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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**

APPLICATION FOR REHEARING OF THE RETAIL ENERGY SUPPLY ASSOCIATION

PUBLIC VERSION

April 29, 2016

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code, the Retail Energy Supply Association ("RESA")[1] submits this Application for Rehearing of the March 31, 2016 Opinion and Order issued by the Public Utilities Commission of Ohio ("Commission") in this matter. RESA is a party to this proceeding and actively participated in all phases of the proceeding.

RESA files this Application for Rehearing because the Commission's March 31, 2016 Opinion and Order is unreasonable and unlawful in the following respects:[2]

GENERAL

1. The Commission's approval of Rider RRS is unreasonable and unlawful because it represents a reversal by the Commission from the General Assembly's legislative directives to promote competition, a reversal that is solely intended to benefit the utility's affiliate at the expense of ratepayers.

LEGAL AUTHORITY

2. The Commission erred in finding, as a matter of law, that Rider RRS constitutes "terms, conditions, or charges," as required by R.C. 4928.143(B)(2)(d).

3. The Commission erred in finding, as a matter of law, that Rider RRS constitutes "limitations on customer shopping," as required by R.C. 4928.143(B)(2)(d).

4. The Commission erred in finding, as a matter of law, that Rider RRS, will "have the effect of stabilizing" retail electric service rates, as required by R.C. 4928.143(B)(2)(d).

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[1] The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of more than twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

[2] Several parties in this proceeding have taken the position that a Commission order imposing Rider RRS would be preempted by the Federal Power Act and the Supremacy Clause of the U.S. Constitution. RESA takes no position on those issues before this Commission, and expressly waives its right to have those issues adjudicated by this Commission. Instead, RESA intends to assert such any claims (to the extent applicable to a final order entered by the Commission), only in federal district court.

5. The Commission erred in finding, as a matter of law, that Rider RRS constitutes a program to implement "economic development" under R.C. 4928.143(B)(2)(i).

6. The Commission erred, as a matter of law, in finding that the provisions of the ESP IV, including Rider RRS, do not violate the pro-competition policies of R.C. 4928.02.

7. The Commission erred, as a matter of law, by not addressing and adopting the argument that Rider RRS violates the separation of services requirements of R.C. 4928.03 by merging competitive and regulatory services.

8. The Commission erred, as a matter of law, by not addressing and adopting the argument that the provisions of ESP IV, including Rider RRS, violates the corporate separation requirements of R.C. 4928.17.

9. The Commission erred, as a matter of law, by not addressing and adopting the argument that Rider RRS does not violate R.C. 4905.22 by imposing an unreasonable charge that includes an unknown future charge for unknown market risk.

STIPULATION TEST

10. The Commission erred, as a matter of law, in using its version of an earlier three-prong test to decide whether the Stipulation in this matter should be approved.

11. The Commission erred, as a matter of law, in finding that the reasonableness of a stipulation is not affected by the fact that millions of dollars in favors were traded to the signatories to obtain their consent to the Stipulation.

12. The Commission erred in finding, as a matter of law, that the reasonableness of a stipulation is not affected by the existence of side deals with signatories.

13. The Commission erred by affording undue weight to the Stipulation when it does not qualify as a true Stipulation.

14. The Commission erred in finding, as a matter of law, that a stipulation is reasonable if it is beneficial "as a package," regardless of the nature and extent of the harmful effects of its individual components.

15. The Commission erred, as a matter of law, in finding that FirstEnergy's unenforceable "commitments" regarding resource diversity are evidence that the Stipulation benefits ratepayers and the public interest.

RIDER RRS PROJECTIONS AND RATES

16. The Commission erred when it approved Rider RRS on the basis of highly uncertain financial projections that it believed were "better" than financial projections presented by other witnesses, without regard to whether they were sufficiently reliable to meet FirstEnergy's burden of proof.

17. The Commission erred when it approved Rider RRS on the basis of highly uncertain financial projections without addressing the need for or adopting annual and aggregate limits on the charges that can be imposed on ratepayers.

18. The Commission erred when it approved Rider RRS without providing a coherent formula for calculating the limitations on average customer bills that it provides during the first two years of Rider RRS.

19. The Commission erred in finding that the financial projections by witness Rose are reliable.

20. The Commission erred in finding that the financial projections by witness Lisowski are reliable without citing specific record evidence.

21. The Commission failed to consider all of witness Kalt's analyses and erred in finding that witness Kalt's sensitivity analysis was not reliable.

22. The Commission erred in finding that it could properly ignore downward price trends in the price of natural gas in evaluating the reliability of financial projections.

23. The Commission erred in finding that it is proper to average contradictory financial projections by two witnesses, who disagree as to whether Rider RRS will produce a charge or a credit to ratepayers, and to predict on that basis that Rider RRS will result in a net credit to ratepayers over its eight-year term.

PROTECTIONS FROM RIDER RRS

24. The Commission erred in finding that a two-year limit on rate increases related to Rider RRS will "protect customers" from price fluctuations.

25. The Commission erred in finding that short-term harmful effects of Rider RRS on customers' bills can be ignored if they are somehow outweighed by later positive effects.

OTHER ERRORS

26. The Commission erred in assuming that the Sammis and Davis-Besse plants will close unless Rider RRS is approved without addressing evidence to the contrary.

27. The Commission erred in finding that the provisions of ESP IV including Rider RRS will promote economic development.

28. The Commission erred in finding that Rider RRS will provide rate stability.

29. The Commission erred in finding that Rider RRS does not provide an anti-competitive subsidy to FirstEnergy's affiliate.

30. The Commission erred in finding that ESP IV is more favorable in the aggregate than the expected results of an MRO.

31. The Commission erred in failing to order that FirstEnergy must return all of the amounts it collects from customers under Rider RRS if Rider RRS is invalidated.

32. The Commission erred in approving Rider RRS and allowing the collection of generation costs from customers based on a power purchase agreement that was not produced by a competitive process.

33. The Commission erred in approving Rider RRS and recovery of legacy costs because it will allow FirstEnergy to recover transition revenues or any equivalent revenues in violation of R.C. 4928.38.

34. The Commission erred in approving the Stipulation's severability provision that does not require a refund if Rider RRS is invalidated and that only applies the severability provision if a court of competent jurisdiction invalidates Rider RRS.

35. The Commission not only erred in approving Rider RRS, it also erred in allowing the rider to be effective as of June 1, 2016.

COMPETITIVE RETAIL MARKET ISSUES

36. The Commission erred by failing to explicitly rule on the Stipulation to expand Rider NMB to include PJM line items 1375 and 1218.

37. The Commission erred by failing to require an "action agenda" from FirstEnergy to ensure that necessary data and information (i.e., interval data, PLCs, etc.) will be provided to CRES providers, while allowing the utilities to continue and expand the time-of-use service offerings.

38. The Commission erred by failing to establish a stakeholder collaborative for the web portal implementation process.

39. The Commission erred by failing to require implementation of a purchase of receivables program in the FirstEnergy service territories.

40. The Commission erred in failing to find that the Rider NMB pilot and the High Load Factor Time-of-Use service violate R.C. 4928.02(A) because they are unduly discriminatory and unjust.

41. The Commission erred in adopting the Rider NMB Pilot as it is poorly designed.

42. The Commission erred in adopting the HLF/TOU service as its pricing is so ambiguous that the evidence does not demonstrate that it will benefit ratepayers and the public interest.

43. The Commission erred in approving the Federal Advocacy section of the Stipulation, which obligates the Commission to "solicit comments from interested parties no later than October 30, 2017 * * *" because the stipulating parties have no authority to bind the Commission.

44. The Commission erred in adopting the Stipulation, which purports to freeze distribution rates for the term of the electric security plan (except to allow the filing of a transition to the straight-fixed variable cost recovery mechanism for changing residential customers' base distribution rates during the term), and then ordering a rider and the filing of an application to unbundle SSO costs from base distribution rates during the term.

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

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. Introduction

On March 31, 2016, the Public Utilities Commission of Ohio ("Commission") incorrectly approved the Retail Rate Stability Rider ("Rider RRS") proposed by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "FirstEnergy"). In conjunction with Rider RRS, FirstEnergy will implement a wholesale transaction with its affiliate, FirstEnergy Solutions Corp. ("FES") for eight years beginning on June 1, 2016, under which FirstEnergy will purchase the output from the W.H. Sammis plant, the Davis-Besse plant and FES' entitlement to the Ohio Valley Electric Corporation plants at cost plus a return on and of equity (10.38%). FirstEnergy will then sell that power into the PJM Interconnection LLC markets. The net difference between the purchase cost and the PJM revenues/charges will be recovered or returned to FirstEnergy's ratepayers – FirstEnergy will be neutral under this scenario and FES will be guaranteed all of its costs plus a profit for eight years.

The Commission found that the "pass through" of FES' generation costs is permissible under Ohio law and that Rider RRS will benefit FirstEnergy ratepayers. In addition, the Commission incorrectly ruled that the proposed Stipulation and Recommendation[3] (as modified by the Commission) was the product of serious bargaining, will benefit ratepayers and the public interest, and will not violate any regulatory practices or principles. The Commission further concluded that FirstEnergy's fourth electric security plan ("ESP IV") proposal (as modified by

[3] 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, with all the supplements, will be referred to as "the Stipulation."

the Commission) would be more favorable in the aggregate than a market rate offer ("MRO"), despite extensive evidence to the contrary.

The Retail Energy Supply Association ("RESA") respectfully disagrees with the Commission's assessment of Rider RRS, the Stipulation and the MRO test. Rider RRS is contrary to multiple Ohio statutes and cannot be lawfully approved. Compelling evidence demonstrating the harmful and anti-competitive nature of Rider RRS was presented throughout the lengthy hearing by numerous parties. The Stipulation (as modified by the Commission) does not resolve or mitigate the legal and factual failings of Rider RRS. Rider RRS also is not an economic development mechanism. Furthermore, the qualitative and quantitative benefits of the ESP IV do not outweigh the benefits of an MRO.

The Commission not only unlawfully and unreasonably implemented Rider RRS, it failed to rule on several issues of concern to the competitive retail market which are:

- Billing line items for FirstEnergy's non-market-based services rider ("Rider NMB") – A direct ruling is necessary and highly time sensitive because competitive retail electric service ("CRES") providers will have to implement a number of changes with PJM to adjust the billing responsibility for PJM costs for the June 2016 start of the ESP IV if FirstEnergy's request is approved. That request, however, should not be granted. In particular, FirstEnergy has asked to take responsibility for costs in PJM line items 1375 (Balancing Operating Reserve) and line item 1218 (Planning Period Congestion Uplift), among others, and then recovering those costs from ratepayers through Rider NMB. These specific requests would result in the utility being assigned <u>market-based</u>

costs and then socializing those costs among its ratepayers via Rider NMB, rather than maintaining the responsibility for the recovery of those costs with the competitive market (load-serving entities) as it has been appropriately. These specific requests would also create the opportunity for load-serving entities to "game the system" improperly. Placing market-based costs in the non-market-based recovery mechanism for cost-recovery is unjust and unreasonable, and should be rejected outright.

- An "action agenda" to ensure that necessary data and information is provided to CRES providers should be implemented.
- A stakeholder collaborative should be established to assist with an efficient and effective implementation of a web portal for CRES providers to have access to data.
- A purchase of receivables program should be established in FirstEnergy's service territories.

The Commission also erroneously dismissed objections to two exclusive and ill-designed pilots (Rider NMB Opt-Out Pilot and High Load Factor Time of Use Program) that will be created as a result of the Stipulation, while allowing itself to be bound to what the stipulating parties agreed – requiring the Commission to solicit comments if a longer term capacity program is not approved, rather than exercising its own judgment. Lastly, the Commission adopted a distribution rate freeze for eight years, but also approved the filing of distribution rate changes (straight-fixed variable cost recovery for residential customers and an unbundling of standard service offer ("SSO") costs). It is unclear how FirstEnergy's distribution rates will be frozen with such upcoming, rate-related changes.

As detailed below, the Commission should reverse its decision, reject Rider RRS and the Stipulation, specifically rule on the above-noted issues of concern to the competitive retail market, and reject the two exclusive and ill-designed pilots. Lastly, as the Commission has done previously, the Commission should clarify (a) that the stipulation does not bind the Commission and (b) that the unbundling of SSO costs is separate and apart from the distribution rate changes and freeze.[4]

II. Argument

As presented, RESA raises assignments of error that fall under the following arguments:

- The Commission has not properly evaluated the Rider RRS proposal or the Stipulation;
- Rider RRS is not authorized by Ohio law and violates several Ohio statutes;
- Application of the Commission's three-prong test was erroneous;
- The projection of Rider RRS presented by FirstEnergy is not reliable;
- The underlying plants are not at serious risk of closure;
- Rider RRS will not promote economic development;
- Rider RRS will not provide rate stability;
- Rider RRS is an anti-competitive subsidy;
- The ESP IV will not be more favorable in the aggregate than a Market Rate Offer;
- The Commission should grant rehearing to ensure customer refunds, to provide for competitive bidding, and to ensure compliance with Ohio policy on promoting competition;

[4] Several parties in this proceeding have taken the position that a Commission order imposing the Rider RRS would be preempted by the Federal Power Act and the Supremacy Clause of the U.S. Constitution. RESA takes no position on those issues before this Commission, and expressly waives its right to have those issues adjudicated by this Commission. Instead, RESA intends to assert such any claims (to the extent applicable to a final order entered by the Commission), only in federal district court.

- The Commission should grant rehearing to ensure no prohibited collection of transition revenues, to ensure proper severability and to delay the effective date of Rider RRS;

- A ruling must be made on four issues of concern to the competitive retail market, including the time-sensitive issue of responsibility for certain PJM billing line items;

- The two new exclusive and ill-designed programs should be rejected; and

- The Commission should clarify (a) that the stipulation does not bind the Commission and (b) the interplay between the distribution rate changes and freeze.

A. The Commission has not properly evaluated the Rider RRS proposal or the Stipulation.

Assignment of Error No. 1:

The Commission's approval of Rider RRS is unreasonable and unlawful because it represents a reversal by the Commission from the General Assembly's legislative directives to promote competition, a reversal that is solely intended to benefit the utility's affiliate at the expense of ratepayers.

For more than 10 years, the Commission has been transitioning Ohio's electric distribution utilities toward a fully competitive retail-market construct.[5] The Staff had found that AEP Ohio's OVEC-only PPA proposal would be a step backwards in the Commission's goal to transition Ohio Power Company to a fully competitive market.[6] Multiple parties in this proceeding argued similarly that FirstEnergy's PPA proposal and Rider RRS will also "reverse course" for Ohio, taking it away from the competitive generation regulatory environment and moving it back to the traditional regulatory scheme that existed before 1999.[7]

The Commission disagrees, and as a result of the Commission's March 31, 2016 decision in this matter, FirstEnergy's regulated service will now include Rider RRS, which the

[5] Staff Ex. 12 at 7.
[6] *AEP ESP III*, Opinion and Order at 12. Tr. Vol. 30 at 6225-6226.
[7] *See, e.g.*, IMM Ex. 1, Direct Testimony of Joseph E. Bowring, at 3; P3/EPSA Ex. 1, Direct Testimony of Joseph P. Kalt, at 8.

Commission claims will benefit consumers. The uncontroverted evidence, however, establishes that the driving force behind FirstEnergy's application in this proceeding is not FirstEnergy or its customers. FES formulated a proposal in early 2014, after Ohio Power Company made its initial PPA proposal to the Commission.[8] FES' Vice President of Commodity Operations, Donald Moul,[9] reviewed the structure of the Ohio Power Company proposal, and because he knew that FirstEnergy would be filing an ESP shortly, "looked to see if there was something [FES] could add value to that ESP – and provide some certainty in return for our plants."[10] He then discussed the idea internally at FES, including with FES' president. FES' internal discussions took place in early 2014,[11] and included a review of the profit and loss statements for all its plants taking into consideration "the various range of challenges at the competitive fleets."[12] This case is not about providing customers and Ohio with rate stability, it is about satisfying the utility's affiliate financial needs.

Given that (a) the affiliate is pushing for financial support for the involved plants, (b) Rider RRS is based on a no-bid, non-arms-length agreement between affiliates, (c) FirstEnergy's customers have not asked for this PPA proposal or Rider RRS and (d) numerous customers oppose it,[13] the Commission should have rejected FirstEnergy's skeptical claim that its customers are the "alleged" beneficiaries of Rider RRS, recognizing that this rider is really intended to bolster FirstEnergy's affiliate, FES.

A review of how Rider RRS will function explains that the true benefit of the rider is the significant transfer of market risk to the ratepayers. FES will be able to receive full cost

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[8] Tr. Vol. 11 at 2290; 2351.
[9] Mr. Moul transferred to a new position at the time of hearing, to Senior Vice President, Fossil Operations and Environmental at FirstEnergy Generation, LLC. Tr. Vol. 10 at 2180.
[10] Tr. Vol. 11 at 2290.
[11] Tr. Vol. 11 at 2290.
[12] Tr. Vol. 11 at 2290.
[13] The Commission's docket contains thousands of letters from the public, and the majority of them oppose AEP Ohio's request in this matter.

recovery and a guaranteed return under its contract with FirstEnergy for the entire term and not be subject to the risk of not recovering all those costs when the power is sold into the PJM market.[14] FirstEnergy will pay FES at a rate of "cost plus a return on equity" (10.38%) for the capacity, energy and ancillary services that each plant can provide.[15] The payment and guaranteed return provisions transfer the market risks associated with these plants to FirstEnergy, which in return is going to use Rider RRS to transfer the market risks to its ratepayers. That is not rate stability for ratepayers.

Contrary to the Commission's belief, sufficient rate stability protections for ratepayers exist without Rider RRS. As the Commission found in 2015, there are already existing means by which generation price volatility can be mitigated – the laddering and staggering of SSO auction products and the availability of fixed-price contracts in the market.[16] Additionally, FirstEnergy has in place today numerous riders that adjust periodically to avoid rate volatility *for the services that FirstEnergy provides to its ratepayers* (unlike generation service). These riders are adjusted periodically and capture changes in costs for FirstEnergy's specific services. A few examples are:

- Residential and Non-Residential Deferred Distribution Cost Recovery Riders – recover the actual August 31, 2009 balances related to the post-May 31, 2007, ETP Transition Tax, Line Extension and RCP Distribution deferrals, including applicable interest, until completed. Both are nonbypassble riders, applicable to all ratepayers.

[14] FirstEnergy Ex. 13 at 4-6.
[15] FirstEnergy Ex. 154 at 7.
[16] *AEP ESP III*, Opinion and Order at 24.

- Phase-In Recovery Rider – recovers costs associated with phase-in recovery bonds issued to securitize costs for which the Company was previously authorized recovery. It is a non-bypassable rider.
- Delta Revenue Rider – recovers the difference in revenue ("delta revenue") between the application of rates in the otherwise applicable rate schedule and the result of any economic development schedule, energy efficiency schedule, reasonable arrangement, or governmental special contract. It is a non-bypassable rider.
- Delivery Capital Recovery Rider – recovers costs associated with delivery plant investments. It is a non-bypassable rider.

FirstEnergy's ratepayers do not need another rider to allegedly provide rate stability – especially when the record evidence establishes that Rider RRS is for the benefit of the utility's affiliate.

In sum, this Commission erred in changing the regulatory landscape for generation service by imposing, via Rider RRS, substantial risks and potentially billions of dollars on FirstEnergy ratepayers for the purpose of supporting its affiliate's financial needs, which inure to the benefit of the corporate shareholders. The Commission's decision is a clear departure from the General Assembly's legislative directives to promote competition, and the Commission has cited no record evidence supporting another rider for alleged rate stability. The Commission acted unreasonably and unlawfully in approving Rider RRS.

B. Rider RRS is not authorized by Ohio law and violates several Ohio statutes.

Assignment of Error No. 2:

> **The Commission erred in finding, as a matter of law, that Rider RRS constitutes "terms, conditions, or charges," as required by R.C. 4928.143(B)(2)(d).**

The Commission recognized in its Opinion and Order that its legal authority to approve Rider RRS and the other components of ESP IV is provided -- and limited -- by Ohio Revised Code Section ("R.C.") 4928.143(B)(2). (Opinion and Order, at 107.) FirstEnergy claimed that it is authorized by two provisions of that statute, R.C. 4928.143(B)(2)(d) and R.C. 4928.143(B)(2)(i). The Commission agreed. (*Id.*, at 108-110.)

