

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) Case No. 14-1297-EL-SSO
a Standard Service Offer Pursuant to R.C.)
§ 4928.143 in the Form of an Electric Security)
Plan.)

APPLICATION FOR REHEARING OF DYNEGY INC.

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Now comes Dynegy Inc. ("Dynegy") and pursuant to Section 4903.10, Revised Code, requests that the Public Utilities Commission of Ohio ("Commission") grant rehearing on its March 31, 2016 Opinion and Order in the above-styled proceeding. Specifically, the Opinion and Order was unreasonable and unlawful in the following respects:

NO COMPETITIVE BIDDING

1. The Commission's award of a subsidy to FES to the prejudice of FES' competitors was unreasonable and unlawful.
2. The Commission's failure to require competitive bidding for any PPA to be included in Rider RRS was unreasonable and unlawful.

NO LEGAL AUTHORITY FOR RIDER RRS

3. The Commission's holding that Rider RRS is authorized by R.C. 4928.143(B)(2)(d) was unreasonable and unlawful.
4. The Commission's holding that Rider RRS is authorized by R.C. 4928.143(B)(2)(i) was unreasonable and unlawful.
5. The Commission's failure to find that the stipulation (including Rider RRS) violates R.C. 4928.17, which requires corporate separation between an electric utility and its generation affiliate, was unreasonable and unlawful.
6. The Commission's failure to find that Rider RRS violates R.C. 4905.22 as an unreasonable charge was unreasonable and unlawful.

INSUFFICIENT OVERSIGHT OVER RIDER RRS

7. The Commission's finding that its oversight over Rider RRS is sufficient was unreasonable and unlawful.

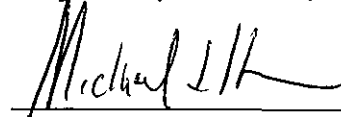
RIDER RRS DOES NOT BENEFIT RATEPAYERS AND IS NOT IN THE PUBLIC INTEREST

8. The Commission's failure to substantively address concerns that Rider RRS threatens competitive markets and impedes the development of new sources of generation in Ohio was unreasonable and unlawful.
9. The Commission ignored evidence that the Sammis, Davis-Besse, and OVEC plants are not closing.
10. The Commission's finding that Rider RRS promotes fuel diversity was unreasonable and unlawful.

11. The Commission's finding that Rider RRS promotes grid reliability was unreasonable and unlawful.
12. The Commission's finding that Rider RRS promotes retail rate stability was unreasonable and unlawful.

The facts and arguments that support these grounds for rehearing are set forth on the attached Memorandum in support.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On March 21, 2016, the Public Utilities Commission of Ohio approved Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company's (collectively, "the Companies" or "FirstEnergy") fourth electric security plan ("ESP IV") in accordance with R.C. 4928.143, as supported by a Stipulation between FirstEnergy and certain other parties.¹ The lynchpin of the ESP IV and the Stipulation is an eight-year Retail Rate Stability Rider ("Rider RRS"). Rider RRS contemplates FirstEnergy acquiring the generation of the output of two generating plants—Davis-Besse and Sammis—operated by FirstEnergy's affiliate, FirstEnergy Solutions ("FES") as well as FES' entitlement to 4.85 percent of the output of two generating plants owned and operated by the Ohio Valley Electric Corporation ("OVEC") through a power purchase agreement ("PPA"). FirstEnergy would then sell the generation output into the PJM Interconnection LLC ("PJM") markets, and would net the revenues received from these sales against the costs paid to FES, and credit or charge the difference to all of FirstEnergy's ratepayers on a nonbypassable basis.

In its Opinion and Order, the Commission approved of the Stipulation and Rider RRS, finding that Rider RRS is a form of "rate insurance" or "hedge" that protects customers against rate volatility and price fluctuations, while stabilizing FirstEnergy's plants and that the Stipulation, as a whole, benefits ratepayers and favors the public interest.²

Dynegy, Inc. ("Dynegy") submits that the Commission's decision approving the Stipulation and Rider RRS is unreasonable and unlawful. First, the Commission failed to require

¹ The Stipulation and Recommendation was filed on December 22, 2014, and thereafter supplemented on May 28, June 4, and December 1, 2015. The Stipulation and Recommendation, including all supplements, is referred to herein as the "Stipulation."

² See Opinion and Order at 78-80, 99, 108-109.

that any PPA to be included as part of the Rider RRS mechanism be competitively bid. Second, the Commission erred in failing to find that Rider RRS is unlawful as it runs contrary to multiple Ohio statutes. Third, the Commission was unreasonable and unlawful in failing to consider the objections of several intervenors that the level of oversight contemplated in the Stipulation is insufficient to adequately safeguard against the serious risks posed by Rider RRS. Finally, the Commission was unreasonable and unlawful in failing to substantively address the evidence in this proceeding that Rider RRS will hurt ratepayers and the public interest, including evidence that Rider RRS will harm competitive markets and discourage new generation from being sited in Ohio, evidence that Rider RRS does not advance retail rate stability, and evidence that the Sammis, Davis-Besse and OVEC plants are not closing, whether or not Rider RRS is approved, obviating concerns over grid reliability and fuel diversity.

As discussed further below, the Commission should address this evidence, reverse its decision, and disapprove of the Stipulation and Rider RRS.

II. ARGUMENT

A. The Commission Awarded FES with Rider RRS to the Detriment of FES' Competitors and Without a Competitive Bidding Process.

Assignment of Error No. 1: The Commission's Award of a Subsidy to FES to the Prejudice of FES' Competitors was Unreasonable and Unlawful.

Assignment of Error No. 2: The Commission's Failure to Require Competitive Bidding for any PPA to be Included in Rider RRS was Unreasonable and Unlawful.

By approving the Stipulation and Rider RRS, the Commission awarded FirstEnergy's affiliate FES with a subsidy in the form of a guaranteed cost recovery and a guaranteed return on and of equity equal to 10.38 percent, for sales made through its PPA with FirstEnergy. Because of this subsidy, FES will enjoy a significant and unfair advantage in the marketplace over its competitors, including Dynegy.

Like its competitor FES, Dynegy is a merchant generator and owns a number of coal-and-gas-fired generating units in Ohio totaling 5,332 megawatts of net capacity.³ But unlike FES, Dynegy will enjoy neither guaranteed cost recover nor a guaranteed return on and of equity, and instead must compete for sales and bear the risk of lost revenues if it does not competitively price its generation output.⁴ Simply stated, the Commission has placed FES at an unfair competitive advantage. Dynegy witness Dean Ellis testified how this unfair advantage will harm FES' competitors in the marketplace:

For example, if low gas prices and warm weather this winter depress prices in the Duke Ohio Zone, Dynegy will have to reduce or possibly eliminate its margin, carefully control costs and carefully watch the market in order to make a profitable sale into the market for its Ohio generation assets. By contrast, with the stipulated PPA proposal in place, FES will simply bill the Companies its costs for its operation of the Sammis and Davis Besse units along with its share of costs for the OVEC entitlement, and collect its 10.38% rate of return.⁵

In addition to being a wholesale merchant generator, FES is certified to provide retail generation and power marketer services in Ohio, and while it is not currently participating in the residential marketplace (which may change if Rider RRS is upheld), FES continues to operate as a CRES provider.⁶ The guaranteed subsidy FES will receive from ratepayers under Rider RRS will allow FES to make offers to shopping customers that are not reflective of actual market prices, and will provide FES with a competitive advantage over other CRES providers that must procure their commodity supply at market prices.

