratepayers just like Rider RRS.[148] Duke lost its bid for an OVEC-only PPA proposal and corresponding rider in 2015. Like it did in the *AEP ESP III* case, the Commission concluded that Duke's proposal would not provide customers with sufficient benefit from the rider's alleged financial hedging mechanism or any other benefit that is commensurate with the rider's potential cost.[149] There is no reason, however, to believe that Duke will abstain from submitting a new proposal if Rider RRS is approved.

4. The total amount of generation that could go back to a cost-of-service recovery is significant.

It is important for the Commission to consider Rider RRS with the fact that every electric distribution utility is looking to return a significant portion of its affiliate generation back to a traditional cost-of-service construct. The below table presents a possible outcome if the various utilities continue their march back away from corporate separation and the separation of competitive services from regulated services.

Utility	Megawatts in or likely to be in a proposed rider
FirstEnergy	3,244 MW[150]
AEP Ohio	3,111 MW
DP&L	2,181 MW
Duke	200 MW
GRAND TOTAL	**8,736 MW**

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[148] *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R. C. 14928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service,* Case No. 14-841-EL-SSO.

[149] *Id*., Opinion and Order at 46-47 (April 2, 2015).

[150] Company Ex. 13 at Attachment SES-1; Company Ex. 33 at 3; Company Ex. 23 at 2; Tr. Vol. 1 at 31; Tr. Vol. 2 at 407; OCC Ex. 4 at 5.

Altogether, what is being sought in this case and other pending proceedings and what Duke is likely to request again is a significant amount of what is owned and/or affiliated with the electric distribution utilities in Ohio. That is not a transition toward competitive retail electric generation service; rather, it is a move back to the vertically integrated utility construct.

B. The Ohio General Assembly decided to move Ohio to competitive generation markets.

1. Ohio has been transitioning to a fully competitive retail electric generation service.

Staff witness Choueiki testified that, for many years in the Companies' service territories, the generation supply for all customers has been either procured through Commission-administered SSO auctions or the customers have shopped individually or through aggregation.[151] Simply put, the Companies are providing "wires only" services. This is exactly what the Ohio General Assembly established, beginning in 1999 when it declared the generation component of electric service to be a competitive service, and mandated both the unbundling of electric service, and the separation of competitive and non-competitive services and assets. The Ohio General Assembly was clear on this point. R.C. 4928.03 states:

> Beginning on the starting date of competitive retail electric service, <u>retail electric generation</u>, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility <u>are competitive retail electric services</u> that the consumers may obtain subject to this chapter from any supplier or suppliers. (Emphasis added)

Moreover, Ohio's electric policy was established in R.C. 4928.02, and included as the first subsection: "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service[.]"

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[151] Staff Ex. 12 at 8-9.

Additionally, the Ohio General Assembly required separation between the competitive and noncompetitive businesses in R.C. 4928.17:

> Except as otherwise provided in sections 4928.142 or 4928.143 or 4928.31 to 4928.40 of the Revised Code and beginning on the starting date of competitive retail electric service, no electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission.

Through these various statutes, the Ohio General Assembly altered the regulatory framework in Ohio – moving it from a traditional framework to a competitive framework. As Staff witness Choueiki and P3/EPSA witness Dr. Kalt noted, the framework was altered many years ago.[152] The Companies have been operating under the competitive framework for years. Dr. Kalt added:[153]

> We undertook this restructuring because it had become all too apparent that cost-of-service regulation of generation, with captive ratepayers ultimately backstopping even bad decisions and operations, was insulating generation from competitive discipline by preventing consumers from accessing the lowest cost alternatives that could meet their needs.

2. Rider RRS will be a step backward.

Multiple witnesses testified in this proceeding and explained that Rider RRS will be a step back to the traditional utility framework and regulation. For example, the Independent Market Monitor ("IMM") for PJM,[154] who oversees numerous markets in the PJM region, testified unequivocally and candidly:

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[152] Staff Ex. 12 at 7-8; P3/EPSA Ex. 1 at 21.