First, the Commission found that Rider RRS will "at times" meet the first requirement of R.C. 4928.143(B)(2)(d), *i.e.*, that it consists of "terms, conditions, or charges" for retail electric service. (Opinion and Order, at 108.) That finding should be reversed on rehearing as a matter of law.

The legal authority provided by R.C. 4928.143(B)(2) extends only to ESP components that are specifically included in the language of the statute. *Columbus Southern Power Co. v. PUCO*, 128 Ohio St. 3d 512, 520, 2011 Ohio 1788, ¶ 32 ("if a given provision does not fit within one of the categories listed 'following' (B)(2), it is not authorized by the statute"). The provisions that are authorized by R.C. 4928.143(B)(2)(d) are expressly limited to "[t]erms, conditions, or charges." The Commission found that the provisions of Rider RRS satisfy this requirement even though it adopted projections showing that Rider RRS will provide a net <u>credit</u> over the term of ESP IV. It also found that Rider RRS will result in "charges" to customers only during the first two years of its eight-year term. (Opinion and Order, at 108.) The Commission nevertheless concluded that the first requirement of R.C. 4928.143(B)(2)(d) is satisfied because "Rider RRS would, at times, consist of a charge to customers." (*Id.*)

This does not satisfy the statutory requirement. Under the forecasts that the Commission deemed reliable, Rider RRS will result in a "charge" only 25% of the time (*i.e.*, the first two years) and result in a credit 75% of the time (*i.e.*, the last six years). Moreover, the total amount of credits will purportedly vastly exceed the total amount of charges over its full term. In addition, Rider RRS could easily vary between charges and credits on a quarterly basis over the eight-year term. The General Assembly authorized provisions that constitute "charges," not payments by the utility to customers. Rider RRS will not be solely a charge, and the Commission should therefore find on rehearing that Rider RRS is not authorized by R.C. 4928.143(B)(2)(d). *See In re Columbus S. Power Co.*, 128 Ohio St.3d 512, ¶ 32 (2011) ("if 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.").

Assignment of Error No. 3:

> **The Commission erred in finding, as a matter of law, that Rider RRS constitutes "limitations on customer shopping," as required by R.C. 4928.143(B)(2)(d).**

The Commission's finding that it has legal authority to approve Rider RRS under R.C. 4928.143(B)(2)(d) should also be reversed on rehearing for another reason. Even if the credits that purportedly will result from Rider RRS could legally be defined as "charges," they are not authorized by the statute unless they "relat[e] to limitations on customer shopping."

The Commission found that Rider RRS meets this second requirement of R.C. 4928.143(B)(2)(d) because it "is a financial limitation on customer shopping for retail electric generation service." (Opinion and Order, at 109.) It conceded that "Rider RRS would impose no physical constraints on shopping," and "would have no impact on customers' physical generation supply." (*Id.*) It nevertheless reasoned that Rider RRS constitutes a "limitation on customer shopping" because, to the extent it provides a credit to customers, it "[e]ffectively would function as a financial restraint on complete reliance on the retail market for the pricing of retail electric generation service." (*Id.*) The Commission found on this basis that "Rider RRS is a financial limitation on customer shopping" pursuant to R.C. 4928.143(B)(2)(d). (*Id.*) This finding is legally incorrect for several reasons, and it should be reversed on rehearing. Even if Rider RRS would moderate unusually high and low prices through customer credits and charges, this would not limit customer shopping and thus does not satisfy R.C. 4928.143(B)(2)(d).

Throughout this proceeding, FirstEnergy has repeatedly insisted that Rider RRS "will have no adverse impact on . . . customers' ability to shop. . . ."[17] FirstEnergy witness Mikkelsen agreed that "the companies' customers' ability to shop for their own energy service would remain unchanged whether or not the proposed transaction were finalized."[18] Moreover, the stipulating parties agreed that Rider RRS "does not in any way limit a customer's ability to shop. . . ."[19]

FirstEnergy testified and argued in its briefs that Rider RRS will not limit shopping, and that the Commission therefore did not have to weigh the harms that would ensue from such a limitation when it determined whether ESP IV is advantageous under the MRO test, and whether it is in the public interest under the three-prong test for stipulations. But if Rider RRS places no limitation on customer shopping, as FirstEnergy argued, then it cannot be authorized under R.C. 4928.143(B)(2)(d).

FirstEnergy witness Mikkelsen admitted that ratepayers will continue to obtain generation service either through the SSO or through contracts with a CRES provider or

[17] FirstEnergy Ex. 1 at 9 (emphasis added).
[18] Tr. Vol. 1 at 39 (emphasis added). *See also* Tr. Vol. 1 at 108.
[19] FirstEnergy Ex. 154 at 18 (emphasis added).

aggregation.[20] Rider RRS will not change any part of that shopping process and will not restrict or otherwise limit customer shopping in any way. Mikkelsen explained that Rider RRS "acts as a financial limitation on the consequence of a customer shopping for generation supply from a CRES provider or from electing to take competitively-sourced generation from the companies as an SSO customer."[21] In other words, Rider RRS does not limit <u>shopping</u>; it has an economic impact on <u>all customers</u>, whether shopping or not, because it is a <u>non-bypassable</u> charge or credit.

Accordingly, the Commission should find on rehearing that Rider RRS does not relate to limitations on customer shopping and therefore is not authorized by R.C. 4928.143(B)(2)(d).

Assignment of Error No. 4:

> **The Commission erred in finding, as a matter of law, that Rider RRS, will "have the effect of stabilizing" retail electric service rates, as required by R.C. 4928.143(B)(2)(d).**

The Commission's finding that it has the authority to approve Rider RRS under R.C. 4928.143(B)(2)(d) should also be reversed on rehearing for a third reason. Even if the Rider RRS charges and credits were considered "charges" that "limit customer shopping," they are not authorized by this statute unless they "would have the effect of stabilizing or providing certainty regarding retail electric service." The Commission found that this statutory requirement was satisfied "since the record reflects that Rider RRS would, in theory, have the effect of stabilizing or providing certainty regarding retail electric service" as "a financial hedging mechanism." (Opinion and Order, at 109.) The Commission erred in making this finding, and it should be reversed on rehearing.

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[20] Tr. Vol. 2 at 342-43.
[21] Tr. Vol. 2 at 342.

FirstEnergy claims that Rider RRS will stabilize retail electric rates by providing credits to customers to offset increases in market-based retail prices; by supporting fuel diversity and asset diversity; by keeping baseload generating plants in operation; and by providing a financial mechanism that will stabilize the retail market when market prices rise.[22] However, the evidence of record in this proceeding supports none of these claims. On the contrary, it shows that Rider RRS will actually result in rate *instability*.

First, current retail markets in Ohio are not unstable and are not at the mercy of fluctuations in wholesale spot market prices. The prices that the majority of retail customers pay for electricity are set by power procurements far in advance of their use of that electricity; retail prices based on these forward market prices are much more stable than day-to-day power prices.[23] The majority of customers already have stable rates that "are not even remotely as volatile as wholesale spot market prices."[24] SSO customers do not experience volatility because they have fixed contracts that are based on periodic blended auctions.[25] Shopping customers' fixed-price contracts can extend for up to three years and may include price discounts for long-term purchases, further stabilizing prices.[26]

The Commission's conclusion that Rider RRS is authorized by R.C. 4928.143(B)(2)(d) because it stabilizes retail electric service rests on two major premises: (1) that the Rider RRS rate will move in the opposite direction of wholesale market prices and provide customers with a counter-cyclical hedge against the wholesale market volatility, and (2) that ratepayers will receive a $561 million credit under Rider RRS over the course of its eight-year term.[27] Both of

[22] Company Ex. 13 at 3.
[23] P3/EPSA Ex. 1 at 11.
[24] P3/EPSA Ex. 1 at 40.
[25] P3/EPSA Ex. 1 at 40; Staff Ex. 12 at 14.
[26] Company Ex. 13 at 13; P3/EPSA Ex. 5 at 26-27; Exelon Ex. 1 at 12-13.
[27] FirstEnergy Ex. 13 at 4-5; Tr. Vol. 2 at 431.

these assumptions are incorrect, and the Commission simply ignores all of the evidence that Rider RRS will not have a stabilizing effect during the ESP IV period.

First, the charges under Rider RRS will not correspond to actual costs. Its initial rate will be calculated based on projected costs and projected revenues, and that rate will remain in effect until it is adjusted.[28] Until it is reconciled, Rider RRS will not fluctuate and thus cannot be "counter-cyclical" of wholesale market prices for as long as the current rate is in effect. It therefore cannot stabilize or provide certainty as to retail rates.

When it is reconciled in each quarter, the Rider RRS rate is once again based on projected costs and projected revenues, but it will also capture the amount that the prior rider rate had not recovered or returned (the "off amount") together with carrying costs.[29] Some portion of every reconciled Rider RRS rate will pick up the historical off amount and carrying costs, and it is impossible to know how much of the reconciled Rider RRS rates will be attributed to them. The Commission therefore cannot simply assume that the reconciled Rider RRS rates will fluctuate in the opposite direction of wholesale market prices. It is impossible to know whether that Rider RRS will stabilize rates in subsequent years, given the nature of the reconciliation process.

FirstEnergy projects that Rider RRS will be a charge to ratepayers in 2016, 2017, and 2018, of $155 million, $175 million, and $84 million, respectively.[30] FirstEnergy claims that the imposition of the Rider RRS *charges* on its ratepayers during those years will stabilize or provide certainty regarding rates. No ratepayer would agree that the additional Rider RRS charges of between $84 million and $155 million will provide "rate stability" to ratepayers,

[28] FirstEnergy Ex. 43 at 3.
[29] FirstEnergy Ex. 43 at 4.
[30] Sierra Club Ex. 89.

especially when they already purchase their electric generation supply under fixed-priced CRES contracts or under the blended SSO rate.[31]

There is conflicting evidence as to the effect of Rider RRS in the subsequent years of the ESP IV period. The Commission accepted predictions that customers will receive a credit during that time period, even though multiple expert witnesses testified that FirstEnergy's prediction relies on out-of-date data that ignores recent significant changes in energy prices.[32] More recent estimates show that Rider RRS will inevitably lead to substantial charges to ratepayers,[33] and this expert evidence was not rebutted by FirstEnergy. FirstEnergy will not even rely on its own forecast to implement the Rider RRS rates after the first quarter; it will prepare new forecasts prior to each reconciliation filing.[34] It was improper for the Commission to conclude that Rider RRS will stabilize rates or provide certainty in these circumstances.

The evidence of record thus establishes that FirstEnergy did not meet its burden of proving that Rider RRS will have the effect of "stabilizing or providing certainty" as to rates for retail electric service throughout the ESP IV period. The Commission should therefore find on rehearing that Rider RRS is not authorized by R.C. 4928.143(B)(2)(d).

Assignment of Error No. 5:

> **The Commission erred in finding, as a matter of law, that Rider RRS constitutes a program to implement "economic development" under R.C. 4928.143(B)(2)(i).**

The Commission also found, in the alternative, that it has legal authority to approve Rider RRS pursuant to R.C. 4928.143(B)(2)(i), which authorizes provisions that "implement economic development, job retention, and energy efficiency programs. . . ." (Opinion and Order, at 109-110.) The Commission concluded that the Economic Stability Program, of which Rider RRS is

[31] Staff Ex. 12 at 8; P3/EPSA Ex. 1 at 40; Exelon Ex. 1 at 12-13.
[32] P3/EPSA Ex.12 at 11-19; OCC/NOPEC Ex. 9 at 3-8; Sierra Club Ex. 95 at 2, 7-9.
[33] P3/EPSA Ex.12 at 17; OCC/NOPEC Ex. 9 at 3.
[34] Tr. Vol. 18 at 3652; Opinion and Order at, 89-90.

part, "is an economic development program under R.C. 4928.143(B)(2)(i)" because it will avoid closure of the Sammis and Davis-Besse plants, which have a significant "total economic impact" on the region. (*Id.*) It found that the statute is satisfied even if the utility's "economic development program" consists entirely of "assisting" its own affiliate. (*Id.*) This is erroneous as a matter of law, and it should be corrected by the Commission on rehearing.[35]

FirstEnergy claimed that Rider RRS is authorized by R.C. 4928.143(B)(2)(i) because it "supports" economic development by giving credits to ratepayers that "will benefit Ohio's economy and lead to job retention and creation."[36] Its contention is based on the credits that ratepayers will theoretically receive on their bills after the first two years of ESP IV. This does not satisfy R.C. 4928.143(B)(2)(i) as a matter of law.

Most obviously, Rider RRS was not conceived, designed, or presented to the Commission as an economic development program, and FirstEnergy has not carried its burden of proving that it is. Rider RRS is supposed to be a hedging mechanism; it will definitely result in charges to ratepayers in its early years, and it is far from certain that it will ever result in any credits to ratepayers in the subsequent years. This would be a very strange way to conduct an economic development program, if that was actually what it was supposed to be. But in any event, Rider RRS will not stabilize rates, as discussed above, and thus will not support economic development in that way. Regardless of whether it is ultimately a net charge or a net credit, the results of Rider RRS will vary with market conditions, and it cannot be authorized as an "economic development" program under R.C. 4928.143(B)(2)(i).

The Commission's finding that this is an economic development program is also incorrect as a matter of law for another reason. The provisions of ESP IV and Rider RRS merely

[35] AEP argued that its version of Rider RRS was authorized by R.C. 4928.143(B)(2)(i) in *AEP ESP III*, but the Commission did not rule on the issue. *See AEP ESP III*, Opinion and Order, at 10, 19-27.
[36] FirstEnergy Initial Brief at 122.

anticipate the continued operation of two generating plants; they do not constitute (or even describe) an "economic development" program. Nothing is being "developed," and no additional economic activity is even contemplated. They also do not constitute an economic development "program." There is no "program" here, merely the expectation that two existing plants will not be closed, in the face of overwhelming evidence, discussed below, that they will not close regardless of whether Rider RRS are approved.

Accordingly, the Commission should correct its initial finding that Rider RRS is authorized under R.C. 4928.143(B)(2)(i) as an economic development program.

Assignment of Error No. 6:

> **The Commission erred, as a matter of law, in finding that the provisions of the ESP IV, including Rider RRS, do not violate the pro-competition policies of R.C. 4928.02.**

The Commission is statutorily required to ensure that the policies set forth in R.C. 4928.02 are effectuated.[37] This includes R.C. 4928.02(H), which expresses a policy to "[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates * * *." Thus, the Commission must ensure that FirstEnergy's ESP IV will avoid anticompetitive subsidies between competitive retail electric service and the utility's noncompetitive retail electric service, including the recovery of any generation-related costs through distribution or transmission rates.

[37] R.C. 4928.06(A) states in pertinent part: (A) "Beginning on the starting date of competitive retail electric service, the public utilities commission shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated. * * *"

Numerous intervenors objected throughout these proceedings that Rider RRS is anti-competitive and will violate R.C. 4928.02, but the Commission was "not convinced." (Opinion and Order, at 110.) It recognized that it "must be cognizant of the state policies set forth in R.C. 4928.02," but the Commission did not address the arguments raised by the opposing parties – namely that Rider RRS and the related PPA create an anticompetitive subsidy on multiple levels because:

> (a) Even though the FirstEnergy ratepayers will continue to purchase retail generation service as they wish, they will be required, through the non-bypassable Rider RRS, to pay the net costs (above-market costs) of FES' wholesale generation, making that one generator in the wholesale market whole;
>
> (b) FES, as a competitive retail energy service ("CRES") provider as well, is guaranteed full cost recovery for its generation, unlike other retail competitive market participants;
>
> (c) FirstEnergy is a "wires only" company and provides electric distribution service to its ratepayers. Rider RRS will be a FirstEnergy non-bypassable distribution rider as part of its company tariffs imposing charges on the ratepayers, but it will collect for generation-related costs.

This scheme will shift FES' market risks to the FirstEnergy ratepayers and allow FES to keep the price of its retail products and services low and to continue to function. It is a classic subsidy.

The Commission skirted these arguments completely, however.[38] Instead, the Commission concluded that Rider RRS will not be anticompetitive because (1) as a non-

[38] The Commission did reflect that it is "mindful" of concerns that, in the event that FirstEnergy does not sell the purchased power in the PJM markets, FirstEnergy could enter into a bilateral contract with an affiliate, which could

bypassable rider, it will have the same impact on shopping customers as SSO customers, (2) Rider RRS creates no advantage to shopping and no disincentive to shopping, and (3) impacts all shopping customers the same.[39] The Commission erred in not addressing the subsidy arguments set forth above and in finding that Rider RRS will not violate this statute.

The Commission was required to address the arguments presented to it, including the specific subsidy arguments listed above, but the Commission failed to do so.[40] This alone is reason for the Commission to reverse its ruling.

Moreover, the function of Rider RRS is really not in dispute – the flow of money and the shifting of risks are clear. The Commission should rule that Rider RRS will operate as a pass-through mechanism so that the FirstEnergy affiliate's net costs (above-market costs) are passed on to the FirstEnergy ratepayers, and the competitive market risks are shifted from the competitor to the ratepayers. This is tantamount to an anticompetitive subsidy.

Turning to the recovery of the Rider RRS generation-related costs, FirstEnergy describes Rider RRS as a non-bypassable generation-related rider and agrees that its costs and revenues would not be recoverable in a base rate case proceeding.[41] Although FirstEnergy recognizes that it cannot recover generation costs through distribution or transmission charges, it has not acknowledged that Rider RRS would in fact do so. However, FirstEnergy's proposed tariff sheet lends further support for the conclusion that Rider RRS applies to the distribution or transmission services provided to its ratepayers:

> Applicable to any customer <u>who receives electric service under the Company's rate schedules</u>. This Retail Rate Stability Rider (RRS) will be <u>effective for service rendered</u> beginning June 1, 2016. This

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provide anticompetitive advantage to the affiliate in violation of R.C. 4928.02(H). (Opinion and Order at 110.) That conclusion also was in error and is addressed later in this Application for Rehearing.

[39] Opinion and Order at 110.

[40] R.C. 4903.09. <u>See</u> <u>In re Application of Columbus S. Power Co.</u>, <u>supra</u>, 2016 Ohio 1608, at ¶ 55.

[41] Tr. Vol. 2 at 344, 401.

> Rider is not avoidable for customers during the period the customer takes electric generation service from a certified supplier. (Emphasis added.)[42]

This implies that Rider RRS will be collected as a distribution charge for the benefit of FirstEnergy's generation affiliate even though it is a generation charge. This is another basis for finding that Rider RRS violates R.C. 4928.02(H) by imposing the financial costs of FirstEnergy's affiliate's generation on ratepayers.[43] Even if revenues exceed the affiliate's costs, Rider RRS creates a subsidy from the distribution service to the affiliated generation service and shifts the market risk, and ratepayers will make payments to the unregulated affiliated generator for at least several years.

Notably, the Federal Energy Regulatory Commission ("FERC") has precluded sales with respect to the AEP Ohio/AEPGR PPA "unless and until the [FERC] approves the Affiliate PPA under *Edgar* and *Allegheny*."[44] It concluded in its April 27, 2016 decision that the non-bypassable charges under Rider PPA present the "potential for the inappropriate transfer of benefits from [captive] customers to the shareholders of the franchised public utility."[45]

Accordingly, the Commission should find on rehearing that the provisions of ESP IV, including Rider RRS, provide an anticompetitive subsidy and allow for recovery of generation-related costs through distribution rates, in violation of R.C. 4928.02(H).

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[42] Company Ex. 1, at Attachment 4, page 127 of each proposed tariff (emphasis added).
[43] EPSA v. FirstEnergy Solutions, *supra*, at ¶ 55.
[44] *Electric Power Supply Association et al. v. AEP Generation Resources, Inc. and Ohio Power Company*, Docket No. EL16-33-000, Order Granting Company at ¶55 and fn. 85 ("*AEP v. AEP Generation*").
[45] *Id.* at ¶55.

Assignment of Error No. 7:

> **The Commission erred, as a matter of law, by not addressing and adopting the argument that Rider RRS violates the separation of services requirements of R.C. 4928.03 by merging competitive and regulatory services.**

In its Opinion and Order, the Commission acknowledged intervenors' objection that Rider RRS violates R.C. 4928.03 by requiring shopping customers to pay for affiliated generation, thereby merging competitive electric services with regulatory electric services. (Opinion and Order, at 102.) It implicitly rejected this objection by failing to discuss it in its findings. This is an error of law that the Commission should correct on rehearing.