The Commission's decision to award one merchant generator, FES, a significant competitive advantage over competitor market participants undoubtedly harms the public

³ FirstEnergy Ex. 16 at 103-104.

⁴ *Id.* at 5.

⁵ Dynegy Ex. 1, Direct Testimony of Dean Ellis at 7.

⁶ See Case No. 00-1742-EL-CRS, Renewal Certificate Number 00-011E(8) dated November 4, 2014. See also, Tr. Vol. 11 at 2342; 2481.

interest, but it is particularly pernicious because this award was not preceded by a competitive bidding process. To mitigate (at least in part) the unfairness to merchant generators who cannot benefit from Rider RRS, the Commission's only reasonable course of action would have been to require that any PPA to be included in the Rider RRS mechanism be the subject of a competitive bid process, which, incidentally, would have also minimized the exposure to Rider RRS charges faced by FirstEnergy's ratepayers.

Ohio law and public policy favors market competition. Competition, after all, was the impetus for Am. Sub. S.B. 3, which decreed that the generation component of electric service must be unbundled from non-generation aspects of electric service and offered to ratepayers on a competitive basis.⁷ And competitive bidding in particular is prevalent throughout Ohio law. For example, competitive bidding is required for county purchases, leases, or contracts to be obtained through competitive bidding.⁸ Municipalities⁹ and state agencies¹⁰ are likewise required to procure supplies or services over a certain dollar amount through competitive bidding. Ohio courts too have recognized the many benefits of competitive bidding to both merchants/service providers and the public at large:¹¹

Competitive bidding is well recognized in public matters because it gives everyone an equal chance to bid, eliminates collusion, and saves taxpayers money. There has been a strong public policy in favor of competitive bidding to protect the public and eliminate collusion. It fosters honest competition in order to obtain the best work and supplies at the lowest possible price because taxpayers' money is being used. It is also necessary to guard against favoritism, imprudence, extravagance, fraud and corruption. Competitive bidding statutes are to be construed for the benefit of taxpayers and not bidders. The guidepost is the public interest.

⁷ See Am. Sub. S.B.3 of the 123rd General Assembly (1999).

⁸ See R.C. 307.86.

⁹ See R.C. 735.05.

¹⁰ See R.C. 125.05(B).

¹¹ *United States Constructors & Consultants, Inc. v. Cuyahoga Metro. Hous. Auth.*, 35 Ohio App.2d 159, 300 (8th Dist.1973). Accord *State v. Bd. of Cnty. Comm'rs*, 8th Dist. Cuyahoga No. 36979, 1978 Ohio App. LEXIS 10306, at *9-10 (Apr. 27, 1978) (emphasis added).

The benefits of competitive bidding are also demonstrated by the success of the standard service offer (“SSO”) auctions held by FirstEnergy and other electric distribution utilities. Today, 100 percent of the SSO loads of three Ohio electric distribution companies¹² are being procured through competitive retail auctions administered by the Commission.¹³

Here too, requiring FirstEnergy to engage in a competitive bidding process to obtain a PPA to include in the Rider RRS mechanism, rather than award the PPA to its affiliate FES, would have given other merchant generators like Dynegy a fair and equal chance to participate, while reducing cost exposure for FirstEnergy’s ratepayers. And as the record in this case demonstrates, if the Commission had opened up the Rider RRS mechanism to competitive bidding, there *would* have been offers more favorable to ratepayers than the PPA with FES, such as Exelon’s offer, which would have provided over *\$2 billion* in customer savings over the FES offer.¹⁴ Likewise, on multiple occasions in these proceedings, Dynegy expressed interest in participating in a competitively bid process or request for proposal if the Commission approved Rider RRS.¹⁵

By unfairly awarding FirstEnergy’s affiliate with a subsidy not enjoyed by its competitors—and by failing to require that any PPA to be included as part of the Rider RRS mechanism be competitively bid, the Commission acted unreasonably and unlawfully. On reconsideration, the Commission should reject Rider RRS, or at a minimum, limit recovery under Rider RRS to competitively bid PPAs.

¹² Ohio Power Company, Duke Energy Ohio, and FirstEnergy.

¹³ Staff Ex. 12 at 7.

¹⁴ Exelon Ex. 4 at 6.

¹⁵ Dynegy Initial Brief at 19-20; Dynegy Reply Brief at 22.

B. Rider RRS Violates Ohio Law.

The Opinion and Order acknowledged that the Commission's authority to approve Rider RRS depends on the satisfaction of the requirement in R.C. 4928.143(B)(2)(d) or R.C. 4928.143(B)(2)(i).¹⁶ Rider RRS is not permitted under either subsection.

Assignment of Error No. 3: The Commission's Holding That Rider RRS is Authorized by R.C. 4928.143(B)(2)(d) was Unreasonable and Unlawful.

Section 4928.143(B)(2)(d) provides that an electric security plan may include the following:

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

The Commission concluded that Rider RRS satisfies subsection (d) as (i) it is a "charge"; that it (ii) acts as a "financial limitation on customer shopping;" and (iii) that it is proposed to have the effect of stabilizing or providing certainty regarding retail electric service."¹⁷ For the following reasons, these findings are unreasonable and unlawful should be reversed on rehearing.

1. Rider RRS is not a Charge

To be permissible under Section 4928.143(B)(2)(d), Rider RRS must be a "term, condition, or charge" that relates to certain enumerated items.¹⁸ The Commission acknowledged that Rider RRS will only be a charge to customers over the first two years of Rider RRS but will provide a net credit of around \$256 million for FirstEnergy's ratepayers over the entire eight-

¹⁶ Opinion and Order at 107-108.

¹⁷ *Id.* at 108-109.

¹⁸ R.C. 4928.143(B)(2)(d) (emphasis added).

year term of ESP IV.¹⁹ Nonetheless, the Commission found that Rider RRS satisfies Section 4928.143(B)(2)(d) because Rider RRS would “**at times**, consist of a charge to customers.”²⁰ Selective compliance with Section 4928.143(B)(2)(d) at only certain times during the term of ESP IV is insufficient to satisfy R.C. 4928.143(B)(2)(d).

Significantly, while the Commission found Rider RRS to be a net credit over the term of ESP IV, the word “credit” does not appear anywhere in Section 4928.143(B)(2)(d) and the Commission is without authority to read it into the statute. *See In re Columbus S. Power Co.*, 128 Ohio St.3d 512, ¶ 32 (2011) (“[I]f a given provision does not fit within one of the categories listed “following” (B)(2), it is not authorized by statute”); *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608, ¶ 49 (“[I]n construing a statute, we may not add or delete words.”). Because Rider RRS can switch between a payment from FirstEnergy to ratepayers, *or* a payment from the ratepayers to FirstEnergy, it is not solely a “charge.” Section 4928.143(B)(2)(d) does not authorize a “credit,” only a “charge” whereby the utility charges the ratepayer a fee. The Commission has no authority to allow a “credit,” i.e., a payment *from* the utility *to* the ratepayer, and therefore, the Commission’s order is unlawful and should be reversed on rehearing.

2. *Rider RRS Does not Limit Customer Shopping*

To be sustained under R.C. 4928.143(B)(2)(d), Rider RRS must satisfy one of the enumerated items in subsection (d), which includes “limitations on customer shopping for retail electric generation service.” The Opinion and Order concedes that Rider RRS “would have no impact on customers’ physical generation supply.”²¹ The Commission stated that “[c]ustomers in

¹⁹ Opinion and Order at 85, 108.