[153] P3/EPSA Ex. 1 at 8.

[154] PJM is a regional transmission organization that coordinates the movement of wholesale electricity in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania,

> The proposed Rider RRS would shift responsibility from FirstEnergy, for all historical and future costs associated with the Rider RRS assets for the term of the Rider RRS, to the ratepayers of the Companies. The Companies are requesting that the plants and the contracts be returned to a version of the cost of service regulation regime that predated the introduction of competitive wholesale power markets.

The IMM's assessment is particularly unique, given his many years in monitoring the PJM region and in his expertise of the PJM wholesale market.[155]

P3/EPSA witness Kalt concurred, stating "[t]he proposed ESP of the Companies represents a return through the back door to old-style ratemaking that uses the captivity of local ratepayers to insulate generation owners from risk.[156]

No matter how the Companies spin Rider RRS, the risk transfer that would take place under Rider RRS will move Ohio back toward traditional cost-of-service regulation.[157]

3. In the aggregate, a substantial amount of Ohio-sited generation would move back to a cost-plus recovery construct.

The Companies' Rider RRS proposal effectively would allow FES to receive payment of its full costs, plus a return on equity (10.38%), for the 3,244 MW of generation from the Davis-Besse, Sammis and OVEC plants throughout the entire eight-year term of the ESP IV. The pending AEP Ohio proposal is very similar,[158] and the new DP&L proposal also envisions a cost-plus recovery over a 10-year period.[159] Collectively, these requests seek to move Ohio out of the

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Tennessee, Virginia, West Virginia and the District of Columbia. *Who We Are*, PJM Website, http://www.pjm.com/about-pjm/who-we-are.aspx (accessed February 23, 2016).

[155] IMM Ex. 1 at 1, 4.

[156] P3/EPSA Ex. 1 at 8.

[157] Instead, the Companies argued that the rider will not prohibit or hinder competition. Companies Initial Brief at 147.

[158] Dynegy Ex. 1 at 5.

[159] *DP&L, supra*, Application at 4.

market-based framework and back to a cost-plus recovery construct. These requests will alter the landscape for the involved generation and to do so for lengthy periods of time.

4. The Commission cannot implement Rider RRS until it receives that authority from the Ohio General Assembly.

The Commission, as a state agency, can only exercise that authority which has been specifically delegated to it by the Ohio General Assembly.[160] The current regulatory framework in Ohio, described earlier, does not allow for ratepayer-guaranteed subsidies for affiliated generation plants. The Companies have claimed that Rider RRS is permissible under two subsections of R.C. 4928.143(B)(2) – subsections (d) and (i).[161] Exelon addressed in its initial brief and above that, not only is R.C. 4928.143(B)(2)(d) not intended for a Rider RRS construct, but Rider RRS will nonetheless not have the effect of stabilizing or providing certainty regarding retail electric service. Those arguments will not be repeated here. The end result, though, is that Rider RRS does not satisfy R.C. 4928.143(B)(2)(d) and therefore, cannot be authorized under that statute.

The Companies have raised another theory pursuant to which they claim Rider RRS can be approved under R.C. 4928.143(B)(2) – this time under subsection (i).[162] That subsection states that an ESP may provide for or include:

> Provisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs, which provisions may allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system.

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

[161] Companies Initial Brief at 117-124.

[162] Companies Initial Brief at 122-124.

The Companies explained that Rider RRS falls with this statute because it will provide credits to the ratepayers over the term of the ESP IV, which will support or spur *economic development*.[163]

This claim is disingenuous because Rider RRS was not presented to the Commission as an economic development program. FES came up with the idea for the long-term hedge and presented that to the Companies for the benefit of FES and only FES.[164] Rider RRS was not the Companies' idea and is intended to be financially neutral to the Companies; rather, it was to provide some certainty for the FES plants.[165] Additionally, Rider RRS has been presented by the Companies as a mandatory non-bypassable rider that, for at least roughly one-third of the ESP IV term, will result in a charge to ratepayers.[166] By mandating that all ratepayers be subject to the rider and by imposing a charge on them for a long period of time, Rider RRS cannot be characterized as an economic development program benefitting the ratepayers. Moreover, the plain language of the proposed rider lacks any indication of it being an economic development program:[167]