The language of R.C. 4928.03 expressly includes retail electric generation as a "competitive" service:

> Beginning on the starting date of competition, retail electric service, retail electric generation, [*et al.*] . . . are competitive retail electric services.

FirstEnergy describes Rider RRS as a generation-related charge.[46] Rider RRS, however, will be collected by FirstEnergy (the regulated utility) and requires shopping customers to pay for the affiliated generation of FES. This merges a competitive retail electric service (generation) with a non-competitive regulated service (distribution) in violation of R.C. 4928.03.

The Commission erred as a matter of law in not addressing this argument and failing to find that Rider RRS violates the separation of services requirements of R.C. 4928.03. It should now correct that error on rehearing by rejecting Rider RRS.

[46] Tr. Vol. 2, at 344.

Assignment of Error No. 8:

> **The Commission erred, as a matter of law, by not addressing and adopting the argument that the provisions of ESP IV, including Rider RRS violates the corporate separation requirements of R.C. 4928.17.**

The Commission noted objections by various intervenors that Rider RRS violates R.C. 4928.17 by abusing affiliate power and failing to maintain corporate separation, but it failed to address the argument and therefore implicitly overruled it. (Opinion and Order, at 103, 105.) The Commission should correct this legal error upon rehearing.

The Ohio General Assembly long ago decided that generation is a competitive retail electric service, R.C. 4928.03, and that utilities must separate their electric generation assets from their non-competitive assets, R.C. 4928.02(H). FirstEnergy divested its generation assets years ago,[47] but it has now asked the Commission for permission to entangle itself once again with the same generation assets that it has previously divested, through a non-bid PPA and Rider RRS.

This violates Ohio's corporate separation statute, R.C. 4928.17(A), which provides:

> ***[N]o 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 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 under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the following:
>
> (1) The plan provides, at a minimum, for the provision of competitive retail electric service . . . through a fully separated affiliate of the utility, and the plan includes separate accounting requirements . . . and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.

[47] *See* Company Ex. 1, at 19-20.

In short, R.C. 4928.17 requires separation between competitive and non-competitive services, but generation is not separated from FirstEnergy under the Economic Stability, which includes Rider RRS. Moreover, Rider RRS is not "consistent with the policy specified in [R.C.] 4928.02," for the reasons discussed *supra*.

The evidence of record establishes that there will be an intermixing of personnel with respect to generation from affiliated plants. The term sheet confirms FirstEnergy's involvement in all plant operations; it will schedule and dispatch all energy and ancillary services associated with the plants, and after capacity rights are transferred in PJM's eRPM system, FirstEnergy will be "solely responsible" for offering the Contractual Capacity into the PJM capacity auctions. . . ."[48] The term sheet also shows FirstEnergy's involvement in generation in other ways. All energy and ancillary services associated with its contractual capacity are allocated based on its respective share and recorded in the PJM scheduling and settlement systems, and all credits and charges associated with those services are settled under the PJM settlement process.[49]

Although FirstEnergy's affiliate will operate the plants, Section 12 of the Term Sheet reflects FirstEnergy's involvement in deciding whether to make capital expenditures and in reviewing capital expenditure plans.[50] In fact, FirstEnergy must determine whether the work complies with applicable standards before payments are made.[51] Its oversight over the affiliated generating plants violates the corporate separation requirements of R.C. 4928.17, which are independent of and consistent with the provisions of R.C. 4928.143(B), and the Commission should make this finding on rehearing.[52]

[48] *See* Companies' Ex. 156, at 6-7; P3/EPSA Ex. 10, at 25 of 32; Companies' Ex. 158, at 7-8.
[49] Companies' Ex. 156, at 7-8.
[50] *Id.*, at 3-4; Tr. Vol. 14, at 3000.
[51] Tr. Vol. I, at 52.
[52] 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)

Assignment of Error No. 9:

> **The Commission erred, as a matter of law, by not addressing and adopting the argument that Rider RRS violates R.C. 4905.22 by imposing an unreasonable charge that includes an unknown future charge for unknown market risk.**

The Commission also failed to address and implicitly rejected the intervenors' objection that Rider RRS violates R.C. 4905.22 by imposing an "unjust or unreasonable charge" for retail electric services.[53] It should review the argument and reverse that ruling on rehearing.

Pursuant to R.C. 4905.22, "all charges made or demanded for any service rendered, or to be rendered, shall be just [and] reasonable . . . and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service. . . ." In this proceeding, FirstEnergy seeks to impose customer charges in order to transfer unknown future market risk to its ratepayers.[54] These charges are per se unreasonable in violation of this statute.

Under the terms of Rider RRS, FirstEnergy's affiliate will recover its costs plus a guaranteed return on equity under a contract with FirstEnergy. The market risks FES currently bears do not disappear; they are shifted to FirstEnergy and then transferred to FirstEnergy's ratepayers under Rider RRS.

It is fundamentally unfair to allow FirstEnergy to charge customers for market risks that are now properly placed on its affiliate. It is particularly unjust and unreasonable to impose an unknown charge, based solely on wholesale transactions, for the benefit of FirstEnergy's affiliate.

The Commission should find on rehearing that Rider RRS violates the R.C. 4905.22 prohibition against unjust or unreasonable charges.

(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)." EPSA v. First Energy Solutions, *supra, at* ¶ *66*

[53] *See* P3/EPSA Initial Brief, at 19.

[54] Companies' Ex. 156.

C. Application of the Commission's three-prong test was erroneous.

Assignment of Error No. 10:

> **The Commission erred, as a matter of law, in applying the three-prong test in a manner that is contrary to its intended use.**

As noted below, it was error to have given the Stipulation undue weight. The Commission should have evaluated in the first instance whether the Stipulation qualified as a valid stipulation, which when valid would not be binding on the Commission but is accorded substantial weight. *See* Ohio Adm. Code 4901-1-30; *Ohio Consumers Counsel v. PUCO*, 64 Ohio St. 3d 123, 125 (1992); *Akron v. PUCO*, 55 Ohio St. 2d 155, 157 (1978). However, there is no statute or administrative regulation specifying the legal standard of review that the Commission should apply in deciding whether to approve, modify, or reject a stipulation.

In this proceeding, the Commission stated that it must ultimately decide "whether the agreement . . . is reasonable and should be adopted." (Opinion and Order, at 39.) It then applied a three-prong test that "has been discussed in a number of prior Commission proceedings" to make that determination:

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

(Opinion and Order, at 39.) The Commission explained that the Supreme Court of Ohio "has endorsed the Commission's analysis using those criteria" in past proceedings, citing *Indus. Energy Consumers of Ohio Power Co. v. PUCO*, 68 Ohio St. 3d 559 (1994). (*Id.*)

The Commission erred as a matter of law in using its current interpretation of this three-prong test to decide whether to approve the Stipulation filed in the present matter, for several reasons. The Commission has effectively nullified the first criterion by approving a Stipulation that is the product of favor-trading and side deals, not "serious bargaining", which allowed FirstEnergy to "buy" signatories to a deal that is favorable to FirstEnergy and the signatories, not to ratepayers. The Commission applied the second criterion, which requires that the Stipulation benefit ratepayers and the public interest, in a vague and amorphous form, with no clear standards, that abdicates its legal responsibility to judge the merits of the agreement and allows it to approve virtually any stipulation if it chooses to do so. Finally, it treats the third criterion of the three-prong test, violations of regulatory principles, as a discretionary consideration that allows the Commission's abstract motions of ratepayers "benefits" to outweigh mandatory statutory requirements adopted by the General Assembly.

In short, the Commission's current interpretation of the three-prong test does not truly evaluate the reasonableness of a proposed Stipulation and is of little value in deciding whether it should be approved, modified, or rejected. None of the indicia of merit typically associated with products of serious bargaining apply here, when the Stipulation reflects side-deals and favor trading instead. There has been no real showing on the merits that it will benefit ratepayers or the public interest, just optimistic hopes resting on wildly inaccurate predictions that ignore contemporary price trends. And, as discussed *supra,* the provisions of the Stipulation, including Rider RRS, are not authorized by Ohio law and violate numerous Ohio statutes, so it cannot be approved by the Commission regardless of the first two criteria of the three-prong test.

In addition, the three criteria included in the Commission's test are inapplicable when a utility has the authority to simply reject modifications that the Commission proposes to a stipulation. The Commission is not acting in a truly adjudicatory role, and its ruling on the Stipulation is ultimately advisory.

The Commission's current interpretation of the three-prong test also distorts the proper role of stipulations in its proceedings. In judicial disputes, a stipulation reached between truly adverse parties is inherently the result of genuinely serious bargaining, but in this matter it constitutes advocacy for one side against another side. In other words, stipulations can determine the rights of intervenors and non-intervenors who oppose the terms of the stipulations, but the Commission is asked to approve those terms as "stipulations" that will be binding on all.

In this context, the Stipulation presented to the Commission is not a "Stipulation" in the judicial sense of that word, and it should not be treated as if it is. It is an attempt to obtain a favorable outcome at the expense of other participants in the proceedings and must be reviewed and evaluated on that basis. The fact that some of the participants agreed on a stipulation that favors <u>them</u> is not an indication of serious bargaining and hardly suggests that their agreement is fair or beneficial to others. The Court's implicit assumption that the stipulation in this matter deserves some presumption of fairness or merit is inconsistent with this Commission's performance of its statutory duties.

Accordingly, the Commission should rule on rehearing that its current interpretation of the three-prong test is not the proper legal standard for evaluating the Stipulation and deciding whether it should be approved, modified, or rejected.

Assignment of Error No. 11:

> **The Commission erred, as a matter of law, in finding that the reasonableness of a stipulation is not affected by the fact that millions of dollars in favors were traded to the signatories to obtain their consent to the Stipulation.**

The Commission found that the stipulations in this matter "appear to be the product of serious bargaining among capable, knowledgeable parties." (Opinion and Order, at 45.) It reached that conclusion despite undisputed evidence of record that a number of the signatories received substantial benefits from FirstEnergy, including $19 million in financial benefits, by trading their signatures on the Stipulation. This is not "serious bargaining", and the Commission should reverse its ruling on rehearing.

FirstEnergy had the burden of proving that the Stipulation resulted from serious bargaining. *See Ohio Consumers Counsel v. PUCO*, 111 Ohio St. 3d 300, 2006 Ohio 5789. Negotiations over the terms of a stipulation must be conducted fairly; "special considerations, in the form of side agreements among the signatory parties," can give one party an "unfair advantage" that distorts the bargaining process. 111 Ohio St. 3d at 321.

In this case, the Stipulation is permeated with provisions that reflect serious favor trading rather than serious bargaining. Over $19 million in benefits are earmarked for specific signatories, including the City of Akron, COSE, AICUO, the Citizens Coalition, and OPAE. In addition, a special pilot program that bypasses otherwise non-bypassable Rider NMB and the High Load Factor Time of Day program are restricted to participants who either signed the Stipulation or expressly agreed not to oppose it. This did not result from "serious bargaining" that produced better Stipulation terms for ratepayers and the public; it was simply favor-trading, in which payments or other benefits were used to buy support for the Stipulation or silence its opponents.

The severability provision of the Stipulation dramatically illustrates this point. It provides that a signatory party's "stipulation provision" will be forfeited if it unsuccessfully challenges any attempt by FirstEnergy to cure a termination of Rider RRS:

> The Signatory parties agree to work in good faith, on an expedited basis not to exceed 60 days, to cure any court-determined deficiency. The Companies will then file . . . the modified Rider RRS, or its successor provision, for expedited approval by the PUCO. . . . A Signatory Party may choose to oppose and express any concerns with the modified Rider RRS, or its successor

> provision, to the Commission; however, if such concerns are not accepted by the Commission, then any Signatory Party that opposed the modified Rider RRS or successor provision, will forfeit its stipulation provision(s). . . . No amounts collected shall be refunded as a result of their severability provision.[55]

This language confirms that FirstEnergy traded "stipulated provisions" to specific signatories to obtain their support for Rider RRS, and that a signatory will lose the favor it traded for if it opposes -- or even "express[es] any concerns" about -- a modified Rider RRS in the circumstances described above.

The Commission summarily rejected the objections of many intervenors that it could not presume the reasonableness of the Stipulation from the fact that it was supported by numerous signatories, when signatories supported the Stipulation because they received financial or other benefits for supporting it, not because they believed it was reasonable or beneficial to ratepayers or to Ohio. Instead, the Commission approvingly noted that the Stipulations "are supported by a diverse group" and summarily dismissed concerns about favor trading:

> [W]hile many signatory parties receive benefits under the Stipulations, we will not conclude that these benefits are the sole motivation of any party in supporting the Stipulations. We expect that the parties to a stipulation will bargain in support of their own interests in deciding whether to suppose a stipulation. Further, we believe that parties themselves are best positioned to determine their own best interests and whether any potential benefits outweigh any potential costs. . . .

(Opinion and Order, at 44.) The Commission thus conflates the "best interests" of the signatories with the best interests of ratepayers and the State of Ohio. This excerpt from its ruling evidences a profound misunderstanding of its legal duty in this proceeding. First, it states that "parties themselves" should decide whether a stipulation accomplished through favor trading is in their interests, which abdicates the Commission's responsibility to decide whether to

[55] Company Ex. 154, at 8-9.

approve a stipulation containing those favors. The Commission treats the fact that favors were traded for support of the Stipulation as evidence that the Stipulation is reasonable, when it is actually reason to distrust the reasonableness of the Stipulation and to question who will actually benefit. Parties to a stipulation will naturally "bargain in support of their own interests," but that is precisely why favor trading is suspect, not why it should be treated as evidence that a stipulation is beneficial for others, including ratepayers.

In the end, the Commission suggested that it is enough if Staff approves the Stipulation, because Staff did not trade support for favors. (Opinion and Order, at 44.) Support by Staff is not, of course, the legal standard by which stipulations are reviewed, and it certainly does not demonstrate that they were the product of serious bargaining.

As noted above, the Supreme Court of Ohio has recognized that "special considerations, in the form of side agreements among the signatory parties" are evidence that "one or more parties may have gained an unfair advantage in the bargaining process." 111 Ohio St.3d at 321. The stipulations in the present proceeding reveal many of these special considerations, amounting to millions of dollars in financial inducements. They include:

- $300,000 to the City of Akron for energy efficiency programs;
- $300,000 to COSE's Ohio Efficiency Resource Program;
- Up to $1 million to COSE for advancement of energy efficiency projects;
- $400,000 to AICUO to encourage energy efficiency;
- $1.39 million for a fuel fund to benefit the Consumer Protection Association and others;

- $8 million allocated for the benefit of the Citizens Coalition for a Customer Advisory Agency; and
- $7 million allocated for the benefit of OPAE for a fuel fund administered by OPAE.

FirstEnergy has perverted the negotiation process by agreeing to trade millions of dollars in benefits to selected parties in exchange for their support of Rider RRS. The fact that its strategy worked is not evidence that the Stipulation is reasonable and should be approved.

Accordingly, the Commission should find that the Stipulation in this matter did not result from serious bargaining that demonstrates their reasonableness.

Assignment of Error No. 12:

> **The Commission erred in finding, as a matter of law, that the reasonableness of a stipulation is not affected by the existence of side deals with signatories.**

The Commission also implicitly rejected intervenors' objection that the Stipulation does not satisfy the first criterion of the three-prong test, which requires "serious bargaining", because it resulted from a side deal that FirstEnergy entered into to gain support. The Stipulation is not the product of serious bargaining in these circumstances, and the side deal is not evidence that the stipulation is beneficial to ratepayers or the State of Ohio.

The Commission acknowledged that "the existence of a side agreement can be relevant to a determination of whether serious bargaining occurred in the negotiation of a stipulation." (Opinion and Order, at 44.) However, it found "no reason to believe" that the side agreement "influenced any signatory party, other than IGS, to sign the Stipulation[s]." (*Id.*) But that is not the point; the side deal was the reason that party signed the Stipulation[s], so its signature does not demonstrate "serious bargaining" under the first criterion of the Commission's three-prong test. The Commission nevertheless concluded that "all provisions of the Stipulations. . . appear to be the product of serious bargaining." (*Id.*)

The Commission based this finding on three things: (1) "no signatory party has raised an objection to the [side] agreement"; (2) the side agreement was not executed until after the Stipulation was filed; and (3) the Commission was not required to approve the side agreement. (Opinion and Order, at 44-45.) None of these matters support the Commission's finding that the Stipulation resulted from serious bargaining. The absence of objections by any signatory shows only that favor trading and side deals bought off any opposition to the Stipulation. The date the side deal was executed and its effectiveness without Commission approval are irrelevant to the present issue.

The Stipulation approving Rider RRS followed an evidentiary hearing that began in August, 2015, and concluded in October, 2015. When the final part of the Stipulation was filed on December 1, 2015, the hearing record was reopened, and the hearing resumed on January 14, 2016. On that date, January 14, 2016, FirstEnergy revealed for the first time that it had struck a separate side deal with another party that was becoming a signatory to the Stipulation.[56] It provided the side deal to the parties for the first time that evening, after several of them had completed their opportunity to cross-examine the only witness that FirstEnergy offered in support of the Stipulation.[57]

FirstEnergy's failure to disclose this side deal earlier, during the negotiations over the Stipulation, is the type of behavior that the Ohio Supreme Court condemned as providing unfair advantage in the bargaining process. *OCC v. PUCO, supra.* FirstEnergy gained an unfair

[56] Tr. 37 at 7806; OMAEG Ex. 24.
[57] OMAEG Ex. 23 and Ex. 24.

advantage during the bargaining process in the present by hiding this side deal from the other parties until the negotiations were finished.

The Supreme Court of Ohio has reversed previous Commission orders when reasonable means for settlement participation were lacking. *OCC v. PUCO, supra.* The Commission itself has rejected a stipulation involving side agreements for lack of serious bargaining when the evidence did not demonstrate the participation of parties during negotiations. *In the Matter of the Application of the Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates*, Nos. 03-93-EL-ATA, 03-2079-EL-AAM, 03-2081-EL-AAM, 03-2080-EL-ATA, 2007 Ohio PUC Lexis 703, at *104.

In the present proceedings, the evidence regarding the side agreement reveals exclusionary settlement discussions, not serious bargaining. The Commission erred in finding serious bargaining despite use of a side deal to obtain support for FirstEnergy's Stipulation. It does not matter that the side deal was ultimately revealed; it was not revealed until after it has executed and the Stipulation signed. The Commission should find on rehearing that it shows an absence of serious bargaining under the first criterion of the three-prong test.

Assignment of Error No. 13:

> **The Commission erred, as a matter of law, in affording undue weight to the Stipulation because it does not qualify as a true Stipulation.**

The record is clear – some parties in this proceeding joined the Stipulation, while other opposed it. As demonstrated in the chart below, there was widespread opposition to the Stipulation and fewer, special-interest groups supporting the Stipulation:

Opposing the Stipulation	Supporting the Stipulation
Buckeye Association of School Administrators	Association of Independent Colleges and Universities of Ohio
City of Cleveland	Citizens Coalition
City of Maumee	City of Akron
City of Northwood	Cleveland Housing Network
City of Perrysburg	Consumer Protection Association
City of Sylvania	Council for Economic Opportunities in Greater Cleveland
City of Toledo	Council of Smaller Enterprises
Constellation NewEnergy, Inc.	EnerNOC, Inc.
Dynegy, Inc.	International Brotherhood of Electrical Workers Local 245
Environmental Law & Policy Center	Interstate Gas Supply, Inc.
Environmental Defense Fund	Material Sciences Corporation
Electric Power Supply Association	Nucor Steel Marion, Inc.
Exelon Generation Company LLC	Ohio Edison Company
Lake Township Board of Trustees	Ohio Energy Group
Lucas County Board of Commissioners	Ohio Partners for Affordable Energy
Northeast Ohio Public Energy Council	Ohio Power Company
Northwest Ohio Aggregation Coalition and its Individual Communities	The Kroger Company
Ohio Association of School Business Officials dba Power4Schools	The Cleveland Electric Illuminating Company
Ohio Environmental Council	The Toledo Edison Company
Ohio Consumers' Counsel	Staff
Ohio Hospital Association	
Ohio Manufacturers' Association Energy Group	
Ohio School Boards Association	
Ohio Schools Council	
PJM Power Providers Group	
PJM Independent Market Monitor	
Retail Energy Supply Association	
Sam's East, Inc.	
Sierra Club	
The Cleveland Municipal School District	
Village of Holland	
Village of Ottawa Hills	
Village of Waterville	
Walmart Stores East LP	
Amicus	
Oregon Clean Energy LLC	

When widespread affected stakeholders do not join a stipulation and the majority of stakeholders oppose the stipulation, there is no broad-based stakeholder support for the stipulation.

