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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter 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 CLEVELAND MUNICIPAL SCHOOL DISTRICT

Pursuant to R.C. 4903.10 and Rule 4901-1-35, Ohio Administrative Code ("OAC"), the Cleveland Municipal School District ("CMSD") hereby applies for rehearing from the Commission's opinion and order in this docket of March 31, 2016 ("Order"), whereby the Commission approved, subject to certain modifications, the electric security plan ("ESP") set out in the Third Supplemental Stipulation submitted in this proceeding. As its grounds for rehearing, CMSD respectfully submits that the Order is unreasonable and unlawful in the following particulars:

1. The Commission erred in finding that Rider RRS meets the criteria of R.C. 4928.143(B)(2)(d) for inclusion as a component of an ESP because Rider RRS is not a charge relating to a limitation on shopping.

2. The Commission erred in finding that Rider RRS meets the criteria of R.C. 4928.143(B)(2)(d) for inclusion as a component of an ESP because the Rider RRS arrangement will not stabilize or provide certainty regarding retail electric service.

3. The Commission erred in finding that Rider RRS meets the criteria of R.C.4928.143(B)(2)(i) for inclusion as a component of an ESP because the Rider RRS arrangement is not an economic development program in any sense of that term, but is simply a charge imposed on distribution ratepayers to provide a guaranteed return to a single, specified provider of generation service.

4. The Commission's refusal to address the federal preemption issue in its Order was unreasonable because the failure to address this issue exposes FirstEnergy customers to significant financial risk.

5. The Commission's authorization of Rider RRS is unlawful because the Federal Power Act preempts the Commission from implementing the Rider RRS arrangement.

6. The Commission erred in approving the Third Supplemental Stipulation because the Rider RRS arrangement is contrary to both state and federal pro-competition policies, and is inconsistent with the state policy embodied in the Ohio Uniform Depository Act.

Pursuant to Rule 4901-1-35(A), OAC, a memorandum in support more fully explaining these grounds for rehearing is attached hereto.

WHEREFORE, CMSD respectfully requests that the Commission grant its application for rehearing.

Respectfully submitted,

Barth E. Royer
Barth E. Royer, LLC
2740 East Main Street
Bexley, Ohio 43209
(614) 385-1937 – Phone
(614) 360-3529 – Fax
BarthRoyer@aol.com – Email

Adrian Thompson
Taft Stettinius & Hollister LLP
200 Public Square, Suite 3500
Cleveland, OH 44114-2302
(216) 241-3141 – Phone
(216) 241-3707 – Fax
athompson@taftlaw.com – Email

Attorneys for
The Cleveland Municipal School District

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MEMORANDUM IN SUPPORT
OF
APPLICATION FOR REHEARING
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THE CLEVELAND MUNICIPAL SCHOOL DISTRICT

INTRODUCTION:

The Commission prefaces its March 31, 2016 opinion and order ("Order") with an introduction in which it bemoans the complexity of balancing the interests of "Ohio public utilities, other vital businesses, and hard working *[sic]* citizens" in fulfilling its mission to "ensure customers are provided electricity in reliable, cost effective and safe manner."[1] If the Commission operated in a vacuum, this would, indeed, be a daunting task, but the fact is that the Commission is not permitted – let alone required – to decide cases based on some nebulous ad hoc balancing test that involves weighing the competing interests of various constituencies. Rather, the Commission, as creature of statue, has only the authority conferred upon it by the legislature,[2] and must decide cases based on the specific statutory standards and requirements

[1] Order, 8.

[2] *See, e.g., Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 234 (1996); *Canton Transfer and Storage Co. v. Pub. Util. Comm.*., 72 Ohio St.3d 1, 5 (1995); *Dayton Communications Corp. v. Pub. Util. Comm.*,64 Ohio St.2d 302, 307 (1980); *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St. 2d, 153, 166 (1981).

established by the General Assembly. Yes, under the familiar three-pronged test used by the Commission to evaluate stipulations, the Commission must consider whether a stipulation, as a package, benefits ratepayers and the public interest, but that prong of the three-part test is trumped by the requirement that every provision of an approved stipulation must comport with Ohio law.[3] Moreover, the Commission is also limited by the Supremacy Clause of the U.S. Constitution. Thus, regardless whether the Commission believes that a provision of a stipulation is in the public interest, the Commission is preempted from implementing a provision of a stipulation that intrudes on the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC"). Unfortunately, in approving the Third Supplemental Stipulation, the Commission appears to have been so consumed by the task of determining what is in the public interest that it lost sight of the legal constraints under which it must operate.

It is painfully obvious that the Commission's decision in this case was driven by its belief that the public interest dictates that the Sammis and Davis-Besse plants remain in service and that the only way to guaramtee the future of these plants was to require FirstEnergy distribution customers to subsidize their operation. This presented a problem for the Commission because, with restructuring, the legislature removed generation from the Commission's jurisdiction, leaving it without authority to guarantee cost recovery and a return on the generation assets in question. Thus, to justify approval of Rider RRS PPA funding mechanism as a component of an ESP, the Commission was forced to buy into FirstEnergy's pitch that the purpose of Rider RRS is to benefit customers by providing a financial hedge against volatility in the wholesale electric market and future increases in wholesale prices, notwithstanding that there can be no doubt that

[3] Indeed, Commission Haque makes this very point in his concurring opinion, stating that "at the very least, the stipulation cannot violate a statute of the Ohio Revised Code or a rule of the Ohio Administrative Code." Concurring Opinion of Commissioner Asim Z. Haque, 7.

FirstEnergy's actual motive for proposing Rider RRS was to add to the bottom line of its parent, FirstEnergy Corp., for the benefit of its shareholders. Indeed, the FirstEnergy distribution companies ("the Companies") – the applicants in this proceeding – get no financial benefit from the Rider RRS arrangement, and, with the minimum credit feature of the Third Supplemental Stipulation, could actually lose money if Rider RRS is approved. By accepting FirstEnergy's disingenuous rationale, the Commission assured that the only guaranteed winners will be FirstEnergy's ultimate shareholders, who, contrary to fundamental economic principles – not to mention common sense – will receive a guaranteed return on their investment in Sammis and Davis-Besse while being exposed to zero risk.[4] Apparently, the Commission was so caught up with assuring the continued operation of Sammis and Davis-Besse that it found it acceptable to transfer the risk that should be shouldered by the owners of these assets to the Companies' distribution ratepayers.