> **APPLICABILITY:**
> Applicable to any customer who receives electric service under the Company's rate schedules. This Retail Rate Stability Rider (RRS) will be effective for service rendered beginning June 1, 2016. This Rider is not avoidable for customers during the period the customer takes electric generation service from a certified supplier.
>
> The RRS charges will apply, by rate schedule, for all kWhs per kWh.
>
> **RATE:**

* * *

[163] *Id*.

[164] Tr. Vol. 13, 2760; Tr. Vol. 11 at 2290-2291.

[165] Tr. Vol. 11 at 2290; Companies Ex. 43 at 2.

[166] Companies Ex. 13 at 5; Sierra Club Ex. 89.

[167] Company Ex. 1 at Attachment 4, Original Sheet 127.

> **<u>RIDER UPDATES:</u>**
> The charges contained in this Rider shall be updated on an annual basis. No later than April 1st of each year, the Company will file with the PUCO a request for approval of the Rider charges which, unless otherwise ordered by the PUCO, shall become effective on a service rendered basis on June 1st of each year. This Rider shall expire with service rendered through May 31, 2031, subject to final reconciliation.

The Companies have pointed to their projected credits for Rider RRS as demonstrating that the rider is an economic development program.[168] However, that ignores the details of the proposal and the credible evidence from multiple experts indicating that Rider RRS will more likely cost ratepayers millions or billions over the eight-year course. The evidence that the Rider RRS originated with FES, the structure of Rider RRS, and the likely impact of Rider RRS all establish that the rider cannot constitute an economic development program for ratepayers.

Based on the substantial weight of evidence in the record, the Companies' Rider RRS proposal does not meet the criteria of either subsection (d) or (i) of R.C. 4928.143(B)(2). Accordingly, the Commission should find that there is no express statutory authority for Rider RRS and it should be rejected.

C. The Commission should impose a cap on Rider RRS charges if it approves the rider.

1. Total losses of similar riders could be millions or billions of dollars over the next few years.

Exelon has noted the outdated forecast being relied upon by the Companies and the more compelling expert testimony of Dr. Kalt and Mr. Wilson, which includes more current forecasts of significant losses under the Companies' Rider RRS:

- Dr. Kalt: $793 million in losses for the first three years[169]

[168] Companies Initial Brief at 122-124.

[169] P3/EPSA Ex. 12 at 17.

- Mr. Wilson: $1.52 billion in losses for the first three years and $3.6 billion in losses over the eight-year term[170]

The Commission should not put this level of risk on ratepayers without some form of protection (i.e., a cap) or a true risk allocation (a credit guarantee).

2. The Commission was not willing to impose that risk on ratepayers in the Columbia weather normalization adjustment case.

History can be instructive and, in this instance, history provides a useful example for the Commission to take into consideration for its deliberations. In 1994, the Commission was presented with a stipulation, which was signed by many parties who intended to resolve many issues in a rate case involving Columbia Gas of Ohio, Inc. ("Columbia").[171] One part of that settlement recommended an experimental Weather Normalization Adjustment ("WNA") rider. Under the rider, Columbia would apply normalized weather volumes for five winter months in 1994-1995 for purposes of calculating the customers' bills during the five months.[172] The Commission reviewed the stipulation under its three-part test, approved it, and the WNA mechanism was put into place.[173]

The weather, however, was warmer than expected, and the mechanism allowed Columbia to collect more than it would have if the WNA had not been put into place. The Commission received many "inquiries"[174] and Columbia collected approximately $8.5 million more from residential customers than it would have if the WNA had not been in place.[175] In response to

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[170] OCC/NOPEC Ex. 9 at 3, 8.