As is clear from the decision, the Commission focused on the Stipulation and the three-prong test, instead of conducting a full analysis of the application in light of *all* of the evidence of record (one piece of which was the Stipulation). For example, the Commission stated:

- "The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted."[58]

- "Under the three-prong test, we always carefully review all terms and conditions of a proposed stipulation in order to determine whether the stipulation is in the public interest; in making this determination, we exercise our independent judgment, based upon our statutory authority, the evidentiary record, and the Commission's specialized expertise and discretion. *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 578 (2004)."[59]

As a result, the Commission "promoted" the Stipulation, moving it to the forefront of this proceeding, giving it substantial added weight and special evidentiary value. This act by the Commission was unreasonable and unlawful because significant, major opposition exists to the Stipulation.

The Commission thus erred in applying its less stringent version of the three-prong test to evaluate the Stipulation filed in this proceeding. Also, the Commission erred in approving the Stipulation in a slightly modified form when the record plainly establishes that the Stipulation resulted from favor-trading and side deals, rather than serious bargaining among the interests of every party that it affects. Unlike a stipulation in civil litigation, the Stipulation signed by FirstEnergy and selected signatories in this proceeding constitutes advocacy for their interests at the expense of the interests of the other parties. This is another reason why the Stipulation in this case should not be given the weight normally given to judicial stipulations. Instead, the Commission should have approached the record in a fashion more akin to a motion for summary

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[58] Opinion and Order at 39.
[59] Opinion and Order at 41.

judgment by FirstEnergy and the beneficiaries of its Stipulation, by considering all of the evidence in the record and not placing a priority on a hotly contested Stipulation.[60]

The Commission's decision implies that a stipulation is the only proper way to proceed and that parties who do not sign it are somehow being obstructionist. *See* Opinion and Order, at 39 (characterizing disagreement with the Stipulation by many parties as "refus[ing] to sign"). The Commission's role in this proceeding is to remain impartial and to approve brokered stipulations only when they meet all statutory requirements and serve the interests of the public, not just the interests of the signatories.

Here, the Commission gave "substantial weight" to an agreement by a minority of the parties that was strenuously opposed by the majority of the parties. Important groups of those who will be most affected by the Stipulation, such as wholesalers, urged the Commission to reject it. There is no reason that the Stipulation should be entitled to substantial weight, or to any weight at all.

Accordingly, the Commission erred in approving the Stipulation, and it should correct that error on rehearing.

[60] *See, also,* Opinion and Order, at 49 ("the Commission *may* place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission." (Emphasis added.)

Assignment of Error No. 14:

> **The Commission erred in finding, as a matter of law, that a stipulation is reasonable if it is beneficial "as a package," regardless of the nature and extent of the harmful effects of its individual components.**

The Commission also erred as a matter of law when it found that the Stipulation benefits ratepayers and the public interest under the second prong of its three-prong test. It believed that it "must determine whether the settlement, as a package, satisfies that requirement." (Opinion and Order, at 46; emphasis added.) The Commission explained that:

> [T]his portion of the three-part test specifically requires that we evaluate the Stipulations as a package. . . . We have repeatedly found value in the parties' resolution of pending matters through a stipulation package. . . . Consequently, we affirm that the Stipulations must be viewed as a whole.

(Opinion and Order, at 79.)

The Commission's "package" approach suggests that a stipulated provision that harms ratepayers and the public interest should nevertheless be approved if it is "outweighed" in some sense by beneficial stipulated provisions. This ignores the fact that harmful provisions can be individually severed from a stipulation, so that their harm is avoided while separate beneficial provisions are retained. As Dr. Kalt explained in response to a question from Commissioner Haque on social utility:

> I will try to give you a briefer answer. That's sort of the topic of public policy economics. That's what we teach about. The first principle that we invoke is the public has an abiding interest in an economically efficient economy meaning you deliver what consumers want at the lowest possible cost. You don't waste resources. And you -- that's principle No. 1. Principle No. 2 is that where you have some inefficiency the appropriate public policy approach to that we sometimes say to the students you go at it head on. What we mean by that, if you need grid modernization among your regulated companies, then what you do is you get grid modernization for its own sake. **And, you know, to go to the heart of this case in some sense, you don't, for example – *in other words, if it's efficient to do it,* you ought to do it. You don't, for example, say we will do that as part of a trade. We'll let you shift all these costs and have the captive**

ratepayers and use their captivity to guarantee the rates of return and so forth on a couple of plants in order to get grid modernization. You want to separate those from a public policy point of view. And there's actually theorems about this in the work of Nobel Prize Winner Paul Samuelson about how you want to take on those things because - *** if you try to mess up, if you will, make this inefficient over here in order to get some inefficiency over here, you are going to end up distorting the whole economy, and that's contrary to the public interest. **And so we have this principle of separation we call it, approach the problem head on. Want a better, cleaner environment? Go regulate the plants for environmental cleanliness. Don't trade it away by doing something like, you know, using your captive ratepayers to cut a deal.** I think that's trying to be responsive.[61]

The issue is <u>not</u> whether the "good" provisions of the Stipulation somehow outweigh the "bad" provisions. It is whether the provisions that harm ratepayers and the public interest are so essential to the functioning of the Stipulation that they must be retained in order to achieve its other benefits.

In this case, the Commission did not separately analyze Stipulation provisions that harm ratepayers and the public interest and determine whether it is reasonable to retain them. It side-stepped that analysis by finding that the Stipulation is beneficial as a package. This is improper, as a matter of law, and the Court should reconsider its finding.

Assignment of Error No. 15:

The Commission erred, as a matter of law, in finding that FirstEnergy's unenforceable "commitments" regarding resource diversity are evidence that the Stipulation benefits ratepayers and the public interest.

As a part of its finding that the Stipulation benefits ratepayers and the public interest, under the second criterion of the three-prong test, the Commission counted as "benefits" certain unenforceable "commitments" that FirstEnergy made regarding resource diversity. It noted objections by at least eight groups of intervenors that these so-called "commitments" are illusory

[61] Tr. Vol. 41 at 8717-8718 (emphasis added).

at best because they do not actually subject FirstEnergy to any enforceable obligations, and thus do not provide any real benefits to consumers. (Opinion and Order, at 47.)

The Commission relied upon an assortment of unenforceable commitments to find that the Stipulation benefits ratepayers and is in the public interest. (Opinion and Order at 78-79). First, the Commission found that "the Economic Stability Program will encourage resource diversity in the state." (*Id.*, at 87.) Second, the Commission relied upon unenforceable "goals" to find that Rider RRS will encourage resource diversity:

> Rider RRS will support 2,200 MW in *existing coal-fired generation* and 908 MW in *existing nuclear generation....* Moreover, the Stipulations provide for the *opportunity to procure* at least 100 MW in wind and solar generation. ... *in the event that* the market fails to adequately spur development [of new energy resources]. ...

(Opinion and Order, at 87; emphasis added.) In the end, however, the most the Commission could say was that the Stipulation "promote[s] resource diversity by investing in utility scale battery technology and, <u>potentially</u>, by procuring additional renewable energy resources." (*Id.*, at 119; emphasis added.)

Promises to potentially take future actions under certain conditions do not count as "benefits" to ratepayers and do not promote the public interest. The Commission should reconsider its finding that making unenforceable statements of intention in a Stipulation are not evidence that a stipulation benefits ratepayers and is in the public interest.

Assignment of Error No. 16:

> **The Commission erred when it approved Rider RRS on the basis of highly uncertain financial projections that it believed were "better" than financial projections presented by other witnesses, without regard to whether they were sufficiently reliable to meet FirstEnergy's burden of proof.**

Faced with radically different financial projections about the effects of Rider RRS, the Commission used an incorrect legal standard to determine whether the projections that it adopted show that Rider RRS will benefit ratepayers and the public interest under the second criterion of its three-prong test. It concluded that it "must choose from the most reliable of these projections and forecasts to make a determination." (Opinion and Order, at 80.) But the Commission ignored the fact that the "most reliable" projections may nevertheless not be sufficiently reliable to carry FirstEnergy's burden of proof. In fact, it recognized that all projections are "simply predictions" of the future and "may be proven wrong." (*Id.*, at 86.) Remarkably, it "averaged" two diametrically opposed projections because it could not say which was more reliable, and then based its decision on its own constructed projection, which no witness supported. (*Id.*, at 85.)

The Commission erred as a matter of law in adopting the "best" projections, however bad they might be, without regard to whether FirstEnergy carried its burden of proving that its proposed projections are reasonable, *i.e.*, that RRS will actually benefit ratepayers and the public interest. It compounded that error when it averaged the two projections it deemed best, even though each repudiated the other. The Commission should find, on rehearing, that FirstEnergy has not met its burden of proof that its financial projections are reliable and reasonable.

Assignment of Error No. 17:

The Commission erred when it approved Rider RRS on the basis of highly uncertain financial projections without addressing the need for or adopting annual and aggregate limits on the charges that can be imposed on ratepayers.

Even the more favorable financial projections that were adopted by the Commission show that Rider RRS will result in charges to ratepayers, rather than credits, for at least the first few years of its eight-year term. (Opinion and Order, at 108.) However, the Commission failed to address intervenors' request to impose annual and aggregate caps on the charges. It should now review those arguments and adopt limits on RRS charges.

The Commission's ruling recognizes that projections are not guarantees and that it cannot predict with certainty whether Rider RRS will ultimately result in a charge or a credit to ratepayers, let alone predict the amount of those charges and credits:

> We note at the outset that projections and forecasts are predictions. They are predictions of future conditions and are based upon what is happening now and multiple additional assumptions. The Commission acknowledges that the projections presented in this case are simply predictions of future market prices and costs; thus, even the most reliable projections may be proved wrong in the future, particularly over an eight-year timeframe.

(Opinion and Order, at 80.) The Commission recognized this risk and attempted to provide some protection from the uncertainty by limiting the increase in average customer bills during the first two years of the Rider RRS term, and by promising minimum credits in its last years under certain circumstances. (*Id.*, at 86.)

However, the Commission did not adopt annual or aggregate limits on Rider RRS charges despite the requests of several intervenors. The same reasoning that requires an initial limit on average customer bills also requires a limit on the total amount of charges that are billed to ratepayers. In the absence of such limits, substantial Rider RRS charges would significantly harm ratepayers and the public interest.

The use of Rider RRS as a hedge has <u>unlimited</u> downside if there are no caps on its charges. There is no precedent for placing a financial risk of this magnitude on captive ratepayers. On the contrary, the Commission has imposed annual and total limits on ratepayer payments in other proceedings. *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).

In the present proceeding, everyone agrees that the amount of charges that will result under Rider RRS is speculative, and many experts believe that it could cost ratepayers billions of dollars over its term. Witness James Wilson reviewed several scenarios under updated market data and concluded that the most likely and reasonable estimate of Rider RRS charges to retail customers is $3.6 billion.[62] In the absence of any upper limit on these charges, Rider RRS poses an unknown but substantial risk of massive charges to ratepayers over the next eight years.

The minimum credits that the Commission adopted for years five through eight do little or nothing to mitigate this risk. First, these credits apply only to the last four years of Rider RRS, leaving ratepayers exposed to the full risk of any and all charges during the first four years, and those are the years in which the Commission already forecasts millions of dollars in charges. Second, the credits come from FirstEnergy, not from its affiliate or OVEC, and thus provide an incentive to maximize revenues in the PJM markets only during the second four years. Third, the minimum credits promised for the second four years apply only to their respective years and do not roll over or otherwise aggregate, but they are each woefully inadequate to cover the

[62] OCC/NOPEC Ex. 9, Second Supplemental Direct Testimony of James F. Wilson, at 12.

massive risk that Rider RRS shifts to the ratepayers.[63] Moreover, there is no guarantee that ratepayers will receive those credits in any year, even though FES receives all of its costs and a return on equity in every year. FirstEnergy's risk is capped for years 5 through 8, but the risk to ratepayers is unlimited.

Accordingly, if the Commission does not invalidate Rider RRS, it should at a minimum impose annual and aggregate limits on Rider RRS charges to ratepayers.

Assignment of Error No. 18:

> **The Commission erred when it approved Rider RRS without providing a coherent formula for calculating the limitations on average customer bills that it provides during the first two years of Rider RRS.**

The Commission modified the Stipulation to ensure that average customer bills will not increase, in comparison to the previous year, during the first two years that Rider RRS is in effect. (Opinion and Order, at 86.) It directed FirstEnergy to take into account any seasonal rate differential and any over-and-under recoveries of Rider RRS for prior periods. (*Id.*) It also authorized FirstEnergy to defer expenses for future recovery in an amount equivalent to the reduction in revenue that results from implementing the limit on average customer bills for the second year of Rider RRS. (*Id.*)

The Commission also subjected the "mechanism limiting average customer bills" during the first two years to other limits. For example, costs for smart grid development, renewable energy procurement, and certain impacts resulting from riders are excluded from consideration. (Opinion and Order, at 86.) Ultimately, however, the Commission did not provide a coherent formula for calculating the two-year limit on average customer bills, and there is thus no way to

[63] *See, e.g.*, P3/EPSA Ex. 12, Second Supplemental Testimony of Joseph P. Kalt at 17 ($793 million in charges for the first three years); Sierra Club Ex. 89, Mikkelsen Workpaper 11/30/15 ($363 million in charges for the first three years).

evaluate whether it will have negative or beneficial effects for ratepayers. If the Commission does not invalidate Rider RRS on rehearing, it should define a precise methodology for calculating these limits and provide an example. Also, the Commission should require that customers be informed during the limitation time period of the impact that these limits are having, by disclosing the rate impact and dollar amounts.

D. The projection of Rider RRS adopted by the Commission is not reliable.

In its decision, the Commission found that Rider RRS *will* operate as a form of rate insurance. (Opinion and Order, at 80.) It then proceeded to analyze the reasonableness of the various estimates of the financial impact of Rider RRS over the term of the ESP IV, based on the financial projections discussed *supra*. The Commission admitted the importance of the projections in evaluating the Stipulation and that their assessment is part of the determination of whether the Stipulation, as a package, will benefit ratepayers. (Opinion and Order, at 80.) But the Commission failed to mention that the financial impact of Rider RRS affects much more than its evaluation of the Stipulation; it affects whether Rider RRS can even function as a "form of rate insurance." The Commission made several errors in its evaluation of the projections of the financial impact of Rider RRS over the term of the ESP IV, as described below.

Assignment of Error No. 19:

The Commission erred in finding that the financial projections by witness Rose are reliable.

The Commission noted that its "first task" in its analysis of Rider RRS "is to determine a reasonable estimate of the net credit or charge based upon the evidence in the record." (Opinion and Order, at 80.) Its approval of Rider RRS relied heavily upon testimony about its price projection component presented by FirstEnergy witness Rose. (*Id.* at 85.) The Commission stated that it found that his price projection is reliable for the following reasons:[64]

- Because Mr. Rose's firm, ICF, is a recognized leader in its field.
- Because Mr. Rose forecast higher energy prices in the future based upon a number of factors that included higher natural gas prices; greater reliance on natural gas as the price-setting fuel; greater reliance on more costly units as demand grows and units retire; growth in demand for electricity power plant retirements; new environmental regulations; new FERC policies; inflation; and carbon emission regulations.
- Because Mr. Rose forecast higher capacity prices in the future based upon elimination of excess capacity due to plant retirements; demand growth; reduced capacity price suppression from demand response; less capacity imports from other regions; environmental regulations, rising financing and other capital costs; inflation; and greater natural gas infrastructure leading to higher costs as gas is shipped elsewhere.
- Because only Mr. Rose and Mr. Lisowki presented a full projection of energy prices.
- Because one of the EIA cases utilized by OCC witness Wilson (the Reference case) projects natural gas prices that are lower than the natural gas prices projected by Mr. Rose.
- Because EIA's Annual Energy Outlook for 2015 projected natural gas prices from 2020 to 2030 to be four percent higher than the 2014 reference case.

(Opinion and Order, at 80-81.)

These factors do not justify the Commission's conclusion that Mr. Rose's energy price projection is reliable. First, the fact that Mr. Rose uses multiple factors in his forecast of higher energy prices in the future obviously does not render his projections reliable unless the factors are appropriate and complete. The inputs and assumptions that Dr. Rose used are critical to his projections, but the Commission did not analyze or even discuss them. Second, the fact that Mr.

[64] Opinion and Order at 80-81.

Rose forecasts higher *capacity* prices, based on several additional factors, also has no bearing on whether his energy price projections were reliable; these are two different and separate elements of the Rider RRS projection equation. Accordingly, Mr. Rose's capacity price projections have no bearing at all on the reliability of his energy price projections.

Third, the fact that no other party presented a full projection of energy prices is again irrelevant to the *reliability* of Mr. Rose's energy price projections. No other party was required to present a full projection of energy prices, because only FirstEnergy has the burden of proof in this proceeding. R.C. 4928(C)(1). The Commission's reliance on the absence of other full projections of energy prices in finding that Mr. Rose's projection is reasonable has no support in law or logic.

Finally, the existence of two EIA forecasts of future natural gas prices (one that is lower than Mr. Rose's projections and one that is higher than a 2014 reference case) does not support the reliability of Mr. Rose's energy projections in any way.

The Commission never analyzed or explained the reasonableness of the inputs and assumptions of Mr. Rose's projections in its Opinion and Order. In the face of significant opposition from multiple experts, the Commission failed to critically examine the basis of his energy projection, to weigh the various arguments, and to explain why his inputs and assumptions are reliable. This is clear from the Commission's decision when the cursory discussion of Mr. Rose's projection is compared to the detailed, multi-page dissection of OCC witness Wilson's projections. (Opinion and Order, at 80-86.) Given the critical nature of the energy price projection in reviewing the harms and benefits of Rider RRS, the Commission's error is significant and should be corrected on rehearing.

Assignment of Error No. 20:

> **The Commission erred in finding that the financial projections by witness Lisowski are reliable without citing specific record evidence.**

FirstEnergy witness Lisowski used Mr. Rose's energy and capacity price projections to determine the annual revenues that will be recovered or credited under Rider RRS. (Opinion and Order, at 80.) After it found that Mr. Rose's projection was reliable, as discussed *supra*, the Commission also accepted Mr. Lisowski's calculations of Rider RRS over the eight-year term. (*Id.*) But the Commission's decision never analyzed the FirstEnergy modeling that he used in his calculations or the testimony critiquing that modeling, such as Dr. Kalt's testimony. It stated only the following:

> Mr. Lisowski used [Mr. Rose's] prices to determine the net annual revenues to be recovered or credited under Rider RRS using the Companies' dispatch modeling. (Opinion and Order, at 80.)
>
> Despite the various criticisms of the projections prepared by FirstEnergy witness Rose and the modeling prepared by FirstEnergy witness Lisowski, we are not persuaded by arguments against giving weight to the projections and models. (*Id.* at 81.)

These cursory statements fail to state specific findings of fact, supported by the record, and the reasons for the Commission's decision to adopt Mr. Lisowski's calculations of the projected charges and credits under Rider RRS. This violates R.C. 4903.09, which requires the Commission to file "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." The Commission's decision does not comply with this requirement.[65]

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[65] Accord, *Motor Service Co. v. Pub. Util. Comm.*, 39 Ohio St. 2d 5 (1974); *Ideal Transportation Co. v. Pub. Util. Comm.*, 42 Ohio St. 2d 195 (1975).

Assignment of Error No. 21:

> **The Commission failed to consider all of witness Kalt's analyses and erred in finding that witness Kalt's sensitivity analysis was not reliable.**

Intervenors P3 and EPSA presented the testimony of Dr. Joseph P. Kalt, the Ford Foundation Professor (Emeritus) of International Political Economy at the John F. Kennedy School of Government at Harvard University, and a senior economist for Compass Lexecon.[66] The Commission failed to consider the majority of Dr. Kalt's testimony in this proceeding, and dismissed the one analysis it did consider as "a sensitivity analysis" related to only one variable – natural gas prices. (Opinion and Order, at 85).