²⁰ *Id.* at 108.

the Companies' service territories have the ability to choose a competitive supplier pursuant to R.C. 4928.03 and will continue to benefit from a robust choice in competitive suppliers."²²

Nonetheless the Commission found that Rider RRS "constitute[s] a financial limitation on shopping that would help to stabilize rates,"²³ reasoning that "Rider RRS would function as a financial restraint on complete reliance on the retail market for the pricing of retail electric generation service."²⁴ The Commission's determination is unreasonable and unlawful and should be reversed on rehearing.

The term "limitation" is understood in its plain sense to denote "the act of controlling the size or extent of something" or "control[ling] how much of something if possible or allowed."²⁵ No party to these proceedings asserts that the Rider RRS controls the "size or extent" of the class of FirstEnergy's ratepayers that shop for generation with a CRES provider, or alternatively, prohibits FirstEnergy's ratepayers from migrating to or from the Standard Service Offer. In fact, the Company has emphasized throughout these proceedings that Rider RRS does not limit ratepayers from shopping for their generation supply. FirstEnergy's Application, for example, provides that "[t]he Economic Stability Program, as designed, will *have no adverse impact* on the CRES market in Ohio, customers' ability to shop for generation service, or on the Companies' competitive bidding process or SSO Supply."²⁶ And FirstEnergy witness Mikkelsen noted that "the companies' customers' ability to shop for their own energy service *would remain unchanged* whether or not the proposed transaction were finalized."²⁷ The Stipulation too

²¹ *Id.*

²² Opinion and Order at 109.

²³ *Id.*

²⁴ *Id.*

²⁵ Merriam-Webster Online Dictionary, <http://www.merriam-webster.com> (accessed April 27, 2016).

²⁶ FirstEnergy Ex. 1 at 9 (emphasis added).

²⁷ Tr. Vol. 1 at 39 (emphasis added). *See, also*, Tr. Vol. 1 at 108.

provides that Rider RRS “does not in any way limit a customer’s ability to shop, and does not negatively impact retail competition or POLR auctions.”²⁸

The requirement relating to “limitations on customer shopping for retail electric generation service” is plain and unambiguous and the Commission lacks the authority to ignore it or subvert its plain meaning. *See Doe v. Marlinton Local Sch. Dist. Bd. of Educ.*, 122 Ohio St.3d 12, 2009-Ohio-1360, ¶ 29 (“It is our duty to apply the statute as the General Assembly had drafted it; it is not our duty to rewrite it.”). Because Rider RRS is nonbypassable and does not prohibit FirstEnergy’s ratepayers from shopping for generation through a CRES provider or migrating to or from FirstEnergy’s SSO load, under the plain meaning of R.C. 4928.143(B)(2)(d), it is *not* a “limitation” on shopping. Therefore, the Commission’s finding that Rider RRS is a limitation on customer shopping is unreasonable and unlawful and should be reversed on rehearing.

3. *Rider RRS Does not Provide Rate Stability or Certainty*

The Commission’s finding that Rider RRS satisfies R.C. 4928.143(B)(2)(d) should be reversed for a yet another reason. To comply with that statute, a rider must have the “effect of stabilizing or providing certainty regarding retail electric service.”

FirstEnergy has claimed in this proceeding that Rider RRS promotes retail stability by (i) providing a retail rate stabilization mechanism against volatility in the wholesale market; (ii) keeping base load generating plants open; and (iii) providing a stabilization mechanism against fluctuations in the retail market.²⁹ The Opinion and Order concludes that “Rider RRS would, in theory, have the effect of stabilizing or providing certainty regarding retail electric

²⁸ FirstEnergy Ex. 154 at 18.

²⁹ FirstEnergy Ex. 13, Direct Testimony of Steven E. Strah, at 7.

service” as a “financial hedging mechanism.”³⁰ But the Commission’s decision fails to substantively address the extensive evidence presented in these proceedings that Rider RRS will have no discernible effect on stabilizing rates (a reversible error standing alone). *See In re Comm. Rev. of Capacity Charges of Ohio Power Co.*, Slip Opinion No. 2016-Ohio-1607, ¶ 52 (“AEP is correct that the commission failed to address its argument in any substantive manner. Accordingly, we remand the cause to correct this error.”) Moreover, Rider RRS will likely lead to increased rate *instability*, contrary to the requirements of R.C. 4928.143(B)(2)(d). On rehearing, the Commission should consider the evidence submitted in support of this objection and find that Rider RRS does not have the effect of stabilizing retail rates.

First, there is no basis to suggest that volatility in short-term wholesale power markets results in volatility in longer-term retail power markets.³¹ Power prices for most retail customers are set by procurements carried out considerably in advance of consumption.³² Moreover, retail prices based on forward market prices are much less volatile than day-to-day power prices.³³ Consider, for example, retail SSO rates. As noted in Dr. Kalt’s testimony (and the attachments thereto), the volatility of daily wholesale power prices is not transmitted to retail rates.³⁴ This is even true for notable events such as the spike in wholesale power prices during the “Polar Vortex” of January 2014.³⁵ SSO retail rates simply do not positively correlate with daily wholesale rates.³⁶ This is the case for shopping customers as well. CRES providers heavily emphasize price stability in their marketing materials, and provide discounts for customers to

³⁰ *Id.* at 109.

³¹ P3/EPSCA Ex.5, Supplemental Testimony of Joseph P. Kalt, at 27.

³² P3/EPSCA Ex. 1, Direct Testimony of Joseph P. Kalt, at 11.

³³ *Id.*

³⁴ P3/EPSCA Exhibit 5 at 27.

³⁵ *Id.* at 28.

³⁶ *Id.*

sign up for up to three-year fixed-rate contracts.³⁷ Like SSO customers, shopping customers already enjoy price stability. Dr. Kalt's testimony shows that the premise that retail price stability is a problem calling out for a solution in the form of Rider RRS simply fails to conform to the evidence.

Moreover, the Commission failed to consider objections that Rider RRS will actually destabilize retail rates. First, Rider RRS' initial rate will be calculated based on projected costs and revenues, and that rate will remain in effect until the next adjustment.³⁸ But until this readjustment—which occurs only four times per year—Rider RRS would not fluctuate and cannot be “counter-cyclical” of wholesale market prices for the entire time that the current rate is in effect. With each quarterly reconciliation or “true-up,” the Rider RRS rate will again be based on projected costs and projected revenues, but also capture the reconciliation amount resulting from the prior rider rate (the “off amount”) along with carrying costs.³⁹ However, exactly how much of the reconciled Rider RRS rates will be attributed to the historical off amount and carrying costs is unknown.

But it is possible that these true-ups can actually exacerbate retail price volatility. For example, during a spike in wholesale prices, if the generating revenues of the plants significantly exceed their costs, then the Rider RRS true-up would be expected to take the form of a credit.⁴⁰ But it is possible that the “lag” in making billing adjustments under Rider RRS and the random walk characteristics of electricity prices mean that this bill reduction would be applied in a post-spike period in which wholesale prices have receded from their spike and are already relatively

³⁷ *Id.* at 27.

³⁸ FirstEnergy Ex. 43 at 3.

³⁹ *Id.* at 4.