The Cleveland Municipal School District ("CMSD") intervened in this proceeding to oppose the Rider RRS arrangement proposed in the application, which, even under the most optimistic forecast presented in the case, will cost CMSD hundreds of thousands of dollars over the early years of the ESP. Because of its fiduciary obligation in connection with the taxpayer supplied funds that represent its only source of revenue, CMSD aggressively pursues measures to control its electric costs, including negotiating long-term generation supply contracts with competitive retail suppliers to secure favorable pricing. CMSD protects itself from both price volatility due to extreme weather conditions and the possibility that the market price of electric

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[4] It appears that the Commission may actually have experienced some pangs of conscience over forcing FirstEnergy ratepayers to provide a guaranteed profit to FES. In its Order, the Commission encourages "FirstEnergy to place the long-term interests of its employees and the grid first" in utilizing the additional cash flow that will be realized from the Rider RRS arrangement, rather than increasing dividends or flowing the profit through to the bottom line. *See* Order, 88. The problem, of course, is that the Commission has no jurisdiction over FirstEnergy Corp., and, thus, cannot tell First Energy Corp. what to do with the FES's profits.

will increase in the future by entering into multi-year, fixed-price contracts, a strategy that not only limits CMSD's risk to an acceptable level, but also provides the certainty CMSD requires for its budgeting process.

Although billed as a financial hedging arrangement that will serve to stabilize the cost of electricity, the Rider RRS arrangement is not actually a hedging arrangement at all,[5] but, instead, is a high-risk derivative of the type that the General Assembly, by enacting the Ohio Uniform Depository Act, has specifically prohibited political subdivisions of the state, including CMSD, from purchasing with public funds.[6] Rather than providing stability, the Rider RRS arrangement creates a level of uncertainty that will frustrate CMSD's ability to budget and will deny CMSD the savings it would otherwise have achieved over the next few years. CMSD objects to being forced to gamble scarce taxpayer dollars on the mere possibility that it might ultimately realize a net future benefit in an unknown and unknowable amount. CMSD further objects to the Commission presupposing that it knows how to manage risk better than customers, who, with restructuring, have the ability to enter into pricing arrangements with suppliers that reflect their individual tolerance for risk.

In its Order, the Commission attempted to mitigate the near-term adverse financial impact Rider RRS will have on customers by modifying the Third Supplemental Stipulation to include a mechanism "to limit average customer bills . . . to insure that the average customer bill will see no total bill increase for two years."[7] Not only is this mechanism ill-defined and

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[5] Unlike the typical hedge, where the investor combines long and short positions to mitigate risk, under the Rider RRS arrangement there is no known strike price. Thus, ratepayers are force to go "all in" at day one, and to trust to luck that Rider RRS will actually have generated a positive return (*i.e.*, a net credit) when the final reckoning comes at the end of the eight-year term of the ESP.

[6] *See* R.C. 135.14(C).

[7] Order, 86.

unworkable, but, more importantly, even if the Commission eventually somehow sorts out how this can be applied to shopping customers, it will further distort the price signals that are critical to customers making informed shopping decisions. More importantly, this two-year "freeze" is actually worse for customers than the stipulated version of Rider RRS because, in addition to being denied the near-term savings they would otherwise have experienced, customers will now also be required to pay the carrying costs on the regulatory asset created by the Commission authorizing the Companies to defer the expense resulting from the revenue reduction for future recovery.

Like the briefs it has previously filed in this matter, CMSD's application for rehearing focuses solely on the provisions of the Order relating to the Commission's approval of Rider RRS. Although CMSD is reluctant to burden the Commission by repeating arguments previously made in its briefs, under the circumstances, CMSD has no choice but to replay certain of its arguments in this memorandum. Apart from its disregard for ratepayer interests, one of the most disappointing aspects of the Order is the Commission's failure to address many of the arguments presented by the intervenors opposing Rider RRS, particularly those relating to the eligibility of Rider RRS for inclusion as a component of an ESP under R.C. 4928.143(B)(2)(d) as a "limitation on shopping" and as a measure that "would have the effect of stabilizing or providing certainty regarding retail electric service." Although the Order does contain a cursory one paragraph summary of these arguments,[8] the Commission made no attempt to answer them. With respect to the former, the Commission merely cites its findings in *AEP Ohio EXP III* and *Duke ESP III* as being dispositive of the "limitation on shopping" question."[9] Reliance on its

[8] Order, 101-102.

[9] Order, 109.

previous orders would be fine if the Commission had actually analyzed the opposition arguments in those cases, but it did not. With respect to the latter, the Commission simply concludes that Rider RRS is "intended to mitigate, by design, the effects of market volatility, providing customers with more stable pricing and a measure of protection against substantial increases in market prices," and, therefore, qualifies under the stability/certainty criterion of R.C. 4928.143(B)(2)(d).[10] Again, the Commission made no attempt to refute the numerous intervenor arguments that Rider RRS does not, in fact, meet this criterion. That the Commission ignored all arguments that it found inconvenient – *i.e.*, arguments that undercut its stated rationale for concluding that Rider RRS qualifies for inclusion in an ESP under R.C. 4928.143(B)(2)(d) – supports the premise that the Commission is so bent on preserving Sammis and Davis-Besse that it will not allow the law to get in the way. If the Commission actually has answers to these intervenor arguments, CMSD respectfully requests that the Commission provide them in its entry on rehearing. On the other hand, if, as CMSD suspects, it has no such answers, the Commission should grant rehearing on these issues.