Dr. Kalt provided extensive expert testimony on FirstEnergy's projections. He explained why FirstEnergy's projections are full of risk in his December 30, 2015 supplemental testimony on the stipulation. Specifically, he noted that the "primary driver of the Companies' estimated net positive present value for ratepayers in the latter years of the proposed PPA is their projection of high and rising power prices over the 8-year term of the plan now proposed in Third Stipulation."[67] He then pointed out that the increases in power prices were largely a result of FirstEnergy's projected natural gas prices which FirstEnergy projected to start "[redacted]."[68] The problem with FirstEnergy's projected natural gas prices, provided by Mr. Rose, is that they are "now clearly now long out-of-date and [redacted] with current natural gas price forecasts available from the marketplace."[69]

[66] P3/EPSA Ex. 1 at 1.
[67] P3/EPSA 12 at 12.
[68] P3/EPSA 13C at 12.
[69] *Id.*

Dr. Kalt then compared Mr. Rose's 2014 gas price forecast to other available forecasts. He found that:

> [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).[70]

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:

> 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]

[70] P3/EPSA 13C at 12.

> [redacted] as used by the Companies' in asserting that ratepayers would benefit from their proposed bailout of FES' stockholders and lenders.[71]

Dr. Kalt also developed a forecast using FirstEnergy's own numbers but substituting short-term NYMEX futures for the first three years of Rider RRS and then relying on the EIA long-term natural gas price forecasts. As he testified:

> In Attachment JPK-SS-3, I show results using only the first three years of current NYMEX futures prices, and then letting projected gas prices rise after 2018 at the rate of change seen in the EIA's long-term AEO forecast of April 2015. As Attachment JPK-SS-1 indicates, [redacted] each shows quite similar rates of increase over time (as represented by their roughly parallel slopes). **The consequence of trusting NYMEX for only its first three years of futures prices, and then turning to the U.S. Department of Energy's EIA forecast for the rate of price increase after 2018, is that the proposed ESP plan portends a net present value loss of $793 million for the Companies' rank-and-file captive consumers** (Attachment JPK-SS-3).[72]

Dr. Kalt summarized the issue with Mr. Rose's gas prices by noting that the levels [redacted] for the same time periods. He testified that:

> 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.[73]

Dr. Kalt's analysis of historical generation levels and the generation levels used to create FirstEnergy's projections for Rider RRS show how quickly FirstEnergy's revenue projections for

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

[72] P3/EPSA Ex. 13C at 17 (emphasis added, footnotes omitted).

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

Rider RRS turn into millions of dollars in charges. Specifically, Dr. Kalt compared the projected generation levels for the Sammis and Davis-Besse plants, which are embedded in Ms. Mikkelsen's Rider RRS projections, to the plants' actual historical generation levels to see if FirstEnergy's projections were reasonable.[74] He found that the average levels of plant net generation that are embedded in FE's future projections [redacted] the average net generation the plants have actually realized over the last decade or more.[75] In other words, FirstEnergy is asking its ratepayers (and the Commission) to trust that, going forward, [redacted]

Dr. Kalt then noted that "[i]n particular, 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)."[76] Dr. Kalt ran FirstEnergy's projection sheet using Mr. Rose's price forecasts but relying on the historical average of the plants' generation output.[77] He also reduced the plants' variable costs to account for those costs that would not be incurred if the plants generate less electricity.[78] The result was a net present value loss of $201 million.[79]

The Commission failed to address and consider the majority of this evidence. It only considered the NYMEX gas analysis, and in rejecting Dr. Kalt's analysis, the Commission stated that it is "skeptical that all other variables will remain constant." (Opinion and Order, at 85.) This misses the point. Dr. Kalt did not presume that all other variables underlying the Rose

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[74] P3/EPSA Ex. 12 at 20-21.
[75] P3/EPSA Ex. 13C at 21
[76] *Id.*
[77] *Id.* at 21-22.
[78] P3/EPSA Ex. 12 at 22, fn. 37.
[79] *Id.* at 21-22.

projections will remain constant; he demonstrated that a critical component of Mr. Rose's projections is demonstrably wrong.

In short, the Commission acted unreasonably and unlawfully by offering no reasoned basis for its rejection of Dr. Kalt's analysis, and by failing to address or consider other analyses and testimony by Dr. Kalt.

Assignment of Error No. 22:

> **The Commission erred in finding that it could properly ignore downward price trends in the price of natural gas in evaluating the reliability of financial projections.**

The Commission rejected all of the evidence of record of recent drops in natural gas prices. (Opinion and Order, at 83-84.) It ignored the fact that *at present* natural gas prices are low and, thus, that the rapidly approaching onset of ESP IV will begin at a time when natural gas prices are unusually low.[80] Given the significant effect of natural gas prices on the price of energy, the Commission erred in endorsing financial projections that categorically ignore this important factor.

In fact, the Commission expressly rejected the testimony that natural gas prices are low and will remain low for some time, which it ridiculed as "energy price utopia." (Opinion and Order, at 83-84.) By contrast, the Commission found that Mr. Rose's projections are reliable, even though he assumed higher natural gas prices for the entire ESP IV period, which is already impossible for at least the beginning of that period, given the current low prices.

The Commission erred in ignoring the current low prices, their impact on the trend in future natural gas prices, and the resulting effect on the Rider RRS financial projections.

[80] P3/EPSA Ex. 6, Supplemental Testimony of J. Kalt, at 28.

Assignment of Error No. 23:

The Commission erred in finding that it is proper to average contradictory financial projections by two witnesses, who disagree as to whether Rider RRS will produce a charge or a credit to ratepayers, and to predict on that basis that Rider RRS will result in a net credit to ratepayers over its eight-year term.

After evaluating several but not all[81] of the projections in evidence, the Commission concluded that two were reliable. (Opinion and Order, at 85.) The Commission made no adjustments to those two projections despite the other evidence in the record; it simply averaged the eight-year effect on ratepayers predicted by the two projections, so that Mr. Rose's projection of a \$561 million credit and Mr. Wilson's "Scenario 1" Projection of a \$50 million charge were collectively transformed into a \$256 million credit. (*Id.*)

The Commission erred by averaging the two projections. For example, it necessarily assumed that each projection was *equally* reliable in all respects, even though they reached contradictory results. The Commission relied upon testimony from OEG witness Baron to conclude that averaging the projection results is reasonable, but he stated only that averaging is possible and that it could be reasonable only "if all things were equal."[82] In fact, Mr. Baron recommended that the Commission go beyond simple averaging to examine the methodologies and the assumptions, and to weight the probabilities.[83] Nothing in the Commission's decision suggests that it attempted to do this. The Commission erred in employing rudimentary averaging to make a key determination in this proceeding.

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[81] In addition to not taking into consideration Dr. Kalt's analyses, the Commission claimed that it could not include the projection presented by Sierra Club witness Comings in its estimate of Rider RRS charges because it was based on confidential information. (Opinion and Order at 85.) This overlooks the fact that Mr. Rose's projection was based on confidential information, Mr. Wilson's projections were based on confidential information, and Dr. Kalt's analyses were based on confidential information. Moreover, the Commission can incorporate a full analysis based on confidential information by placing under seal any portions of its decisions that contain confidential information.

[82] Tr. Vol. 22 at 4384.

[83] *Id.* at 4385-4386.

The commission's finding that Rider RRS will result in a net credit to customers over its eight-year term is based on improper averaging of unreliable projections, and it should reconsider this finding on rehearing.

Assignment of Error No. 24:

> **The Commission erred in finding that a two-year limit on rate increases related to Rider RRS will "protect customers" from price fluctuations.**

After evaluating the financial projections for Rider RRS and concluding that it will result in an overall credit to customers, the Commission acknowledged that even the "most reliable" projections may be wrong. (Opinion and Order, at 86.) It therefore imposed limits from June 2016 through May 2018 on customer bills for increases in Rider RRS charges. (*Id.*). The Commission explained that these limits have three purposes: (1) to protect customers from rate volatility; (2) to protect customers against price fluctuations; and (3) to provide additional rate stability for customers. (*Id.*)

The Commission's limits are based on average customer bills, which cannot increase above the average of bills from June 2015 to May 2016, except to allow for seasonal differences and over-/under-recoveries in Rider RRS. (*Id.*) The Commission expressly allowed FirstEnergy to defer the unrecovered amounts of Rider RRS expenses during the second year of the ESP IV for future recovery. (*Id.*)

This two-year "limit" is of virtually no value to ratepayers, for several reasons, and it will have virtually no stabilizing effect on rates. First, during the first two years of the ESP IV, all estimates of Rider RRS project that it will be a charge on customer bills,[84] so the alleged protection afforded by this "limit" depends upon the difference between average customer bills during the 2015/2016 period and average customer bills during that first two years. If the

[84] Opinion and Order, at 108.

amounts billed during the 2015/2016 period drop off below the average customer bills, then customer bills under Rider RRS will increase beyond what they would be without Rider RRS. It is unclear from the Commission's decision what effect this two-year "limit" will actually have on ratepayers. We do know, however, that Rider RRS will be an additional amount on the ratepayer bill, which does not protect customers from rate volatility and price fluctuations and does not provide additional rate stability.

Second, if the Commission truly believes that the two-year limit will protect customers from rate volatility and price fluctuations and will provide additional rate stability, there is no reason that it then should apply this limit for just the first two years of the ESP IV. This is yet another example of the machinations underlying the Commission's attempt to resolve the parties' disputes over a brokered Stipulation.

Third, the two-year limit on increases in average customer bills expressly allows Rider RRS to be adjusted up and down through quarterly adjustments during that period. Once again, adjusting the rider rate on a quarterly basis does not protect customers from rate volatility and price fluctuations, and provides no additional rate stability. In fact, quarterly adjustments will cause Rider RRS rates to fluctuate, and ratepayers will see those fluctuations in their electric bills.

Fourth, the Commission's decision allows FirstEnergy to defer any amounts not recovered under Rider RRS during the second year of the ESP IV. (Opinion and Order, at 86.) But FirstEnergy can seek recovery of those amounts at any time, including during the ESP IV, and those unrecovered amounts would be additional amounts on customer bills. Deferring rider costs for later recovery will not protect customers from rate volatility and price fluctuations and will not provide additional rate stability.

For all of these reasons, the Commission should reconsider its finding that an initial two-year limit on average rate increases related to Rider RRS protects ratepayers by stabilizing rates under Rider RRS.

Assignment of Error No. 25:

> **The Commission erred in finding that short-term harmful effects of Rider RRS on customers' bills can be ignored if they are somehow outweighed by later positive effects.**

The Commission concluded that the Stipulation will benefit ratepayers and the public interest by producing "a projected net credit to customers of $256 million. . . for the eight years of ESP IV." (Opinion and Order, at 78.) The Commission's projection and the methodology that created it are not reliable, for the reasons discussed *supra*. But virtually every witness who addressed the issue testified that there will be substantial customer charges during the early years of Rider RRS,[85] which the Commission has weighed against the projected customer credits during the later years to yield a "net credit." The Commission completely ignored the effect of the uneven distribution of charges and credits on consumers during the eight-year term. This was error, and it should be corrected by the Commission on rehearing.

Most obviously, a "net" benefit to ratepayers is not necessarily a benefit at all. A customer charged $10 a year for a service for 8 years will have a net charge of $80, which is the same net charge that a customer would have if it was charged $1,000 in the first year and then credited $131.43 per year during the following years. But a $1,000 expense in the first year would be punitive, if not impossible, for many customers, and no one could claim that they are not harmed merely because the total net charge will be the same under either billing practice.

[85] *See., e.g,* P3/EPSA Ex. 12, Second Supplemental Testimony of Joseph P. Kalt at 17 ($793 million in losses for the first three years); OCC/NOPEC Ex. 9, Second Supplemental Testimony of James F. Wilson ($1.52 billion in lossess for the first three years).

The Commission ignored the harmful effects on consumers if Rider RRS charges are extremely high during the initial years of ESP IV (or the converse), regardless of whether they can be netted against any future credits. It should correct this error on rehearing.

E. The underlying plants are not at serious risk of closure.

Assignment of Error No. 26:

> **The Commission erred in assuming that the Sammis and Davis-Besse plants will close unless Rider RRS is approved without addressing evidence to the contrary.**

FirstEnergy maintained throughout this proceeding that Rider RRS is needed to "prevent" the Sammis and Davis-Besse generation plants "from retiring before it is economic to do so." (Company Ex. 42, at 4). This issue came to dominate much of the argument about economic concerns and the public interest. Indeed, FirstEnergy justifies ESP IV as an "economic development" program almost solely on its representation that the two plants will otherwise close, and many of its other arguments similarly rest on that contention.

However, the Commission never evaluated the evidence for FirstEnergy's claim that the plants will close unless its application is approved, and it never clearly found as a fact that the plants would close. Instead, it found "a serious risk of closure," without finding that this would actually happen. *See* Opinion and Order, at 87 ("in the event of plant closure, substantial transmission investments would be necessary"); 88 ("[t]he economic impact of plant closures and the impact on local communities is of concern"); *and* 99 ("[i]f Sammis or Davis-Besse were to be retired, and such plant retirement caused the ATSI zone to separate from PJM," customers could face higher rates).

The sole basis for FirstEnergy's claim is its assertion, without any quantitative evidence, that the Sammis and Davis-Besse plants are "financially challenged" because PJM's cash flows "are chronically and artificially too low to cover the costs of investments" that are needed "to keep the Plants running."[86]

Dr. Kalt found that [redacted][87] He explained:

[redacted]

[86] Company Ex. 42, at 6, 12, and Company Ex. 29, at 4.
[87] P3/EPSA Ex. 2 at 42.

[redacted]

Dr. Kalt summarized his analysis as follows:

[redacted]

Even witness Don Moul [redacted] stating only that it is possible FES "may reach a point where these plants aren't covering their avoidable costs, at which point we would have to make a decision as to whether to continue to invest in them and to keep them online. ...[90] This does not change Dr. Kalt's conclusion that [redacted]"[91]

Dr. Kalt's testimony on this issue is specific and unequivocal:

> For the reasons I set out in my prior testimonies, the proposed ESP is not credibly needed to keep the subject plants in operation – either by FES or, if FES is not capable of operating the plants efficiently, by another owner. For fiduciarily responsible plant owners, retirement is only reasonable when a plant cannot be expected to cover its going-forward costs. The shutdown decision ignores past, even if unrecovered costs (e.g., that may be due to lenders). So long as going-forward revenues can be expected to cover going-forward costs, positive cash flow is generated – and some positive cash flow is preferred to no cash flow (as occurs upon retirement) when it comes to shareholders and lenders seeking recovery of already incurred past costs. **In the case of the Sammis and Davis-Besse plants, while lower fuel costs can be expected to result in lower electricity prices, I have shown previously that gross margins far exceed the**

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[88] *Id.* at 42-44 (emphasis added, footnotes omitted).
[89] P3/EPSA Ex. 2 at 44.
[90] Tr. Vol. 10 at 2202.
[91] P3/EPSA Ex. 2 at 43.

> **going-forward operating and capital expenditures that the Companies' own calculations show would be needed to keep the plant operating on a positive cash flow basis.**[92]

Even testimony from FirstEnergy witnesses indicates that the Davis-Besse and Sammis plants are not in financial need and are not at risk of closing. Mr. Moul's job responsibilities at the time of his direct testimony included advising senior FES management on whether the plants would retire,[93] but no one within FES had asked his opinion as to whether the Davis-Besse and Sammis plants should close and he had not been involved in any conversations regarding their closure.[94] FirstEnergy witness Mikkelsen also could not answer the question of whether the plants would retire within the next three years.[95]

FES has made over $2 billion worth of capital investments in the Davis-Besse and Sammis plants, which strongly suggests that it believes they have a future.[96] As Dr. Kalt observed:

> [FirstEnergy] witness Mr. Harden testifies that the plants have recently received almost $2 billion worth of capital investment in 2010[97] (excluding the recent reported investment of $600 million in Davis-Besse's new steam generators), indicating that FES has expected these plants to continue to operate for many years into the future. That is, these plants have recently received enormous capital investments presumably based on FES' expectation that higher future power prices will compensate FES for its capital investments.[98]

FirstEnergy insists that the Sammis and Davis-Besse plants "have a significant financial need."[99] It claims that Sammis [redacted] and that Davis-Besse [redacted] from

[92] P3/EPSA Ex. 12 at 19-20 (emphasis added).
[93] Tr. Vol. 11 at 2305.
[94] Tr. Vol. 11 at 2305.
[95] Tr. Vol. 2 at 414-415.
[96] FirstEnergy Ex. 32, Direct Testimony of Paul A. Harden at 10.
[97] P3/EPSA Ex 1, Direct Testimony of Joseph P. Kalt, at 42.
[98] P3/EPSA Ex. 1 at 41, citing Harden Direct Testimony at 10 (footnote omitted).
[99] FE Initial Brief at 125.

2009 through 2014.[100] But the tables in Mr. Moul's testimony show that [redacted] Mr. Moul repeatedly emphasized during his testimony that a plant retirement decision is based on a one-year snapshot of whether it is recovering its avoidable cost going forward, considering the cost of any necessary future capital expenditures and the balance sheet.[102] FirstEnergy nevertheless relied on historical profit and loss information despite its own witnesses' repeated insistence that each plant must stand on its own and the analysis must focus on the immediate future's financials.[103]

Dr. Kalt's analysis established that Davis-Besse and Sammis [redacted] He explained:

[redacted]

[100] *Id.* at 125-126.
[101] FirstEnergy Ex. 30 at 2.
[102] Tr. Vol. 32 at 6630.
[103] *See, e.g.*, Tr. Vol. 11 at 2256-2257; Tr. Vol. 8 at 1726.

[redacted]

Dr. Kalt's Attachment JPK-7,[105] reproduced on the next page, shows that the plants [redacted]

[redacted]

[redacted]

As the tables indicate, Dr. Kalt included FirstEnergy's own projections of necessary capital investments. This is important because FirstEnergy witnesses Moul and Lisowski repeatedly stated that there was a risk that Davis-Besse and Sammis would not be able to generate sufficient cash flow to pay for capital investments.[106] Mr. Lisowski included the necessary cash for capital investments in his revenue and cost projections,[107] which Dr. Kalt used in reaching his conclusion that [redacted][108]

Significantly, FirstEnergy presented no expert testimony to refute Dr. Kalt's findings. Mr. Lisowski, the assistant controller for FES, was the only FirstEnergy witness to present rebuttal testimony to Dr. Kalt's analysis.[109] He claimed that Dr. Kalt left out necessary capital expenditures, accretion expense and interest expense, as well as any equity return and income tax expense.[110] He also claimed that Dr. Kalt presented a hypothetical scenario and failed to explain how a financially challenged plant can continue to pay expenses and incur costs without available cash flow.[111]

However, Dr. Moul, the Senior Vice President, Fossil Operations and Environmental, at FirstEnergy Generation, LLC, a subsidiary of FES, **agreed with Dr. Kalt** [redacted][112]

[redacted] [redacted]

[106] Tr. Vol. 10 at 2184-2185;.Tr. Vol. 32 at 6687.
[107] Tr. Vol. 32 at 6693, 6695.
[108] P3/EPSA Ex. 2 at 42-44.
[109] Company Ex. 143 and Ex. 144 (confidential).
[110] Company Ex. 143 at 2-3.
[111] *Id.*
[112] Tr. Vol. 11 at 2433.

[redacted]

Mr. Moul then acknowledged that [redacted][114]

This evidence that [redacted] *is critical. Mr. Moul's unqualified testimony that the plants will not close under these circumstances* precludes any finding that the plants will close.

Finally, FirstEnergy's witness Don Moul stated that the Sammis and Davis-Besse plants are in the "middle of the pack" with respect to performance.[115] If FES is threatening to close the Sammis and Davis-Besse plants, then at least one-half of its plants are presumably in similar dire straits. But this has never been implied in any testimony, suggesting that FirstEnergy's insinuation that Davis-Besse and Sammis will close if Rider RRS is not approved is not credible.

Accordingly, the Commission erred in assuming, without supporting evidence, that the Sammis and Davis-Besse plants will close if Rider RRS is not approved, and in ignoring the above evidence to the contrary. It should find on rehearing that FirstEnergy failed to carry its burden of proof on this issue.

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[113] Tr. Vol. 11 at 2432-2433.
[114] P3/EPSA Ex. 11 (confidential); P3/EPSA Ex. 11C (confidential).
[115] Tr. Vol. 10 at 2190.