⁴⁰ P3/EPSC Exhibit 5 at 28.

low.⁴¹ Therefore, counter to the intended function of Rider RRS, wholesale prices and Rider RRS adjustments would *not* be counter-cyclical, but instead reinforce each other, resulting in customers incurring charges in periods of higher prices, and receiving credits in periods of lower prices, exacerbating the acuity of retail price instability.⁴² The Commission should grant rehearing and find that Rider RRS does not promote rate stability or certainty as required by R.C. 4928.143(B)(2)(d).

Assignment of Error No. 4: The Commission's Holding That Rider RRS is Authorized by R.C. 4928.143(B)(2)(i) was Unreasonable and Unlawful.

The Commission erred in accepting FirstEnergy's claim that Rider RRS is part of an economic development program under R.C. 4928.143(B)(2)(i). That section 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.

The Commission found R.C. 4928.143(B)(2)(i) validated Rider RRS because "the record is clear that the plants [i.e., Sammis and Davis-Besse] have a significant economic impact upon the regions in which the plants are located."⁴³ But the Commission overreached in concluding that subsection (B)(2)(i) applies, and this finding should be reversed on rehearing for the following reasons.

First, the Commission's interpretation of subsection (B)(2)(i) is so expansive that it suggests that any spending of ratepayer money by a public utility could constitute an "economic development program," so long as it has some incidental effect on job retention or the broader

⁴¹ *Id.*

⁴² *Id.* at 28-29.

⁴³ Opinion and Order at 109.

economy—an interpretation that opens the floodgates to obvious abuse. But a common-sense reading of R.C. 4928.143 is narrower: to permit ESPs to include certain development programs such as energy efficiency and economic development riders like those that were approved by the Commission in the AEP *ESP III* decision.⁴⁴

Second, FirstEnergy did not conceive, design or present Rider RRS to the Commission as an economic development program, and FirstEnergy has not met its burden in proving that it is. For example, the Company’s application pitched Rider RRS as a “retail rate stability mechanism against increasing market prices and price volatility for all retail customers”—not as an economic development plan.⁴⁵

But whatever label FirstEnergy ascribed to it, in practice, Rider RRS is *not* an economic development program. For one, it is certain to result in charges to ratepayers for at least its first two years,⁴⁶ and whether Rider RRS will result in a credit to ratepayers for the rest of the ESP IV term is very questionable. But more importantly, the underpinning of FirstEnergy’s claim that Rider RRS is an economic development program rests on the premise that the Sammis, Davis-Besse and OVEC plants will close if Rider RRS is not approved. If these plants would not close without Rider RRS, then any additional economic impact of Rider RRS is simply illusory. And as addressed in Assignment of Error No. 9, below, these plants will not close even without Rider RRS. Therefore, on rehearing, the Commission should reverse its holding that Rider RRS is authorized under R.C. 4928.143(B)(2)(i).

⁴⁴ See *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) (“*ESP III*”), 68 (approving Economic Development Rider).

⁴⁵ FirstEnergy Ex. 1, Application, at 9.

⁴⁶ Opinion and Order at 109.

Assignment of Error No. 5: The Commission's Failure to Find That the Stipulation (Including Rider RRS) Violates R.C. 4928.17, Which Requires Corporate Separation Between an Electric Utility and its Generation Affiliate, was Unreasonable and Unlawful.

R.C. 4928.17 prohibits an electric utility from supplying both a non-competitive retail electric services (i.e., distribution) and competitive retail electric service (i.e., generation) except under a corporation plan approved by the Commission. The Commission noted that several intervenors claimed that Rider RRS contravenes legal protections against abuse of affiliate power and failure to maintain corporation separation.⁴⁷ However, the Opinion and Order did not specifically address these contentions, appearing instead to implicitly overrule them (itself a reversible error). On rehearing, the Commission should expressly address this issue and find that the Stipulation, and in particular, Rider RRS violates R.C. 4928.17.

As required by R.C. 4928.17, FirstEnergy has divested itself of its generation assets and today depends on SSO auctions to procure generation for its customers.⁴⁸ But the required separation between FirstEnergy and its generation affiliate, FES, will not be enforced if the Commission upholds the Stipulation and Rider RRS.

With respect to the generation from FES' plants, the evidence establishes that there will be an intermixing of FirstEnergy and FES personnel, with FirstEnergy actively involved in the operation of the plants included in the PPA.⁴⁹ For example, the term sheet provides that: (i) FirstEnergy will schedule and dispatch all of the energy and ancillary services associated with the plants; (ii) after FES transfers capacity rights in PJM's eRPM system to FirstEnergy, FirstEnergy will be "solely responsible for offering FirstEnergy's contractual capacity into the PJM capacity auctions occurring after the Effective Date and covering PJM capacity delivery

⁴⁷ Opinion and Order at 103, 105.

⁴⁸ Staff Ex. 12 at 8-9.

⁴⁹ P3/EPSCA Ex. 10 at 25 of 32, FirstEnergy Ex. 156 at 6-7.

years within the Delivery Period; (iii) all energy and ancillary services associated with the FirstEnergy Companies' contractual capacity will be allocated to the Companies in accordance with their respective shares and will be recorded in PJM's scheduling and settlement systems; and (iv) all credits and charges associated with FirstEnergy's capacity, energy, and ancillary services will be settled in the respective PJM accounts of the FirstEnergy Companies through the PJM settlement process.⁵⁰

While FES or one of its subsidiaries will be operating the Davis-Besse and Sammis plants, Section 12 of the term sheet reflects that FirstEnergy will be involved with deciding whether capital expenditures should be made and reviewing a capital expenditure plan.⁵¹ Moreover, FirstEnergy will determine before making payments to FES whether FES performed in accordance with good utility practice.⁵² These terms further demonstrate that FirstEnergy has oversight over FES at these plants, contrary to the corporate separation provisions of R.C. 4928.17.

Moreover, the reference to R.C. 4928.143 in R.C. 4928.17 does not excuse FirstEnergy's failure to abide by the corporate separation provisions of R.C. 4928.17. While R.C. 4928.17 may exclude items "provided in sections * * * 4928.143," nothing in R.C. 4928.143 negates the corporate separation requirements of R.C. 4928.17. Even if the Commission reaffirms its finding that Rider RRS is authorized by R.C. 4928.143, Rider RRS—standing alone—would not allow FirstEnergy to reassert de-facto ownership over FES' generation plants.⁵³

⁵⁰ FirstEnergy Ex. 156 at 7-8.

⁵¹ *Id.* at 3-4; Tr. Vol. 14 at 3000.

⁵² Tr. Vol. 1 at 52.

⁵³ It is April 27, 2016 Order, FERC noted that "[i]n addition, the finding that the FE Ohio Regulated Utilities have captive customers with respect to the Affiliate PPA may impact other existing waivers of 18 C.F.R. § 35.39 granted to Respondents and their affiliates, including other provisions of the Commission's regulations, such as § 35.39(c) (separation of functions), § 35.39(d) information sharing), § 35.39(e) (non-power goods or services) and § 35.39(f) (brokering of power) and the corresponding regulations in § 35.44(a) and § 35.44(b)." *EPSC v. FirstEnergy Solutions Corp.*, 155 FERC ¶ 61, 101, at ¶ 66 (April 27, 2016).

For these reasons, on rehearing, the Commission should squarely address the objection that Rider RRS violates R.C. 4928.17 and conclude that Rider RRS is unlawful under that statute.