Finally, as the Commission knows from the recent FirstEnergy motion for an extension of the date for filing its compliance tariffs, on April 27, 2016, FERC issued its order in Docket No. EL16-34-000 granting the complaint of the Electric Supply Association, *et al.*, against FES and the Companies and rescinding the waiver of the affiliate power sales restrictions previously granted to FirstEnergy Corporation's market-regulated power sales affiliates as that waiver relates to the FirstEnergy-FES PPA. Although the rescission of the waiver, of itself, does not invalidate the PPA, it is fair to say that the language of the order presages that, as CMSD and others intervenors correctly predicted in their briefs, FERC is not about to permit generation

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[10] Order, 109.

suppliers receive out-of-market compensation under an affiliate contract that exceeds the market-based compensation that would result from the FERC model. The timing of the FERC order is fortuitous because it provides the Commission the opportunity to consider the impact of the order on the Rider RRS arrangement before ruling on the rehearing applications. CMSD suggests that the Commission grant all the applications for rehearing submitted in this proceeding for the purpose of providing the additional time that will be required in light of the FERC order. Such a result would be consistent with its modification of the severability provision of the Third Supplemental Stipulation, whereby the Commission reserved the right to reevaluate and modify the stipulation if there is a change to the PJM tariff or the rules that prohibit the plants from being bid into PJM auctions.[11]

FIRST GROUND FOR REHEARING:

> **The Commission erred in finding that Rider RRS meets the criteria of R.C. 4928.143(B)(2)(d) for inclusion as a component of an ESP because Rider RRS is not a charge relating to a limitation on shopping.**

As in its *AEP Ohio ESP III* and *Duke ESP III* orders, the Commission again acknowledges in its decision in this case that the Ohio Supreme Court has expressly held that the Commission has the authority to approve, as a component of an ESP, only elements that fall within a category specifically identified in R.C. 4928.143(B)(1) or (B)(2).[12] And, as in these previous orders, the Commission again hangs its hat on R.C. 4928.143(B)(2)(d) as the source of its authority to include the Rider RRS arrangement as a component of the FirstEnergy ESP.[13]

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[11] Order, 92.

[12] Order, 107, citing *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 519-520 (2011).

[13] Order, 109.

R.C. 4928.143(B)(2)(d) provides that an ESP may include:

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

Consistent with its approach in the *AEP Ohio ESP III* and *Duke ESP III* orders, the Commission began its analysis by parsing R.C. 4928.143(B)(2)(d) to identify three separate conditions that the proposed riders had to satisfy to be eligible for inclusion in an ESP under this provision.[14] The Commission then found that Rider RRS qualified for inclusion because (1) it represented a "charge," (2) the charge "relat(ed) to limitations on customer shopping for retail electric generation service," and (3) the charge "would have the effect of stabilizing or providing certainty regarding retail electric service."[15] Although CMSD does not dispute that Rider RRS represents a charge, the Commission's determinations that the Rider RRS arrangement relates to a limitation on shopping and would have the effect of stabilizing or providing certainty regarding retail electric service does not stand up to even cursory scrutiny.

The Commission's conclusion that Rider RRS represents a limitation on shopping has no basis in logic or the law. As in the *AEP Ohio ESP III* and *Duke ESP III* orders, the Commission began by conceding that Rider RRS is simply a financial device and imposes no physical limitation on shopping.[16] The Commission then went on to find that the Rider RRS arrangement "would function as a financial restraint on complete reliance on the retail market for the pricing

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[14] *Id.*

[15] Order, 108-109.

[16] Order, 109.

of retail electric generation service," which, according to the Commission, equates to a limitation on shopping.[17] Not only is this a total non sequitur, but this tortured interpretation flies in the face of the Ohio Supreme Court's rejection of similar Commission interpretations of R.C. 4928.143(B)(2) on the ground that such interpretations "would remove any substantive limit to what an electric security plan may contain, a result we do not believe the General Assembly intended."[18] CMSD respectfully submits that there is no reasonable reading of R.C. 4928.143(B)(2)(d) that would bring Rider RRS within its ambit as a charge "relating to a limitation on shopping."

In CMSD's view, the Commission's acknowledgement that the Rider RRS arrangement imposes no physical limitation on shopping should have ended the inquiry. By empowering the Commission to include terms and conditions in an ESP relating to limitations on shopping, the General Assembly recognized that there could be circumstances where constraints on the right to shop, such as customer eligibility requirements or minimum stay provisions, might be necessary or appropriate. However, it is difficult to envision a scenario in which a tariffed charge could constitute a limitation on shopping unless, of course, the charge was imposed <u>only</u> on shopping customers as a condition of the right to shop.[19] Because Rider RRS would be imposed on <u>both</u> shopping an non-shopping customers, there is, as a matter of logic, no way that this charge can reasonably be construed as relating to a limitation on shopping for retail electric generation service. Moreover, the notion that the riders "would function as a financial restraint on complete reliance on the retail market for the pricing of retail electric generation service" cannot save

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[17] *Id.*

[18] *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 520 (2011).

[19] Obviously, such a charge would open an entirely different can of worms in light of the state policy of promoting a competitive retail electric market and eliminating barriers to competition. *See* R.C. 4928.02(B) and (H).

Rider RRS because this rationale does not jibe with any of the conditions appearing in the R.C. 4928.143(B)(2)(d) criteria for the inclusion of an element in an ESP.

Although the Commission took great pains in its *AEP Ohio ESP III* and *Duke ESP* orders to characterize the AEP Ohio and Duke riders as generation charges,[20] no matter what one calls it, Rider RRS is not a charge for generation service because it will not buy any FirstEnergy ratepayer a single kWh of electrical energy or Kw of capacity. Rather, Rider RRS is a charge that will be imposed on all the Companies' distribution customers regardless of their source of generation supply. Thus, the Commission's suggestion that "the consequence of Rider RRS is that the bills of all customers would reflect a price for retail generation service that is passed in part on the retail market and in part on the cast of Sammis, Davis-Besse, and the OVEC plants"[21] is, pure and simple, a fallacy. Rider RRS will not provide customers with a blended electric rate. With the approval of Rider RRS, the Companies' distribution customers will still pay 100 percent of the market-based SSO price or their competitive supplier price for retail electric service, and, on top of that, will pay 100 percent of the annual PPA costs, in exchange for which they will not receive any of the output of Sammis, Davis-Besse, or the OVEC plants. Although it is possible that the Rider RRS could convert from a cost to a credit if, somewhere down the road, the annual revenues resulting from bidding the output of the subject plants into the PJM markets exceeds the annual PPA costs paid by ratepayers, this credit would not reduce the amount paid by customers for retail electric service. Rather, the credit would simply reduce the amount of the bills the customers must pay in the following year as a condition of continuing to receive distribution service from the Companies. Thus, the notion that SSO price or the CRES

[20] *AEP Ohio ESP III* Order, 26; *Duke ESP III* Order, 48.