F. Rider RRS will not promote economic development.

Assignment of Error No. 27:

> **The Commission erred in finding that the provisions of ESP IV including Rider RRS will promote economic development.**

As discussed *supra*, the Commission found that it has legal authority to approve ESP IV pursuant to R.C. 4928.143(B)(2)(i), based on its conclusion that Rider RRS is an "economic development program," but it never squarely found that it will actually result in economic development. (Opinion and Order, at 108-110.) To the extent that factual finding may be inferred from its ruling, it is not supported by the record and should be corrected on rehearing.

Rider RRS was not conceived or designed to advance economic development. FirstEnergy attempted to claim that this would be an incidental result, but it presented no evidence in support. In the end, it was left with the claim -- adopted by the Commission -- that Rider RRS promotes economic development if one *assumes* that the Sammis and Davis-Besse will otherwise close. (Opinion and Order, at 109.) But the evidence demonstrates that neither of those plants will close in any event, as explained *supra*, so Rider RRS adds nothing to regional economic development in this respect.

Similarly, vague claims that the promised rate stability will indirectly help Ohio's economy were not proven or even explained in any rigorous way. FirstEnergy presented no quantitative or qualitative evidence on this issue. The Commission should find on rehearing that Rider RRS will not promote economic development.

G. Rider RRS will not provide rate stability.

Assignment of Error No. 28:

The Commission erred in finding that Rider RRS will provide rate stability.

The Commission found that the Stipulation, as modified, "protect[s] consumers against rate volatility and price fluctuations by promoting rate stability for all ratepayers." (Opinion and Order, at 100.) It made that finding in connection with its approval of Rider RRS under R.C. 4928.143(B)(2)(d), which requires that it have the effect of stabilizing or providing certainty regarding retail electric service. (*See* discussion *supra.*) But the Commission also claimed that this purported rate stabilization effect would lead to a host of ratepayer benefits under its three-prong test.

The Commission used very qualified language in finding that Rider RRS, as "a financial hedging mechanism *** is intended...to provid[e] customers with more stable pricing" and "would, in theory, have the effect of stabilizing" rates. (Opinion and Order, at 100; emphasis added.) The remainder of its ruling nevertheless appears to treat the hypothetical "intended" effect of rate stabilization as a factual finding that Rider RRS will stabilize rates.

The Commission's tepid endorsement of the purported rate stabilization effects of Rider RRS reflects the weakness of FirstEnergy's evidence of such effects. In fact, the evidence shows that Rider RRS will have little or no stabilizing effect because it does not guarantee a sufficient credit to ratepayers to offset rate volatility, and that the new quarterly reports of forecasted values will actually decrease rate stability, as explained above. The Commission should change its finding on this issue during rehearing.

FirstEnergy has claimed that Rider RRS will promote rate stability in several ways, as discussed *supra,* but the evidence in this proceeding flatly refutes those claims and shows that

Rider RRS will actually cause rate *instability*. Significantly, the rates paid by a majority of retail customers are set by power procurements carried out considerably in advance of consumption,[116] and these forward market prices are much less volatile than day-to-day power prices.[117] SSO customers do not experience rate volatility because they have fixed contracts based on periodic blended auctions,[118] and they may receive price discounts for committing to long-term contracts.[119]

As discussed *supra*, Rider RRS charges will also fail to correspond to actual costs, because the initial rate is based on a forecast and all subsequent rates reflect the difference between the forecasted revenues and the actual costs and revenues. The quarterly reconciliations merely increase the potential for rate instability.

In his testimony, Dr. Kalt described the lack of any reliable evidence that Rider RRS will reduce retail price volatility. He pointed to Ohio consumers' current access to competitive retail electric service offers, and compared retail residential SSO rates to daily average wholesale prices in the PJM daily energy market over 2005-2015 in the major Ohio cities served by FirstEnergy.[120]

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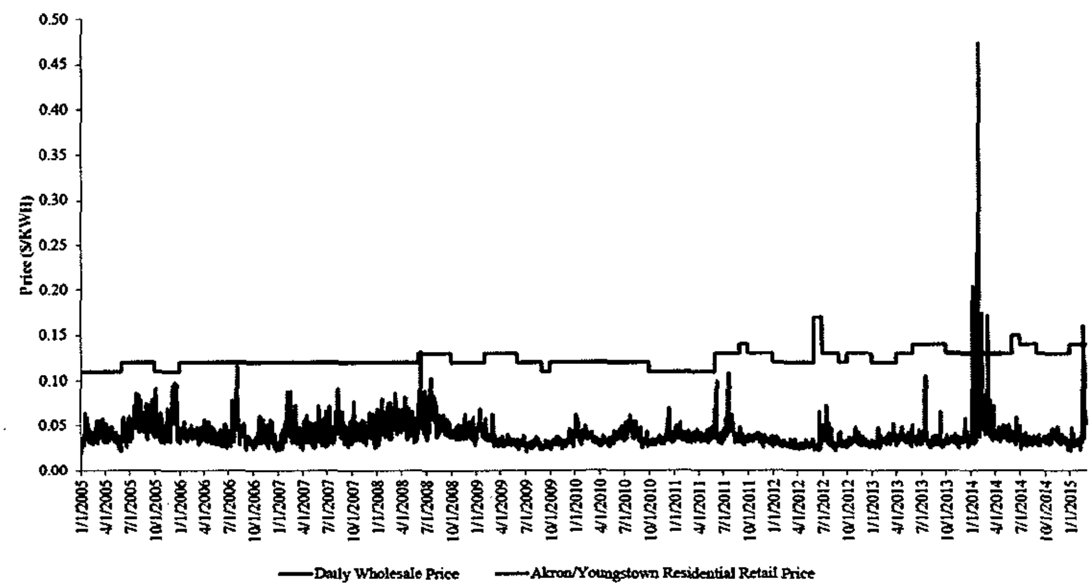
[116] P3/EPSA Ex. 1 at 11.
[117] P3/EPSA Ex. 1 at 11.
[118] P3/EPSA Ex. 1 at 40; Staff Ex. 12 at 14.
[119] Company Ex. 13 at 13; P3/EPSA Ex. 5 at 26-27; Exelon Ex. 1 at 12-13.
[120] P3/EPSA Ex. 5 at 26-27.

The following attachments from his testimony[121] demonstrate that there was no correlation between the volatility of daily wholesale power prices and SSO retail rates:

Attachment JPK-S3a

DAILY WHOLESALE PRICE AND AKRON/YOUNGSTOWN STANDARD SERVICE OFFER RESIDENTIAL PRICE 2005-2015



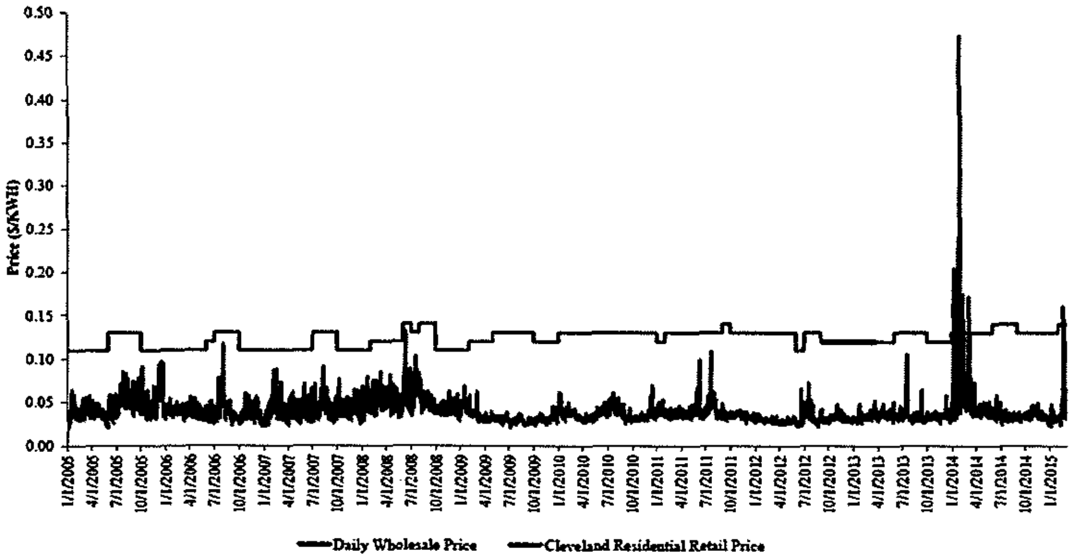
Source: The Public Utilities Commission of Ohio ("PUCO") http://www.puco.ohio.gov/puco/index.cfm/industry-information/statistical-reports/ohio-utility-rate-survey/#sthash.D6DTZpmz.dpbs ; Ventyx Velocity Suite Products.

Note: For the retail price PUCO uses the Standard Service Offer as reported by the "Ohio Utility Rate Survey"; The wholesale price is PJM's AEP/Dayton hub day-ahead daily average hourly price.

[121] P3/EPSA Ex. 6, Supplemental Testimony of J. Kalt (Confidential), at Exhibits JPK-S3a, JPK-S3b, JPK-S3c.

Attachment JPK-S3b

DAILY WHOLESALE PRICE AND CLEVELAND STANDARD SERVICE OFFER RESIDENTIAL PRICE 2005-2015

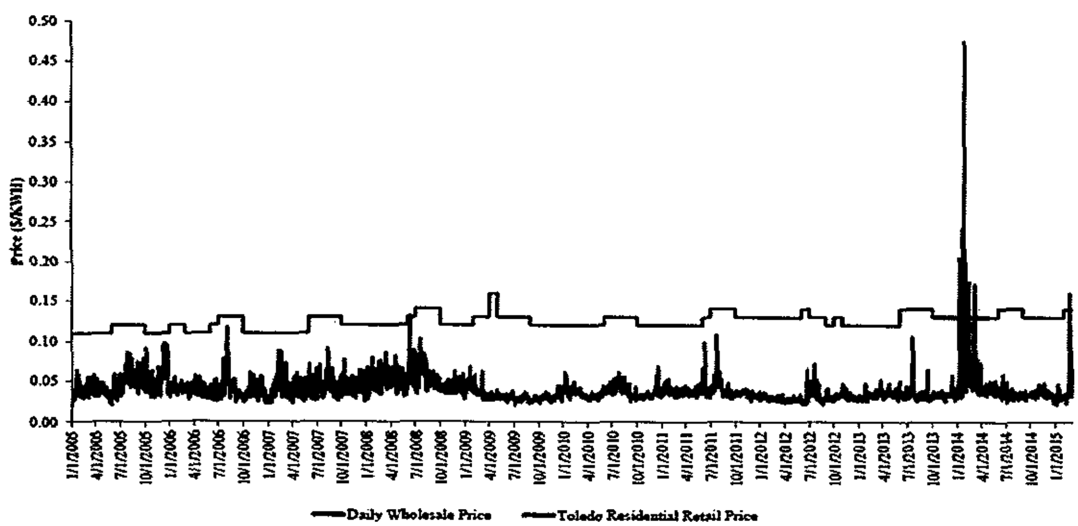


Source: The Public Utilities Commission of Ohio ("PUCO") http://www.puco.ohio.gov/puco/index.cfm/industry-information/statistical-reports/ohio-utility-rate-survey/#sthash.D6DTZpmz.dpbs ; Ventyx Velocity Suite Products.

Note: For the retail price PUCO uses the Standard Service Offer as reported by the "Ohio Utility Rate Survey"; The wholesale price is PJM's AEP/Dayton hub day-ahead daily average hourly price.

Attachment JPK-S3c

DAILY WHOLESALE PRICE AND TOLEDO STANDARD SERVICE OFFER RESIDENTIAL PRICE 2005-2015



Source: The Public Utilities Commission of Ohio ("PUCO") http://www.puco.ohio.gov/puco/index.cfm/industry-information/statistical-reports/ohio-utility-rate-survey/#sthash.D6DTZpmz.dpbs ; Ventyx Velocity Suite Products.

Note: For the retail price PUCO uses the Standard Service Offer as reported by the "Ohio Utility Rate Survey"; The wholesale price is PJM's AEP/Dayton hub day-ahead daily average hourly price.

As Dr. Kalt noted, these figures make clear that the "volatility of daily wholesale power prices is not transmitted through to SSO retail rates," even during wholesale spikes.[122] Moreover, long-term power prices vary less than spot-market prices,[123] and retail prices vary less than wholesale electricity prices. He testified that:

> Retail consumer power prices are set such that they are not even remotely as volatile as wholesale spot market prices. The former rise and fall much more slowly than wholesale market prices and are considerably less volatile. The Companies currently procure generation resources for Standard Service Offer customers via a laddered auction with 12-, 24- and 36-month terms, and the Companies' price to non-shopping customers is a fixed rate per kWh. In Ohio, only retail customers who choose to opt into variable rate pricing are exposed to variation in the price of electricity. Shopping customers may select fixed rates for periods as long as 36 months. **Therefore day-to-day volatility in wholesale electricity prices has limited direct impact upon retail customers.**[124]

The Commission ignored all of the evidence that Rider RRS may increase rather than decrease rate instability. Rider RRS "true-ups" in retail ratepayers' bills will not be countercyclical to the movements of wholesale prices[125] because of the lag before the bill adjustments.[126] Thus, if a period of quite high wholesale prices occurs and revenues in that period are in excess of the plants' calculated costs for the period, the subsequent Rider RRS "true-up" would be expected to take the form of a bill reduction. The lag in making bill adjustments under Rider RRS and the random walk characteristics of electricity prices mean, however, that this bill reduction would likely apply when wholesale prices have receded from their spike.[127] In other words, low wholesale prices and the Rider RRS adjustment would tend, if anything, to reinforce each other, with the Rider RRS adjustments pushing rates down at the

[122] *Id.*
[123] P3/EPSA Ex. 1 at 39.
[124] P3/EPSA Ex. 1 at 40 (footnotes omitted; emphasis added).
[125] P3/EPSA Ex. 5 at 28.
[126] Company Ex. 43 at 3.
[127] P3/EPSA Exhibit 5 at 28

same time wholesale prices are soft.[128] Similarly, periods of relatively soft wholesale prices would tend to generate under-recovery of the plants' calculated costs, leaving consumers having to bear upward Rider RRS adjustments on their bills in periods when unusually low wholesale prices have passed and wholesale markets have firmed.[129] The result is that Rider RRS upward adjustments are imposed on consumers right when wholesale prices are rising.

Rider RRS does not even provide the incremental rate stability that an aggregate or annual limit on customer charges would provide. If the Commission's averaging of the forecasts prove incorrect, customers will be saddled with extremely high Rider RRS charges that are added to their bills. Rider RRS does not guarantee a sufficient credit to customers to offset any rate volatility that occurs, and it places no limits on the amount of increased charges that can be imposed. In short, there is no evidentiary basis for the Commission's finding that Rider RRS will provide rate stability.

H. Rider RRS is an anti-competitive subsidy.

Assignment of Error No. 29:

> **The Commission erred in finding that Rider RRS does not provide an anti-competitive subsidy to FirstEnergy's affiliate.**

Several intervenors objected that Rider RRS constitutes an anti-competitive subsidy to FirstEnergy's affiliate that is harmful to FirstEnergy's customers and the public interest. (*See* Opinion and Order, at 76-77.) The Commission said that it is "mindful" of "concerns that the Companies will enter into bilateral contracts with an affiliate in order to give the affiliate a competitive advantage." (*Id.*, at 110.) It then summarily concluded that its annual prudency review process is sufficient to protect against "anticompetitive subsidies." (*Id.*) In making that

[128] P3/EPSA Ex. 5 at 28.
[129] *Id.*

conclusion, the Commission failed to materially address and consider the intervenors' evidence and arguments.

Rider RRS will be collected as a distribution charge for the benefit of FirstEnergy's affiliate even though it is a generation charge.[130] It therefore imposes the affiliate's financial general costs on ratepayers and, when revenues exceed the affiliate's costs, it creates a subsidy from the distribution service to the affiliated generation service, in violation of R.C. 4928.02(H), as discussed *supra*.

Rider RRS acts as a subsidy by shifting the risks of the affiliate's plants to FirstEnergy's ratepayers. If operating or investing at a particular level or under particular conditions is potentially money-losing, Rider RRS makes it less risky for FirstEnergy's affiliate, inasmuch as ratepayers will ultimately bear the costs of uneconomic performance.[131] Dr. Kalt explained that all of these factors have the same economic effect on wholesale market: "They encourage overproduction and inefficiency, and they crowd out competitive producers."[132]

The PPA proposal on which Rider RRS depends is an unabashed guarantee of cost-plus recovery for FirstEnergy's affiliate that is paid for by FirstEnergy's ratepayers. As such, it provides the affiliate with extensive pecuniary assistance that constitutes a long-term subsidy. The PJM Market Monitor agreed that this is a subsidy analogous to other subsidies that have been rejected as inconsistent with competition in the wholesale power markets.[133] Thus, the PPA will create an incentive for generators to present a "zero offer" in the PJM markets, in order to

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[130] RESA Ex. 2, at 5
[131] *Id.* at 29.
[132] P3/EPSA Ex. 1 at 29.
[133] IMM Ex. 1 at 3-4.

maximize the revenue offset to the customers, and that will have price-suppressive effects and make it difficult for generating units that have no subsidies to compete in the market.[134]

Numerous experienced and knowledgeable witnesses from all segments of the electric industry testified in this proceeding that Rider RRS is an unjustified and anti-competitive subsidy that will harm the competitive markets. Excerpts of their testimony are set forth in the chart below:[135]

Witness	Testimony
Exelon witness Campbell	"Making shopping customers pay FE and in turn its affiliate FES for generation service that they do not receive from either FE or FES has the potential to destroy the development of the competitive retail market, and puts Ohio at a competitive disadvantage, as businesses will face unreasonably higher energy costs." (Exelon Ex. 1 at 12)
Dynegy witness Ellis	"If approved by the Commission, the Stipulation will have a direct impact for years on Dynegy's ability to compete with FES and the Companies in the wholesale markets. Under the proposed PPA, FES will have all its costs covered plus receive a guaranteed 10.38% rate of return. All other merchant generators, including Dynegy, must compete for sales and bear the risk of lost revenues if they do not competitively price their generation output. The Stipulation provides FES with an advantage over other merchant generators, placing other existing merchant generators, jobs and tax revenues at risk. Further, because the design of the PPA remains cost plus, FES and the Companies have no financial incentive to act in an economically rational manner for the purchased output from the PPA units and the OVEC entitlement." (Dynegy Ex. 1 at 5)
PJM IMM Bowring	"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. * * * This type of subsidy is inconsistent with competition in the wholesale power markets because of its price suppressive effects. Such effects would make it difficult or impossible for generating units without subsidies to compete in the market." (IMM Ex. 2 at 4-5)
OMAEG witness Hill	"Consumers can never be empowered and retail competition can never be enhanced when regulatory powers are being used to increase the base prices of the product and when regulation takes away the consumer's

[134] IMM Ex. 1 at 3.
[135] Exelon Ex. 4 at 6; Dynegy Ex. 1 at 4.