Assignment of Error No. 6: The Commission's Failure to Find That Rider RRS Violates R.C. 4905.22 as an Unreasonable Charge was Unreasonable and Unlawful.

R.C. 4905.22 requires that “[a]ll charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable . . . and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service” As the Commission acknowledged, Intervenor P3/EPSC and Exelon objected that Rider RRS violates R.C. 4905.22 as an unreasonable charge.⁵⁴ The Commission did not expressly address this objection but appeared to implicitly reject it—a reason alone that supports reversal. *See* R.C. 4903.09 (requiring the commission to explain its decision and identify, in sufficient detail to enable review, the record evidence upon which its orders are based); *In re Comm. Rev. of Capacity Charges of Ohio Power Co.*, Slip Opinion No. 2016-Ohio-1607, ¶ 52 (“AEP is correct that the commission failed to address its argument in any substantive manner. Accordingly, we remand the cause to correct this error.”). On rehearing, the Commission should address this question and find that Rider RRS violates R.C. 4905.22.

1. Rider RRS Is an Unreasonable Charge Because it Shifts Significant Risk From FES to Ratepayers

Rider RRS, based on a contract between FirstEnergy and its affiliate FES that was not the result of any sort of competitive process, is an unreasonable and unlawful charge that saddles FirstEnergy’s ratepayers with significant risk while awarding FES with its costs and a return on and of equity. While the Commission concluded that Rider RRS will result in a projected \$255.5

⁵⁴ Opinion and Order at 102.

million net credit to customers over the eight years of Rider RRS,⁵⁵ credible testimony offered by the intervenors in this proceeding, such as analysis by P3/EPSC witness Kalt, showed that if FirstEnergy's forecast was revised through small adjustments to NYMEX natural gas prices, the projected impact of Rider RRS to ratepayers would have been a net present value loss of \$858 million.⁵⁶ Even Staff witness Choueiki acknowledged that he has zero level of comfort in a forecast past three years.⁵⁷ The only thing that is certain: Rider RRS will result in a charge during its first two years.⁵⁸ Exposing ratepayers to guaranteed charges during the first two years, and a serious risk of charges during the remainder of ESP IV is unreasonable, unlawful and violates R.C. 4905.22.

2. *Rider RRS is an Unreasonable Charge Because the Commission Failed to Mitigate the Risks That Rider RRS Poses to Ratepayers*

The transfer of a real and substantial risk to FirstEnergy's ratepayers through Rider RRS is patently unreasonable. But it is even more egregious because even if the Commission believed (wrongly) that Rider RRS is more likely than not a benefit to ratepayers, it could have mitigated (at least in part) the serious risks that Rider RRS poses. That it failed to take such mitigation measures further demonstrates that Rider RRS is unreasonable under R.C. 4905.22.

One mitigating measure would have been to impose a dollar cap on Rider RRS charges, similar to what the Commission imposes in rate discount arrangements filed under R.C. 4905.31.⁵⁹ This could have conclusively avoided the possibility of customers paying a charge in excess of \$800 million, as Dr. Kalt's adjustment to FirstEnergy's forecast indicates will be the likely result of Rider RRS.

⁵⁵ *Id.* at 85.

⁵⁶ P3/EPSC Ex. 12 at 17.

⁵⁷ Tr. Vol. 30 at 6258.

⁵⁸ Opinion and Order at 108.

⁵⁹ See, e.g., *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company*, Case No. 09-119-EL-AEC, Opinion and Order, at 9 (July 15, 2009).

The Commission did concede that “even the most reliable projections may be proven wrong”⁶⁰ and imposed a limitation that for the first two years of Rider RRS, average customer bills do not increase as compared to average customer bills for the period of June 1, 2015 through May 31, 2016, taking into account any seasonal rate differential and any over and under recoveries of Rider RRS for prior periods.⁶¹ But this “limitation” is itself unreasonable, as it is difficult to decipher, and at any rate, fails to sufficiently protect ratepayers against Rider RRS. First, during the first two years of the ESP IV, all estimates show that Rider RRS will be a charge,⁶² and therefore, the alleged protection be accorded by this “limit” is dependent on how different the average customer bills from the 2015/2016 period are to bills during the first two years of ESP IV. Moreover, the “limit” does not cover the remaining six years of ESP IV, notwithstanding the substantial risk of charges in those years. Finally, FirstEnergy has the ability to defer any amount not recovered under Rider RRS as a result of this “limit” for recover during the second year of ESP IV,⁶³ leaving open the possibility that customers will pay for these costs in the later years of Rider RRS. The Commission’s anemic limitation is grossly inadequate to protect ratepayers against the significant risks of Rider RRS.

The Commission could have also required that the PPA included with the Rider RRS mechanism be obtained through competitive bidding. As discussed in Assignment of Error No. 2, above, competitive bidding is strongly favored by Ohio law and public policy, and would have resulted in offers that are much more favorable than the terms of the PPA between FirstEnergy and FES.

⁶⁰ Opinion and Order at 86.

⁶¹ *Id.*

⁶² Opinion and Order at 108.

⁶³ *Id.*

The Commission's failure to implement reasonable mechanisms to blunt the potential harm of Rider RRS is further evidence that Rider RRS is unreasonable and contravenes R.C. 4905.22.

C. The Commission's Oversight Over Rider RRS is Insufficient.

Assignment of Error No. 7: The Commission's Finding That its Oversight Over Rider RRS is Sufficient was Unreasonable and Unlawful.

The Commission found that in order for the Stipulation to be valid under its *AEP Ohio ESP III* order, the Commission must possess "rigorous" oversight over Rider RRS.⁶⁴ The Commission found that this requirement was satisfied with regard to Rider RRS.⁶⁵ The Commission did note that it "disagree[d] with claims that this review is inadequate or illusory"⁶⁶ but the Commission failed to substantively address the objections of intervenors, including Dynegy, that the Commission's oversight of Rider RRS was inadequate to protect ratepayers and the public interest. *See In re Comm. Rev. of Capacity Charges of Ohio Power Co.*, Slip Opinion No. 2016-Ohio-1607, ¶ 52 (noting that Commission's failure to address objection in substantive manner is grounds for remand). On rehearing, the Commission should address these objections and modify its decision to enhance its oversight over Rider RRS.

The Stipulation (provision V.B.3.a) contains the parameters of the Commission's "rigorous" review process over Rider RRS.⁶⁷ The Commission's oversight consists of an initial Staff audit as to calculation verification, followed by a Commission review of the costs included in Rider RRS.⁶⁸ This is only a financial audit, not a substantive review or oversight over

⁶⁴ Opinion and Order at 88.

⁶⁵ *Id.* at 89.

⁶⁶ *Id.*

⁶⁷ FirstEnergy Ex. 154 at 8.

⁶⁸ FirstEnergy Ex. 7 at 14.