[21] Order, 109.

provider's price and the Rider RRS rate should be viewed as the combined price for commodity service is not conceptually valid. Rider RRS will simply add to the cost both SSO customers and shopping customers will pay as a condition of receiving distribution service, but will in no way limit any customer's right to shop.

Contrary to the Commission's claim, R.C. 4928.143(B)(2)(d) does not authorize imposing additional costs on customers to create "a financial restraint on reliance on the retail market for the pricing of retail generation service." Indeed, such a result would be inconsistent with granting customers the right to elect to make their own arrangements for generation supply based on their own tolerance for risk.[22] There is nothing in this or any other statute that remotely suggests that the Commission has the authority to substitute its judgment for that of the shopping customer when it comes to the question of risk tolerance, let alone the authority to force shopping customers to pay for a financial hedge that they neither need nor want. The Commission should grant rehearing on this ground.

SECOND GROUND FOR REHEARING:

> **The Commission erred in finding that Rider RRS meets the criteria of R.C. 4928.143(B)(2)(d) for inclusion as a component of an ESP because the Rider RRS arrangement will not stabilize or provide certainty regarding retail electric service.**

The Commission's determination that the Rider RRS arrangement qualifies for inclusion in the ESP under R.C. 4928.143(B)(2)(d) because it is intended to have the effect of stabilizing or providing certainty regarding retail electric service is also fatally flawed.

First, under the plain language of R.C. 4928.143(B)(2)(d), the Commission can only include a term, condition, or charge as a component of an ESP upon a showing that the proposed

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[22] *See* R.C. 4928.02(B).

term, condition, or charge "would have the effect of stabilizing or providing certainty regarding retail electric service" (emphasis added). It is not enough that the Rider RRS arrangement could have the effect of stabilizing or providing certainty with respect to retail rates or, to use the Commission's words, "is proposed to have the effect of stabilizing or providing certainty regarding retail electric service" or "would, in theory, have the effect of stabilizing or providing certainty regarding retail electric service." [23]

Unlike amortizations and deferrals, where the stabilizing effect on rates can be calculated with certainty going in, or the staggering and laddering of SSO auctions, which, perforce, reduce the impact of wholesale market volatility on the rate paid by SSO customers for generation service, the Rider RRS arrangement carries no guarantee that it will do anything other than increase the bills of all FirstEnergy customers starting on the day Rider RRS is implemented. That the desired effect of a proposed arrangement is to provide additional protection to customers from price volatility in the wholesale market is irrelevant. If the legislature had intended this to be the test, the statute would speak in terms of the purpose or intent of the term, condition, or charge instead of requiring that the term, condition, or charge actually have the effect of stabilizing and providing certainty regarding retail electric service. Moreover, the Commission's statement that Rider RRS will operate to mitigate the increase in market prices if the market prices for energy, capacity, and ancillary services rise[24] is based on the false premise that cost-based prices and market based-prices are countercyclical. Cost-based prices and market based prices can move in the same direction, and, as OCC Witness Wilson testified, Rider RRS is likely to move in the same direction as market-based prices, thereby exacerbating volatility

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[23] Order, 109

[24] *Id.*

rather than promoting stability.[25] Thus, there is no economic basis for the Commission's claim that Rider RRS will operate to mitigate the increase in market prices if market prices rise. Market prices could rise significantly and still be below the Rider RRS rate.

Second, as previously noted, the proposed Rider RRS arrangement will have no effect on the price that customers will pay for retail electric service. SSO customers will continue to pay the price for generation service resulting from the SSO competitive bidding process, while shopping customers will continue to pay the price for generation service specified in their contact with their CRES provider. Rider RRS will simply be a conduit for an involuntary customer investment in a Commission-sanctioned gamble that may or may not provide customers with a positive net dollar return over the period it remains in effect. Thus, by definition, Rider RRS will neither stabilize nor provide certainty regarding retail electric service. Rather, the Rider RRS charge or credit will simply appear as a separate line item on the bills of all the Companies' distribution customers, where it will serve to either increase or offset the total amount both SSO and shopping customers would otherwise pay as a condition of receiving distribution service from FirstEnergy.

Any question that this is the fundamental nature of Rider RRS can be quickly laid to rest by considering the scenario in which a CRES provider issues its own bills for generation service. If, at some point in the future, the Rider RRS arrangement were to actually result in a credit rather than a charge, the customer of a direct-billing CRES provider would receive the credit on the FirstEnergy bill for distribution service as an offset to the amount the customer would otherwise have to pay for wires service.[26] The customer's bill for generation service would be

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[25] Order, 102.

[26] *See* Application, Attachment 4.

unaffected by the credit. Thus, the mere possibility that the customer might realize a positive return on its forced investment in the PPA over the life of Rider RRS does not make Rider RRS eligible for inclusion in an ESP under the R.C. 4928.143(B)(2)(d) criterion requiring that the proposed term, condition, or charge actually have the effect of stabilizing or providing certainty regarding retail electric service.

Third, even under the most optimistic forecast presented in this case, Rider RRS is projected to cost customers some $414 million over the first three years of the ESP.[27] Thus, even if one were to make the leap of logic required to find that Rider RRS would somehow impact the cost of retail electric service, it is impossible to argue with a straight face that Rider RRS would have the effect of stabilizing or providing certainty with respect to this service. In fact, Rider RRS would do precisely the opposite, to the detriment of all customers, but particularly to the detriment of shopping customers who, like CMSD, enter into long-term fixed-price contracts with a competitive retail supplier precisely because they place a high value on stability and certainty. Not only would approval of Rider RRS impact the ability of these customers to budget, but it would also create significant additional risk for all customers, an outcome that is totally at odds with the stated objective of providing stability and certainty regarding retail electric service.