[171] *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Service*, Case No. 94-987-GA-AIR, Joint Stipulation and Recommendation at 8 and Attachment A, Original Sheet 41e.

[172] *Id*.

[173] *Columbia*, *supra*, Opinion and Order (September 29, 1994).

[174] *Columbia*, *supra*, Entry (February 8, 1995).

[175] *Lucas County Commissioners v. Columbia Gas of Ohio, Inc.*, Case No. 95-1135-GA-CSS, Columbia's Motion to Dismiss etc. at 16-17 (December 21, 1995).

numerous public "inquiries," the Commission asked Columbia's collaborative to discuss and make appropriate recommendations. The Columbia collaborative proposed a modification so that the WNA rider would only apply when the weather was colder than normal for the remainder of the period.[176] Two days later, the Commission approved the modification and revamped the experiment so that Ohioans were not subjected to additional charges during the remainder of the period.[177]

Like Columbia's WNA rider, Rider RRS will not result in the credits that the Companies project. Like Columbia's WNA rider, Rider RRS could impose millions of dollars in charges that would not otherwise be applied to the ratepayers' bills. If Mr. Wilson's forecast comes to fruition, billions of dollars will be imposed on ratepayers. Like Columbia's WNA rider, there is nothing in Rider RRS (i.e., caps or limits) that protects the ratepayers.[178] Like Columbia's WNA, the Commission has received thousands of comments from the public, opposing Rider RRS. The Commission should similarly find that Rider RRS is not worth the substantial risk.

3. The Commission has recognized the value of limiting ratepayer risk.

More recently, the Commission was presented with an eight-year contractual arrangement involving AEP Ohio for which its ratepayers were exposed to substantial risks and the Commission took action. The case involved a unique arrangement between AEP Ohio and Ormet Primary Aluminum Corporation for which the ratepayers would be responsible for the delta revenues.[179] Rather than allow the ratepayers to be fully exposed to risks for the entire contract term, the Commission imposed a floor and ceiling on the amount of the ratepayers'

[176] *Columbia*, *supra*, Letter (February 6, 1995).

[177] *Columbia*, *supra*, Entry (February 8, 1995).

[178] There are credits that will apply during the final four years, but as Exelon noted in its Initial Brief (at 52-55), they are inadequate.

[179] *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company*, Case No. 09-119-EL-AEC.

responsibility under that arrangement. Staff had advocated for a floor as an incentive that would encourage efficient and effective operations, and for a ceiling as a safeguard against substantial ratepayer risks. The Commission agreed with the Staff's recommendation concluding "generally, unique arrangements must contain a floor, a minimum amount that the party seeking a unique arrangement should be required to pay, and a ceiling, a maximum amount of delta revenue which the ratepayers should be expected to pay."[180] Additionally, the Commission stated that it was imposing the floor and ceiling in part because the aluminum market is "subject to a great deal of volatility and that the unique arrangement should address that volatility."[181]

Rider RRS is based on an arrangement between the Companies and FES with no floor that incentivizes FES to operate efficiently and effectively, and no meaningful ceiling for the ratepayers' protection. If the Commission does not reject Rider RRS or order a competitive bid process, the Commission should impose additional, appropriate incentives like the Commission did in the *Ormet* case. The ESP IV is a lengthy eight-year period and the ratepayers deserve true protections from all of the risks being imposed on them.

VIII. CERTAIN PJM CHARGES SHOULD NOT BE INCLUDED IN THE NON-MARKET-BASED RIDER

The Companies have proposed to continue their non-market-based rider ("Rider NMB").[182] Also, the Companies have proposed to include additional PJM Line Items in the rider such that they will bill and collect for those charges, as opposed to the customer's load serving entity being responsible for the billing and collecting. Companies witness Stein claims that all of the additional items are non-market-based charges.[183]

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[180] *Id*. at Opinion and Order at 9 (July 15, 2009).

[181] *Id*. at 10-11.

[182] Company Ex. 1 at 15 and Attachment 5, 1st Revised Page 46-52.