FirstEnergy's activities under the PPA. Equally troubling is that the Commission's oversight is limited solely to FirstEnergy; it has no oversight over FES.⁶⁹

Furthermore, the Commission cannot audit legacy costs that will be included in Rider RRS, which are conclusively deemed as "not unreasonable costs."⁷⁰ These legacy costs, no matter how vaguely identified or manifestly unreasonable, will be outside of the Commission's review. Additionally, the Stipulation restricts the Commission from unilaterally disallowing costs as FirstEnergy is permitted to object to any recommendation for cost disallowance through a hearing appealable all the way through resolution at the Supreme Court.⁷¹

This level of oversight is insufficient to safeguard against the risk of Rider RRS. Even though the Staff reversed its position about Rider RRS after the first phase of the hearing closed, Staff witness Dr. Choueiki's testimony is instructive on this issue. Dr. Choueiki concluded that "[FirstEnergy] and FES did not commit to a rigorous Commission oversight of Rider RRS."⁷² He found FirstEnergy's commitment "vague" and noted that it "does not satisfy the definition of a rigorous Commission oversight."⁷³ Dr. Choueiki recommended that to address these inadequacies, FirstEnergy *and FES* should accept that all future cost components (fixed and variable) will be audited annually by Staff (or by an outside consultant representing Staff) and that FirstEnergy *and FES* should accept the Commission's finding to the extent there is a disagreement between the Companies *or FES* and Staff and a hearing is conducted.⁷⁴ Disregarding Dr. Choueiki's recommendation, the Third Supplemental Stipulation and Recommendation (which followed this testimony) does not provide for oversight of FES.⁷⁵

⁶⁹ Tr. Vol. 36 at 7702-7703.

⁷⁰ FirstEnergy Ex. 7 at 14.

⁷¹ Tr. Vol. 36 at 7739.

⁷² Staff Ex. 12, Direct Testimony of Hisham M. Choueiki, at 12.

⁷³ *Id.* at 13.

⁷⁴ *Id.* at 16.

⁷⁵ Tr. Vol. 36 at 7702-770; FirstEnergy Ex. 154 at 8.

Further on the topic of FES, the Stipulation provides that as the Commission conducts its review, it will be provided with FES' fleet information on any cost component, but such information shall only be provided upon a "reasonable request" by Staff.⁷⁶ This assures that no "full" information sharing will occur. Rather, the Staff will need to know what to ask for in advance in order to be entitled to information under the Stipulation. This loophole creates the serious risk that a plethora of documents will not be part of the so-called "rigorous" review simply because the Staff did not know to ask for it.

The Commission's current level of oversight is unreasonable and inadequate to protect FirstEnergy's customers from the risks of Rider RRS. On rehearing, the Commission should specifically address these objections and modify its Opinion and Order to enhance its level of oversight over Rider RRS.

D. The Stipulation (Including Rider RRS) does not Benefit Ratepayers and is not in the Public Interest Under the Commission's Three-Prong Test for Stipulations.

In order for the Stipulation to satisfy the Commission's three-prong test, the Stipulation must, among other matters, benefit ratepayers and be in the public interest.⁷⁷ The Opinion and Order erroneously concludes that the Stipulation does benefit ratepayers and favors the public interest.⁷⁸ However the Stipulation (including Rider RRS) fails to benefit ratepayers and does significant harm to the interest of the Ohio public in maintaining and participating in competitive electricity markets. The evidence introduced by Dynegy and the other intervenors firmly established that Rider RRS is not necessary to address rate volatility, and that its supposed economic benefits are essentially illusory. For the reasons that follow, the Commission's finding that the Stipulation advanced the interests of ratepayers and is in the public interest is

⁷⁶ FirstEnergy Ex. 154 at 8.

⁷⁷ *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.* 68 Ohio St.3d 559, 562 (1994).

⁷⁸ Opinion and Order at 78.

unreasonable and unlawful and should be reversed on rehearing.

Assignment of Error No. 8: The Commission's Failure to Substantively Address Concerns That Rider RRS Threatens Competitive Markets and Impedes the Development of New Sources of Generation in Ohio was Unreasonable and Unlawful.

In finding that the Stipulation (including the Rider RRS) favors the public interest, the Commission failed to substantively address the threats that Rider RRS poses to the wholesale and retail markets. But the substantial evidence in this proceeding establishes that Rider RRS will do significant damage to the wholesale and retail markets. R.C. 4903.09 requires the Commission to explain its decision and identify, in sufficient detail to enable review, the record evidence upon which its orders are based. *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 312 (1987) (R.C. 4903.09 requires the Commission to set forth the reasons for its decisions and prohibits summary rulings and conclusions that do not develop the supporting rationale or record). The Commission was unlawful and unreasonable in ignoring this evidence.

Multiple witnesses testified about the damage that Rider RRS would do to the wholesale markets. Dynegy witness Dean Ellis noted that if approved, the Stipulation would directly impair Dynegy's ability to compete with FirstEnergy and FES in the wholesale markets.⁷⁹ Mr. Ellis explained that in a competitive market environment, merchant generators must carefully control costs, and pay attention to power markets that fluctuate based on weather and economic activity.⁸⁰ These concerns are not shared by a regulated cost-of-service utility, but regulated cost-of-service utilities must strive to keep their costs at rates established by the regulator, which requires rates to be based on units shown to be used and useful.⁸¹ However the

⁷⁹ Dynegy Ex. 1, at 5.

⁸⁰ *Id.* at 6.

⁸¹ *Id.*

Stipulation proposes a hybrid between these concepts, wherein FES will be awarded with the best elements of being an unregulated merchant generator with none of the downsides that come with being a regulated cost-of-service generator.⁸² As a result, FES is guaranteed a competitive market rate of return for years but without the risk of not making that return due to weak sales, increasing costs, or lower-priced competition.⁸³ This would enable FES to “easily engage in market behavior that would distort prices, such as offering its capacity or energy in the market at prices that do not reflect the actual cost of operations, suppressing the market clearing price for owners of other generating units.”⁸⁴

Dr. Joseph E. Bowring, the PJM Market Monitor, concurred, testifying that Rider RRS acts as a “subsidy [which] is inconsistent with competition in the wholesale power markets because of its price suppressive effects.”⁸⁵ These price-suppressive effects arise as a consequence of Rider RRS enabling FirstEnergy to bid into the wholesale marketplace “at less than the competitive offer level.”⁸⁶ He noted that these price-suppressive effects “would make it difficult or impossible for generating units without subsidies to compete in the market.”⁸⁷ This view was also shared by RESA witness Stephen E. Bennett, who concluded that “[w]ith the subsidized, guaranteed return inherent to the Stipulation, both new market entrants and existing asset owners would be put in a situation in which they retain competitive market risk while being forced to compete with the PPA Units which do not have any competitive market risk.”⁸⁸

The harm of Rider RRS extends to the retail markets as well. Mr. Bennett explained that the “competitive electric retail market depends on a robust competitive electric wholesale

⁸² *Id.*

⁸³ *Id.* at 7.

⁸⁴ *Id.* at 8.

⁸⁵ IMM Ex. 2, at 5.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ RESA Ex. 6, at 4.

market” and “[a]ny provision that undermines or erodes the wholesale market will ultimately have a negative impact on the retail market and retail suppliers in that market.”⁸⁹ In the aggregate, Mr. Bennett concluded, Rider RRS “ha[s] the potential to negatively impact the retail market.”⁹⁰

Moreover, Rider RRS could adversely impact SSO supply procurement in Ohio. Historically, FES has been an active participant in wholesale SSO supply procurements.⁹¹ FES’ guaranteed return on certain of its plants could lead FES to potentially participate in the competitive procurements without bidding in a market-reflective manner. That bidding could be at prices that are below market that are then offset by FES with the subsidy it is receiving via Rider RRS. The uncertainty caused by FES’ reduced incentive to make market-based bids could distort the outcome of the SSO competitive procurements.