Fourth, the Commission's finding that the Rider RRS arrangement is designed to mitigate the effects of market volatility is also demonstrably incorrect. Because the Rider RRS Rider rate will be recalculated annually based on the prior year's PPA costs, any credit that might result from netting these historical costs with the historical revenues (if any) realized from selling the output of the subject plants into the PJM would lag the market price increase that created it and,

[27] *See* Mikkelsen Workpaper filed December 1, 2015.

thus, would not contribute to providing stability or certainty with regard to retail electric service. Indeed, on the gas side, one of the concerns that led the Commission to replace the GCR with a commodity rate established via a competitive bidding process was to provide a price signal to customers considering competitive supplier offers that was not distorted by out-of-period adjustments.[28] Moreover, even if the market price of electricity spiked at one point in a given year, this would have no adverse impact either on shopping customers with fixed price contracts or on SSO customers, who are protected from the consequences of short-term market price fluctuations by the staggering and laddering of SSO auctions. Although it is true that a spike in market price would cause the rate of shopping customers with indexed contracts to go up, it is still quite possible that the customer's total generation bills for the year would be below the annual cost of the Rider RRS rate. In other words, these customers would still be better off under their supply contract than they would be with Rider RRS in place. Further, if such customers find the risk associated with a spike in the market price unacceptable, they can elect to return to SSO service or can enter into a fixed-price contract with a CRES supplier. Thus, contrary to the Commission's finding, Rider RRS will not provide stability or certainty in terms of smoothing out the impact of short-term fluctuations in market price of electricity.

Having said this, CMSD agrees that Rider RRS could provide an overall net benefit to customers if the market price of electricity rises appreciably during the out years of the ESP to the point that it exceeds PPA costs for an extended period. The problem is that, as the Commission candidly acknowledged, no one can know at this point what will happen to the

[28] *See In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services*, Case No. 08-1344-GA-EXM (Opinion and Order date December 2, 2009, at 13).

market price of electricity over an eight-year time frame.[29] Thus, although the Commission performed a detailed analysis of the various projections of future market prices offered in the case to come up with an estimate that Rider RRS would produce a net credit to customers of $256 million over the eight-year term of the ESP, it is not clear to CMSD why the Commission found it necessary to engage in this exercise. The Staff expert, Dr. Choueiki, testified that, although he has reasonable confidence in three-year forecasts, he has "zero" comfort level in forecasts with horizons that go beyond three years.[30] Commissioner Haque echoed this sentiment in his concurring opinion, stating that "it was hard for me to be convinced that any expert can truly project with accuracy beyond a few years out."[31] Because every forecast presented in the case projected that Rider RRS will result in a significant net cost to customers over the first three years of its term, the Commission could reasonably find that Rider RRS will result in a net cost to customers over the first three years of its life. However, it is sheer speculation for the Commission to determine that Rider RRS will produce a net financial benefit to ratepayers over its eight-year term. Thus, not only is the Commission's finding that the Rider RRS will provide an effective hedge that will protect customers from future increases in the market price based on a speculative estimate, the notion that Rider RRS will provide stability and certainty with regard to retail electric service is belied by the fact that no one can know what the market price of electricity will be in the final years of the ESP. However, as previously discussed, the more important point for the purpose at hand is that, although Rider RRS may be intended to have the effect of stabilizing or providing certainty regarding retail electric service,

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[29] Order, 86.

[30] *See* Choueiki Cross, Tr. XXX, 6258-6260.

[31] Concurring Opinion of Commissioner Asim Z. Haque, 4.

there can be no finding that Rider RRS will actually have this effect, which is what R.C. 4928.143(B)(2)(d) requires.

Far from promoting stability and certainty with regard to retail electric service, the Rider RRS arrangement will serve to create instability and uncertainty, and, thus, could not have been what the legislature had in mind in establishing the final criterion of R.C. 4928.143(B)(2)(d). The Commission should grant rehearing on this ground.

THIRD GROUND FOR REHEARING:

> **The Commission erred in finding that Rider RRS meets the criteria of R.C. 4928.143(B)(2)(i) for inclusion as a component of an ESP because the Rider RRS arrangement is not an economic development program in any sense of that term, but is simply a charge imposed on distribution ratepayers to provide a guaranteed return to a single, specified provider of generation service.**

On brief, FirstEnergy contended that the Commission also had authority to approve its so-called "Economic Stability Program," under R.C. 4928.143(B)(2)(i), which provides that "an ESP may also include provisions under which an EDU may implement economic development, job retention, and energy efficiency programs."[32] In support of this claim, FirstEnergy went on to argue that Rider RRS was eligible for inclusion in its ESP under this provision because the Rider RRS arrangement would support economic development and job retention by "providing Ohio's current and future businesses with a greater degree of pricing certainty."[33] However, the Commission, rather than evaluating this rationale, picked up on FirstEnergy's alternative theory that "Sammis and Davis-Besse themselves are engines of economic development" and that its "Electric Stability Plan assures continued operation of the Plants and their continued positive

[32] FirstEnergy Brief, 122.

[33] FirstEnergy Brief, 122-123.

impact on economic development."[34] After citing evidence showing the economic impact Sammis and Davis-Besse have on the regions in which the plants are located, the Commission concluded "that there is nothing in R.C. 4928.143(B)(2)(i) which limits economic development programs authorized under the statute from assisting affiliates of the electric distribution utility."[35] This is, without a doubt, one of the most extraordinary statements ever to appear in a Commission decision.

For the Commission to imply that it has the authority to require ratepayers to subsidize an unregulated affiliate of an electric distribution utility under the guise that the Rider RRS arrangement is an economic development program of the type contemplated by R.C. 4928.143(B)(2)(i) is beyond the pale of reason. Plainly, the Commission has muddled the public interest test for stipulations with the statutory eligibility requirements for the inclusion of a component of an ESP. In any event, the FirstEnergy's Economic Stability program cannot reasonably be construed as an economic development program.

First, the Rider RRS arrangement is not a "program" in any sense of the word. A program is a structured plan offered to all qualifying customers or potential customers on a non-discriminatory basis. But Rider RRS, which is actually the sole component of the Economic Stability Program, is simply a rate that will be imposed on the Companies' distribution ratepayers to assure a guaranteed return to a single entity, FES. Although economic development programs may be funded through rates,[36] a rate is not a program. This cannot be

[34] FirstEnergy Brief, 123-124.

[35] Order, 109-110.

[36] As the Commission well knows, the rationale for imposing the cost of economic development programs on utility customers is that properly-crafted programs that are designed to bring new large customers to the utility's service area will increase the base over which fixed costs will be spread, thereby providing a benefit to ratepayers.

what the General Assembly had in mind when it provided in R.C.4928.143(B)(2)(i) that an ESP may include "(p)rovisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs."