[183] Company Ex. 14 at 16.

Exelon disagrees that the responsibility for billing and collecting for the following PJM Line Items should be changed:

- Balancing Operating Reserves (PJM Lines Items 1375, 1376, 1378, 2375, 2376, and 2378)
- Load Reconciliation (PJM Line Item 1450)
- Planning Period Congestion Uplift (PJM Line Items 1218 and 2218)

Exelon witness Campbell disagreed that the above items should be collected by the Companies.[184] RESA witness Bennett testified with regard to the Balancing Operating Reserve, urging that it continue to be collected as currently done and not be switched to collection under Rider NMB.[185] He explained, as to the Balancing Operating Reserve, that it helps incent entities to be as accurate as possible in the day-ahead financial market.[186]

A review of the current manner of billing of these PJM Line Items among the electric distribution utilities in Ohio is depicted in the following chart:[187]

PJM Line Item	**FE**	**AEP Ohio**	**DP&L**	**Duke**
Balancing operating reserve charge 1375	No[188]	No	No	No
Balancing operating reserve for load response charge 1376	No	No	No	No
Reactive services charge 1378	No[189]	No	No	No
Balancing operating reserve credit 2375	No	No	No	N/A

[184] Exelon Ex. 1 at 8, 29.

[185] RESA Ex. 1 at 11-12.

[186] *Id*. at 12.

[187] *See*, tariffs of the Companies, P.U.C.O. No. S-2, Sheet 1, pages 46-48; *AEP ESP III*, AEP Ohio Ex. 15 at Exhibit CL-2, Attachment F; DP&L tariff P.U.C.O. No. 17 at Eighth Revised Sheet No. T8; Duke tariff P.U.C.O. Electric No. 19, Sheet 89.04; *Duke*, *supra*, Duke Ex. 1 at Attachment F, pages 84-88..

[188] Companies witness Stein testified that the Companies are billing and collecting for some PJM Line Item 1375 services associated with deactivated units. Company Ex. 14 at 16. That is not reflected in the Companies' tariff.

[189] Similarly, Companies witness Stein testified that the Companies are billing and collecting for some PJM Line Item 1378 services associated with deactivated units. Company Ex. 14 at 16. That is not reflected in the Companies' tariff.

Balancing operating reserve for load response credit 2376	No	No	No	N/A
Reactive services credit 2378	No	No	No	N/A
Load reconciliation for transmission owner scheduling, system control and dispatch service charge 1450	Yes	Yes	No	Yes
Planning period congestion uplift charge 1218	No	No	No	No
Planning period congestion uplift credit 2218	No	No	No	No

In light of the foregoing, there is no need or justification for changing the responsibility for billing and collecting (a) the Balancing Operating Reserves (PJM Lines Items 1375, 1376, 1378, 2375, 2376, and 2378); (b) Load Reconciliation (PJM Line Item 1450); and (c) Planning Period Congestion Uplift (PJM Line Items 1218 and 2218). Other than stating a desire to do the billing and collection and an unconvincing claim that these charges are non-market-based, the Companies have not justified the change in responsibility for these PJM Line Items. Accordingly, the Commission should reject the proposed change.

IX. CONCLUSION

For the foregoing reasons and the reasons set forth in Exelon's initial brief, the Commission should reject the Companies' proposed Rider RRS and the Stipulation. In the event that the Commission finds that Rider RRS is in the public interest, the Commission should require the Companies to hold a competitive bid process to enter into a real PPA for inclusion in Rider RRS. As to the other components of the ESP IV, the Commission should (a) adopt the proposed competitive bidding process for the SSO auctions, (a) approve Rider NMB without the nine PJM line items identified by Exelon, (c) incorporate the modifications suggested by Exelon for the MSA and (d) require the Companies to provide to PJM daily information that reflects *actual* daily aggregate PLC for the zone based on customers moving into and out of the zone.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio e-filing system will electronically serve notice of the filing of the public version of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served upon the persons below via electronic mail this 26th day of February, 2016.

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