Finally, Rider RRS could discourage the siting of new generation in Ohio. Dr. Bowring noted that “[s]uch 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.”⁹² Similarly, Mr. Ellis observed that “the subsidy will act as a barrier to new market participants who must put their own capital at risk to build or purchase generation units with no guaranteed rate of return to compete against the FES subsidized units.”⁹³

The Commission failed to substantively address the concerns Dr. Bowring and the other witnesses raised concerning the price-suppressive effects of Rider RRS. The Commission did note that FirstEnergy will bear the burden of proof at its annual prudency reviews of

⁸⁹ *Id.* at 5.

⁹⁰ *Id.*

⁹¹ Exelon Ex. 1 at 14.

⁹² IMM Ex. 2, First Supplemental Testimony of Joseph E. Bowring at 5.

⁹³ Dynegy Ex. 1, Direct Testimony of Dean Ellis at 6.

demonstrating that its bidding behavior is prudent and in the best of interest of retail ratepayers.⁹⁴ But this annual review is simply inadequate to protect against the corrosive effects of Rider RRS on the wholesale market, especially because the annual review only applies to the year of cost recovery. In other words, FirstEnergy's capacity bids will not be reviewed until after the delivery year. Given this one-year delay and the three-year delay between a capacity auction and its corresponding delivery year, FirstEnergy's price-suppressive bidding behavior will send out pricing signals that will deter investment in new Ohio generation *four years* prior to the Commission's review of such bidding behavior. By then, the damage to the PJM market and the price signals it sends will have already been done.

For the foregoing reasons, the Commission should find on rehearing that the Stipulation, including Rider RRS, does not benefit ratepayers and is not in the public interest.

Assignment of Error No. 9: The Commission Ignored Evidence That the Sammis, Davis-Besse, and OVEC Plants are not Closing.

Throughout this case, FirstEnergy has claimed that Rider RRS is needed to avoid the closure of the Sammis, Davis-Besse and OVEC plants. FirstEnergy argued in its brief, for example, that with respect to Sammis and Davis-Besse, it "may not be financially able to bear the short-term losses associated with [these plants]" and in the absence of Rider RRS, "the future of these financially challenged plants is uncertain."⁹⁵ And if Sammis and Davis-Besse prematurely closed, FirstEnergy threatened that a parade of horrors would ensue, including a loss of 2,700 jobs, and an impact to the economy of \$1.1 billion per year, as well as triggering the need to increase electricity prices to cover \$1.7 to \$4.1 billion associated with necessary transmission upgrades.⁹⁶

⁹⁴ Opinion and Order at 91.

⁹⁵ FirstEnergy Initial Brief at 29.

⁹⁶ *Id.*

In its decision, with regard to Sammis and Davis-Besse, the Commission summarily concluded that “both plants are at a serious risk of closure.”⁹⁷ It also found that “in the event of plant closure, substantial transmission investments would be necessary”⁹⁸ and noted that “[t]he economic impact of plant closure and the impact on local communities is of concern to the Commission.”⁹⁹ The Commission did not appear to make any specific findings as to whether FirstEnergy’s 4.85 percent entitlement from OVEC is also at peril.

But the Commission simply ignored the considerable evidence in this proceeding that the OVEC, Sammis and Davis-Besse plants will not close even without Rider RRS. Nowhere in the Opinion and Order did the Commission specifically address this evidence to justify its finding that the plants are at risk of closure without the intervention of Rider RRS. By failing to substantively consider this evidence and address the objection that these plants will not, in fact, close, the Commission committed reversible error. *See In re Comm. Rev. of Capacity Charges of Ohio Power Co.*, Slip Opinion No. 2016-Ohio-1607, ¶ 52 (noting that Commission’s failure to address objection in substantive manner is grounds for remand). On rehearing, the Commission should address the probative evidence that Sammis, Davis-Besse and the OVEC plants will not close and reject Rider RRS.

First, with respect to FirstEnergy’s OVEC entitlement, the record is clear that FES on its own cannot close the OVEC plants as its entitlement share is less than five percent and there are multiple other owners (called sponsoring companies) who would have to agree.¹⁰⁰ Also,

⁹⁷ Opinion and Order at 99.

⁹⁸ *Id.* at 87.

⁹⁹ *Id.* at 88.

¹⁰⁰ Tr. Vol. 2 at 405, 407.

FirstEnergy witness Mikkelsen reluctantly conceded that there is greater certainty with respect to the continued operation of the OVEC plants.¹⁰¹

As to Davis-Besse and Sammis, the Companies pointed to historical profit/loss information for the plants to support their claim that FES may close the Davis-Besse and Sammis plants in the short-term.¹⁰² That evidence is insufficient to show that those two plants are in financial need, especially as FirstEnergy witness Don Moul testified repeatedly that a plant retirement decision is based on a snapshot of one year, looking at whether the plant is recovering its avoidable cost going forward and taking the cost of any necessary future capital expenditures, and overlaying that information with the balance sheet of the company.¹⁰³

The record of the Davis-Besse and Sammis plants' going forward costs and revenues demonstrates that those plants will not close as testified to by P3/EPSC witness Kalt¹⁰⁴ and confirmed by FirstEnergy's witness Moul.¹⁰⁵ That explains why FES has not announced that either of the plants are retiring and why FES continues to invest in both plants.¹⁰⁶ The investments include a steam generator for Davis-Besse, a 600 million dollar project,¹⁰⁷ which as Mr. Moul said was a once in a lifetime event for a nuclear facility.¹⁰⁸ All of this evidence demonstrates that Davis-Besse and Sammis will not close in the near term.

The plants will also receive a significant revenue boost through PJM's new capacity performance program. PJM has run a Base Residual Auction for delivery year 2018/2019, a transition auction for delivery year 2016/2017 and a transition auction for delivery year

¹⁰¹ *Id.* at 407.

¹⁰² FirstEnergy Initial Brief at 125.

¹⁰³ Tr. Vol. 32 at 6630.

¹⁰⁴ P3/EPSC Ex. 2 at 42-44.

¹⁰⁵ Tr. Vol. 10 at 2202.

¹⁰⁶ P3/EPSC Ex. 1 at 41.

¹⁰⁷ Tr. Vol. 32 at 6606.

¹⁰⁸ Tr. Vol. 10 at 2200.

2017/2018 under the capacity performance design.¹⁰⁹ The result was a significant increase in capacity prices for all capacity resources in PJM and particularly for capacity resources in the western part of PJM, including Ohio.¹¹⁰ The implementation of capacity performance, as intended, has resulted in generators receiving millions of dollars in additional revenue, in exchange for higher expectations around performance during extreme system events.¹¹¹

The evidence in the record demonstrates that the Davis-Besse, Sammis and OVEC plants are not in financial need and will not close in the near term.¹¹² FES also has the benefit of being the affiliate of a major corporation. As Mr. Moul testified, FirstEnergy Corp. could borrow money to invest in the plants and he did not rule out FirstEnergy Corp. financing any necessary capital investments in the plants if Rider RRS was not approved.¹¹³ The Commission was unreasonable and unlawful in simply ignoring this evidence and summarily finding that these plants will close without the aid of Rider RRS. On rehearing, the Commission should address this evidence and conclude that Sammis, Davis-Besse, and the OVEC plants are not at risk of retirement, whether or not Rider RRS is approved.

Assignment of Error No. 10: The Commission's Finding That Rider RRS Promotes Fuel Diversity was Unreasonable and Unlawful.