Second, although FirstEnergy attempted to support its claim that its Economic Stability Program is authorized by R.C.4928.143(B)(2)(i) because its will mitigate long-term retail price increases and provide customers with a net financial benefit over its term, it is far from clear how this would lead to job creation and retention as FirstEnergy claims.[37] Further, the Commission's estimate of the net credit customers will receive over the term of Rider RRS is not as rosy as FirstEnergy's $560 million projection and there is clearly no assurance that Rider RRS will not ultimately result in a net cost to customers. In that case, Rider RRS would take dollars out of ratepayers' pockets over the next eight years. Again, this cannot be what the legislature contemplated when it authorized the Commission to include provisions in an ESP under which EDUs may implement economic development programs.

Third, FirstEnergy also attempted to defend the Rider RRS arrangement as an economic development program by citing the following excerpt from the testimony of its witness Strah:[38]

> By tempering future rate increases and volatility, Rider RRS will promote economic development. Price stability is an important consideration in site location analysis. When major companies consider locating or staying in Ohio, or existing companies consider expansion, they are making long term, multi-million dollar investments, and require pricing stability in their budget projections. The greater the degree of certainty about energy costs that we can provide these companies, the greater our odds of landing new capital investment and employment in the State of Ohio.

[37] FirstEnergy Brief, 122-123.

[38] *Id.*

The notion that approval of Rider RRS will serve to attract major companies to Ohio or will persuade existing major companies to stay in Ohio borders on the absurd. CMSD would be the first to agree that major companies value price stability and certainty about energy costs. However, major companies are obviously not going to become SSO customers, and, thus, will secure generation supply on their own under terms that reflect their individual needs for stability and certainty. As Staff witness Choueiki explained, sophisticated major companies rely on in-house energy professionals to develop hedging strategies against market volatility, while others address the need for certainty in the budgeting process by entering into long-term fixed price contracts with generation suppliers.[39] Because Rider RRS would only add uncertainty to this process, there is no earthly reason that major companies would find the risk associated with Rider RRS acceptable, let alone see Rider RRS as an inducement to locate or remain in Ohio. And, there is certainly no reason major companies would want the Commission to make hedging decisions for them.

Notwithstanding the Commission's ill-considered finding "that there is nothing in R.C. 4928.143(B)(2)(i) which limits economic development programs authorized under the statute from assisting affiliates of the electric distribution utility," CMSD stands by its statement that the purpose of economic development programs is to attract and retain customers. The proposed Rider RRS arrangement is not an economic development program, but is simply a welfare program for FirstEnergy's unregulated generation affiliate, which would not only provide out-of-market compensation to FES for wholesale generation, over which the Commission has no jurisdiction, but would also pull the rug from the legislature's determination that generation should be an unregulated competitive service. CMSD submits that, in enacting R.C.

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[39] *See* Staff Ex. 12 (Choueiki Direct), 14.

4928.143(B)(2)(i), the legislature did not contemplate that this provision would be used for this purpose. If the legislature believed it important to Ohio's economic development to guarantee cost recovery and a return on Ohio generation assets, it would not have restructured Ohio's electric utility industry in the first place. The Commission cannot require the Companies' distribution ratepayers to subsidize FES under the pretense that Rider RRS is an economic development program. Rehearing should be granted on this ground.

FOURTH GROUND FOR REHEARING:

The Commission's refusal to address the federal preemption issue in its Order was unreasonable because the failure to this issue exposes FirstEnergy customers to significant financial risk.

Numerous intervenors, including CMSD, presented detailed legal arguments in their respective briefs demonstrating that the Federal Power Act preempts the Commission from implementing the Rider RRS arrangement. As in its *AEP Ohio ESP III* and *Duke ESP III* orders, the Commission again declined to address the federal preemption issue, claiming that it has no authority to decide constitutional questions and that "under the specific facts and presented here such issues are best reserved for judicial determination."[40] However, in this instance, the Commission attempted to beef up its refusal to consider the preemption issue by citing *Reading v. Pub. Util. Comm.,* 109 Ohio St.3d 193, 195 (2006) for the proposition that " we have no authority to declare a state statute unconstitutional."[41] This proposition, although obviously correct, has nothing whatever to do with the preemption issue raised by intervenors in this case.

[40] Order, 112, citing *AEP Ohio ESP III* Order, 26.

[41] Order, 12.

As review of the intervenor briefs will show, no intervenor ever suggested that R.C. 4928.143(B)(2) is unconstitutional, nor did any intervenor ask the Commission to so find. Rather, the intervenors' position was that, even if the Commission had authority under Ohio law to include the Rider RRS arrangement as an element of an ESP (which it does not), the Federal Power Act would preempt the Commission from implementing the arrangement in any event. No one disputes that the Commission lacks authority to decide constitutional questions, but the Commission most certainly does have the authority, and, indeed, the responsibility to determine whether it has jurisdiction to implement a proposal advanced in a Commission proceeding. In fact, the Commission has routinely dismissed cases on preemption grounds in the past.[42] Moreover, this is not a case of first impression. There is ample precedent indicating the states are preempted from implementing out-of-market compensation mechanisms for generation suppliers that are inconsistent with the FERC-approved, market-based pricing models governing the sale of wholesale capacity and energy. For the Commission to subject customers to Rider RRS without first determining if it has been preempted from doing so is unreasonable on its face in light of the potential consequences for ratepayers.

As CMSD pointed out on brief, it is well settled under Ohio law that neither the Commission nor the courts can order a refund of previously approved rates that are subsequently invalidated.[43] Thus, the Commission's failure to address the preemption issue will result in FirstEnergy ratepayers paying millions of nonrefundable dollars to subsidize FES's uneconomic generation assets while awaiting a judicial determination that the Commission was preempted by

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[42] *See, e.g., Marketing Research Services, Inc. v. Pub. Util. Comm.*, 34 Ohio St.3d 52 (1987) (affirming the Commission's dismissal of a complaint on the grounds that the it was precluded from considering the issue presented because it involved the rendition of interstate communications service provided under interstate tariffs). *See also Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521 (1996).