Witness	Testimony
	ability to choose a supplier. There is no amount of technology or information that can repeal partial price-fixing. Rider RRS is explicitly designed to socialize the losses from the three power plants under the PPA. * * * Rider RRS is a cross-subsidy." (OMAEG Ex. 26A at 25)
P3/EPSA witness Kalt	"The proposed plan would shift very large risks from FES' debt and equity investors onto the Companies' captive ratepayers. The economics of the Companies' own calculations shows that their proposed plan would burden the Companies' capital ratepayers with $220 million of uncompensated risk. It would do this without any compensating benefits or return to the general ratepaying public. The plan, in short, is what is commonly called a 'bailout'." (P3/EPSA Ex. 12 at 3-4)
OCC/NOPEC witness Sioshansi	"Such a potential subsidy has no place in a competitive market, such as those operated by PJM, because the market is intended to provide revenues for economic efficient assets to recover their costs. Allowing subsidized generators to participate in the wholesale market is anti-competitive, as the subsidized generators would have a competitive advantage over unsubsidized assets." (OCC/NOPEC Ex. 2 at 2)
OCC/NOPEC witness Wilson	"Rider RRS would shift onto customers the net cost and risk associated with the FE Companies' affiliate's ownership of generation and the contractual relationship with OVEC. This net cost could be considerable * * *." (OCC/NOPEC Ex. 4 at 15)
RESA witness Bennett	"Even setting aside the significant departure from appropriate competitive market structure and the potential disruption and negative impacts inherent to Rider RRS, it is difficult to support the idea that Rider RRS is optimized for customer benefit. By the Distribution Utilities' own admission, the generation assets that the affiliated companies agreed to include in the PPA are economically challenged and are not expected to result in customer credits for the entire length of the [originally proposed] ESP." (RESA Ex. 2 at 7)
RESA witness Scarpignato	"The Commission should reject Rider RRS in its entirety. The units in question have no handicap except that the un-regulated affiliates of the Companies do not like the prices for their output coming from the wholesale competitive marketplace. Indeed, the Companies put forth evidence that the plants in question meet all current Environmental Protection Agency ("EPA") standards and all upcoming standards * * * FirstEnergy Corp. (the parent of the Companies) appears to have so little faith in the market forecasts regarding whether the units will be economic that they instead have the Companies, file for a guaranteed recovery (Rider RRS) of these costs, foregoing any possible inframarginal revenues." "Approval of RRS will afford a single generation owner in the PJM wholesale markets [a] subsidy that other generation owners in PJM will not possess. The subsidy will cause inefficient operation and guarantee that the "wrong" generation (Rider Generation) will clear when said generation

Witness	Testimony
	has out-of-market actual costs. It also introduces many operating inefficiencies that are forced into the market." (RESA Ex. 1 at 4, 14)

The overwhelming weight of testimony in this proceeding demonstrates that the provisions of Rider RRS constitute an anti-competitive subsidy to FirstEnergy's affiliate that violates Ohio law and penalizes its competitors.[136]

Moreover, nothing in Rider RRS prohibits FES from using the subsidy it receives for its plants to adjust pricing in both the retail and wholesale markets. FES is a certified CRES provider that directly sells generation service to retail customers in Ohio,[137] and it also participates in FirstEnergy's standard service offer ("SSO") auctions, which are used to procure generation for FirstEnergy's non-shopping customers.[138] The subsidy that FES will receive related to its merchant business can easily be used to promote its retail business at the expense of other CRES providers. Likewise, FES can use the subsidy it will receive to adjust SSO bid prices and gain a competitive advantage over other bidders. In fact, there is nothing in ESP IV or Rider RRS that protects Ohio ratepayers from having to subsidize FES' sales of lower-priced power outside of Ohio, effectively subsidizing economic development in other states.

In short, the evidence in this proceeding is overwhelming that Rider RRS will harm the competitive markets by providing a subsidy to FirstEnergy's affiliate that it can use to its advantage in the retail and wholesale markets. The Commission did not materially consider this evidence when summarily concluding that its annual prudency review process is sufficient to protect against anticompetitive subsidies.

[136] FERC reached the same conclusion in EPSA v. FirstEnergy Solutions, *supra*, at ¶ 55 (finding that the "non-bypassable generation-related charges incurred under the Affiliate PPA" present the "potential for the inappropriate transfer of benefits" from FirstEnergy customers to FES).
[137] *See* Case No. 00-1742-EL-CRS, Renewal Certificate Number 00-011E(8), Nov. 4, 2014; Exelon Ex. 1 at 12.
[138] Exelon Ex. 1 at 14.

I. The ESP IV will not be more favorable in the aggregate than a Market Rate Offer.

Assignment of Error No. 30:

The Commission erred in finding that ESP IV is more favorable in the aggregate than the expected results of an MRO.

The Commission erred in finding that the "ESP v. MRO" test is satisfied here. First, the Commission's analysis only compared the quantitative and qualitative benefits over the entire eight-year period of the ESP IV. (Opinion and Order, at 118.) However, R.C. 4928.143(E) requires, for ESPs that are more than three years in length, that the Commission must re-test the plan every fourth year "to determine whether the plan, including its then-existing pricing and all other terms and conditions * * * **continues to be** more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under [an MRO]." (Emphasis added.) This envisions that the ESP was more favorable in the aggregate as compared to an MRO for the first portion of ESP IV. However, the Commission did not conduct an ESP versus MRO analysis over the first portion of the ESP IV. It only looked at the entire eight-year period. This was plain error. Accordingly, the Commission should reverse its decision for lack of a finding that the ESP will be more favorable in the aggregate as compared to an MRO for the first portion the ESP IV prior to the re-look test in the fourth year.

Second, it found that "on a quantitative basis the proposed ESP IV is more favorable than an MRO by $307.1 million," which consists of "the predicted $256 million in net revenue predicted for Rider RRS and $51.1 million in committed shareholder funding over the eight years of ESP IV." (Opinion and Order, at 119.) This prediction of quantitative benefits is derived from the financial projections discussed above and thus incorporates all of their shortcomings, including the inexplicable averaging of contradictory and deeply flawed predictions about the future. (*Id.*, at 85.)

Rider RRS is speculative and could easily cost ratepayers billions of dollars. For example, economist James Wilson reviewed three scenarios and concluded that the most likely and reasonable estimate of Rider RRS charges to retail customers was the $3.6 billion loss scenario, based on updated market conditions.[139] Economist Dr. Joseph Kalt[140] found that FirstEnergy's $561 million projected credit was unreliable and that, just by using up-to-date NYMEX natural gas prices, the projected impact on FirstEnergy's captive ratepayers is a net present value loss of $858 million.[141] If NYMEX natural gas future prices are used for the first three years and the U.S. Department of Energy's EIA forecast for price increases is used for the rest of the term, the net present value loss is $793 million.[142] Finally, his projections show that ratepayers will realize a net present value loss of $201 million simply by assuming that the net generation of the plants corresponds to historical averages.[143]

The Commission decided that the most favorable projection, by Rose and Lisowski, should be averaged with one of the Wilson scenarios to estimate the total Rider RRS net credit. (Opinion and Order, at 85.) The unknowable risk that Rider RRS will be a massive charge to ratepayers over the eight-year ESP IV term remains, and it negates any qualitative benefits. In fact, the qualitative benefits identified by the Commission consist largely of the "continuation" of various existing options and programs, a "goal" to reduce CO_2 emissions, and programs to "promote" energy efficiency. (Opinion and Order, at 119.)

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[139] *Id.* at 12.
[140] Dr. Kalt is the Ford Foundation Professor (Emeritus) of the International Political Economy at the John F. Kenney School of Government, Harvard University He also works as a senior economist with Compass Lexecon, an economics consulting firm. P3/EPSA Ex.15 at 1.
[141] P3/EPSA Ex. 12 at 16-17.
[142] P3/EPSA Ex. 12 at 17.
[143] P3/EPSA Ex. 12 at 21-22.

The Commission's heavy reliance on these qualitative benefits mirrors FirstEnergy's strategy of inflating their unknown but modest value. When Ms. Mikkelsen was asked whether ESP IV would still be more favorable than an MRO if Rider RRS resulted in a charge of $561 million to customers instead of a credit, she responded:

> Q. Let me ask you this. **If rider RRS was forecasted to result in a charge of $561 million over the eight-year term**, would you still believe that the ESP would be more favorable than an MRO?
>
> A. I haven't thought about that question, but certainly there would still be significant qualitative benefits that we have discussed throughout this proceeding associated with the ESP versus the MRO. ... [s]. **I think as I sit here today, yes.**[144]

Ms. Mikkelsen's belief that the alleged qualitative benefits of ESP IV would justify charges of $561 million to customers makes a mockery of the statutory requirement that an ESP must be more favorable than the market rate option. The Commission erred in finding that the quantitative and qualitative benefits outweigh the vast potential charges under Rider RRS. It should reverse that ruling on rehearing.

J. The Commission should grant rehearing to ensure customer refunds, to provide for competitive bidding, and to ensure compliance with Ohio policy on promoting competition.

Assignment of Error No. 31:

The Commission erred in failing to order that FirstEnergy must return all of the amounts it collects from customers under Rider RRS if Rider RRS is invalidated.

The Commission's approval of ESP IV allows FirstEnergy to impose the new rates on customers at the start of the ESP IV. The Supreme Court of Ohio has steadfastly refused to allow rates to be refunded after they have been collected, even if the rates are unjustified. *See In re Comm. Rev. of Capacity Charges of Ohio Power Co.*, -- Ohio St.3d --, 2016 Ohio 1607, at ¶ 66 (Pfeifer, J., dissenting). *See also In re Application of Columbus Southern Power Co.*, 138

[144] Tr. Vol. 36 at 7736-7737 (emphasis added).

Ohio St.3d 448, 2014 Ohio 462, at ¶ 56. In the present proceeding, FirstEnergy agreed that the largest Rider RRS charges will occur at the beginning of the ESP IV term.[145] By the time the Supreme Court of Ohio reviews the Commission's findings, it is likely that substantial rates will have been paid.

In light of the extraordinary amount of charges that may be imposed on ratepayers in the near future, and the significant possibility that the Commission's approval of this highly unusual application will be reversed in whole or in part, it would be manifestly unfair to impose potentially unlawful but nonetheless non-refundable costs of Rider RRS on FirstEnergy's customers. The Commission should specifically provide in its ruling upon rehearing that any Rider RRS charges be refunded if they are found by the Court to be unlawfully collected. Any other outcome violates the multiple Ohio statutory provisions outlined above that preclude approval of Rider RRS, as well as Ohio and federal Constitutional provisions that guarantee due process of law, access to remedies for legal injuries, and compensation for unlawful takings.

Assignment of Error No. 32:

> **The Commission erred in approving Rider RRS and allowing the collection of generation costs from customers based on a power purchase agreement that was not produced by a competitive process.**

The Commission should not have allowed FirstEnergy to collect generation costs from its customers on the basis of a PPA with its affiliate that was not the result of a competitive bidding process. This error should be corrected on rehearing.

There are significant inherent problems in awarding a PPA to an affiliate on a no-bid basis. This Commission would never approve the award of an eight-year, no-bid contract to FirstEnergy's affiliate to supply generation for FirstEnergy's SSO customers. That supply is

[145] *See* Sierra Club Ex. 89, Mikkelsen Workpaper 11/30/15.

procured through competitive retail auctions administered by the Commission.[146] As Staff witness Dr. Choueiki noted: "[n]ot only are the resulting SSO rates competitive, they also serve as transparent 'prices to compare to' or 'benchmarks' for customers who are considering whether to take service from a competitive retail electric service (CRES) provider."[147] By contrast, Rider RRS is equivalent to allowing the affiliate to offer generation to FirstEnergy's ratepayers at an initial bid price without the challenges of a competitive process.

The benefits of competitive bidding have been well established in Ohio's electricity auctions,[148] as well as in Ohio law. As the Commission noted in its *AEP ESP III* Order, "... there are already existing means, such as the laddering and staggering of SSO auction products and the availability of fixed price contracts in the market, that provide a significant hedge against price volatility ...."[149] Likewise, the State of Ohio has recognized the value of competitive bidding and implemented a policy for state agencies to procure sizeable purchases, supplies and services via competitive bid.[150]

Conditioning Rider RRS' approval upon a competitive process is consistent with the competitive processes (SSO auctions) that Ohio electric distribution utilities use to procure energy.[151] These processes have worked to lower energy costs and provide choice to millions of Ohio families and businesses,[152] and should be required prior to any PPA being considered for recovery through the Rider RRS.

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[146] Staff Ex. 9 at 7.
[147] *Id.* at 7, n.14.
[148] Exelon Ex. 4 at 3.
[149] *AEP ESP III* Opinion and Order at 24.
[150] *See* R.C. 125.05 ("A state agency shall make purchases of supplies and services that cost fifty thousand dollars or more through the department of administrative services and the process provided in section 125.035 of the Revised Code * * *").
[151] *See*, Ohio Administrative Code Rule 4901:1-35-11.
[152] Exelon Ex. 4 at 3.

The benefits of a competitive offer are reflected in Exelon Generation Company LLC's proposal. Exelon developed a commercial offer (the Exelon Offer) and presented that through the testimony of Exelon witness Lael Campbell. To prepare the offer, Mr. Campbell requested that Exelon's commercial group develop a quote for an eight-year bundled fixed price for energy and capacity delivered to ATSI from 100% zero carbon resources, with Exelon maintaining 100% of the PJM capacity performance risk.[153] He requested a maximum fixed price to which Exelon would commit for a fixed quantity product of anywhere up to 3,000 MW (the combined nameplate capacity of the Davis-Besse and Sammis plants) of unforced capacity ("UCAP") and around-the-clock ("ATC") energy for the same eight-year period.[154] The capacity product included in the offer is the PJM Capacity Performance product.[155]

Through the Exelon Offer, which was approved by Exelon's Chief Executive Officer,[156] Exelon predicted that customers in Ohio will receive $2 billion more in credits under Rider RRS versus FES' "hedge" offer of $561 million in credits.[157] The Exelon Offer also had other terms that FES' offer did not include. Specifically, the Exelon Offer included (1) a 100% carbon-free package of energy and capacity from nuclear, hydro, solar and wind assets in PJM; and (2) zero capacity performance risk for FirstEnergy and its customers.[158]

A competitive bid process will lead to the development of offers that may vary and allow FirstEnergy to select the offer that is best for its customers. That could include terms covering the spread if the ATSI zone separates on pricing and product requirements. Other terms may not be necessary, such as collateral requirements, because FirstEnergy is not procuring generation

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[153] Exelon Ex. 4 at 6.
[154] Exelon Ex. 4 at 6.
[155] *Id.*
[156] Tr. Vol. 38 at 8031.
[157] Exelon Ex. 5 at 6.
[158] Exelon Ex. 4 at 7.

like the standard service auctions and the requiring that output be sourced from locations to be in Ohio (especially as the Sammis and Davis-Besse plants are not closing).

The Commission stated that it appreciated "Exelon's efforts to craft a worthwhile proposal" (Opinion and Order at 99) but then found that "the proposal is not superior to the Stipulations because the Exelon proposal imposes too many risks on retail ratepayers in the FirstEnergy's service territories." (Opinion and Order at 99.) In reaching that conclusion, the Commission critiqued Exelon's offer as an around-the-clock product versus the FES PPA which would let FirstEnergy dispatch on an economic basis. The Commission also raised a concern that should the plants close and the ATSI zone then separate from PJM, resulting in higher capacity prices, the Exelon offer would require ratepayers to pay more under the rider. The Commission also focused on its belief that the plants were at serious risk of closure, and that the Exelon offer would do nothing to mitigate the economic impact on the region. (Opinion and Order, at 99-100).

The Commission's decision, however, ignores the argument that competitive bidding of any PPA to be included for cost recovery in Rider RRS would result in savings for ratepayers. In particular, the Commission did not weigh the reliability and economic impact benefits of the FES PPA as compared to the $2 billion in savings to ratepayers created by the Exelon offer. The Exelon offer demonstrates the creativity and interest of wholesale suppliers in crafting alternative proposals. The Commission also ignored and did not address whether its Ohio-centric concerns warranted a PPA that, per the Exelon offer, is $2 billion above market. It was unreasonable and unlawful for the Commission to ignore the argument that competitive bidding should be required, and on rehearing it can start that process by stripping out Rider RRS from the Stipulation, especially as Rider RRS is not a necessary component for general service to

FirstEnergy's ratepayers, and putting the underlying required load out for competitive wholesale bidding.

Rider RRS applies to all customers regardless of whether they shop or not, forcing everyone to pay FES for its cost-plus recovery. This is contrary to the Commission's reliance on competitive markets to seek the lowest cost for ratepayers. The no-bid nature of the PPA on which Rider RRS will be based is contrary to this Commission's past and current practices, and it should be reconsidered on rehearing.

I. The Commission should grant rehearing to ensure no prohibited collection of transition revenues, to ensure proper severability and to delay the effective date of Rider RRS.

Assignment of Error No. 33:

The Commission erred in approving Rider RRS and recovery of legacy costs because it will allow FirstEnergy to recover transition revenues or any equivalent revenues in violation of R.C. 4928.38.

It is undisputed that included in the costs flowing through Rider RRS is a return on "legacy costs." FirstEnergy's definition of legacy cost components includes "all costs that arise from decisions or commitments made and contracts entered into prior to December 31, 2014, including any costs arising from provisions under such historic contracts that may be employed in the future."[159] There is no start date for which historic contracts (or other "decisions or commitments") qualify as legacy cost components, and there is no limit on the amount of legacy costs that can be included in Rider RRS.[160] For example, FirstEnergy confirmed that the $1.8 billion investment in scrubbers at the Sammis plant in 2010 constitutes a legacy cost component

[159] Co. Ex. 7 at 14.
[160] Tr. Vol. I at 88.

and that its remaining book value would be subject to the return on equity.[161] Rider RRS thus allows the recovery of legacy costs.

The Ohio General Assembly, however, has barred recovery after December 31, 2010 of not only transition revenue associated with costs that were stranded during the transition to market (following Senate Bill 3), but also any revenue that amounts to transition revenue by another name. R.C. 4928.38[162] and R.C. 4928.40(A). FirstEnergy witnesses testified that Rider RRS was required to avoid the risk of the Davis Besse and Sammis plants from closing so those plants can continue to operate in the competitive markets.[163] The legacy costs included in Rider RRS, thus, are "transition revenues or any equivalent revenues" which may not be recovered.

The Commission, in approving Rider RRS, left undisturbed FirstEnergy's recovery of legacy cost components in Rider RRS, and directed FirstEnergy to provide audited accounting information establishing the amount of legacy costs. (Opinion and Order at 90). The Commission also directed the auditor in the first annual audit to verify the information provided by FirstEnergy to serve as a baseline for future audits. (*Id.*) Allowing legacy costs that include a return on equity of capital investments for plants that were previously in rate base, however, constitutes an unlawful allowance of "transition revenues or any equivalent revenues."

The Commission erred by authorizing the receipt of transition revenues or any equivalent revenues by FirstEnergy and in turn, its affiliate FES. The Commission should grant rehearing on this basis and find that Rider RRS will violate R.C. 4928.38.

[161] Tr. Vol. XII at 2597-2598.
[162] R.C. 4928.38 states in pertinent part: "* * * The utility's receipt of transition revenues shall terminate at the end of the market development period. With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code." *See, also, In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608, ¶21.
[163] *See e.g.* Tr. Vol. IX at 1981-83.

Assignment of Error No. 34:

> **The Commission erred in approving the Stipulation's severability provision that does not require a refund if Rider RRS is invalidated and that only applies the severability provision if a court of competent jurisdiction invalidates Rider RRS.**

In Section V.B.3.c, the Stipulation contains the following language:

> If a ***court of competent jurisdiction* invalidates Rider RRS in whole or in part**, the Companies will permit any part of the Stipulated ESP IV that has not been invalidated to continue while a good faith effort is made by the Signatory Parties to restore the invalidated provision to its equivalent value. The Signatory Parties agree to work in good faith, on an expedited basis not to exceed 60 days, to cure any court-determined deficiency. * * * This commitment on severability is not intended and shall not be construed to affect the prohibition against retroactive ratemaking. **No amounts collected shall be refunded as a result of this severability provision.**[164]

The Commission was faced with similar language in its decision in the AEP Ohio PPA proceeding.[165] There, the Commission modified the stipulation to remove the sentence that stated "[n]o amounts collected shall be refunded as a result of this severability provision." The Commission noted in its decision that "[w]ith respect to the terms of the stipulation's severability provision, we find that the prohibition on refunds, in the event of an invalidation of the PPA rider proposal, should be removed from the stipulation, as it is a matter for determination by the Commission or reviewing court."[166]

The Commission's failure to make the same modification in this proceeding was unreasonable as it allows FirstEnergy to retain any amounts collected through Rider RRS regardless whether the Commission's approval of Rider RRS was lawful. The Commission should modify the Stipulation on rehearing to remove the sentence.

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[164] Company Ex. 154, Third Supplemental Stipulation and Recommendation at 9 (emphasis added).
[165] *In Re Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, et al., Opinion and Order at 87, dated March 31, 2016.
[166] *Id.*

It was also unjust and unreasonable for the Commission to approve a severability provision that addresses invalidation of Rider RRS only by a reviewing court, when the Commission or FERC could just as easily take action that invalidates the PPA Rider. The Commission should modify the severability provision in the Stipulation to state that "[i]f a court of competent jurisdiction **or regulatory authority** invalidates **or precludes** Rider RRS in whole or in part * * *."