During these proceedings, FirstEnergy argued that “maintaining adequate generation resource diversity is important to avoid potential catastrophic reliability issues related to over-reliance on any single class of generation, such as natural gas generation.”¹¹⁴ Without addressing the evidence introduced by the intervenors on this issue, the Commission accepted FirstEnergy’s

¹⁰⁹ IMM Ex. 2 at 3.

¹¹⁰ *Id.*

¹¹¹ *See e.g.* Tr. Vol. 9 at 1986-1987.

¹¹² *See e.g.* Tr. Vol 9 at 1984 (Lisowski); Tr. Vol. 13 at 2815 (Ruberto); Tr. Vol. 11 at 2432-2433 (Moul); P3/EPSC Ex. 2 at 42-44 (Kalt).

¹¹³ Tr. Vol. 10 at 2199.

¹¹⁴ Opinion and Order at 54.

argument, finding that Rider RRS will encourage resource diversity by supporting existing coal-fired and nuclear generation (i.e., the Sammis and Davis-Besse plants).¹¹⁵

The Commission's finding hinges on the assumption that Sammis and Davis-Besse will close without Rider RRS. But, as discussed above, this assumption is belied by the evidence: Sammis and Davis-Besse will not close, regardless of whether Rider RRS is approved. Moreover, whether or not these plants close, the Commission failed to address intervenors' position that Sammis and Davis-Besse are not necessary for adequate resource diversity. As Dynegy noted in its reply brief, there is no evidence that the closure of Sammis or Davis-Besse will have a significant impact on fuel diversity in Ohio.¹¹⁶ Rather, as Dr. Choueiki's testimony shows, Ohio's generation mix consists of approximately 68 percent coal, 17 percent natural gas, and 12 percent nuclear as of November 2014, meaning that if Sammis and Davis-Besse closed, Ohio's generation mix would still tilt predominantly toward coal.¹¹⁷ P3/EPSCA witness Dr. Kalt agreed with this view, noting that "it would take a significant shift toward natural gas resources to materially change the proportion of coal-fired resources."¹¹⁸ As for nuclear diversity, PJM has approximately 30,000 megawatts of installed nuclear capacity of which Davis-Besse is only approximately 3.0 percent.¹¹⁹ Because Sammis and Davis-Besse will not close, and also because fuel diversity would be assured with or without these plants, the Commission's findings that Rider RRS is justified by fuel diversity concerns is unreasonable and unlawful.

Assignment of Error No. 11: The Commission's Finding That Rider RRS Promotes Grid Reliability was Unreasonable and Unlawful.

FirstEnergy also tried to sell Rider RRS as promoting grid reliability, based on the on-site

¹¹⁵ *Id.* at 87.

¹¹⁶ Dynegy, Reply Brief at 6.

¹¹⁷ Tr. Vol. 30 at 6206.

¹¹⁸ P3/EPSCA Ex. 1 at 37.

¹¹⁹ Tr. Vol. 17 at 3503 to 3504.

fuel storage capacities of their PPA plants and close proximity of the plants to FirstEnergy's load.¹²⁰ Conversely, FirstEnergy argued, if those plants closed, investments in the transmission system ranging from \$400 million to \$1.1 billion would need to be made to maintain reliability.¹²¹ Here too, the Commission agreed, accepting that these transmission upgrades would be necessary "in the event that Sammis and Davis-Besse were to close."¹²²

As with FirstEnergy's claims concerning generation diversity, the notion that grid reliability is imperiled without Rider RRS rests entirely on the premise that Sammis and Davis-Besse will close. But, as discussed above, the Commission ignored considerable evidence that Sammis and Davis-Besse *will not close* regardless of Rider RRS. Additionally, FirstEnergy is not the only contributor to grid reliability in Ohio. Dynegy, for example, owns approximately 2,700 megawatts of baseload coal-fired generation in Ohio, further refuting the notion that grid reliability in Ohio hinges on Sammis and Davis-Besse.¹²³

Also, as Dynegy has emphasized in these proceedings, the overall responsibility for monitoring and maintaining grid reliability rests not with FirstEnergy or the Commission, but with PJM.¹²⁴ Among PJM's duties are to coordinate and direct the operation of the transmission grid and plan transmission expansion improvements to maintain grid reliability in the PJM region.¹²⁵ New generators must go through PJM's interconnection process, which addresses any needed transmission upgrades.¹²⁶ For units that may be deactivated, PJM has a process for studying grid reliability and can provide a Reliability Must Run ("RMR") contract for any units

¹²⁰ Opinion and Order at 58 (summarizing arguments).

¹²¹ *Id.* at 55 (summarizing arguments).

¹²² *Id.* at 87.

¹²³ FirstEnergy Ex. 184 at 103-104.

¹²⁴ Dynegy, Reply Brief at 8.

¹²⁵ FirstEnergy Ex. 76, Quarterly State of the Market Report for PJM: January through June, at page 3.

¹²⁶ *See e.g.* Interconnection Service Agreement Among PJM Interconnection, LLC and Carroll County Energy LLC and AEP Ohio, Inc., Sierra Club Ex. 59 (administrative notice taken, Tr. Vol. 16 at 3411).

determined necessary to maintain reliability.¹²⁷ Mr. Moul acknowledged that FirstEnergy would be willing to consider an RMR for the Davis-Besse or Sammis plants, should the need arise.¹²⁸ Other existing mechanisms already support grid reliability in Ohio and given its risks to ratepayers, Rider RRS simply cannot be justified on these grounds. The Commission's summary conclusion that Rider RRS promotes grid reliability failed to substantively address any of these evidentiary points. On rehearing, the Commission should evaluate this evidence and find that the record does not justify Rider RRS on grounds of promoting grid reliability.

Assignment of Error No. 12: The Commission's Finding That Rider RRS Promotes Retail Rate Stability was Unreasonable and Unlawful.

As discussed above, the Commission found that Rider RRS will, "in theory," have the effect of stabilizing or providing certainty regarding retail electric service."¹²⁹ The Commission made this finding in connection with its (erroneous) finding that Rider RRS satisfies the requirements of R.C. 4928.143(B)(2)(d).

The Commission also appeared to find stability is a benefit to ratepayers and is in the public interest under its three-prong test for stipulations.¹³⁰ But as discussed in Assignment of Error No. 3, above, the Commission ignored evidence that Rider RRS will have no positive effect on retail rate stability, and may, in fact, destabilize retail rates. As noted in that discussion, volatility in short-term wholesale power markets does not result in volatility in longer-term retail power markets. Moreover, both SSO and shopping customers are insulated from wholesale market volatility. But Rider RRS may destabilize retail rates as a result of the quarterly reconciliation or "true-up" which may cause wholesale price spikes and charges to reinforce each other, rather than being counter-cyclical. Simply put, ratepayers and the public will not benefit

¹²⁷ Exelon Ex. 1 at 16.

¹²⁸ Tr. Vol. 11 at 2258.

¹²⁹ *Id.* at 109.

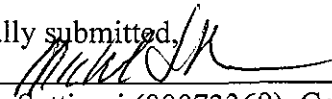
¹³⁰ *Id.* at 109, 113.

from any added retail rate stability as a result of Rider RRS. On rehearing, the Commission should address this issue and conclude that Rider RRS does not benefit ratepayers and is not in the public interest through its claimed ability to enhance retail rate stability.

III. CONCLUSION

For the foregoing reasons, the Commission should grant this Application of Rehearing and reject the Stipulation and Rider RRS.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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