[43] *See Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257 (1957) and *Green Cove Resort I Owners' Assn. v. Pub. Util. Comm.*, 103 Ohio St.3d 125 (2004).

the Federal Power Act from imposing this charge. Under these circumstances, ratepayers cannot afford to have the Commission defer the federal preemption issue for subsequent judicial determination – and passing the buck to the courts will not absolve the Commission from responsibility for every dollar ratepayers lose between the time Rider RRS is implemented and a judicial determination that the Commission was federally preempted. If, despite the wealth of authority to the contrary and the advice of Staff counsel in the *AEP Ohio ESP III* and *Duke ESP III* proceedings, the Commission truly believes that it has jurisdiction to intrude upon the FERC-approved, market-based wholesale pricing model in this fashion, it owes it to the customers of FirstEnergy to step up and say so rather than hiding behind the proposition that it has no authority to decide the preemption issue. In the wake of a judicial decision invalidating Rider RRS on preemption grounds, ratepayers will find little solace in an apology from the Commission that says "Sorry, but we did not have authority to determine if we were preempted from implementing the Rider RRS arrangement." The Commission should grant rehearing on this issue and, regardless of where it comes down, the Commission should affirmatively address the preemption issue in its entry on rehearing.

FIFTH GROUND FOR REHEARING:

> **The Commission's authorization of Rider RRS is unlawful because the Federal Power Act preempts the Commission from implementing the Rider RRS arrangement.**

Although a number of intervenors opposing the Third Supplemental Stipulation joined with CMSD in arguing that the Federal Power Act preempts the Commission from implementing the stipulated Rider RRS arrangement,[44] the Commission, as noted above, deigned not to address

[44] *See, e.g.,* OMAEG Brief, 24-27; OCC, et al., Brief, 12-17; NOPEC Brief, 11-18; Sierra Club Brief, 121-125.

the preemption issue in its Order. Because there is no Commission finding resolving this issue this issue, there is no analysis to challenge in the context of this rehearing application. Thus, no purpose would be served by repeating CMSD's preemption argument here, and, in support of this ground for rehearing, CMSD simply incorporates by reference the discussion of the preemption issue set out in its initial brief and its reply brief as if fully restated herein.[45] . Suffice it to say, CMSD believes that the recent federal court decisions invalidating similar plans in Maryland and New Jersey provide ample authority for a finding that the Commission is preempted by the Federal Power Act from implementing the Rider RRS arrangement.[46]

Although the Commission did not address the preemption arguments in its Order, there are two comments in the Order that appear to have been inserted in an attempt to provide a basis for defending Rider RRS from a subsequent attack on preemption grounds. Both of these comments are wide of the mark. At one point in the Order, the Commission asserts that "its approval of Rider RRS, as retail hedge, is based on retail ratemaking authority under state law, which does not conflict with or erode federal laws or the responsibility of FERC to regulate electricity at wholesale."[47] CMSD does not dispute that Rider RRS is a retail rate, and no party opposing Rider RRS on preemption grounds has ever suggested that it is not. As explained at length in CMSD's initial brief, the conflict arises because the funds generated by Rider RRS will be used to provide out-of-market compensation to FES in excess of that which it would receive through the FERC-approved auction processes, an outcome that intrudes on FERC's exclusive jurisdiction over wholesale transactions, just as the federal courts found in *Nazarian*, *Hanna*, and

[45] *See* CMSD Initial Brief, 18-25; CMSD Reply Brief, 16-22.

[46] *See PPL EnergyPlus, LLC v. Nazarian*, 974 F. Supp.2d 790 (D. Md. 2013), *aff'd*, 753 F.3d 467 (4th Cir. 2014) and *PPL EnergyPlus, LLC v. Hanna*, 977 F. Supp.2d 372, (D. N.J. 2013), *aff'd sub nom., PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014).

[47] Order, 86-87.

Solomon. The fact that Rider RRS is a retail rate subject to Commission jurisdiction is irrelevant. The problem is that Rider RRS serves as a conduit for retail distribution ratepayers to fund the PPA based on FES's costs, a result that conflicts with the FERC market-based pricing process for wholesale generation.

The Commission also appears to suggest that significance should be attached to the fact that the Commission did not require the Companies to enter into the PPA, citing *Penn Power Co. v. Pennsylvania Pub. Util. Comm.*, 77 Pa.Commw. 97, 561 A.2d 43 (1989). However, a review of this decision will quickly show that it has no application in this setting. The issue in *Penn Power* was whether a Pennsylvania Commission decision denying full recovery of the costs associated with a FERC-approved power supply agreement through retail rates on the ground that less expensive alternatives were available violated the filed-rate doctrine. The court found that the Pennsylvania Commission was not preempted from disallowing full recovery of the contract costs on the ground that the costs were excessive because Penn Power had entered into the contract of its own volition rather than exploring the less expensive alternatives that were available, an issue the commission had authority to address. Here, the fact that the Commission did not require the Companies to enter into the PPA is irrelevant. The issue here is that the Commission-approved Rider RRS arrangement provides out-of-market compensation to FES in excess of that which it would receive through the FERC-approved auction processes. By implementing Rider RRS, the Commission has impermissibly intruded upon the accomplishment and execution of the full purposes and objectives of the federal policy embodied in the FERC-approved market-based wholesale pricing model utilized by PJM. The Commission should grant rehearing on this ground.

SIXTH GROUND FOR REHEARING:

> **The Commission erred in approving the Third Supplemental Stipulation because the Rider RRS arrangement is contrary to both state and federal pro-competition policies, and is inconsistent with the state policy embodied in the Ohio Uniform Depository Act.**

For the reasons stated in the foregoing grounds for rehearing, the Commission's approval of the Rider RRS arrangement was unlawful. Thus, the Commission's approval of the Third Supplemental Stipulation fails to satisfy the third prong of the three-part test for evaluating stipulations: Does the stipulation violate any important regulatory principle or practice? For reasons stated in the briefs previously submitted by CMSD in this matter,[48] which are incorporated herein by reference as if fully restated, the Rider RRS arrangement fails to satisfy this standard in numerous other respects, and the Commission's failure to recognize in its Order that Rider RRS is inconsistent with both state and federal pro-competition policies, as well as other stated public policies, is unreasonable and unlawful. CMSD will stand on its previous discussion of the manner in which Rider RRS is contrary to state and federal pro-competition policies, but, because the Commission, although mentioning CMSD's argument that the Rider RRS arrangement is inconsistent with the state policy embodied in the Ohio Uniform Depository Act, failed to address it, CMSD feels compelled to place this argument before the Commission again in the hope that the Commission will explain why forcing ratepayers to invest in a high-risk derivative is consistent with sound public policy.