Assignment of Error No. 35:

> **The Commission not only erred in approving Rider RRS, it also erred in allowing the rider to be effective as of June 1, 2016.**

The Commission allowed for an effective date for Rider RRS of June 1, 2016 by its inclusion in the ESP IV, despite the opposition of many parties to the proceeding to its approval. The Commission should delay the rider effective date for the following reasons.

By setting an effective date that is just one month away, the Commission ensured that certain charges authorized by its Opinion and Order would commence before there is a ruling on the applications for rehearing and would have certainly commenced before the Supreme Court of Ohio can hear and decide any appeals from the decision on rehearing. In addition, the PPA cannot be implemented until and unless it is approved by FERC. *See EPSA v. FirstEnergy Solutions Corp.*, 155 FERC ¶ 61, 101, at ¶ 62 (April 27, 2016) ("[t]o the extent FE Solutions or any other FE Ohio Market Affiliate wishes to make sales under the Affiliate PPA, they must submit the argument to [FERC] under section 205 of the FPA for analysis under the *Edgar* and *Allegheny* standards.")

Accordingly, upon rehearing the Commission should provide that Rider RRS cannot become effective until the date on which the Ohio Supreme Court issues a final, non-appealable decision on the validity of Rider RRS, *or* the date on which FERC authorizes the PPA, whichever is later.

J. Several competitive market issues were presented but not ruled upon by the Commission.

Assignment of Error Nos. 36, 37, 38 and 39:

The Commission erred by failing to explicitly rule on the Stipulation to expand Rider NMB to include PJM item 1375. (Opinion and Order, at 74)

The Commission erred by failing to require an "action agenda" from FirstEnergy to ensure that necessary data and information (i.e., interval data, PLCs, etc.) will be provided to CRES providers, while allowing the utilities to continue and expand the time-of-use service offerings. (Opinion and Order, at 94)

The Commission erred by failing to establish a stakeholder collaborative for the web portal implementation process. (Not addressed in Opinion and Order)

The Commission erred by failing to require implementation of a purchase of receivables program in the FirstEnergy service territories. (Not addressed in Opinion and Order)

As outlined below, the Commission erroneously failed to rule in its decision upon several recommendations made by RESA. The issues are:

- *Rider NMB line items:*[167] Rider NMB specifically recovers "**non-market-based** costs, fee or charges imposed on or charged to the Company by FERC or a regional transmission organization * * *."[168] FirstEnergy has proposed to modify its Rider NMB by changing the billing responsibility for certain costs imposed by PJM. More specifically, FirstEnergy is proposing to become responsible for several billing line items for which it currently is not responsible. On pages 73 and 74 of the decision, the Commission described the proposal for Rider NMB and the other parties'

[167] Rider NMB is a nonbypassable rider designed to recover non-market-based transmission-related costs, such as Network Integration Transmission Service charges, which are charged to the Companies by the Federal Energy Regulatory Commission or PJM Interconnection, LLC. Opinion and Order at 19.
[168] *See*, Ohio Edison Company Tariff, P.U.C.O. No. 11 at Sheet 119.

positions. Parties presented testimony and argued that PJM Billing Line Item 1375 (Balancing Operating Reserve) and Billing Line Item 1218 *(Planning Period Congestion Uplift) should not be billed by FirstEnergy* through Rider NMB.[169]

Balancing Operating Reserves involve the costs for deviating from what the load-serving entity schedules into PJM and what the entity's customers need.[170] Load-serving entities can influence the Balancing Operating Reserve costs, and therefore, Line Item 1375 is a classic market-based cost.[171] More specifically, including Line Item 1375 in Rider NMB would wrongly remove the existing market incentive for the load-serving entities to not deviate the amount they schedule because the costs will no longer be imposed on the load-serving entities. In other words, including Line Item 1375 in Rider NMB would improperly allow the load-serving entities to avoid their own market-based costs and make all FirstEnergy ratepayers directly responsibility for it. Importantly, including Line Item 1375 in Rider NMB will provide a specific benefit for FirstEnergy's affiliate FES because FES will be able to avoid these market-based costs, while all of FirstEnergy's ratepayers become responsible for them.

Planning Period Congestion Uplift Charges are payments from one set of Financial Transmission Rights ("FTR") holders to other FTR holders and

[169] RESA Ex. 2 at 12; Exelon Ex. 1 at 27-29.
[170] RESA Ex. 2 (Bennett Direct Testimony) at 12.
[171] RESA Ex, 2 (Bennett Direct Testimony) at 11; RESA Ex. 5 at 4-5; RESA Initial Brief at 16.

involve the economic decision to enter into an FTR position at PJM. As Exelon witness Campbell explained, the Planning Period Congestion Uplift charge is the "participant's share of the allocated costs of providing the Uplift credits" and "charges are allocated to FTR holders in proportion to their net positive total FTR Target Credits for the planning year." He further noted that the PJM Billing Guide states that the "Planning Period Congestion Uplift credit is a "make-whole" congestion credit to FTR holders to satisfy any previously unfulfilled FTR Target Credits that remain at the end of the planning year.[172] There are alternative options that mitigate the risk of underfunding/make-whole payments to FTR holders. Therefore, this market-based cost should remain with the market participant, instead of being shifted to the utility.

Socializing these market-based line items is incorrect and should be rejected outright. The Commission must expressly rule on rehearing on this important point – it will significantly upset the balance of responsibility that exists in PJM's billing of costs.

- *Data access "action agenda" and limit on Rider GEN*: On page 73 of the decision, the Commission briefly referred to FirstEnergy's commitment to supply interval data to CRES providers and RESA's non-opposition to the time-of-day ("TOD") service option under Rider GEN so long as the Commission requires (a) "action agenda" identifying how the Companies would provide interval data to CRES providers and (b) a limit on the TOD

[172] Exelon Ex. 1 at 28-29.

under Rider GEN to only customers currently taking service under it.[173] RESA's witness Bennett explained that time-of-use data is essential for time-differentiated service offerings.[174]

- *A web portal collaborative*: On pages 76 and 77 of the decision, the Commission referenced the web portal proposal, RESA's support thereof, and RESA's recommendation for a collaborative to assist in the development and implementation of the CRES web portal.[175]
- *A purchase of receivables program*: RESA recommended implementation of a purchase of receivables program in the FirstEnergy service territory as a true competitive market enhancement.[176] There was no discussion of this at all in the Commission's decision.

It was error for the Commission to not address these issues.[177] A ruling must be made on these competitive retail market issues on rehearing.

K. The exclusive and ill-designed Rider NMB Opt-Out Pilot and the High Load Factor Experimental Time of Use Program should be rejected.

Assignments of Error No. 40, 41 and 42:

The Commission erred in failing to find that the Rider NMB pilot and the High Load Factor Time-of-Use service violate R.C. 4928.02(A) because they are unduly discriminatory and unjust. (Opinion and Order, at 106)

The Commission erred in adopting the Rider NMB Pilot as it is poorly designed. (Opinion and Order, at 94, 112)

[173] RESA Ex. 3 (Bennett Supplemental Testimony) at 5-6; RESA Initial Brief at 20.
[174] RESA Ex. 3 (Bennett Supplemental Testimony) at 5.
[175] *See, also*, RESA Ex. 2 (Bennett Direct Testimony) at 19; RESA Initial Brief at 17-18.
[176] RESA Ex. 2 (Bennett Direct Testimony) at 12-18; RESA Initial Brief at 20-24.
[177] *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608 at ¶66 (remanding an issue after finding that the Commission "never offered a response to AEP's claims and thus failed to explain its decision. This was error.").

The Commission erred in adopting the HLF/TOU service as its pricing is so *ambiguous that the evidence does not demonstrate that it will benefit ratepayers and* the public interest. (Opinion and Order, at 94)

The Stipulating Parties recommended a new "small-scale" pilot that allows certain Stipulating customers to opt out of FirstEnergy's Rider NMB and obtain all their transmission and ancillary services from a CRES provider.178 The stated purpose of the pilot is to determine if those customers will benefit by doing so. However, the Rider NMB-opt-out pilot is available only to a select group of customers: (a) members of IEU, (b) members of Ohio Energy Group, (c) Nucor Steel Marion, Inc., (d) Material Sciences Corporation and (e) five General Service – Transmission ("Rate GT") customers. This portion of the Stipulation is unduly limiting, discriminatory, and unjust because it excludes nearly other interested stakeholders or customers simply because they did not sign the Stipulation. All eligible customers do not have an equal opportunity to participate in the pilot; except for a handful of general transmission customers, participation is based on who signed the Stipulation.[179]

This pilot is also contrary to an important tenet of Ohio's electric services policy: to "[e]nsure the availability to consumers of * * * nondiscriminatory, and reasonably priced retail electric services." R.C. 4928(A).

The Commission should not have approved this pilot program given its unduly limiting and discriminatory terms. The Commission disagreed, stating that the point of a pilot is to keep the pilot manageable and therefore a limit on the number of participants is reasonable.[180] However, the Commission overlooks the fact that this pilot can be structured in truly

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[178] FirstEnergy Ex. 3 at 3.

[179] This is distinguishable from other situations wherein an opportunity was available to the first X percent of eligible parties. In those situations, the Ohio Supreme Court has held that all have had an equal opportunity to take advantage of the special offering and, as such, there is no undue discrimination or preference. *AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 81, 87, 765 N.E.2d 862 (2002); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 (2006).

[180] Opinion and Order at 112.

nondiscriminatory ways. For instance, it could be available all interested customers for six month or it could be available to the first 50 customers who sign up. Plus, the Commission is ignoring that this pilot is basically only available to the designated signatory parties (it was only available to those designated signatory parties until the last supplement was filed, allowing the five Rate GT customers to be eligible as well. The Commission's cursory dismissal of RESA's discrimination argument inadequately addressed it.

In addition, RESA presented concerns with the design of the pilot. RESA witness Bennett testified that this pilot proposal contained none of the information necessary for the Commission to determine whether it is justified on a cost-causation basis or whether it violates rate change gradualism.[181] He also criticized this pilot on its structure:[182]

> A properly designed pilot is one in which: (1) the hypothesis being tested is clearly stated; (2) the data collected and kept will aid in testing that hypothesis; (3) the test data is made available to the Commission for review and consideration; and (4) if a public benefit is found, the pilot can be up-scaled to all who want it. <u>As proposed, the stipulation does not include any of these important pilot program design components.</u> The FirstEnergy EDUs have stated that the Rider NMB exemption pilot cannot be up-scaled as only the customers identified in Section V.A.2 of the Supplemental Stipulation can participate (discovery response OMAEG Set 7-INT-139).
>
> If the Commission sees value in modifying Rider NMB to test improvements in how costs are allocated to individual customers, it could waive Rider NMB for a pilot program in which the FirstEnergy EDUs use individual customer energy and network demand parameters to allocate costs to a representative set of customers. Structured in this manner, the pilot would maintain the non-bypassability of Rider NMB for all customers, allocate costs for pilot participants based on their individual usage parameters, and allow Rider NMB to be assessed as to the remaining customers under the tariff formula in place today, adjusted for the costs charged to pilot program participants. Such a design would provide the Commission with all relevant price data, including any operational issues or financial costs of obtaining the individual customer allocation parameters. It would also put the Commission in position to

[181] RESA Ex. 5 at 7.
[182] RESA Ex. 5 at 7-8 (Emphasis added).

> adjust the program if the ratemaking principle of gradualism was being violated.

As this testimony demonstrates, the pilot is clearly not well designed. However, the Commission has apparently already determined that it will succeed:[183]

> Finally, the pilot program for large customers to obtain non-market based transmission services outside of Rider NMB provides the opportunity to determine if industrial customers can obtain substantial savings by obtaining certain transmission services outside of Rider NMB without imposing significant costs on other customers. The Rider NMB pilot program will provide better price signals to industrial customers and promote job retention and economic development in this region * * *. All of these programs should facilitate the state's effectiveness in the global economy in accordance with R.C. 4928.02(N).

The Commission has ignored Mr. Bennett's testimony. There are other concerns with how this pilot can succeed too. For instance, with the customers opting out of Rider NMB and the customers' CRES providers handling the billing, FirstEnergy will no longer have access to the necessary information to determine if those customers are benefitting from the opt-out. Another example relates to the PJM subaccounts that will have to be established. CRES providers whose customers are participants in the pilot will have to create "subaccounts" with PJM for settlement purposes. A CRES provider can establish one subaccount for all participating customers or one subaccount for each participating customer. With one subaccount, the information needed to assess the impact of the pilot again will not be discernible because the cost information for the group of customers will flow into the subaccount for all CRES customers, not just those opting out of Rider NMB. As a result, there are already fundamental concerns with this pilot that will only lead to failure.

The Commission did not delve into these details in its decision. Upon rehearing, the Commission should consider the pilot's goals, structure, and ultimate benefit. RESA again

[183] Opinion and Order at 94.

advocates that FirstEnergy's Rider NMB remain non-bypassable for pilot participants and all other ratepayers, with FirstEnergy billing the costs of Rider NMB based on allocating under individual usage and demand parameters, or under existing class averages.[184]

The Stipulation also included a High Load Factor Experimental Time-of-Use ("HLF/TOU") program intended to determine "whether time-of-use rates could reduce [participants'] overall energy bills."[185] It would be available only to customers who meet *all* of the following characteristics:[186]

- Commercial customer
- Headquartered in Ohio
- Has at least 30 facilities in the Companies' service territories
- Each facility consumes at least 1.5 GWh annually
- Each facility has interval metering
- Each facility must have an average monthly load factor during the prior 12 months of at least 70%
- Each facility must be served under the GS or GP rate schedules
- A major portion of the load is for refrigeration

These are very difficult eligibility requirements and very few customers would qualify. In fact, there may be only one customer who would qualify: The Kroger Co., which signed onto the Stipulation at the time the HLF/TOU terms were included. FirstEnergy witness Mikkelsen testified that she does not know how many customers will participate and that the only customer who had expressed an interest did not qualify.[187]

It is also unclear why the use of electricity must be linked primarily to refrigeration. FirstEnergy claims that refrigeration is an eligibility factor in order to "contribute to a

[184] RESA Ex. 5 (Bennett Third Supplemental Testimony) at 8.
[185] FirstEnergy Ex. 4 at 1-2.
[186] *Id.* at 1-2.
[187] Tr. Vol. 2 at 289-290; Tr. Vol. 37 at 7788.

homogenous participant pool," but witness Bennett was not aware of any reason for that eligibility restriction or why a time-of-use pricing pilot needs a homogeneous participant pool.[188]

The pilot program also allows the customers who qualify to remain on the pilot even if their qualifications lapse: "[o]nce a facility qualifies for the HLF/TOU and is, in fact, enrolled in the HLF/TOU, that facility may remain on the rate notwithstanding any subsequent changes in the load characterization of the facility or reduction in the energy consumption of the facility."[189] There is no explanation for this loophole and no apparent reason that it benefits ratepayers or the public interest. As a result, this new program violates R.C. 4928.02(A), for the same reasons as the Rider NMB-opt-out pilot discussed above.

The Commission also failed to recognize that with the HLF/TOU program proposed, there was no actual description of the actual time-of-use. An "illustrative" rate design was presented,[190] but it is inadequate. RESA witness Bennett explained:

> What was troubling to me in reading the scant information provided in the Second Supplemental Stipulation and the supporting testimony was that no such description of actual time-of-use was presented. I expected to read about how the load is going to be metered and integrated among the various sites, how the price at the time-of-use is going to be captured and how the customer is going to be billed. My understanding of the proposal is that rather than using actual hourly usage and prices, assumptions and projections will be made based on the theory that a high-load factor customer will have significant off-peak usage. That may be true in part, but it is also true that a customer with a 100% load factor will be on the system for all the capacity setting peaks and the periods of high energy prices. High-load factor cannot in and of itself be automatically equated with time-of-use savings. To structure an effective program that will accrue the proper benefits to the system and to the customer, actual usage and actual cost of power at the time-of-use is needed

Time-of-use and other time-differentiated products are competitive services and should be offered by the competitive market, not the electric distribution utility. The HLF/TOU pilot is

[188] RESA Ex. 5 at 10 and Attachments SEB-8 and SEB-9.
[189] Tr. Vol. 2 at 290-291.
[190] FirstEnergy Ex. 1 at Attachment 1.

so narrowly designed as to be discriminatory and should be rejected. The "illustrative" rate design presented is inadequate to justify approval of this program. As Mr. Bennett pointed out, if FirstEnergy would provide the interval data needed for a true time-of-use program, then the CRES providers will almost certainly offer more time-of-use products to high load factor customers, as well as other customers.[191]

The Commission should re-examine the Rider NMB pilot and the HLF/TOU program on rehearing.

L. The Commission should clarify (a) that the stipulation does not bind the Commission and (b) the interplay between the distribution rate changes and freeze.

Assignment of Error No. 43:

The Commission erred in approving the Federal Advocacy section of the Stipulation, which obligates the Commission to "solicit comments from interested parties no later than October 30, 2017 * * *" because the stipulating parties have no authority to bind the Commission.

In Section V.C.3 of the Stipulation, the Stipulating Parties agreed as follows:[192]

> In the event that PJM has not obtained approval for a longer term capacity product to address State resource adequacy needs by September 1, 2017, the Commission will solicit comments from interested parties no later than October 30, 2017, addressing the State's long term resource adequacy needs.

This language clearly binds the Commission – obligating it to solicit comments by a certain date if a specific event does not occur. The Stipulating Parties have no authority to mandate specific Commission action by entering into a stipulation. Even so, the Commission accepted the Stipulation and none of its modifications address this provision.

[191] RESA Ex. 5 at 12.
[192] FirstEnergy Ex. 154 at 9.

When the Commission was faced with an identical provision in the AEP PPA case, the Commission specifically concluded that such verbiage cannot bind the Commission:[193]

> * * * [W]e note that provisions of the stipulation that purport to bind the Commission in the manner in which it conducts its business, handles its dockets, or renders its decisions remain within the Commission's discretion. These include provisions addressing * * * the Commission's solicitation of comments regarding long-term resource adequacy needs in the state (Joint Ex. 1 at 9) * * *.

The Commission erred in adopting the Federal Advocacy provision within the Stipulation in this proceeding without modifying it in the same manner. On rehearing, the Commission should make modify its ruling accordingly.

Assignment of Error No. 44:

> **The Commission erred in adopting the Stipulation, which purports to freeze distribution rates for the term of the electric security plan (except to allow the filing of a transition to the straight-fixed variable cost recovery mechanism for changing residential customers' base distribution rates during the term), and then ordering a rider and the filing of an application to unbundle SSO costs from base distribution rates during the term. (Opinion and Order, at 98)**

The approved Stipulation states, "[t]he Signatory Parties agree that no proceeding shall commence whereby an adjustment to the base distribution rates of the Companies would go into effect prior to June 1, 2024 (subject to the provisions set forth in this Stipulated ESP IV, including new riders and rider adjustments and other charges provided in the tariffs), except in the case of an emergency pursuant to the provisions of Ohio Revised Code Section 4909.16."[194]

The Commission then found that:

> [W]e will modify the proposed ESP to accept the recommendation of IGS to establish a zero-based rider to unbundle from distribution rates the costs FirstEnergy incurs to support SSO service and to reflect those costs in the SSO price (IGS Ex. 11 at 17-18). We agree with the testimony of

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[193] *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, Opinion and Order at 91 (March 31, 2016).
[194] FirstEnergy Ex. 154 at 13.

> FirstEnergy Mikkelsen that this proposal may enhance competition in the Companies' service territories (Tr. Vol. XXXVII at 7927-28). In order to implement this rider, FirstEnergy should file an application in a separate proceeding. In that proceeding, FirstEnergy will bear the burden of demonstrating that the application is just and reasonable, and any interested party may raise any issues regarding the rider. Further, we will determine whether to approve any such application based solely upon the record of that proceeding.

It is unclear how each of these distribution-related rate changes can/will work together under the ESP IV. Base distribution rates will not be frozen with a transition to the straight-fixed variable cost recovery mechanism. Likewise, base distribution rates will not be frozen with an unbundling of SSO costs. The Commission provided no explanation for adopting contradictory conclusions for the distribution rates and, therefore, it is unclear whether the Commission understood the impact of each of these changes. The Commission should reconsider and clarify its ruling on rehearing.

III. Conclusion

For the many reasons outlined in this Application for Rehearing, the Commission should correct the identified errors and omissions of law and fact on rehearing.

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on the 29th day of April 2016 upon all persons/entities listed below:

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