As CMSD argued in its initial brief, requiring CMSD and other political subdivisions of the state to commit public funds to a speculative financial transaction by paying the Rider RRS rate is contrary to the state policy embodied in the Ohio Uniform Depository Act. Chapter 135. of the Ohio Revised Code, also known as the Ohio Uniform Depository Act ("OUDA"), governs

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[48] CMSD Initial Brief, 26-33; CMSD Reply Brief, 22-23.

the investment of public moneys held by the state and its political subdivisions. R.C. 135.14 addresses the investment of interim moneys by treasurers or governing boards of political subdivisions. R.C. 135.14(B) contains a list of permissible investments, while R.C. 135.14(C) prohibits the investment of interim moneys in speculative financial transactions. R.C. 135.14(C) provides, in pertinent part, as follows:

> Nothing in the classifications of eligible obligations set forth in divisions (B)(1) to (7) of this section shall be construed to authorize any investment in a derivative, and no treasurer or governing board shall invest in a derivative. For purposes of this division, "derivative" means a financial instrument or contract or obligation whose value or return is based upon or linked to another asset or index, or both, separate from the financial instrument, contract, or obligation itself. (emphasis supplied).

Plainly, the legislative intent underlying R.C. 135.14 is to authorize political subdivisions to invest otherwise idle funds in the relatively safe permissible investments identified in subdivisions (B)(1) through (B)(7) of the statute in order to gain a financial return, but to prohibit risky investments in financial instruments, contracts, or obligations where the return on the investment is not tied to the instrument, contract, or obligation itself, but can only be measured based on the performance of some other asset or index. There is no dispute that Rider RRS is simply intended to be a financial mechanism and that the return on this forced investment in PPA contract is not tied to any term of the contract itself, but can only be computed based on the future performance of the wholesale electric market. Thus, the PPA would fall squarely within the definition of a "derivative" set forth in R.C. 135.14(C). Consequently, CMSD and other political subdivisions would be prohibited from investing public funds in this contract in their own right.

As CMSD explained in its initial brief, CMSD does not intend to suggest that the OUDA controls Commission ratemaking decisions. However, because the Commission has the obligation to determine if any aspect of a stipulation violates state policy, it was unreasonable for the Commission to ignore that the de facto effect of approving Rider RRS is to force CMSD and other political subdivisions within the Companies' service territory to make an investment in a high-risk derivative that the legislature has wisely prohibited political subdivisions from making directly. The General Assembly has determined that it is not prudent for political subdivisions to speculate with public moneys in this fashion, and the Commission should have taken this message to heart before requiring political subdivisions to part with scarce public funds to subsidize uneconomic generation assets on the chance that the investment in the PPA might, at some point in the distant future, produce a net positive return. The Commission's finding that requiring CMSD and other political subdivisions to fund the PPA through Rider RRS is in the public interest flies in the face of the public policy underlying the R.C. 135.14(C) restriction. Moreover, forcing CMSD to make this investment would require it to divert resources that could otherwise be used in pursuit of its mission to educate the children of Cleveland, an outcome which, on its face, is contrary to the public interest.

Simply stated, it is not the Commission's job to make investment decisions for FirstEnergy customers, and it is most certainly not the Commission's place to force customers to invest in a speculative derivative that puts the customers' entire principal at risk as a condition of receiving electric distribution service. The Commission should grant rehearing on this ground.

Respectfully submitted,

Barth E. Royer
Barth E. Royer, LLC
2740 East Main Street

Bexley, Ohio 43209
(614) 385-1937 – Phone
(614) 360-3529 – Fax
BarthRoyer@aol.com – Email

Adrian Thompson
Taft Stettinius & Hollister LLP
200 Public Square, Suite 3500
Cleveland, OH 44114-2302
(216) 241-3141 – Phone
(216) 241-3707 – Fax
athompson@taftlaw.com – Email

Attorneys for
The Cleveland Municipal School Distric

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the following parties by electronic mail this 2nd day of May 2016.

Barth E. Royer

burkj@firstenergycorp.com
cdunn@firstenergycorp.com
dakutik@jonesday.com
jlang@calfee.com
talexander@calfee.com
Thomas.mcnamee@puc.state.oh.us
Thomas.lindgren@puc.state.oh.us
Steven.beeler@puc.state.oh.us
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
stnourse@aep.com
mjsatterwhite@aep.com
yalami@aep.com
Jennifer.spinosi@directenergy.com
ghull@eckertseamans.com
myurick@taftlaw.com
dparram@taftlaw.com
Schmidt@sppgrp.com
ricks@ohanet.org
tobrien@bricker.com
mkl@bbrslaw.com
gas@smxblaw.com
wttpmlc@aol.com
lhawrot@spilmanlaw.com
dwilliamson@spilmanlaw.com
blanghenry@city.cleveland.oh.us
hmadorsky@city.cleveland.oh.us
kryan@city.cleveland.oh.us
mdortch@kravitzllc.com
rparsons@kravitzllc.com
gkrassen@bricker.com
dstinson@bricker.com
dborchers@bricker.com
mitch.dutton@fpl.com
DFolk@akronohio.gov
mkimbrough@keglerbrown.com
sechler@carpenterlipps.com

larry.sauer@occ.ohio.gov
maureen.willis@occ.ohio.gov
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
cmooney@ohiopartners.org
callwein@keglerbrown.com
joliker@igsenergy.com
mswhite@igsenergy.com
Bojko@carpenterlipps.com
barthroyer@aol.com
athompson@taftlaw.com
Christopher.miller@icemiller.com
Gregory.dunn@icemiller.com
Jeremy.grayem@icemiller.com
blanghenry@city.cleveland.oh.us
hmadorsky@city.cleveland.oh.us
kryan@city.cleveland.oh.us
tdougherty@theOEC.org
jfinnigan@edf.org
Marilyn@wflawfirm.com
todonnell@dickinsonwright.com
matt@matthewcoxlaw.com
mfleisher@elpc.org
drinebolt@ohiopartners.org
meissnerjoseph@yahoo.com
LeslieKovacik@toledo.oh.gov
trhayslaw@gmail.com
Jeffrey.mayes@monitoringanalytics.com
mhpetricoff@vorys.com
mjsettineri@vorys.com
glpetrucci@vorys.com
msoules@earthjustice.org
sfisk@earthjustice.org

gpoulos@enernoc.com
twilliams@snhslaw.com
dwolff@crowell.com
rlehfeldt@crowell.com